

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

BURN DY LLC

and

GLASS MOLDERS POTTERY PLASTICS &
ALLIED WORKERS LOCAL 39B

Cases 34-CA-065746
34-CA-079296

BURN DY LLC

and

IUE-CWA, LOCAL 485

Case 34-CA-078077

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

Thomas E. Quigley
Counsel for the Acting General Counsel
National Labor Relations Board
SubRegion 34
Hartford, Connecticut

TABLE OF CONTENTS

	Pages (s)
I. <u>STATEMENT OF THE CASE</u>	1
II. <u>SUMMARY OF THE CASE</u>	2
III. <u>RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT</u>	3
A. <u>A brief background of the case</u>	3
B. Respondent's appeal is largely an attack on the judge's credibility <u>findings</u>	4
C. <u>Respondent's witnesses' demonstrated lack of credibility</u>	5
1. Norton's and Hing's testimony was largely corroborated by <u>Respondent's manager Marczyszak and supervisor Arnson</u>	5
2. <u>The judge properly discredited the testimony of Mary Rovello</u>	14
3. <u>Marczyszak's lack of credibility regarding the May 29, 2012 incident that resulted in severe discipline for Bob Sears</u>	20
D. <u>The judge correctly found that Respondent violated Section 8(a)(1)</u>	21
E. The judge properly found that Respondent disciplined Norton, Hing, Vaast, Domeracki, Cavaluzzi, Velez and Sears in 2012, harassed Norton and Hing in Fall 2011, and disparately applied its "no loafing" work rule in violation of <u>Section 8(a)(3)</u>	24
F. The judge properly considered Respondent's records of past discipline in <u>finding evidence of disparate treatment</u>	32
G. <u>Respondent's Noel Canning argument is meritless</u>	36
H. Respondent's Exceptions to certain Notice language recommended <u>by the judge are meritless</u>	36
VI. <u>CONCLUSION AND REMEDY</u>	37
<u>TABLE OF CASES</u>	38

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Answering Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

I. STATEMENT OF THE CASE

On July 21, 2013, Administrative Law Judge Lauren Esposito issued her 57-page Decision in this consolidated case, finding that Burndy LLC (Respondent) committed numerous violations of Section 8(a)(1) and (3) of the Act. The judge found and concluded that, in violation of Section 8(a)(1), Respondent unlawfully prohibited employees from discussing union matters during worktime in situations where conversation regarding other nonwork-related topics was permitted, threatened them with discipline in retaliation for their union activities, created the impression that their union activity was under surveillance, threatened employees with unspecified reprisals, and harassed union officers. (ALJD 26, lines 4-10; ALJD 53-54).¹ Judge Esposito also found that Respondent's discipline of its employees Robert Sears, Ray Velez, and the four GMP officers in February, April, and May 2012 was unlawfully motivated, in violation of Section 8(a)(3). (ALJD 41-43; ALJD 53-54). The judge further found that Respondent disparately applied a work rule in effecting this discipline, and that its top managers harassed and monitored Sears in violation of Section 8(a)(3) and (1), as alleged in the Complaint. (ALJD 44, lines 22-24; ALJD 54). The judge also found that Respondent maintained, in violation of Section 8(a)(1), two overly broad work rules.

¹ References to Judge Esposito's decision are cited as "ALJD - __," followed by the page and line number, where appropriate. References to Respondent's brief in support of its Exceptions are designated "R. Br. to Board at __," followed by the appropriate page number. References to the exhibits of the Acting General Counsel and Respondent are cited herein as "GCX- __" and "RX- __," respectively, followed by the appropriate exhibit number or numbers. References to the official transcript of the hearing are cited as "Tr. __", followed by the appropriate page number.

(See ALJD 51-54).² However, the judge recommended dismissal of the following Complaint allegations: 9(a)(c)(e); 10(b)(d); 11(a)(e); 12(a)(b); 13; 31; and 32.³

On September 18, 2013, Respondent filed 94 exceptions to the judge's findings and recommended order, along with a lengthy supporting brief. Respondent did *not* except to the judge's findings that Respondent committed independent violations of Section 8(a)(1) by maintaining two overly broad work rules (Respondent's "public statements" policy and its policy prohibiting solicitation). (ALJD 51-53). For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel respectfully urges the National Labor Relations Board (the Board) to reject all of Respondent's exceptions and to affirm the Administrative Law Judge's rulings, findings and conclusions, and to adopt her recommended Order in its entirety.

II. SUMMARY OF THE CASE

This is a consolidated case involving an employer engaged in a misguided power struggle with its two unions. This case began with Respondent's unlawful decision, in retaliation for its employees speaking up about a perceived heavy hand by the plant manager, to initiate a crackdown on run of the mill conversations between workers who happen to wear a union hat. Respondent's newfound fondness for disciplining certain employees for "loafing" is apparently based upon speculation that those individuals had suddenly decided to slack off at work, or upon unlawful assumptions that if two

² Interestingly, in its summary of the judge's Decision in its brief to the Board, Respondent omits any mention whatsoever of the judge's findings that two of Respondent's work rules are unlawful. See R. Br. to Board, at 2-3.

³ While otherwise in agreement with the judge's findings and recommended order, Counsel for the Acting General Counsel is not filing cross exceptions to Judge Esposito's recommended dismissal of the Complaints allegations concerning two other work rules, the alleged surveillance, the alleged prohibition of employees being allowed to discuss terms and conditions of employment, the alleged threat of unspecified reprisals by Marczyzak, a solitary threat of reprisals by Human Resources director Lochman, and the two Section 8(a)(5) allegations. (ALJD 26, lines 10-14; ALJD 31, lines 22-26; ALJD 32, lines 11-16; ALJD 33, lines 32-35; ALJD 46-49).

employees who are representatives of a union are seen conversing, they must be up to no good. Respondent then upped the ante by progressing from threats of discipline in 2011 to actual discipline in early 2012, some of it quite serious. At bottom, this case is really about nothing more than a company's ongoing disregard for the Section 7 rights of its employees and its determination, at whatever the cost, to put the screws to its workers. Labor relations at the Bethel plant have deteriorated to the point that it is as if the parties are trapped in a bad marriage where neither side can get a divorce.

III. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

A. A brief background of the case

The instant set of cases originated in September 2011 innocuously enough as a seemingly routine "refusal to provide information" charge filed by the Glass Molders Pottery Plastics & Allied Workers, Local 39B (herein called "the GMP" union) against Respondent. (See GCX-1(a)). However, as the Region's investigation unfolded, it became apparent that this was much more than a plain vanilla information case. After several amendments to the charge, the initial Complaint in this matter issued on January 31, 2012 (with a scheduled hearing date of May 2, 2012), alleging a series of threats and other unlawful conduct by the plant manager on down in violation of Section 8(a)(1), and an unlawful refusal to provide information and imposition of financial charges for fulfilling information requests in violation of Section 8(a)(5). (See GCX-1(g)). But within days of receiving the initial Complaint, Respondent began disciplining employees active on behalf of the GMP as well as the chief employee representative of the other union on site, IUE-CWA Local 485 (herein called the IUE) for "loafing." Both unions subsequently filed new charges in April 2012. The IUE's charge involved allegations of discipline and threats of discipline concerning its Chief Steward, Robert Sears, since February 2012, along with several Section 8(a)(5) allegations (no longer at

issue herein). (See GCX-41). The GMP's new charge concerned the "loafing" disciplines issued to GMP officials in early 2012. Based upon all three charges, an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (herein "the Complaint") issued in this matter on July 31, 2012 (GCX-1(z)), alleging that Respondent committed numerous violations of Section 8(a)(1)(3) and (5). The consolidated case was tried in Hartford, Connecticut over six days before Judge Esposito. Respondent's appeal followed the issuance of her decision.

B. Respondent's appeal is largely an attack on the judge's credibility findings

Respondent filed 94 Exceptions to the judge's decision. A common theme running throughout its brief and 91 of its 94 Exceptions is its disagreement with the judge's credibility and factual findings. Essentially, Respondent argues that she misinterpreted the record evidence and came to the wrong conclusions. Respondent cites selectively to the record to support some of these claims. However, the fact that the judge recommended dismissal of 12 allegations presented by the Acting General Counsel (nearly half of the case) belies any notion that she did not consider this case with an open mind and an even hand. Clearly she did; Respondent is just unwilling to take its medicine. Respondent is also unwilling to accept the fact that its witnesses suffered from an overall lack of credibility where it counted.

Respondent's clever attempt to base its appeal upon a faulty reading of the evidence is belied by the fact that its interpretation of the "facts" is not the same one the record revealed. For instance, Respondent argues in its brief that the judge erred by stating that Arnson and Butler did not begin approaching employees to ask what they were doing until the Summer of 2011. (R. Br. to Board at 20, note 21, citing to ALJD 27-28). But that is not what the judge said. Rather, after discussing at length the testimony of the witnesses, she stated:

The evidence further establishes that in the summer of 2011, Marczyzak specifically instructed other managers to alter their approach to employee discussions of nonwork-related issues during worktime, in response to the increased activity and more aggressive positions taken by the new GMP leadership. Marczyzak admitted that after Norton was elected president of the GMP in July 2011 the Union became more energetic and forceful, and that resolving issues was more difficult. Marczyzak also testified that the new GMP leadership, including Norton, appeared to spend more time investigating grievances and preparing for grievance meetings. Marczyzak admitted that as a result, he told Arnson "whenever you see those union guys getting together and they're not working you write them up," and "tell them that I said so" (Tr. 765). Or, as Arnson described it, Marczyzak told him to give the employees a "heads up" that if they were not working, "we're going to assume you're doing union business," and to vigilantly pursue employees' gathering and engaging in conversation (Tr. 1096). I further find that Marczyzak gave a similar instruction to Butler, who testified that Marczyzak directed him during a meeting to look out for employees' abuse of time. As discussed below, Butler testified that as a result of Marczyzak's directive, when he happened to see Hing and the pattern makers together, he told them that they were supposed to be working. Butler stated he used the phrase "union activity" during these conversations. Thus, the evidence establishes that Respondent's other managers confronted employees who held union office regarding their conversations based upon Marczyzak's instruction, which was ultimately engendered by the more aggressive stance with respect to investigation and contract enforcement taken by Norton and the other officers of the GMP. (ALJD 28, lines 8-25).

When all is said and done -- when Respondent's misstatements of the record are carefully considered -- Respondent's arguments are little more than an attack on the judge's credibility findings. It is well established that the Board has a long-standing policy of acceding to the judge's credibility findings unless the preponderance of the evidence convinces the Board that they are wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, as detailed below, and as revealed by the thoughtful, careful, and evenhanded attention paid to credibility throughout her decision, Judge Esposito's detailed credibility findings are fully supported by the extensive record evidence. What is more, Respondent's supervisor Joe Arson essentially made the case for the General Counsel in several key respects by

his candid admissions against Respondent's interest. For these and all of the reasons that follow, Respondent's exceptions are utterly meritless.

C. Respondent's witnesses' demonstrated lack of credibility

As with many Board cases, much of this case turned on credibility. Unfortunately for Respondent, the versions of events remaining at issue presented by the employees were simply more credible than Respondent's self-serving ones. Judge Esposito simply agreed with this notion. Respondent's arguments in its brief to the Board in which it cites documents are unavailing, because the records simply do not show what Respondent wishes they did. For these reasons, as well as the outright inconsistencies in their testimony, the judge properly discredited the testimony of the Respondent's witnesses, and properly interpreted the records submitted into evidence by Respondent. In fact, as the judge noted, Respondent actually admitted targeting union officers in mid-2011, just as the employees testified had happened. Arnson inadvertently corroborated Hing's and Norton's testimony in critical respects, as he candidly admitted telling Hing and Norton that they had a "target on their back", admitting that Norton had a target on his back if he intended (as new GMP President) to start things or was 'stirring things up.'" (ALJD 29, lines 20-23; Tr. 1093-1094). Respondent can't get around these facts.

1. Norton's and Hing's testimony was largely corroborated by Respondent's manager Marczyszak and supervisor Arnson

Respondent, in brief to the Board, attempts to minimize the damaging testimony elicited at trial that essentially corroborated witnesses for the Acting General Counsel. But the testimony considered by the judge included the following.

Five current employees testified without contradiction that they regularly are allowed to discuss things, while on the clock and at work, such as fishing, sports, hunting, politics, and the like, without restriction. (See Tr. 98-99, 126-127, 208 (Norton);

Tr. 292 (Hing); Tr. 369-370 (Velez); Tr. 395 (Vaast); Tr. 603 (Domeracki)). Moreover, supervisors, even the plant manager, routinely engage employees in these casual conversations. (Tr. 98, 369, 395, 399-400, 1090-1093). Norton testified without contradiction that he and his supervisor Arnson talk about a shared interest – fishing -- four or five times a week, and that he's never been disciplined for talking about fishing with his supervisor. (Tr. 99, 126-127, 208). As Norton testified, when he and Arnson talk at work about bird hunting or fishing or all kinds of other things, he (Norton) is not restricted at all. (Tr. 99). Vaast testified that he's spoken to all of the supervisors at work about sports, and that he's talked with Marczyszak about the Yankees at work, at times when he was not on a break. (Tr. 399-400). Manager Butler admitted that casual talk is permitted at work, and that in fact he talks about sports with Domeracki and Vaast. (Tr. 1050-1051). But in mid-2011, Respondent, by Butler, Marczyszak and Arnson, began a campaign of harassing and questioning union stewards Hing and Norton whenever they spotted Hing and Norton speaking to one another or to an employee in the pattern shop (who until recently were all GMP officers).

Thus, despite the fact that employees are evidently allowed to engage in small talk at work about all manner of non-work related items, Respondent clearly decided that any talk between union officers is suspect, and can be the subject of an immediate inquiry ("What are you talking about?") and possible discipline.

Norton testified without contradiction that on about July 5, 2011, Foundry Supervisor Joe Arnson told him that as union president he had a big target on (his) back and that Ed Marczyszak was going to come gunning for (him)." (Tr. 65, 220). Arson added that if he (Norton):

was seen talking with Robert Hing or any of the other union stewards, I would be written up and it would be assumed that I was talking union business at the time. And it was after that that he said that I had a big

target on my back and that the company would be coming after me, that Mr. Marczyzak personally ... would come gunning for me. (Tr. 66, lines 15-21, 23).

Norton testified that on July 25, 2011, Arnson approached him after their lunch period ended and told him that Marczyzak had seen him (Norton) returning a minute late, but that Marczyzak was giving Norton a “bye.” (Tr. 78-79). Norton told Arnson that he wasn’t late coming back from lunch (Tr. 79). A short while later, Norton went to Marczyzak’s office to hand him some paperwork related to another grievance or NLRB charge. (Tr. 79, 234). When Norton told Marczyzak that he hadn’t been late getting back from lunch, Marczyzak said that he had seen it, and they argued for a bit about whose clock was accurate. (Tr. 79-80, 236-237). When Marczyzak told Norton that he was getting a “bye” anyway, Norton told him that he wasn’t late so he didn’t deserve one. (Tr. 237). Marczyzak took advantage of their time together to once again threaten Norton with discipline, telling him “that if I was seen talking with anyone in the shop like Mr. Hing or any of the other (union) officers that I would be written up. It would just be assumed that I would be talking union business and be written up.” (Tr. 80). Norton emphasized on cross examination that Arnson only approaches him to ask what he is talking about “when he sees me talking with certain people.” (Tr. 209). The judge properly credited Norton’s version of events (ALJD 28, lines 27-32), adding that:

Marczyzak’s warning that if he saw Norton speaking to Hing or other employees a write-up would ensue based on the assumption that they were engaged in union activity was unlawful (under) this standard. Norton could reasonably conclude from Marczyzak’s pronouncement that his interactions with other employees would be subject to heightened managerial observation in the future, and would be presumed to involve the Union. As a result, Marczyzak’s statement unlawfully created the impression that Norton’s union activities were under surveillance. (ALJD 29, lines 7-11).

Norton also testified as to regular harassment he received from manager Brian Butler, who in the Fall of 2011 on a nearly daily basis would tell him that if he “caught”

Norton talking to any of the guys back there (in the pattern shop) or if Robert Hing was caught talking to any of the guys back there, they'd be written up for talking, assuming that they were talking union business." (Tr. 96, lines 9-12). Arnson also harassed Norton, who testified that he made similar statements to him in September and October 2011. (Tr. 96). Norton recalled one incident in particular: Arnson approached him and Hing just before lunch when they were in Norton's work area, and asked to know what they were talking about. Arnson told them that if they were talking "union business" he was going to write them up. Norton was so dumbfounded by this all he could do was stare back at Arnson, blankly. (Tr. 96-97).

On cross examination, Norton admitted that he had stated in his Board-prepared affidavit that one such incident occurred on October 13, 2011 (Tr. 213), and that when Hing had approached him just before lunch to ask a question about some "union business," Norton told him he would talk to him about it at lunch. (Tr. 214). Norton testified that this entire exchange "took all of 20 seconds." (Tr. 214). Asked to explain further, Norton testified that Hing had come to him to ask what they were "running in the pots tomorrow," then mentioned something about another employee named Benny, and it was to that second part that Norton told Hing they would discuss it later. (Tr. 216). Nonetheless, Arnson was there "within a heartbeat ... asking us what we're talking about." (Tr. 216).⁴

On cross examination, Norton also reemphasized key portions of his testimony on direct, as he testified that both Arnson and Butler told him that if they saw him (Norton) in the pattern shop: "If I see you talking to any of the guys back there I will write

⁴ Norton, the sole pattern coordinator, has many reasons to talk to Hing, the sole material handler, mainly because Hing "has to look at my sheets to see how much metal he has to put out to fill those kettles. They have to get melted, the furnaces. So he comes to me a couple of times a day, because ... the production for the next day can change." (Tr. 97).

you up.” (Tr. 227-228). He reiterated that Butler told him this a number of times. (Tr. 230). As noted herein, Norton has many legitimate reasons to be in the pattern shop, but apparently is not allowed to talk to his fellow employees there because they all happen to be union officials.

Hing testified that shortly after Norton became local union president, Arnson began interrupting him whenever he happened upon Norton and Hing talking to each another. (Tr. 289-290). Hing has worked under Arnson for six or seven years, but before 2011 Arnson had never interrupted him as he began doing in 2011. (Tr. 289). Hing testified that after Norton became local union president, Arnson began interrupting him regularly whenever he was talking to Norton, asking him, “What’s going on? I hope you’re not talking about union business.” (Tr. 290). When Hing would explain that he and Norton were talking about their work, Arnson would tell him, “You know what Ed would do if he seen you talking ... about union business.” (Tr. 290). Hing testified that he has many work-related reasons to talk to Norton at work: “I’m a material handler. Tom’s a pattern coordinator. He tells me what pots need to be melted -- what material needs to be melted.” (Tr. 290).

Hing testified that on October 13, 2011, Arnson interrupted him when he was talking to Norton, telling him that “I was told to write you up if you are talking about union business.” (Tr. 291). Hing told Arnson that he and Norton had just been talking about work. (Tr. 292). Hing was unaware that there was ever such a rule prohibiting employees from speaking to each other. (Tr. 292).

On another occasion, in Fall 2011, Arnson approached Hing in the pattern area and asked him what he was doing there. When Hing told him that he was on his way to the bathroom, Arnson told Hing that he should take another route to the bathroom. (Tr. 294). Hing told Arnson, “You can’t tell me which way to go to the bathroom.” (Tr. 294).

Apparently, Respondent thinks it can. One must pass by the pattern shop to use the main bathroom on the main level. (Tr. 60). In finding that Respondent unlawfully harassed Norton, Hing, and the GMP officers, the judge properly credited their testimony over that of Respondent's. (ALJD 31, lines 30-43).⁵

Respondent clearly thinks that none of the above conduct is the slightest bit problematic. Marczyszak testified that routine exchanges of pleasantries are allowed, going out of his way to add that "this is not a gulag." (Tr. 823). But if not exactly a gulag, Respondent continues to see nothing wrong in targeting union talk, threatening employees with discipline for talking union, assuming that any time two employees who happen to be union officials happen to talk to each other they are engaging in prohibited "union business," or interrupting employees who happen to be union officials speaking to one another by demanding to know what they are doing and working on this very minute.

To illustrate his view on these matters, Marczyszak testified that he told Arnson that "whenever you see those union guys getting together and they're not working, you write them up ... and tell them I said so." (Tr. 765, lines 9-13). Arnson dutifully complied with this order ("only had to tell me once!"). As Arnson explained, the first time he received such an instruction from Marczyszak was in October 2011 (Tr. 1117), one of the relevant time periods at issue herein. Arnson has been a foundry supervisor for nearly seven years, and Marczyszak has been plant manager since 2008, *yet it was not until Fall 2011 that Marczyszak issued such an order*. The only thing that changed from 2008 to 2011 was the election of Norton in June 2011 to the GMP president's job, and

⁵ The judge's even-handed approach in her Decision is further revealed by the fact that she recommended dismissal of the companion "surveillance" allegations in the Complaint concerning this harassment. (See ALJD 31, lines 45-52; ALJD 32, lines 1-16).

the “troubles” he caused by filing too many grievances, NLRB charges, and making information requests, unlike his predecessor Jose Valentin.

Supervisor Arnson testified that if he sees employees stopping and talking to each other at work, he goes up to them and asks them what is going on, in a friendly manner. (Tr. 1084-1088). Arnson employs his brand of humor in what he described as these daily encounters with his staff: he will ask the employee who appears to be working why he is “bothering” the employee who has stopped to talk to the one working. (Tr. 1084-1085). In all of these cases, the employees quickly return to whatever they are supposed to be doing. Despite their always having a valid answer, Arnson admitted that, even as of the day he testified, he continued to question Hing and Norton as to what they are doing when he sees them talking to each other, even as recently as two weeks before he testified. (Tr. 1115).

When specifically asked by Respondent’s counsel if he has ever issued discipline to someone for doing something other than working during work time, Arnson did not hesitate -- responding that he once disciplined someone caught smoking. (Tr. 1088). This, of course, is a far cry from the disciplines Respondent would soon mete out here.

When asked on direct examination if he had ever told Norton “that he had a target on his back,” Arnson candidly replied, “I believe I did.” (Tr. 1094). Arnson also failed to specifically rebut Norton’s testimony that on several occasions in 2011 Arnson warned him, when telling him that there was a target on his back, that “Ed was going to come gunning for you.” Amazingly, when asked if he could recall *what led* to his comment to Norton, Arnson said: “I believe Tom became president and it might have been -- I don’t know exactly if it was when we started having NLRB charges. I don’t know exactly the dates it all started.” (Tr. 1094, lines 13-15). Thus Arnson linked the issuance of his warning to Norton with Norton’s protected activity: his ascent to the

GMP president's position and his filing of Board charges. And since he clearly did not rebut Norton's testimony that this conversation occurred in July 2011 (see Tr. 1096: "I don't want to pick a date because I do not know") and that the plant manager was "gunning" for him, Norton's testimony concerning this matter was properly credited. (ALJD 29, lines 20-26).

Arnson's testimony just got better (but not for Respondent). When asked if he ever told Norton that if he was seen talking with Hing or any of the other stewards he would be written up and it would be assumed he was talking union business, Arnson answered "Yes." (Tr. 1096, lines 9-13). Again, he could not say when he told Norton this, but admitted (Tr. 1096, lines 15-20)(emphasis added):

I know I was instructed to give them a 'heads up' that, you know, we're supposed to be working, *if you two are not working, you know, we're going to assume you're doing union business. All right?* And then I told them, you know. *Ed told me if I catch you that you'll be written up.*

According to Arnson, though, he only sees Hing and Norton talking to each other with a union book in sight at most three times a year. (Tr. 1097). This despite the fact that Hing carries his union book with him at all times. (Tr. 1098). Nonetheless, this was so much of a concern that it merited a special instruction from the plant manager.

Arnson admitted that for a few weeks (presumably in 2011) he told Norton and Hing: "*If you two are together they are going to assume you're doing union business.*" (Tr. 1099; emphasis added). Minutes later, he repeated this testimony when asked about the incident in mid-October 2011: "I was told to write them up if they were going to be doing union business" (Tr. 1101) and "Ed told me write you guys up if see you talking together because he's going to assume you're doing union business. Go back to work." (Tr. 1102).

Arnson corroborated Norton's testimony almost verbatim not only on the big issues but in minor respects too, as he admitted that, with respect to the "bye" incident, "Ed relayed the message to me and I spoke to Tom." (Tr. 1100). He even admitted trying to restrict Hing's access to the men's bathroom by telling him to avoid the pattern shop, telling Hing that he "wouldn't be tempted to stop" if he took a different route. (Tr. 1104). Arnson admitted that he and Norton talk frequently about their shared love of fishing. (Tr. 1090-1091).

Respondent's defense, regurgitated here for the Board, is that "work time is for work," and all it is doing is trying to enforce that policy, because "Burndy values each minute of work time." (R. Br. to Board, at 3-7). Counsel for the Acting General Counsel also values work time, but is unable to countenance a defense built so flagrantly upon a misguided view of labor law coupled with a pack of misrepresentations of record evidence.

2. The judge properly discredited the testimony of Mary Rovello

Rovello's testimony was replete with dramatic inconsistencies which failed to escape the judge's attention. Rovello's penchant for dissembling was on full display with her testimony concerning the GMP union's defense to the four counselings she issued over the February 8 incident. Rovello's credibility was dealt a serious blow after she was asked *when was the first time* in this process that she had learned that the Union was claiming that the four of them had been working on a pattern. (Tr. 890-891). She first replied that it was *after* the third step, in conversation with "Hector" (Tr. 891, line 4), then quickly changed her answer to "during" the third step (Tr. 891, line 7). Then on cross examination she changed her answer again, as she was forced to admit that the Union had in fact claimed from the time it first challenged the discipline that the pattern shop's workers were working on a pattern when she happened upon them. (Tr. 948). Only

when confronted with documentary evidence contradicting her earlier testimony (GCX-46(a)(b), revealing that the grievance was filed in February 2012) did Rovello change her testimony.

Rovello's lame explanation that she just "made a mistake" as to when she learned that the Union was claiming that the pattern shop workers had simply been looking at a pattern was entirely unconvincing. (Tr. 951). Her direct testimony was carefully prepared in advance by Respondent's experienced labor counsel. This was not an innocent mistake, but rather an example of Respondent's desperation to prove a point -- that the GMP union was "shading the truth" in its dealings with Rovello. Respondent had carefully and methodically elicited this testimony from Rovello during her lengthy direct examination, testimony which was easily shown to be false.⁶ The judge properly discredited her testimony. (See ALJD 40, lines 4-5, lines 13-16).

Rovello offered more incredible testimony concerning the Sears/Hing forklift incident when she testified: "At first I thought that he had removed a safety log from his fork lift truck." (Tr. 902). Again she contradicted herself on the facts, offering testimony about an undated Step Three grievance meeting over the Sears grievance, claiming that at the time of this meeting she didn't know what "book" Sears was talking about. (Tr. 902). Then moments later she offered testimony regarding a *Step Two* meeting in which Hing stated that the "book" in question was his union contract. (Tr. 906). Yet Hing had testified, without contradiction, that the Step 2 meeting over his grievance over the "forklift" incident took place on May 2, 2012 (Tr. 307-308) and that the Step 3 meeting took place on May 8, 2012. (See Tr. 309). Since the record reveals that the Step Three

⁶ On direct examination Rovello offered even more implausible and self-serving testimony, claiming that when she issued the disciplines over the February 8 incident she did not know if Vaast or Domeracki were union stewards (they are not), or even if they were "union members." (Tr. 918). She quickly contradicted this testimony on cross examination. (See Tr. 958, lines 5-11).

grievance with Sears occurred on May 25, 2012 (Tr. 488, testimony of Sears), more than three weeks *after* any Step 2 grievance meeting involving Hing, Rovello *had* to have known when questioning Sears on May 25 that the book Sears had removed from Hing's fork lift was Hing's labor contract. Yet as her testimony about the Step Three grievance meeting revealed, she played dumb during her meeting with Sears in May -- evidently hoping to pin something even more severe on Sears -- his possible removal from Hing's lift of a safety book! Little wonder that Norton had at one point accused her of unfair tactics. (See Tr. 308).

Rovello also revealed her true colors when disciplining Ray Valez. Whereas Arnson routinely confronts employees chatting with one another for a moment and breaks up their brief discussions using humor, Rovello found it necessary to issue Valez a counseling for doing nothing more than talking for a minute or so with then-Union official Mike Cavaluzzi, who was working at his station. She testified that despite telling him, "Ray, you know better than that," she felt compelled to issue him discipline anyway. (Tr. 910-911).

Rovello's credibility took more hits when comparing the conflicting testimony offered by her and Lochman about the important March 2 meeting with the GMP union. It is obvious -- from the notes Respondent took both before and after the meeting, and from Lochman's testimony -- that Lochman complained that the GMP had been filing a lot of grievances. Incredibly, against all of the evidence, on cross examination Rovello denied that Lochman made such a statement. (See Tr. 957-958: "So I don't think he would have -- that would have had no significance.") Unfortunately for Rovello, Lochman contradicted her testimony the next day of the hearing. Moreover, his notes reveal that he placed great significance on the issue. Rovello could not even recall items mentioned in supervisor Swanhall's notes of that meeting (GCX-47; Tr. 963),

notes which in fact were consistent with Lochman's notes and testimony, thereby dealing yet another blow to her credibility. Even basic concepts eluded Rovello, as she claimed, contrary to Norton and even Lochman, that the March 2, 2012 meeting lasted "maybe an hour, and hour and a half" (Tr. 921), thereby contradicting the testimony of everyone else at that meeting that it lasted over three hours. She also could not bring herself to admit that the Employee Handbook (GCX-3) applies to the unionized employees except to the extent it conflicts with their contract, answering initially that the handbook applies "for our office staff... the production employees, we just use the major rule violations." (Tr. 17). Obviously this is untrue, or at best an oversimplified and cramped view of the handbook's application. In any event, Marczyzak had no difficulty admitting the issue.

In sum, it evidently did not escape the judge's attention that Rovello was an unimpressive witness. She embellished her testimony shamelessly, contradicted her superior Lochman on key matters, refused to concede the substance of Swanhall's notes of the March 2 meeting (Tr. 963), refused to answer questions put to her directly (Tr. 970, 975-976), and at times provided totally non-responsive answers, even to her own counsel (Tr. 986-988). A running theme present throughout her testimony was heaping blame on the local union officials for all manner of sins: the GMP officials "stretch the truth all the time" and Sears intimidates her. (Tr. 891, 896).

Rovello and Lochman could not even begin to keep their stories straight concerning many important issues. When asked on cross examination if Rovello can issue a counseling (the first step in the disciplinary process) *without his knowledge*, Lochman answered that he'd "be surprised if that happens," reiterating moments later that he would be "very surprised..." (Tr. 1171-1172; 1173). He also claimed confidently that "no action can be taken without my approval." (Tr. 1127). He testified on cross

examination that Rovello specifically contacted him *before* she issued the counselings at issue in this case. (Tr. 1174). However, these claims utterly contradicted Rovello's testimony from the previous day, as she testified that first line supervisors can issue discipline on their own ("I don't necessarily get involved in all the disciplines and what they're for"; Tr. 956), and that often they seek her out primarily to see at what stage of the process the employees might be, so as to issue the appropriate *level* of discipline (counseling versus a verbal warning, e.g.). (Tr. 956). In fact, a careful review of Rovello's lengthy direct examination covering the issuance of the counselings at issue revealed that she made no mention whatsoever of having first contacted Lochman. In fact, it appears from her testimony that Rovello did not bother to call Lochman on *any* of the disciplines at issue here *prior* to the issuance of discipline, as she testified that she "probably (did) not" have any such discussion with Lochman before issuing the counselings (Tr. 877-878), and that she only called Lochman *after* her second meeting with Norton concerning his counseling. (Tr. 887).

Lochman was also well aware that the bargaining units had complained in a 2010 petition sent to Andrea Frohning about Marczyszak's poor management style. (Tr. 1171). He had to know there was a problem in Bethel, and he also knew that, until recently, the GMP had done little more than send a petition. Now, in 2012, the new local union leadership was filing grievances and taking them to arbitration, and Lochman was not pleased. Rovello went out of her way to downplay the obvious, denying or not recalling virtually anything asked of her on cross examination regarding her side's notes of that meeting. The natural question is why. Why would Rovello, who attended the meeting, deny such basic matters as whether in fact there had been an increase in grievance filing by the GMP since Norton arrived? (See Tr. 965: "*I think it stayed the same.*") Even Lochman refused to play that game, easily admitting that his notes (RX-

35) and Swanhall's notes (GCX-47) of the meeting reveal that Respondent was unhappy with the increase in grievance activity on the part of the GMP. For example, in contrast to Rovello, who could not recall him saying this (Tr. 963), Lochman also quickly admitted saying "*Let me be blunt*" at the March 2 meeting (Tr. 1164). Rovello could not even bring herself to admit that Lochman said at the meeting (as recorded by supervisor Swanhall in his notes of the meeting) that the "other shops don't have the constant bickering like there is here." (Tr. 963). Rovello's testimony was simply not credible.

In spite of all of the above, Respondent now argues nonsensically that the judge's conclusions concerning the numerous disciplines litigated were "based on a mistaken reading of Rovello's testimony", leading to reversible error. (R. Br. to the Board, at 31-32). This claim would be laughable but for the serious nature of this case. Respondent can do no better than point to a single statement in a lengthy decision concerning whether it was Mike Cavaluzzi or Jose Freitas who was disciplined for smoking in 2008 -- which is not even at issue here! Even assuming that the judge mistook "Cavaluzzi" for "Frietas", this was a harmless mistake, as she found that:

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 (Tr. 1159-1160). It was also during this period that Marczyzak 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 Marczyzak'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, lines 6-17).

Given the numerous documented inconsistencies in Rovello's testimony, coupled with the documents that do not support her claims, Respondent's claims that the judge misread the evidence are simply mystifying.

3. Marczyszak's lack of credibility regarding the May 29, 2012 incident that resulted in severe discipline for Bob Sears

There were two credibility disputes of consequence with respect to the factual versions of the May 29, 2012 incident which led to a four-day suspension for Sears. Marczyszak testified that Sears was "reclining backwards" in a chair and was "leaning back, sitting back having a soda" (Tr. 751, 752); Sears testified that he had been resting on his stool, not a chair, and that he jumped up when he heard voices (Tr. 496-497).

Marczyszak also claimed that when he asked Sears what he was working on right now, Sears told him: "*I'm working on getting a soda.*" (Tr. 750, line 2)(emphasis added). There are three big problems with this testimony. First, Sears, who admitted many of the facts under withering cross examination, was never asked about this alleged statement of his by Respondent's counsel (Tr. 573-574), and there is utterly no evidence in this lengthy record that such a statement had ever before been alleged to have been made on May 29. Nor did Respondent offer Arnson's memo of the incident, casting further doubt that Sears ever made this statement. Second, this is an almost identical statement to the "I'm working on going to the bathroom" remark that Sears admittedly made to Marczyszak in February 2012. But the main problem with this claim, noted by the judge, is that it is not contained whatsoever in the detailed suspension letter Marczyszak drafted later that day. (ALJD 43, lines 33-36; See GCX-39). To the contrary, Marczyszak stated in the May 29 notice that: "When I asked you what you were working on, you responded that you were going to fix the furnace and that you had stopped to get a soda. When I asked 'shouldn't you be working now,' you did not reply,

but got up and left the department.” (GCX-39). When questioned about this matter, Marczyzak made utterly no effort to explain this glaring discrepancy. (See Tr. 831-832). It appears from the weight of the credible evidence that Marczyzak simply fabricated this statement at hearing to further damage Sears and to buttress his weak case, adding damaging details left out of memos contemporaneously drafted. This is an important point, as it revealed the depths to which Respondent would sink in order to bolster its defense. Because Marczyzak should not be believed on this point, his testimony that Sears was “leaning back” and “reclining” was properly discredited. (ALJD 43).

Now, in its brief to the Board, Respondent blithely states as a fact that on May 29 Sears told Marczyzak: “*I’m working on getting a soda.*” (R. Br. to the Board, at 37). Obviously, the judge did not credit this self-serving claim, as she noted that, “Significantly, Arnson did not corroborate Marczyzak’s testimony describing Sears’ response as having been phrased in such an impertinent manner. (Tr. 1111).” (ALJD 43, lines 37-38). This is yet another example of the Respondent’s penchant for misstating the facts. If its version of the facts cannot be trusted, how reliable can its claims be?

D. The judge correctly found that Respondent violated Section 8(a)(1)

The constant questioning, threats of discipline, and surveillance of Hing and Norton in 2011 violated Section 8(a)(1); the harassment of them violated Section 8(a)(3) as well, as found by the judge. See *Laser Tool, Inc.*, 320 NLRB 105 (1995). In *Laser Tool*, the Board found 8(a)(1) and (3) violations when the employer, after the filing of a representation petition by the union, harassed union adherents by restricting their movement throughout the plant, limited their ability to talk in the plant, and harassed union supporters by placing them under close observation. The Board found that the

employer's actions had the result of discriminatorily harassing union adherents, and that the employer had eliminated benefits or privileges of movement that the workers previously enjoyed.

Respondent once again claims that the generalized testimony proffered by its witnesses is sufficient to justify its conduct ("work time is for work!"). Respondent's arguments are unsupported by any credible evidence of employee misconduct on a grand scale warranting the near daily questioning, threats and harassment of the union officials that occurred in Fall 2011. Only union talk was prohibited, or, more accurately, threatened and issued disciplined over. The judge properly found that, by prohibiting employees from talking about union matters during working time while permitting employees to talk about other non-work subjects during working time, Respondent violated Section 8(a)(1). See *PCC Structurals, Inc.*, supra ("when union adherents were observed participating in conversations, it was simply assumed that their discussions were of the prohibited variety"); *Valmont Industries, Inc.*, 328 NLRB 309 (1999)(See ALJD 28-29 and cases cited therein).

In spite of the mountain of evidence that routine shop conversations go "unpunished," Respondent continues to maintain that its policy against interrupting other employee applies across the board and thus justifies its conduct ("work time is for work"). There are, of course, several fundamental problems with this simplistic approach. First, no one else has been disciplined for simply talking to another employee. Second, the employees at issue herein, with two exceptions, were simply discussing work, or something work-related. (Sears was not talking to anyone when he was "caught" having a sip of soda half-undressed, and Velez never claimed that he was doing anything more than chatting about sports with Cavaluzzi, a routine shop conversation if there ever was one). Hing and Sears were talking for one minute about a

labor issue, clearly work-related. Third, there is overwhelming evidence revealing that Respondent was obsessed with “union activity”, when in fact the unions know well enough that such is not to be done on the clock. Talking for a minute or two is not engaging in “union activity”! Respondent just cannot accept that concept; to Respondent, the minute the word “union” is uttered (or suspected) on the shop floor it is duty-bound to put a stop to it. But only suspected union officials were so targeted for the content of their conversations.

It is well established that an employer cannot prohibit employees from discussing the terms and conditions of their employment with other employees, or prohibit employees from talking about union matters during working time while permitting employees to talk about other non-work subjects during working time. There is abundant record evidence to support the judge’s finding that Respondent violated Section 8(a)(1) by its conduct in Fall 2011. (ALJD 28-29).

By targeting only union talk, or talk between Union officials, Respondent violated the Act, as its supervisors not only made unlawful statements to stewards but made a practice of physically stopping stewards from speaking to one another as well as singling out one steward (Hing) by requiring him to take a different route to the bathroom, in an apparent effort to prevent him from speaking to stewards in the pattern shop. Arnson even admitted this, too. With respect to Hing and Norton, Arnson’s testimony only served to buttress the Acting General Counsel’s case. The Fall 2011 statements and actions amounted to a pattern of harassment towards GMP union officials. There is no prohibition on bargaining unit employees speaking on the production floor or in the foundry shop about non-work, non-union topics such as sports, politics, and the like.

- E. The judge properly found that Respondent disciplined Norton, Hing, Vaast, Domeracki, Cavaluzzi, Velez and Sears in 2012, harassed Norton and Hing in Fall 2011, and disparately applied its “no loafing” work rule in violation of Section 8(a)(3)

As the judge noted, Counsel for the Acting General Counsel presented a prima facie case. There is abundant evidence of animus, and the timing of the first set of warnings (“counselings”) – arriving just days after issuance of the first Complaint in this case and less than a month after both bargaining units took the unusual step of petitioning Respondent’s upper management for help in dealing with a bullying boss – strongly suggests retaliation. The burden then shifted to Respondent to *persuade* by a preponderance of the evidence that it would have taken the same actions absent the employees’ protected activities. The judge correctly found that Respondent utterly failed to meet this burden.

Respondent failed to meet its evidentiary burden primarily because it had only twice in the past four years ever enforced a “loafing” rule before, and only in one such past instance did it show that it disciplined someone for what truly could be considered “loafing.” The lone counselings of Feliz and Cavaluzzi in 2008 cannot save Respondent.

The central problem with Respondent’s defense is that the newfound interest in questioning the union stewards was so clearly timed to Norton’s increasing activism as the new GMP president, coupled with the fact that Arnson told him and Hing that any time they were seen talking to each other Respondent was going to assume the worst, that they were engaging in “union business.” Arnson made no bones about the fact that he had never received such an instruction from Marczynszak until Fall 2011, despite supposedly having all these problems with slackers at work for years. And the fact that Respondent would quickly graduate from threats of discipline to actual discipline in a few months -- by suddenly enforcing the “loafing” rule (previously enforced so rarely that

only one employee in the shop had been warned for loafing, Christian Felez, in 2009, and not a single veteran employee who testified was even aware that such a rule existed). Respondent has no legitimate explanation for its sudden interest in cracking down on “union talk.” Arnson essentially admitted the violations!

The key here is that, even if Respondent’s witnesses were credited that they are simply trying to get their employees to work (“work time is for work!”) , and that they harass everyone at the shop equally, the reality is that no one else gets written up for simply talking to a coworker. Thus the record revealed ample evidence that Respondent attempted to prohibit, and in fact has prohibited, conversations between stewards -- no matter what the topic of conversation, even if it is work-related. It is simply enough that two officials are seen together: guilt by association. Respondent’s mindset is truly remarkable, given that this is 2013, not 1913.

There is utterly no merit to Respondent’s defense, expressed by Marczyszak, that employees are not permitted to speak to one another about non-work related topics during working hours. The employees all credibly testified that *only talk about a union is subjected to this policy*. Conversations about sports, their families, and hobbies have been and continue to be permitted. Respondent provided no evidence of when it has counseled *other* employees for speaking to coworkers during working hours on any topic, for the simple reason that it does not do so. Moreover, Arnson, the only Respondent witness with an ounce of credibility, admitted that he made such statements to Union officials such as Norton and Hing. Respondent just doesn’t think there’s anything wrong with this.

The judge correctly found that Respondent failed to meet its burden under *Wright Line*⁷. Respondent appears to have been totally undeterred by the issuance of the initial Complaint on January 31, 2012, and instead upped the ante almost immediately. Respondent's conduct escalated from threats of discipline to actual issuance of discipline. Just a day or two after receiving the Complaint, Respondent took it out on IUE steward Robert Sears, when on February 3, 2012, Rovello issued Sears a written counseling for "loafing." Respondent was just warming up. A few days later, Respondent decided to issue some sort of mass discipline to four GMP-represented employees, all four of whom just coincidentally comprised 80 percent of the entire GMP local union leadership. For three of the four, this was their first discipline ever for supposed "loafing." As revealed at hearing, the discipline was entirely unwarranted and discriminatory, as no one else had ever been disciplined for the mere act of talking over a pattern in the pattern shop, or for talking to another worker, period. Thus, within barely a week after the issuance of the first Complaint, Respondent went from threatening discipline and other adverse consequences to union officials (Fall of 2011) to actual issuance of discipline (early February 2012).

Respondent was unhappy with its unionized workers for a number of reasons. The GMP had gotten new, more "active" union leadership, as Norton had replaced the long-time GMP President, Valentin, in May 2011, and evidently adopted a more aggressive approach in dealing with labor matters than had his predecessor. Respondent could also not have been overly pleased that more than two-thirds of its unionized employees at the Bethel plant had signed a petition protesting the bullying behavior of Marczyzak. Although Respondent attempted at the instant hearing to

⁷ *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982), approved in *Transportation Mgt.*, 462 U.S. 393 (1983).

downplay the effect of this letter/petition, it had to have been downright embarrassing for the local Burndy management.

The record reveals that Respondent's harassment of Norton and Sears in Fall 2011 was based solely upon their status as union officials, an unlawful consideration. As such, the judge had more than ample reason to find that Respondent violated 8(a)(3) as well as (1) by this conduct. See *PCC Structural, Inc.*, supra, 330 NLRB at 893 (known union adherents were monitored and followed, even when going to the restroom).

The harassment in late 2011 set the stage for the disciplines that would soon follow in early 2012. Sears was the first victim; he was simply stopping to talk to a coworker (again, a known union official) for a minute when he received his first ever counseling for "loafing." The February 8 incident was next. Respondent's claim that the four employees were not engaging in work is simply absurd. Rovello's testimony was rightly rejected, as the employees credibly explained that they were simply looking at a pattern. Respondent has, according to Arnson, "tens of thousands of patterns." (Tr. 1113). Arnson testified that he'll have Norton bring a sheet of paper to the pattern shop, and that Norton "deals well with the guys in the pattern shop." (Tr. 1080). Arnson also testified that when Norton brings a sheet of paper to the pattern shop, that piece of paper is only 5 by 8 inches in size. (Tr. 1112). Given that the pattern shop sees thousands of patterns in a given year, and that Norton routinely carries just a small piece of paper to the shop, how could Rovello be so certain that the three pattern makers and the one pattern coordinator were not in fact discussing a pattern when she "caught" them huddled together near a work station in the pattern shop? Her testimony simply defied logic and common sense.

How does talking about a pattern in the pattern shop amount to loafing? As Vaast credibly testified, “we discuss jobs all day ... If they come and there is a problem, we figure out how to fix it, or, you know, what we can do about it.” (Tr. 403). Apparently, the problem was that Norton just happened to be talking to pattern shop employees (all who doubled as union officials) when the HR manager was looking for him, so she immediately jumped to the conclusion that they all were up to no good.

Contrary to Respondent’s contentions, there is ample support in the record for the judge’s finding that Respondent began its crackdown on suspected union activity within the shop in the Fall of 2011 -- because Arnson and Marczyzak readily admitted this. Respondent had never accused an employee of “loafing or abuse of time” and cited Rule #9 before for the mere act of talking to a fellow worker for a few minutes, and its officials admitted that in 2011 they began “assuming” that whenever stewards were talking to each other that they were engaging in unauthorized “union business.” These facts amount to overwhelming evidence that Rovello and company assumed the worst in February 2012 when they “caught” Sears chatting for a minute with Cavaluzzi, or “caught” Norton gathered with pattern shop employees on February 8. Rovello was the one focused on “union business” – not Norton. She was the one trying to find Norton to tell him that the GMP reps had arrived early; Norton wasn’t even expecting them until 3:30 that day. She simply jumped to the conclusion that all four employees were “abusing time” when they didn’t immediately respond to her inquiry a few minutes before lunch. As Arnson had warned Norton in 2011, whenever we see you talking to another union rep we’re going to assume you’re conducting union business. And what if they were? What if in fact they were just talking about something to do with the union? Since casual conversations about all manner of things are clearly permitted, why was it suddenly against the rules to breathe the word “union”? Now, if the employees were

studiously avoiding work and not getting their work done, and preparing for a grievance by laying out questions and answers and the like, *that* conduct could be construed as “conducting union activity.” But the mere question and response engaged in by Sears and Cavaluzzi on February 3, lasting a minute or two at the most, cannot possibly be *reasonably* seen as violating the “abuse of time” rule, assuming *arguendo* that the rule was being enforced evenhandedly! The judge’s common sense finding that this entire exchange lasted about a minute and a half is entirely reasonable, and, again, is a finding based upon credibility and the weight of the evidence. (ALJD 37, lines 37-45).

With respect to the February 8 incident, Rovello quickly learned (although she at first denied it) when she saw the grievance for the first time that the employees had claimed all along that they’d simply been working on a pattern. And with all of the other “bad blood” being generated by the Unions’ January 3 letter to upper management, the issuance of Complaint in the lead case the previous week, and the just-issued “loafing” discipline to Sears of February 3, Rovello likely felt that this was no time to listen to reason, but instead to dig in her heels. The judge correctly “connected the dots” by discrediting Rovello’s testimony concerning this matter. (See ALJD 40, lines 4-16: “Certain of Rovello’s testimony regarding the disciplinary process and grievance procedure with respect to the February 10 and 13 counselings was similarly unreliable.”)

Norton clearly lost his cool when being issued his counseling on February 10. Yet apparently it never occurred to Rovello that perhaps the reason Norton became so angry when being disciplined on February 10 is that he had just been doing his job when she approached them in the pattern shop, and he found it absolutely astounding that he could be disciplined in such an instance. Norton’s version was consistent throughout, while Rovello’s testimony revealed her tendency to embellish and distort to make the employees look bad. For instance, she had to have known when testifying on

Day 5 of the hearing that Cavaluzzi was not testifying, as all the employees who testified did so under subpoena -- and given Respondent's obsession with knowing where each employee is at any given moment in the day it is utterly implausible that Rovello did not know that, not having received a subpoena and made arrangements to be out of work, Cavaluzzi was not going to appear at this hearing. Thus she confidently added details in her testimony concerning Cavaluzzi that she had to know would go unchallenged, such as her self-serving claim that he said "sorry" when she approached the group on February 8. (Tr. 866). Respondent predictably resuscitates this testimony in its latest brief. (R. Br. to Board at 13, 44). Again, Respondent wishes the Board to ignore the fact that Rovello made no mention of this supposed apology by Cavaluzzi in the written counseling she issued him. (See GCX-35). To the contrary, she specifically wrote that "no one responding" (sic) when she asked him and the others what they were doing. (GCX-35). This is just yet another example of Rovello's overall lack of credibility and willingness to fabricate testimony to advance her case.

One of the most serious fabrications Rovello dreamed up was her claim that Norton, who had only been employed at the plant less than two years at the time, told her on February 10, 2012 that he would "get even" with her. (Tr. 882). One would think that, if true, this threat would have warranted a documentation of some sort, yet Rovello admitted that she did not document this threat in any manner, but rather for the first time called Lochman to report the matter. (Tr. 882). Lochman, notably, did not corroborate her claim. Arnson, who testified on Day Six of the hearing, was not asked about this particular incident, so did not offer specific testimony to corroborate Rovello's claim that Norton had threatened her. (Tr. 1108-1109). The judge properly found that "Rovello's account of the disciplinary and grievance process was therefore contradicted by Lochman's testimony and the documentary evidence, which militates in favor of a

conclusion that Respondent's asserted legitimate reason Respondent had for the February 10 and 13 counselings is in fact pretextual." (ALJD 40, lines 13-16).

Regarding the discipline issued to GMP Leadman Velez for "loafing," the record revealed, as the judge noted, "that Velez was simply 'swept up' in Respondent's disparate and retaliatory prohibition on discussion regarding union matters on worktime and changed practices regarding the application of general rule 9 prohibiting loafing or abuse of time." (ALJD 41, lines 34-37). "This is exactly the scenario that, given the testimony of Marczyzak described above, would *not* warrant disciplinary action." (ALJD 41, lines 29-30).

The judge also correctly found that the disciplines issued to Sears, Norton, Cavaluzzi, Hing, Vaast, and Domeracki violated the Act. Respondent suddenly and disparately applied its "no loafing rule" to union officials and targeted them for discipline. Sears, a 24-year veteran whose skills the company relies upon, has been subjected to especially grievous treatment as he has been followed through the shop, interrupted throughout the day and constantly questioned about what he's working on. Sears' mistreatment was also unique in that he has been subjected to progressive discipline for "loafing", resulting in a four-day suspension. Respondent's sudden restriction of allowing Sears to simply photocopy a grievance (an act which takes a few seconds and was previously allowed) has had the predicted chilling effect that Respondent evidently sought to create when it harshly disciplined Sears for using the photocopier to copy a grievance.

Respondent's conduct in issuing these warnings to the employees because it believed they were engaging in union activity is clearly unlawful. See *Valmont Industries, Inc.*, supra, 328 NLRB at 318 (1999)(an employer may not restrict union-related conversation while permitting conversation related to other topics). In that case,

the Board found that the “[t]he credited evidence established that the conversation for which Lewis and Sharp were disciplined was work-related and the Respondent’s employees are allowed to engage in work-related conversations.... The credited evidence further established that the Respondent suspected that the conversation was related to union activities ... and that other employees were not disciplined for similar alleged conduct.”

Sears incurred Respondent’s wrath for a number of reasons. He is the sole remaining face of the IUE, its only on-site representative, he filed a ULP charge on April 3 that rankled Respondent, and he has the temerity to challenge Rovello when she fabricates claims against him. Sears did nothing wrong in any of the incidents for which he was disciplined. He stopped to talk to Cavaluzzi for a minute and was counseled. He stopped to talk to Hing for a minute and received a verbal warning. He stopped to talk to Norton for a minute one day and the next made a copy of a grievance answer and received a written warning. All of these were for “loafing,” which, until 2012, employees were never written up for, with two exceptions, neither one for the simple act of talking to a coworker for a minute or two. Respondent’s focus has at all relevant times been on “union activities,” evidenced not only by its supervisors’ admissions but by the fact that each and every time Sears was written up for loafing he was “caught” talking to an employee who happened to be a union official. Sears just can’t win. Maybe he brought a soda to work on May 29 because when he’d walked to the water fountain on February 3 he was disciplined for stopping to speak to Cavaluzzi along the way. Either way, he, like Norton, has a big target on his back. The timing of the February 3 discipline, coming just days after issuance of the initial Complaint in this matter, also suggests retaliatory motive. For these and all of the reasons contained herein, and based upon the record

as a whole, the judge had ample reason to find and conclude that Respondent's conduct violated Section 8(a)(3) of the Act as alleged in the Complaint.

F. The judge properly considered Respondent's records of past discipline in finding evidence of disparate treatment

As demonstrated herein, Respondent's exceptions to the judge's well-reasoned findings are specious. Respondent claims (R. Br. to Board at 6, emphasis added) that "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 to a coworker*", and then cites to 42 exhibits it offered. But with one exception, in fact none of the 42 exhibits Respondent lists actually specifically cite to Rule No. 9! There is only one counseling to mention the word "loafing" in the subject header, but the discipline mentioned in RX-25(a)(2) was issued on March 12, 2012, *after* the events at issue herein, and was for playing a cell phone after being observed for a couple of minutes. As it was obviously issued after the targeting of union officers had begun, this discipline is of no probative value.

The other lone partial exception is RX-25(c), a July 2008 counseling for Christian Feliz, which mentions the word "loafing" but still contains no mention of Rule No. 9. In fact, under "Type of Violation" Respondent checked the boxes for "Unauthorized Absence from Work Area"; "Insubordination"; and "Attitude." (See RX-25(d)).

Over a third of the 42 counselings, warnings or other disciplines are for smoking outside of the plant: see RX-2(c); RX-4(a)(d)(e)(i)(j); RX-25(f)(r)(s)(t)(u)(v)(x)(y). RX-2(f) is for sitting on a bench in the locker room when supposed to be working; RX-2(g) is for failing to wear a respirator; RX-3(a) is for being seen outside of the building during working hours talking to another worker; RX-3(b) is for using a cell phone on the shop

floor; RX-4(b) is for changing a flat tire during work hours; RX-25(a) is for leaving a work area to take a forklift outside without permission to move a picnic table; RX-25(b) is for collecting soda cans during working hours; RX-25(d) is for working on one's car; RX-25(e)(g) are for talking on a cell phone; RX-25(i)(j) are for leaving work early; RX-25(k) is for "wandering" through the plant with a coffee; RX-25(l) is for being outside of the building while on overtime; RX-25(n) is for carrying an armful of empty soda cans; RX-25(o) is for cleaning one's dishes after break time; RX-25(p) is for buying a water during working hours; RX-25(q) is another counseling to Feliz for "not being at your work station," being out of his department and talking with another worker; RX-25(w) is for talking on a cell phone; RX-25(z) is for "not being at your work station"; RX-25(a)(1) is for leaving early for break; and RX-28(b) is for "violation of site work hours policy." Finally, RX-28(a) is Cavaluzzi's 2008 counseling for "loafing or other abuse of time", which was issued because he had been found reading the newspaper with his feet propped up on a desk (discussed further below). This is the *only discipline* (out of the 42 cited by Respondent in its latest brief) that issued *before* 2012 in which Respondent had cited to Rule #9. Respondent's efforts to attempt to show a consistent practice of applying Rule #9 by summarily listing the other 41 disciplines (described immediately above) and characterizing them as violations of Rule #9 is seriously misleading.

Undeterred by the plain fact that the records it offered into evidence (most without any accompanying explanation of their circumstances) do not say what Respondent wants them to, Respondent confidently proclaims that it 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, when they should be working." (R. Br. to Board at 6). However, the judge obviously disagreed, as she discredited the testimony Respondent cites to in its brief.

For example, she credited Norton's and Hing's testimony over Rovello's, Marcyzak's and Butler's. See ALJD 34-36.

Support for the judge's findings are evidenced by the fact that *Rovello admitted* that no other disciplines existed in Respondent's records for the simple act of talking to a coworker. (Tr. 968-969). Contrary to Respondent's claims on appeal, the judge correctly recounted that "Rovello testified that she could not recall any additional discipline issued to employees solely for speaking with one another." (ALJD 35, lines 16-17). This finding is amply supported by the record, as in fact Rovello could not name a single employee (other than the ones at issue herein) who had ever been written up for merely talking to another employee at work! (Tr. 968-969). At Burndy, though, if you were a union official, talking to a coworker for a minute or so was suddenly suspect and considered "loafing" or an "abuse of time."

Respondent's reliance upon the 2008 counseling Cavaluzzi received is unavailing. Rovello admitted that Cavaluzzi's 2008 warning for abuse of time (RX-28(a)) was issued because he "had his feet up on the desk and he was reading a newspaper." (Tr. 943). It is patently obvious, from that warning and from Rovello's testimony, that Cavaluzzi was clearly performing no work at all and was not talking to another worker (as in all but one of the cases here: Sears' suspension). Thus the discipline Cavaluzzi received in 2008 was arguably warranted. But that is a far cry from the disciplines at issue here, in which employees who happened to be union officials were "suspected" of talking union when gathered about a work bench in the pattern shop (the February 10 and 13 counselings), or suspected of engaging in an apparently prohibited "activity" by talking about a union matter at work near a forklift for a minute or so (Hing and Sears), or merely stopping to talk to a coworker for a few minutes,

when that coworker was a union official (Velez “caught” talking to Cavaluzzi). The judge rightly saw through Respondent’s disregard for the law.

Respondent’s related argument (R. Br. to Board, at 32) that Counsel for the Acting General Counsel “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” is a bizarre reading of the standard in this type of case. Respondent has turned the standard on its head. Respondent’s records and its witnesses both bear out the lack of similar treatment: *no one was ever written up for “loafing” for the mere act of talking to a coworker for a minute or so before the incidents at issue here.* Respondent’s twisted interpretation of the “disparate treatment” factor is entirely unconvincing.

G. Respondent’s *Noel Canning* argument is meritless

Respondent is correct (R. Br. to the Board, at 15-17) that in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the D.C. Circuit held that that the President’s January 2012 appointments to the Board were not valid. However, the Board filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit’s decision, which was granted by the Supreme Court on June 24, 2013. See 133 S. Ct. 2861 (2013). Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board noted that in *Noel Canning* the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*, Nos. 12-1115, 12-1153, 2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus in *Belgrove*,

the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”

H. Respondent’s Exceptions to certain Notice language recommended by the judge are meritless

Finally, Respondent complains that two of the judge’s recommended “Notice language” paragraphs are improperly overbroad. (R. Br. to Board, at 49-50), citing *Anheuser-Busch, Inc.*, 337 NLRB 756 (2002). However, that case appears to be a bit of an anomaly, as the disputed Notice language there “could be interpreted as encompassing unprotected activity at corporate communications meetings.” *Id.* The instant case, by contrast, is far broader, and the disciplines are so clearly related to protected activity.

If any question concerning the propriety of the judge’s recommended Notice language in these two paragraphs remains, Counsel for the Acting General Counsel suggests a possible compromise, in keeping with the Board’s decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 178 (2001)(changes in italics):

WE WILL NOT suspend you *because of or in retaliation* for your activities on behalf of the International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, IUE/CWA Communications Workers of America (“IUE”).

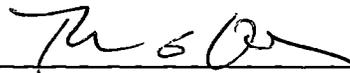
WE WILL NOT discipline you *because of or in retaliation* for your activities on behalf of Glass, Molders, Pottery, Plastics & Allied Workers Union (“GMP”).

VI. CONCLUSION AND REMEDY

For all of the above reasons, Counsel for the Acting General Counsel submits that Respondent's exceptions are entirely without merit, and respectfully urges the Board to affirm Judge Esposito's decision in its entirety.

Dated at Hartford, Connecticut, this 26th day of September, 2013.

Respectfully submitted,



Thomas E. Quigley
Counsel for the Acting General Counsel
National Labor Relations Board, Subregion 34
A.A. Ribicoff Federal Building
450 Main Street, Suite 410
Hartford, Connecticut 06103

TABLE OF CASES

	Page(s)
<i>Anheuser-Busch, Inc.</i> , 337 NLRB 756 (2002)	37
<i>Belgrove Post Acute Care Center</i> , 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013)	36
<i>Evans v. Stephens</i> , 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc)	36
<i>Ishikawa Gasket America, Inc.</i> , 337 NLRB 175, 178 (2001)	37
<i>Laser Tool, Inc.</i> , 320 NLRB 105 (1995)	21
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013)	36
<i>PCC Structurals, Inc.</i> , supra, 330 NLRB at 893	22, 27
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3rd Cir. 1951)	5
<i>Transportation Mgt.</i> , 462 U.S. 393 (1983)	26
<i>United States v. Allocco</i> , 305 F.2d 704, 709-15 (2d Cir. 1962)	36
<i>United States v. Woodley</i> , 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc)	36
<i>Valmont Industries, Inc.</i> , 309 NLRB 318 (1999)	22, 31
<i>Wright Line, a Division of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1980) cert. denied 455 U.S. 988 (1982)	26

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE – SUBREGION 34

BURNDY LLC

and

GLASS MOLDERS POTTERY PLASTICS &
ALLIED WORKERS LOCAL 39B

Cases 34-CA-065746
34-CA-079296

BURNDY LLC

and

IUE-CWA, LOCAL 485

Case 34-CA-078077

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **September 26, 2013**, I served the above-entitled document(s) by **e-mail** as noted below, upon the following persons, addressed to them at the following addresses:

MARY ROVELLO , HR MANAGER
ED MARCZYSZAK, PLANT MANAGER
BURNDY, LLC
185 GRASSY PLAIN ST
BETHEL, CT 06801-2854
Email: mrovello@burndy.com

MICHAEL J. SOLTIS, ESQ.
JACKSON LEWIS LLP
177 BROAD ST
PO BOX 251
STAMFORD, CT 06901-5003
Email: soltism@jacksonlewis.com

THOMAS NORTON , PRESIDENT
GLASS MOLDERS POTTERY PLASTICS &
ALLIED WORKERS LOCAL 39B
186 EATON ST
OAKVILLE, CT 06779-1249
Email: tdsadd5@aol.com

ROBERT SEARS
IUE-CWA LOCAL 485
373 PROSPECT STREER
NAUGATUCK, CT 06770-3118
Email: psears4014@gmail.com

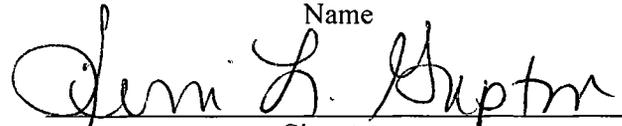
DAVID I. CANN, ESQ
KENNEDY, JENNIK & MURRAY, PC
113 UNIVERSITY PL., FL 2
NEW YORK, NY 10003-4527
Email: dcann@kjmlabor.com

September 26, 2013

Date

Terri L. Gupton, Designated Agent of NLRB

Name



Signature