

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

**J&J SNACK FOODS HANDHELDS
CORP.,**

Respondent,

and

TEAMSTERS LOCAL UNION 839,

Charging Party.

Case No's 19-CA-126632
19-CA-127401
19-CA-127413
19-CA-127689
19-CA-134279

**CHARGING PARTY TEAMSTERS LOCAL NO. 839'S ANSWERING BRIEF TO
J&J SNACK FOODS HANDHELDS CORP.'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

I. INTRODUCTION

Pursuant to Section 102.46(d) of the National Labor Relations Board's Rules and Regulations, Charging Party Teamsters Local Number 839 files this Answering Brief and requests that the Board reject all of Respondent J&J Snack Foods Handhelds Corporation's Exceptions to the March 13, 2015 Decision ("Decision") of the Administrative Law Judge.¹

On the merits, J&J's arguments lack any basis to show the ALJ erred in her Decision. J&J's arguments are based on misstatements of the Trial Record and it relies on leaps of logic to argue its position. Therefore, the Board must reject J&J's Exceptions and affirm the Decision.

¹ Hereafter the National Labor Relations Board will be referred to as the "Board"; the Administrative Law Judge as "ALJ"; the National Labor Relations Act as the "Act"; Teamsters Local 839 as the "Union" or "Charging Party"; J&J Snack Foods Handhelds Corp. as the "Employer" or "J&J." With respect to the record developed in the case, the ALJ decision issued by Judge Eleanor Laws will be identified as "ALJD at p."; Respondent's brief in support of exceptions as "BR at p."; joint exhibits as "JT Ex at p."; the General Counsel's exhibits as "GC Ex at p."; Respondent's exhibits as "ER Ex at p."; and Charging Party's exhibits as "UN Ex at p."

II. LEGAL ARGUMENT

The Board must reject J&J's Exceptions because they lack merit. In contrast, the ALJ's well-reasoned Decision is based on the proper analysis of the Trial Record and case law.

A. The Board must reject J&J's submission that the ALJ erred in holding that it was not justified in banning Rich Davies, refusing to recognize him as the Union's representative, and posting its employee notice.

The ALJ's Decision is not erroneous because she applied case law after making factual findings supported by clear evidence showing J&J was unjustified in its ban against Richard Davies, its refusal to recognize Davies as the Union's representative, and its posting to employees denigrating and disparaging the Union. Therefore, J&J's Brief arguments must be rejected. *See* BR at 7-11; Exception no's 1-2, 7-9.

The Board and courts have consistently protected the principle that bargaining parties must be able to freely choose their own representatives. Both parties have "... [A] corresponding obligation to meet with the representatives chosen by the other side." *Id.* (citing *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); *NLRB v. Indiana & Mich. Elec. Co.*, 599 F.2d 185, 191 (7th Cir. 1979)). The Board has repeatedly protected employees' right and freedom to choose their union representative and protect against employer meddling. *See Battles Transp. Inc.*, 362 NLRB No. 17 fn. 3 (2015); *Barnard College*, 340 NLRB 934, 935 (2003); *In re Anheuser-Busch, Inc.*, 337 NLRB 3 (2001), enforced, 338 F.3d 267 (4th Cir. 2003); *Pac. Gas & Elec. Co.*, 253 NLRB 1143 (1981); *Dal-Tex Optical Co.*, 130 NLRB 1313, 1319 (1961).

Thus, the Board has broadly enforced the Act against employers that unilaterally bar union representatives from the workplace. In *Lytton Rancheria of Calif.*, 361 NLRB No. 148, *8, a grievance meeting was held at the employer's property and two union representatives attempted to engage in further discussion with the human resources manager, who walked away.

The employer's security guard made 4-5 requests to the union representatives before they agreed to leave the property. *Id.* Several weeks later, the employer's attorney sent an email to the union that one of the representatives was barred from its property. *Id.* The employer claimed to permanently expel one of the union representatives because she refused to leave the property after the grievance meeting. *Id.* at *8. The Board rejected the employer's defense because it failed to establish the union representatives unreasonably interfered with its operation. *Id.* at *9. There was a delay in the departure but there was no confrontation, only an attempt to continue the meeting longer than the employer's representatives wanted. *Id.* Importantly, the Board affirmed and held "In expelling [one of the union representatives] from its property, the Respondent deprived employees of their contractually granted access to their bargaining representative on the property. This interference constituted a unilateral change of a material term or condition of employment." *Id.* (referencing *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enforced sub nom. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995) (employer's expulsion of union representatives constituted a unilateral change of a material term or condition of employment, and interfered with the representational process)). The Board held "[T]he Respondent violated Section 8(a)(5) and (1) by barring [a union representative] from its property." *Id.* Likewise, in *Frontier Hotel*, 309 NLRB at 818, when an employer, through unilateral action, denies or reduces the ability of the union to access its employees for representational purposes, the unilateral action or change is material in nature.

Given the adversarial nature of collective bargaining, the NLRB's high tolerance for a broad range of conduct is understandable. Thus, the NLRB has only permitted a party to refuse to deal with a representative when the offensive conduct rises to a "[C]lear and present danger to

the bargaining process or would create such ill will as to make bargaining impossible or futile.”
Elec. Workers v. NLRB, 557 F.2d 995 (2d Cir. 1977); *CBS, Inc.*, 226 NLRB 537, 539 (1976).

Illustrating the imminent harm that must exist before a party can refuse to meet, the NLRB held that when a union representative physically assaulted the employer’s personnel director, sufficient clear and present danger to the bargaining relationship existed for the refusal. See *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379-80 (1980); 670 F.2d 663 (6th Cir. 1982). In *Fitzsimons Mfg.*, the union representative threatened to punch the employer’s representative in the mouth and “knock him on his ass,” challenged the employer’s representative to go to the parking lot, and then grabbed him by the tie and pulled upward until the person got to his feet. *Id.* There were clear threats of physical violence and actual physical intimidation.

Emphasizing the high standard before a party can refuse to bargain with a representative, the *Long Island Jewish Med. Ctr.*, 296 NLRB 51, 71-72 (1989) Board held that an employer was obligated to meet with a union representative despite his use of obscenities against a manager, him blocking an exit, and a light push. And in *Signal Mfg. Co.*, 150 NLRB 1162 (1962), the representative stated that the company founder should have taken the employer’s manufacturing director to the grave with him. In both instances, the Board held that although ill-advised, the conduct “... [D]id not reflect such an underlying hostility to the employer so as to make collective bargaining between the parties a futility.” *Long Island*, 296 NLRB at 71.

In contrast, the case law cited by J&J is inapposite to this case’s facts. First, controlling authority for the Board does not include advisory opinions or federal district courts. Therefore, J&J’s citation to *Chas H. Lilly Co.*, 30 NLRB AMR 400055 (1996) and *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) has no controlling authority. Notwithstanding, the factual background in the *Las Vegas Hilton Corp.* bears no relationship to the alleged comments by

Davies. In *Las Vegas Hilton Corp.*, the behavior was explicit and included sexually charged terms and phrases, in contrast to Davies allegedly calling HR Manager Karyn Schofield with the terms “she” and “her,” among other relatively tame terms. Contrasting with *Las Vegas Hilton*, a person had “screamed” to the plaintiff “[T]hat she had ‘great tits’” and in another instances “[W]hile telling dirty jokes and laughing, stared at Plaintiff’s derriere and then told Plaintiff that she had ‘great legs.’” *Id.* at 1025. In another incident, the plaintiff described a person “staring that went on for approximately 10 to 20 minutes and was accompanied by gestures.” *Id.*

J&J then cites *Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), also bearing no relationship to Davies’s alleged conduct, much less what the ALJ’s factual findings established. In *Steiner*, 25 F.3d 1459, the manager’s comments were outrageous in comparison to Davies’s alleged comments. In that case, a manager confronted the plaintiff and stated “You are not a fucking floor man [plaintiff]. You are a fucking casino host. You comp every fucking fleabag that walks through the door” and then yelled “Why don’t you go in the restaurant and suck their dicks while you are at it if you want to comp them so bad?”. *Id.* at 1461. Then the manager “[R]epeated this two or three times, laughed, and walked off with a grin on his face.” *Id.* J&J’s cited cases must be rejected in their entirety because they bear no relationship to this case’s facts.

Unlike J&J’s flawed analysis, the ALJ properly applied the case law to this case’s facts derived from the Trial Record. The ALJ cites *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), and explained “Words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)” to explain how Davies’s conduct did not justify J&J’s actions. ALJD at 20. Furthermore, the ALJ analyzes ample case law, including *Lehigh Lumber Co.*, 230 NLRB 1122 (1977), *Children’s Ctr. for Behavioral Dev.*, 347 NLRB 35 (2006), and *NLRB v. Gissel Packing*, 395 U.S. 575, 617 (1969) to determine whether J&J violated Section

8(a)(1) of the Act. *See id.* Importantly, the ALJ held that even if she wholly credited J&J's version of the events, which she does not do so, Davies's conduct would not be egregious enough to justify his removal. ALJD at 17. The ALJ then methodically analyzed each of the incidents that J&J claimed to support its affirmative defenses and then rejected them as an insufficient basis to justify its actions. *See id.* at 17-20. Rightfully so, the ALJ concludes that "In short, the only reliable evidence of Davies acting rudely toward Schofield comes from testimony and notes about the April 10 meeting" and it was not enough to justify J&J's ban against Davies, its refusal to recognize him, and its employee posting to denigrate the Union and Davies. *Id.* at 19. The ALJ Decision is well-reasoned and provides detailed analysis to support the Conclusions of Law and Remedy ordered. Therefore, the Board has no basis for overturning the ALJ Decision; J&J's Exceptions must be rejected.

B. The Board must reject J&J's arguments that the ALJ erred in holding that it violated the Act by ceasing its past practice without any bargaining.

1. The ALJ correctly held J&J's ceasing of the past practice for food product samples violated Section 8(a)(5) and (1) of the Act.

The ALJ's Decision is not erroneous because she applied case law after making factual findings based on clear evidence showing J&J violated the Act by ceasing the practice of providing food product samples to employees without bargaining. Therefore, J&J's Brief arguments must be rejected. *See* BR at 11-14; Exception no's 3-4, 7-9.

There is abundant case law providing that an employer cannot unilaterally change a practice to provide food to employees, including the cost of those lunches, without providing notice and an opportunity to bargain. *See e.g. Mercy Hosp. of Buffalo*, 311 NLRB 869, 873 (1993) (employer closed cafeteria from 2 to 4 am and substituted vending machines offering similar meal choices); *Beverly Enterprises*, 310 NLRB 222, 239 (1993) (elimination of free

coffee unlawful); *Central Mack Sales*, 273 NLRB 1268 (1984) (ceasing coffee service is illegal). In *Sprain Brook Manor Nursing Home, LLC*, 2013 359 NLRB No. 105, 196 LRRM 1499, 2013 WL 1793956, 27-28; *enforced* 361 NLRB No. 54, 201 LRRM 1093 (2014), the Board affirmed that the employer's discontinuing of a long-standing practice to provide hot lunches to its employees for 6 months violated the Act. Board law has routinely "[U]nder a variety of circumstances, found that unilateral changes to the type and manner of food and drink provided to employees are unlawful." *Id.* at *28

The Board has similarly interpreted infrequent benefits like Christmas turkeys and hams to require the same duty for the employer to provide notice and opportunity to bargain because they constitute terms and conditions of employment. *See Presto Casting Co.*, 262 NLRB 346, 347, 351 (1982), *enforced*. For example, in *Harowe Servo Controls, Inc.*, 250 NLRB 958, 959 (1980), the Board held the employer's discontinuation of Christmas turkeys, among other items, without prior notice to the union and bargaining over the changes, violated Sections 8(a)(5) and (1) of the Act. *See also Gas Mach. Co.*, 221 NLRB 862 (1975), *Gen. Tel. Co. of Calif.*, 144 NLRB 311 (1963), *enforced* in relevant part 337 F.2d 452 (5th Cir. 1964); *K-D Mfg. Co.*, 169 NLRB 57, 60, 64 (1968), *enforced* 419 F.2d 467 (5th Cir. 1969); *Czas Publ'g Co., Inc.*, 205 NLRB 958, 969-971 (1973), *enforced* 495 F.2d 1367 (2d Cir. 1974)).

In addition to daily lunches and Christmas meat, the Board has held an employer's unilateral action to end free coffee violated Sections 8(a)(5) and (1) of the Act. In *Universal Builders Supply, Inc.*, 2010 WL 3285411, *4, the employer provided free coffee for all employees and admittedly stopped providing it without notice and an opportunity to bargain. Since then, employees have had to pay for their own coffee. *Id.* In *Wisconsin Steel Indus.*, 321 NLRB 1394, 1394 (1996), the Board similarly affirmed that elimination of free coffee and donuts on paydays

(once weekly) was a violation of the Act. Even when an employer unilaterally changes from providing free coffee to a vending machine, the Board has held the Act was violated. *See Central Mack Sales*, 273 NLRB 1268, 1289 (1984); *Missourian Public Co.*, 216 NLRB 175, 175 (1975) (reversing ALJ's recommended dismissal of the allegation). *See also Poletti's Restaurant*, 261 NLRB 313, 320 fn. 16 (1982) (cessation of providing free desserts); *So. Florida Hotel & Motel Ass'n*, 245 NLRB 561, 569 (1979) (cessation of providing two free beers or soft drinks daily).

In contrast to J&J's flawed analysis, the ALJ properly applied the case law. As part of her analysis to determine the past practice to provide quality assurance lab food product samples to employees, the ALJ applied *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (citing *Granite City Steel Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *DMI Distrib. of Del.*, 334 NLRB 409, 411 (2001)) to determine the past practice was binding and required notice and an opportunity to bargain. And with the exception of two months in 2012 when J&J failed to notify the Union of a change in the practice (see discussion below), it is undisputed J&J ceased the practice without any notice to the Union. *See* ALJD at 24, TR at 397. Therefore, the ALJ's holding that J&J's discontinuation of the practice without bargaining was an unlawful unilateral change is supported by case law. *See* ALJD at 24.

2. The ALJ correctly held the past practice to provide food product samples to employees was a material, substantial, and significant benefit, thus violating Section 8(a)(5) and (1) of the Act.

In its Brief, J&J inexplicably claims the past practice is not material, substantial, or significant despite overwhelming Trial Record evidence indicating otherwise.² Defying logic, J&J argued that the Union's inaction to grieve or bargain about a 2012 incident (it is undisputed

² See above for case law analysis regarding when food and drink constitutes terms and conditions of employment and a material benefit to employees, thus, requiring notice and an opportunity to bargain.

that the Union had no knowledge about this set of events) constituted waiver. This is nonsensical. The Union's inaction was entirely due to J&J's prior bad faith actions and failure to meet its statutory and contractual obligation to notify the Union in 2012. Lastly, J&J's Brief conveniently ignores the ALJ's well-reasoned analysis of case law to support her Decision that the past practice constituted a material, substantial, and significant benefit to employees.

In the Decision, the ALJ properly applied case law to determine the parties' past practice for J&J to provide food product samples to employees was material, substantial, and significant. *See* ALJD at 24 (citing *Sprain Brook*, 359 NLRB No. 105 (2013), *aff'd* 361 NLRB No. 54 (2014); *Preston Casting Co.*, 262 NLRB 346, 347 (1982), enforced 708 F.2d 495 (9th Cir. 1983); *Harowe Servo*, 250 NLRB 958, 959 (1980); *Wisconsin Steel Indus.*, 321 NLRB 1394 (1996). The ALJ's analysis included evaluating J&J's arguments and citation to *Weather Tec Corp.*, 238 NLRB 1535, 1536 (1978); she specifically rejected the argument because *Weather Tec Corp.* is distinguishable from the facts in this case. Importantly, the ALJ cited *Wisconsin Steel Indus.*, 321 NLRB 1394, to explain how eliminating low value items, like coffee and doughnuts, and only provided during a bi-monthly payday, still constituted a material, substantial, and significant change. Here, the food product was regularly provided at least twice a week, and the food samples were sizeable. J&J's own witness, Michael Adams, the Production Manager, testified that each "Hot Pocket" is "Approximately six-and-a-half inches by four." TR at 293. Adams described himself as "a pretty big guy" and found one to be "pretty satisfying." *Id.* at 294. Stephen McGuire, an employee with a similar stature to Adams, also testified the Hot Pockets were approximately the same size. *Id.* at 56. Even Adams conceded, from a conservative estimate in relation to other witness testimony, there were up to 50 Hot Pockets per day, several times per week, provided to employees in the cafeteria. *Id.* at 294. This food was

available on a first come-first serve basis with no restrictions. *Id.* at 22. Therefore, J&J's argument that it was a *de minimus* provision to employees, like in *Weather Tec*, lacks merit.

Furthermore, J&J's contrived argument that the Union somehow waived its right to bargain the past practice defies logic. Despite the undisputed fact that J&J failed to notify the Union of the alleged 2012 cessation of the past practice, the Union being completely unaware of those events, J&J's Brief argues the Union had a duty to bargain the 2012 changes (and subsequent reversion) during prior CBA negotiations and to grieve it. *See* TR at 130-31, 133-34, 241; BR at 12-13. This argument is completely baseless. In addition, J&J's reference to *Phila. Coca-Cola Bottling Co.*, 340 NLRB 349 (2003) to support its position is distinguishable because in that case, the union had actual knowledge of a break in the past practice. This is not the case here; it is undisputed the Union had no knowledge about the 2012 events until evidence was recently presented at a grievance arbitration involving theft terminations and the past practice. *See* TR at 130-31. Without knowledge, the Union could not have objected to J&J's bad acts in 2012. To conform to J&J's disingenuous argument, the Board would necessarily need to hold J&J's unlawful failure to notify and bargain with the Union in 2012 still allows it to unjustly enrich itself by claiming the Union waived its right. The logic must be rejected. The ALJ properly addresses this waiver issue. In the Decision, the ALJ explained the practice, even if it only covered the past two year, it was still sufficiently regular and consistent for employees to reasonably expect the practice to continue or reoccur on a regular and consistent basis. *See* ALJD at 25. Thus, J&J's arguments regarding events in 2012 are moot.

Lastly, J&J's argument that the USDA regulations required it to end the practice was properly rejected. J&J's claim that **"It is a direct violation of USDA regulations for QA samples and other product not designated for sale to be sold outside of the facility"** necessitated its

action to unilaterally change the practice is untenable when the facts are scrutinized. BR at 14 (emphasis added). First, there is no direct evidence from the Trial Record to support J&J's claim that USDA regulations necessitated the change. Indeed, the ALJ's analysis is spot-on when she held "Respondent cites to *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987), to assert that an employer is not required to bargain over changes required or necessitated by law. The evidence does not show, however, that there was a requirement to cease the practice of providing employees sample products in the cafeteria in order to comply with the law." ALJD at 25.

Furthermore, J&J's argument that an economic exigency existed does not survive scrutiny because there is no evidence that it was required to immediately and unilaterally change the practice. There was no imminent threat requiring J&J to act immediately in disregard to the Act and the CBA. The ALJ similarly found J&J's argument to be unpersuasive. She held "In the instant case, I find no compelling exigency existed. The Respondent acknowledged that cooked food from the QA line had never been taken from the facility and resold. Moreover, assuming this was a concern, the Respondent was obligated to bargain with the Union prior to unilaterally changing its practice." ALJD at 25. There is no nexus to J&J's immediate decision to end the practice and any imminent threat to J&J's business. Supporting this conclusion, there is no evidence that the USDA is even aware of the crisis claimed by J&J.

Therefore, the Decision must be upheld because the ALJ properly applied case law to the facts. The Board must reject J&J's argument because it is merely crying wolf; there is no evidence to support its economic exigency claims.

C. The Board must reject J&J's argument that the ALJ erred in holding that it violated the Act by unilaterally altering plant visitation and access rules.

The ALJ's Decision is not erroneous because she applied case law after making factual findings supported by the Trial Record showing J&J violated Section 8(a)(1) and 8(a)(5) of the

Act by unilaterally altering plant visitation and access rules. Therefore, J&J's arguments must be rejected. *See* BR at 14-16; Exception no's 5-9.

It is undisputed that the Union had unfettered access to the Weston Plant's non-production areas for many years before the Employer's unilateral change to access in terms of notice, time, place, and manner for union visits. The undisputed facts alone show how the Employer's conduct violated the Act. The Board has repeatedly held "A union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. Union access to the employer's premises is a mandatory subject of bargaining, which requires notice to the union and an opportunity to bargain prior to any change." *Miron & Sons, Inc.*, 358 NLRB No. 78 (2012), 2012 WL 2589918, *35 (citing *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009); *TLC St. Petersburg*, 307 NLRB 605, 610 (1992)).

In *Miron & Sons, Inc.*, the employer implemented new rules regarding the union's access to unit employees at its facility. *Id.* The parties' CBA provided for the union's representatives to visit the plant at any time during working hours as long as there is no interference with production. *Id.* The union's past practice had been to enter the premises and talk, at will, with the employees while they were working. *Id.* at *35-*36. The Board held the employer's unilateral change requiring the Union's agents to only visit employees in the conference room violated Section 8(a)(5) of the Act. *Id.* at *36.

It is also well-established that an employer's regular and longstanding practices, even if not provided in a CBA, become terms and conditions of employment that cannot be altered without notice and opportunity to bargain. *See HTH Corp., Pac. Beach Corp., and Koa Mgmt., LLC*, 361 NLRB No. 65, 201 LRRM 1457 (2014) (citing *Turtle Bay Resorts*, 355 NLRB 706 (2010); *Lafayette Grinding Corp.*, 337 NLRB 832 (2002); *Granite City Steel Co.*, 167 NLRB

310, 315 (1967)). In *HTH Corp.*, 361 NLRB No. 65, the Board affirmed that the employer violated the Act by refusing to provide union access to a hotel property. The ALJ had rejected the employer's argument that it did not abrogate the access policy since it continued to allow the *other* union representatives access. *Id.* (emphasis added). The Board affirmed that the Act does not allow the employer to decide which union representatives may have access to its facility when access has been bargained for and constitutes past practice. *Id.* Therefore, the employer's denial of union access had a material, substantial, and significant negative impact on the union's representational activity on behalf of employees, and thus, potentially affected their terms and conditions of employment. *Id.* (Cf. *KGTV*, 355 NLRB 1283 (2010); *Peerless Food Prod's, Inc.*, 236 NLRB 161 (1978)).

In *Lytton*, 361 NLRB No. 148, the Board affirmed that the employer violated Section 8(a)(5) by unilaterally implementing rules barring union representatives from accessing the employee break room and for barring a union representative from its property indefinitely. The Board rejected the employer's argument that the union must make an appointment to get authorization before entering the employee break room when previously the union representative had unfettered access. *Id.* at *8.

There is no basis for J&J's argument that the unilateral changes to require 24 hour notice, notice to the Plant or HR Managers, limit visits to the cafeteria and to administrative hours, and limit to a "respectable amount of time" was justified. *See* TR at 71. J&J's position that it was "harmonizing" the new access rules with the CBA's union access provision (Article 11.3) is completely unsupported. BR at 5. There is no CBA terms related to the restrictive conditions that Plant Manager Adam Ligon was trying to supposedly "harmonize" with. JT Ex. 2 at 11-12.

Furthermore, there is no basis for J&J's argument that the Union was not materially and substantially affected by the terms. First, J&J cites *Peerless*, 236 NLRB 161 and *Nat'l Sea Products*, 260 NLRB 3 (1982), which are both distinguishable from this case. BR at 15. In *Peerless* and *Nat'l Sea Products*, the union representatives were in the production area of the facility and interfering with the employer's operations. See *Peerless*, 236 NLRB 161, *Nat'l Sea Products*, 260 NLRB 3, 5, respectively. In contrast, the Trial Record has no evidence there was any business necessity for the change, unlike the facts in *Peerless*. *Id.* In this case, the Union's access does not include the production area (as testified by McGuire and Davies), there is no evidence that J&J's operations were interfered with by Davies, and J&J has never claimed a business necessity for the unilateral changes. See TR at 26, 70.

Then J&J cites *Nynex Corp.*, 338 NLRB 659, 662 (2002). BR at 15. In *Nynex Corp.*, the Board held the employer's access changes were not material because "The Respondent's new security procedures did not limit the Union's movement within its facility or result in the Union's being denied access to any unit employees at the workplace. Union representatives were not required to obtain the Respondent's permission in order to enter the facility" *Id.* When analyzed in its entirety, *Nytex Corp.* actually supports the Union's case because J&J's changes including changes to the Union's access, materially and substantially restricted the Union's ability to gain access to employees at the 24-hour plant.

Lastly, J&J's argument that there was no material impact on the Union following the changes to union access is disingenuous. Clearly, requiring 24-hour notice and specific notice to the Plant or HR Manager, when no such notice was not required before other than to sign in, limits the bargained for benefit in the CBA. In addition, requiring strict notice to management materially interferes with the Union's ability to engage in candid discussions with its bargaining

unit employees. Furthermore, restricting the Union's access to administrative hours prohibits the Union from accessing employees that work outside of administrative hours.

Ligon also made it clear that the changes also restricted the duration for Davies's visits. Limiting the Union's visitation time had a profound impact on the Union's resources because the plant is 65 miles away from the union hall so more visits were needed to administer the CBA. *See* TR at 63, 77. Interestingly, J&J conveniently omits any reference to Davies being permanently banned from the plant soon after the unilateral changes took place, when it claimed the Union had limited testimony about the impact. This is another duplicitous argument. It is logical that after the employer bans the union representative from the plant, there will be less testimony about its impact on the affected person because he cannot make any plant visits, in the cafeteria, or elsewhere.

The Decision properly addresses J&J's legal argument shortcomings. The ALJ's factual findings about the past practice for union access and CBA Article 11.3 show how J&J's unilateral changes do nothing to "harmonize" the CBA terms but are rather entirely self-serving. *See* ALJD at 27 JT Ex. 2 at 11-12. Similar to the discussion above, the ALJ properly analyzed J&J's case law and rejected it because they are distinguishable from this case's evidence and in some instances, support the General Counsel and Union's arguments. ALJD at 28. The ALJ also properly applied case law and rejects J&J's argument that the changes were not material, substantial, and significant. *See id.* at 27. The evidence plainly shows how J&J unilaterally changed union access without legitimate justification and caused a substantial and material deleterious effect. Therefore, the Board must affirm the Decision and reject J&J's arguments.

D. The ALJ properly weighed witness credibility and made findings of fact and conclusions of law.

J&J's argument that the ALJ erred because it presented persuasive evidence to justify its actions because Davies's conduct made good faith bargaining impossible must be rejected. The ALJ properly determined credibility issues and considered all the evidence before making findings of fact and conclusions of law.

It is well-established that the ALJ makes credibility determinations based on several factors. Context of the witness's testimony, the witness's demeanor, the respective evidence's weight, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole are all considerations for the ALJ to parse through the trial record. *See Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, slip op. at 7 (2014) (citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001)). In *Standard Drywall Prod.*, 91 NLRB 544, 545 (1950), the Board held that it does "[N]ot overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner's resolution was incorrect." The Board, rightly so, gives significant weight to ALJ's credibility and factual findings because the ALJ has the ability to observe witnesses at trial. Importantly, witness testimony and supporting evidence provide the basis for the ALJ's findings of fact. Thus, the Board cannot overturn the ALJ's credibility and factual findings unless the very high burden in *Standard Drywall Products* is satisfied.

In this case, the ALJ properly determined Rich Davies's conduct was not so egregious to justify J&J's actions, thus, J&J's actions violated the Act. ALJD at 17. She acted properly by weighing the evidence and applying the law. The ALJ, even if J&J's claims were undisputed, the facts would still support the holding that J&J repeatedly violated the Act. The ALJ

explained, “I note that even if I credited the Respondent’s version of events, I would not find Davies’ conduct egregious enough to justify his removal.” ALJD at 17. Aside from this analysis, the Decision then applies case law to the facts over the course of 3-4 pages of analysis.

As part of the ALJ’s Decision, she made credibility determinations when analyzing witness testimony and properly weighed the evidence. *See* ALJD at 15. In particular, she credits Davies’s testimony regarding an April 10, 2014 grievance meeting. ALJD at 17. The ALJ explained Davies testimony was “... more reliable than [McCullough’s] testimony. McCullough’s testimony was often confused with regard to the various meetings.” *Id.* (citing TR at 321-25). The ALJ also noted J&J failed to make reasonable efforts to call Schofield, a key witness, to testify so an adverse inference was appropriate. *Id.* In other instances, the ALJ made credibility determinations favoring J&J regarding the likely adversarial grievance meeting that took place. *Id.*

In contrast to the ALJ’s Decision, J&J’s Brief misstates witness testimonials and misinterprets key evidence. In J&J’s Brief, it misstates the Trial Record by asserting Davies called Schofield “stupid because she allegedly could not speak Spanish as well as he could ...” and “accusing her of being ‘mean’ and ‘ugly’, making gender based remarks such as routinely calling Ms. Schofield ‘she’ or ‘her’ instead of her real name and starring [*sic*] at Ms. Schofield.” *See* BR at 8. In the trial record, it is clear Davies did not call Schofield stupid. Rather, Sandy McCullough’s notes were the only source, and reflected her own assumptions about Davies’s motivations by claiming “**Without calling her stupid** he called her stupid and unable to perform her job.” *See* ER Ex. 17 at 1. This is McCullough’s own assumption and not based on reality.

Besides the Union denying Davies using several of the terms alleged by J&J, the Trial Record supports Davies’s account of what happened preceding J&J banning him from the plant. Besides the evidence favoring Davies regarding J&J’s claims that he called Schofield “ugly” and

“mean,” McCullough’s testimony that Davies called Schofield a liar is also not believable. The ALJ agreed and held that “Her notes do not reflect such a comment, and her testimony was not convincing.” ALJD at 18. Importantly, the ALJD noted that Schofield, J&J’s key eyewitness, was not called to testify about the fact-intensive issue. *Id.*

In J&J’ Brief, it argued the ALJ erred by providing an inadequate analysis of whether Davies’s conduct was unlawful harassment and eluded that his alleged remark with the terms “ugly” and “mean” was on the “basis of her gender; the hallmark of gender-based harassment. In total, this conduct is sufficient to create a triable question as to whether Mr. Davies’ conduct was unlawful harassment.” *See* BR at 8. Then it makes a confusing argument alleging Title VII claims but simultaneously urges “Moreover, J&J was not asking the ALJ to determine whether Mr. Davies’s conduct violated Title VII but whether his conduct was serious enough to constitute potentially unlawful harassment...” *See* BR at 9. Regardless, the ALJ Decision satisfied the NLRB’s role to enforce the Act. Indeed, the ALJ devotes several pages to analyzing the evidence regarding Davies’s conduct. *See* ALJD at 16-20. In her conclusion, the holding is clear: Rich Davies’s conduct did not justify J&J’s ban, refusal to recognize Davies, and the employee posting denigrating the Union and Davies.

In its brief, J&J also erroneously claims Davies engaged in a staring incident with Schofield. During the trial, J&J presented evidence (which the Union disputes as factual) that Robert Hawks, the Union’s Secretary-Treasurer, actively stared at Schofield. *See* TR at 258³, 323-24, 378-79. The Trial Record has no reference to Davies allegedly staring at Schofield. The ALJ similarly analyzed the evidence and concluded “The Respondent also asserts that Davies ‘stared’ at Schofield, but the only evidence regarding staring involves Ligon’s testimony that

³ J&J’s opening statement claimed Hawks stared at Schofield.

Hawks asked if he and Schofield were having a staring contest during a meeting about theft on an uncertain date.” ALJD at 19.

In addition, J&J wholly misstates Davies’s testimony about calling Harry Fronjian, Vice President of Human Resources, an “ass.” *See* Brief at 10. It claims Davies’s stated purpose was to give Schofield something to say to Fronjian and “ ... so that Harry would realize the depth of [Davies’s] antagonism for J&J.” *Id.* J&J’s claim is a complete misrepresentation. When analyzing Davies’s entire statement, the motivation is clearly to elicit a call from the Weston Plant’s corporate office to mediate the local management’s dysfunctional dealings:

Q: What do you mean by that? Why would you say that?

A: ... And I thought that if she was going to call Harry, I might as well give her something to say to Harry that might generate a call from Harry to me. And I would have welcomed that, a call Harry, because I was concerned about the relationship the union and the plant, and I thought that maybe Harry would be as well. Harry never made the call though.

Q: Did you have a reason for opining that Fred was being an ass?

A: Yes. It was -- first of all, it was my opinion. And second of all, I thought it might generate a call from Harry to me.

Tr. at 155-56. Clearly, Davies’s purpose was to try to involve Fronjian and J&J’s corporate office in ongoing disputes at the Weston Plant. There is no evidence showing Davies had any intent to antagonize the employer for the mere sake of doing so. The ALJ analyzed the witnesses’ testimony and similarly held “Davies unrefuted testimony was that he made the comment in attempt to generate a call from Fronjian to him because he was concerned about the relationship between the Union and the plant, he thought Fronjian might also be concerned. ALJD 18, fn. 23 (citing TR at 156). The ALJ properly weighed the evidence and found Davies’s testimony to be more reliable than McCullough’s testimony. *Id.* at 18.

The ALJ Decision meticulously waded through the evidence in order to make findings of fact and conclusions of law. After weighing all the evidence, the ALJ properly held J&J’s

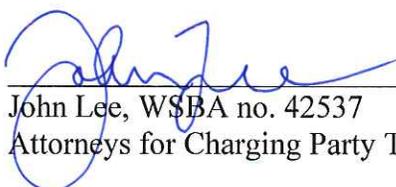
actions were not justified because of Davies's conduct. The ALJ held that "All told, the record does not contain persuasive evidence that Davies' presence would create ill will and make good-faith bargaining impossible." ALJD at 20. The ALJ concluded the evidence shows J&J violated Sections 8(a)(1), 8(a)(5), and (1) of the Act and interfered with employees' Section 7 rights. *See id.* Because the ALJ properly weighed the evidence, made findings of fact and conclusions of law, the Board has no basis for overturning the Decision and must reject J&J's arguments that the ALJ erred in her Decision.

III. CONCLUSION

For all of these reasons, the Union requests that the Board deny all of J&J's Exceptions and affirm the ALJ Decision.

DATED this 24th day of April, 2015 at Seattle, Washington.

REID, MCCARTHY, BALLEW & LEAHY, L.L.P.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24th day of April, 2015, he caused the original of the **Charging Party Teamsters Local No. 839's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision, and Certificate of Service** to be filed with the National Labor Relations Board via electronic filing to:

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Washington, D.C. 20570-0001

with a true and correct copy served via electronically to:

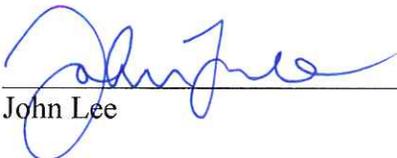
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