

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

**NOVELIS CORPORATION**

**and**

**Cases 03-CA-121293  
03-CA-121579  
03-CA-122766  
03-CA-123346  
03-CA-123526  
03-CA-127024  
03-CA-126738**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS,  
INTERNATIONAL UNION AFL-CIO**

**NOVELIS CORPORATION**

**Employer**

**and**

**Case 03-RC-120447**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS,  
INTERNATIONAL UNION AFL-CIO**

**Petitioner**

**GENERAL COUNSEL'S CONTINUED OPPOSITION TO RESPONDENT'S MOTION  
TO REOPEN THE RECORD**

Counsel for the General Counsel respectfully submits this opposition to Novelis Corporation's ("Respondent") Motion Supplementing its Request to Reopen the Record for Limited Purpose of Presenting Evidence of Changed Circumstances ("Motion") filed on January 27, 2016. The Motion supplements Respondent's original motion filed on June 5, 2015. Counsel for the General Counsel filed its opposition on June 18, 2015.

Respondent's Motion should be denied in its entirety for the following reasons: 1) despite any additional changes proffered by Respondent in its Motion, the reasons set forth by the General Counsel in its initial response to Respondent's original motion to reopen the Record filed on June 18, 2015 remain sound under existing Board law and applicable to Respondent's current Motion; 2) Respondent's Motion ignores the Board's standard practice of considering the appropriateness of a Gissel<sup>1</sup> bargaining order as of the time the unfair labor practices occurred; and 3) Respondent's proffered evidence of changed circumstances fail to warrant a different result.

Respondent seeks to reopen the administrative record after exhaustive litigation involving four parties of interest<sup>2</sup>, over 18 days of hearing, and the admission of extensive testimony and documentary evidence before an administrative law judge. On January 30, 2015, Administrative Law Judge Michael A. Rosas issued his Decision and Order (ALJD) finding, in part, that Respondent's unfair labor practice violations were sufficiently severe so as to erode the Union's majority support and the only fair and appropriate remedy here is a Gissel bargaining order. Specifically, the ALJ found Respondent engaged in twenty-one violations of the National Labor Relations Act (Act) including the following "hallmark" violations: threat of plant closure and business loss during several mandatory captive-audience meetings; the grant of benefits to employees; and the demotion of the initial and lead Union organizer for engaging in protected concerted and union activities. (ALJD p. 46-66). In addition, the ALJ, in response to Respondent's zealous litigation, considered all known mitigating arguments available to a litigant – rejecting them all. In doing so, the ALJ applied appellant court law despite acknowledging no obligation to do so. Based on the same considerations applied by the ALJ, the

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<sup>1</sup> NLRB v. Gissel Packaging Co., 395 U.S. 575 (1969).

<sup>2</sup> The parties include the General Counsel, Respondent, Charging Party Union and Intervenors.

facts proffered in Respondent's Motion (which at best amount to the departure of two supervisory-actors and a 27-percent employee turnover) must be denied.

### **I. Existing Board Law and Policy Finds Changed Circumstances Irrelevant**

Respondent, in its Motion, argues that the Board must reopen the administrative record to admit evidence of changed circumstances that occurred after the unfair labor practices because certain appellate courts, including the Second Circuit, considers such evidence to determine whether to enforce a Board remedial bargaining order. Respondent attempts to take advantage of the discrepancy between the circuit courts and the Board. However, absent a Supreme Court ruling to the contrary, the Board is empowered with the exclusive and independent authority to determine Board policy, and may elect when, if ever, to yield to appellate court pressures. In this regard,

[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. . . . Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

Pathmark Stores, Inc., 342 NLRB 378, 378 n. 1 (2004), quoting Insurance Agents' International Union, AFL-CIO, 119 NLRB 768, 773 (1957).<sup>3</sup>

Section 10(c) of the Act charges the Board with the responsibility to determine appropriate remedial measures for unfair labor practices that includes the power to advise "such affirmative action . . . as will effectuate the policies of this Act." The Supreme Court of the United States "repeatedly interpreted this statutory command as vesting the Board the primary

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<sup>3</sup> E.g., Novak Logging Company, 119 NLRB 1573, 1575-1576 (1958). See also Local 1426, International Longshoremens's Association, AFL-CIO (Heide and Company, Inc.), 128 NLRB 198, 205-206 (1960); North Country Motors, Ltd., 133 NLRB 1479, 1485 (1961).

responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 897 (1984).

Based on the effective enforcement of the Act, the Board consistently declines to consider changed circumstances in determining whether to impose a bargaining order, and in doing so, it reiterates that the appropriateness of a Gissel bargaining order is determined at the time the unfair labor practices occur.<sup>4</sup> Milum Textile Services, Co., 357 NLRB No. 169, slip op. at 11 (2011); Evergreen America Corp., 348 NLRB 178, 181-182 (2006); California Gas Transport, Inc., 347 NLRB 1314 (2006); Garvey Marine, Inc., 328 NLRB 991, 995 (1999), enf. 245 F.3d 819 (DC Cir. 2001); Action Auto Stores, 298 NLRB 875 (1990); Salvation Army Residence, 293 NLRB 944, 944-945 (1989), enf. mem. 923 F.2d 846 (2d Cir. 1990); F&R Meat Co., 296 NLRB 756 (1989); Highland Plastics, 256 NLRB 146, 147 (1981).

As a result of circuit court conflicts on this issue, Respondent in its Motion implies that the Board changed its long-established policy, citing for support Aububon Regional Medical Center, 331 NLRB 374 (2000), Research Federal Credit Union, 327 NLRB 1051 (1999) and Camvac Intern. Inc., 302 NLRB 652 (1991). However, the Board has not reversed its policy. In the cases cited by Respondent, and in similar cases, the Board considered the *enforceability* of a Board order, as a result of pressure from appellate courts hostile to the Board’s view, in order to avoid further litigation delays inherent in any attempt to preserve a remedial order. However, in doing so, the Board did not reverse or overrule itself.

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<sup>4</sup> Although the Board on occasion has addressed the circuits’ concerns about changed circumstances by considering the likelihood of success of an appeal to the circuit courts with differing views, it has done so on a case-by-case basis while still maintaining the Board’s policy.

Contrary to Respondent's assertions, the Board has "doubled down" on its long-established policy of determining the appropriateness of a bargaining order at the time of the unfair labor practices finding the passage of time, employee turnover and the absence of recent violations irrelevant. See Milum Textile Services, Co., 357 NLRB No. 169, slip op. at 11 (2011); California Gas Transport, Inc., 347 NLRB 1314 (2006). The Board articulated the rationale for its policy in Garvey Marine, Inc., 328 NLRB at 995, stating that to determine the appropriateness of a bargaining order at the time the order issues would allow an employer that commits severe unfair labor practices "to benefit from the effects of its wrongdoing. These effects include the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations." Id. at 995, citing Intersweet, Inc., 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997).

Recently, in Milum Textile Services, Co., 2012 WL 989636 (NLRB March 23, 2012) (unpublished order), the Board reaffirmed this policy by denying a motion to reopen the record to consider changed circumstances. Like Respondent in the instant case, the respondent in Milum Textile Services argued that subsequent changes of employee and managerial turnover, the passage of time and the absence of unfair labor practices since the ALJ's decision and order mitigate against a Gissel bargaining order. The Board rejected these arguments finding the changes "irrelevant." Id. at 2. Furthermore, it affirmed "the Board's established practice . . . to evaluate the appropriateness of a Gissel bargaining order as of the time that the unfair labor practices occurred . . ." Id. at 1.

Also applicable to the instant case, the Board in Milum Textile Services, supra, required the moving party to demonstrate that the admission of evidence, if considered, “would require a different result.” Id. at 2, citing Section 102.48(d)(1) Board Rules and Regulations. The Board denied the motion because evidence of changed circumstances is not relevant to the propriety of issuing a Gissel bargaining order under existing Board law therefore consideration of such evidence, if admitted, would not warrant a different result.

Honoring the Board’s sovereignty to determine policy, and applying Board standards and precedent to the instant Motion, mandates that Respondent’s Motion to reopen the record be denied in its entirety including any and all related motions concerning the same issue. Furthermore, assuming for the sake of argument, such evidence is considered under the standard applied by opposing appellant courts, and further assuming the evidence proffered in Malcolm Gabriel’s affidavit is true and correct, such evidence fails to mitigate the employee harm that necessitates a Gissel bargaining order in this case.<sup>5</sup>

## **II. Supervisory and Managerial Turnover**

Managerial turnover is unpersuasive where the employer remains under the same ownership and managerial directives that resulted in the unfair labor practices. See Overnite Transportation Co. (Blaine Minnesota Terminal), 329 NLRB 990 (1999) (Board affirmed bargaining order based, in part, on court precedent that show the management of employer lacked meaningful change); Gerig’s Dump Trucking, Inc., 320 NLRB 1017, 1026-1026 (1996),

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<sup>5</sup> The General Counsel, in its Answering Brief (pages 95-134), addressed Respondent’s argument concerning the propriety of the Gissel bargaining order, including the severity, number and dissemination of unfair labor practices.

enfd. 137 F.3d 936 (7th Cir.1998); Bridgeway Oldsmobile, 281 NLRB 1246, 1247 (1986); Intersweet, Inc., 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997).

The cases relied on by Respondent are inopposite to the facts of the instant case.<sup>6</sup> Respondent cites Audubon Regional Medical Center, 331 NLRB 374, 377-78 (2000), for the proposition that the Board must decline to affirm a bargaining order where there is managerial turnover and the passage of time. However, in Audubon Regional Medical Center, the employer was under completely new ownership and none of the supervisory or managerial personnel who perpetuated the unfair labor practices remain employed.

Contrary to Audubon Regional Medical Center, Respondent remains under the same ownership and continues to employ the supervisory actors that engaged in unfair labor practices continuing its managerial directives. In this regard, Respondent continues to employ 6 of the 8 supervisory personnel. These include Chris Smith, Craig Formoza, Duane Gordon, Andy Quinn, Dan Taylor, Tom Granbois and its Senior Vice President Marco Palmieri located outside the Oswego plant. The local supervisors remain employed among Unit employees at the Oswego plant to continue the managerial directives espoused by Phil Martens and Jason Bro despite their absence. The Board has noted that under similar circumstances, the “words and actions of immediate supervisors . . . leave the strongest impression.” Garvey Marine, Inc., 328 NLRB 991, 993 (1999).

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<sup>6</sup> Respondent also cites Research Federal Credit Union, 327 NLRB 1051, 1052 (1999), however contrary to Respondent’s 27 percent employee turnover, in this case there was 76 percent employee turnover and 76.5 percent of managerial turnover. In Camvac Intern, Inc., 302 NLRB 652, 653 (1991), also cited by Respondent, there was 91 percent employee turnover. It should be noted that in the cases cited by Respondent, the Board elected to consider the circuit courts remand on an individual case basis.

More importantly, the highest-ranking local official, Plant Manager Chris Smith, remains employed by Respondent to continue its managerial directives. Smith announced to employees the restoration of Sunday premium pay and other benefits resulting in a “hallmark” grant of benefit violation. (ALJD p. 24, 30-31). In addition, Smith, Martens and Palmieri spoke at each captive audience meeting preceding the representation election where Respondent engaged in numerous violations of the Act including the “hallmark” threat of plant closure and loss of business. (ALJD p. 48-52, 65-66). During these mandatory meetings, the ALJ found Smith echoed Martens’ threats concluding that both Smith and Martens threatened employees with more onerous working conditions, a loss of business, the rescission of Sunday premium pay and other benefits, and unlawfully disparaged the Union concerning Board charges. (ALJD p. 50-51). In addition, on June 25, 2014, Respondent, by Smith, reaffirmed Martens’ unlawful conduct that occurred at the captive audience meetings, by denying to employees that Respondent engaged in any wrong doing. (R. Exh. 54). Smith’s letter, disseminated to Unit employees on behalf of the “Oswego Works management team” said, “I want you to be unmistakably certain that I did not and would never make any threats . . . I believe that the Company honestly and fairly communicated the facts to you before the union vote . . .” (R. Exh. 54).

Respondent asserts that Bro’s departure is of such significance that it justifies not enforcing the bargaining order in this case. However, Respondent’s remaining managerial team engaged in the same unlawful conduct. In addition to Bro, Respondent managers Taylor, Gordon and Granbois unlawfully enforced Respondent’s no solicitation and distribution rules. (ALJD p. 53-55). These individuals remain employed by Respondent despite Martens and Bro’s absence. In addition, Respondent continues to reinforce its managerial directives by promoting supervisors that engaged in unlawful conduct. In this regard, the ALJ found Formoza unlawfully

interrogated employees, nevertheless, Respondent promoted Formoza to CASH department manufacturing manager three months after engaging in the unlawful interrogation. (ALJD p. 29). Like Bro, Formoza unlawfully interrogated and threatened employees. (ALJD p. 55).

### III. Employee Turnover and Passage of Time<sup>7</sup>

Respondent asserts that its original workforce of 599 unit employees is now comprised of an additional 197 new hires and a loss of 58 individuals that were originally “eligible to vote.”<sup>8</sup> Despite the lack of relevance under existing Board law, even if true, such turnover only amounts to 27% of the workforce.<sup>9</sup> Furthermore, the Second Circuit would not find this amount of employee turnover persuasive. NLRB v. Marion Rohr Corp., 714 F.2d 228, 231 (2d Cir. 1983) (turnover rate of 35% or higher); NLRB v. Chester Vallery, Inc., 652 F.2d 263 (2d Cir. 1981)(same); J.L.M. Inc v. NLRB, 31 F.3d 79 (2d Cir. 1994)(employee turnover was approximately 57% and 3 years had passed); Harper Collins San Francisco v. NLRB, 79 F.3d 1324 (2d Cir. 1996)(57% employee turnover rate and over two years passage of time.)

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<sup>7</sup> Significant employee turnover is often a result of the passage of time and paired together when considered by the courts. In this case with minimal employee turnover, it has been only two years since the election when counted in a manner most favorable to Respondent. The Second Circuit has affirmed a bargaining order with more than double the passage of time than in the instant case. See NLRB v. Star Color Plate Service, 843 F.2d 1507 (2d Cir. 1988)(five years since bargaining order, affirmed) compare Harper Collins San Francisco v. NLRB, 79 F.3d 1324 (2d Cir. 1996)(two years passage of time however paired with 57 percent employee turnover).

<sup>8</sup> Respondent represents that the 58 individuals are no longer in the bargaining unit “for reasons [that include] resignation, retirement and **promotion**. . .” (R. Mot. p. 7-8) (Emphasis added). It is unclear whether or not these individuals were “promoted” to positions of management over Unit employees. Notably, Respondent refers to the 58 as “individuals” rather than “employees,” which under the Act excludes supervisory and managerial personnel. This is of import because it undermines Respondent’s assertion that employee turnover, if considered, mitigates against a bargaining order, since Respondent has not changed ownership or demonstrated that its managerial directives that bore the unfair labor practices cease to affect Unit employees.

<sup>9</sup> This is only 4% higher than when Respondent filed its original motion to reopen the record on June 5, 2015.

More importantly, at least 73% of the workforce remains employed. These employees experienced Respondent's pervasive unfair labor practices that were widely disseminated throughout the workforce. In Milum Textile Services, 2012 WL 989636 (NLRB March 23, 2012) (unpublished decision), the Board noted that it "respectfully continue[s] to disagree with those courts of appeals which have expressed a contrary view of employee turnover as a factor to be considered in determining the propriety of a bargaining order." Id. at 3 n.8, quoting Highland Plastics, Inc., 256 NLRB 146, 147 n. 9 (1981). In doing so, the Board reasoned that when a respondent's violations are widely disseminated throughout the workforce significantly affecting union support, the "same process of dissemination would reach newly hired employees as well, whose support for the Union may well be affected by accounts of past unfair labor practices." Milum Textile Services, supra at 2. Relying on the Fifth Circuit for its rationale, the Board reasoned that "'practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed.'" Id. at 2, n. 10, quoting California Gas Transport, Inc., 347 NLRB 1314, 1326 (2006) (quoting Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978) (enforcing bargaining order)), enfd. 507 F.3d 847 (5th Cir. 2007).

#### **IV. Respondent's Proclivity to Violate the Act is Unchanged**

Respondent, citing Harper Collins San Francisco v. NLRB, supra, asserts that an "employer's cessation from further antiunion conduct" must be considered, among the other factors discussed above, as evidence mitigating the need for a bargaining order. (R.Mot. p. 3). However, Respondent's post-election conduct evinces the contrary. Respondent demoted the initial and lead Union organizer committing a "hallmark" violation. (ALJD p. 68).

The ALJ correctly found that Respondent unlawfully granted employee benefits and solicited employee grievances interfering with employee union support. (ALJD p.56-57). These types of violations linger in employee conscientiousness and the impact of such conduct is difficult to dissipate under ordinary circumstances because such conduct inherently includes a constant reminder of an employer's unlawful act with every paycheck in which the benefit appears. See Teledyne Dental Products Corp., 210 NLRB 435 (1974)(the "long-lasting effect on employees" that result from an unlawful solicitation of grievances); Holly Farms Corp., 311 NLRB 273, 281 (1993); Jamaica Towing Inc., 602 F.2d 1100 (2d Cir. 1979); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964)(lingering impact of an unlawful grant of benefits).<sup>10</sup>

The ALJ found that Respondent's post-election conduct included the extraordinary grant of five years of wage increases. Such an act by Respondent re-enforces rather than dispels Respondent's unlawful conduct. In this regard, the ALJ found the award of five years of wage increases effectively refuted Respondent's assertion that it mitigated its unlawful conduct. (ALJD p. 45-46, 67-69; ALJ Exh. 6; CP. Exh. 2 and 3). The ALJ reasoned that Respondent's five-years of wage increases and its denial of any wrong-doing, demonstrate that Respondent was "emboldened by how it peeled away union support with its unlawful tactics during the election campaign." (ALJD p. 69, citing Tipton Electric Co., 242 NLRB 202, 203 (1979)). Such conduct must not be further rewarded by allowing Respondent to reopen the administrative record.

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<sup>10</sup> General Counsel's Answering Brief to Respondent's Exceptions, pages 112-134, further expounds on Respondent's failure to mitigate and the persisting necessity for a Gissel bargaining order in this case.

## **V. Conclusion**

For the reasons stated above, Respondent failed to demonstrate extraordinary circumstances to warrant reopening the record. Therefore, its Motion should be denied in its entirety.

Respectfully, submitted this 17th day of February, 2016.

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