

IN THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

US FOODS, INC.

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 483

Case No. 27-CA-158614

RESPONDENT'S POST-HEARING BRIEF

Joseph Turner
SEYFARTH SHAW LLP
131 South Dearborn St., Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Counsel for US Foods, Inc.

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RESPONDENT'S POST-HEARING BRIEF

Respondent US Foods, Inc. ("US Foods" or "Respondent") submits this post-hearing brief in accordance with Section 102.42 of the National Labor Relations Board's Rules and Regulations.¹

THE CASE

On June 23, 2015, a group of four (4) US Foods drivers domiciled in Boise, Idaho voted in an *Armour-Globe* election to join an existing multi-state collective bargaining unit that included three (3) other US Foods drivers domiciled in Boise. In place at the time was a collective bargaining agreement (the "Labor Agreement") containing terms and conditions of employment negotiated by Teamsters Local 483 (the "Union") specifically for Boise-based US Foods drivers. The unfair labor practice allegations underlying this case are the Union's attempt to escape the consequences of the

¹ Throughout this brief, citations to the record are formatted as follows: the hearing transcript "Tr. [Page]:[Line]"; the General Counsel's exhibits are "GC Ex. ___"; and Joint exhibits are "J. Ex. ___."

overpromises it made to the four drivers after it realized that applying the negotiated terms of the existing labor agreement to the newly-represented drivers would result in lower rates of pay and diminished vacation and sick leave benefits for those drivers relative to what they previously enjoyed.

Counsel for the General Counsel (“General Counsel”) now proceeds on the following four allegations:

- 1) on about June 2015, Respondent, by Vice President of Operations Brad Forney, threatened employees that their wages would be reduced if they selected the Union as their bargaining representative in violation of 8(a)(1) of the Act;
- 2) in about June 2015 Respondent, by Forney, threatened employees with loss of vacation time if they selected the Union as their bargaining representative;
- 3) on about August 1, 2015, Respondent unlawfully reduced the wage rates and vacation and sick leave balances of Unit employees who voted in the Board election on June 23, 2015 in violation of 8(a)(3) of the Act; and
- 4) Respondent reduced the wage rates and vacation and sick leave balances without bargaining with the Union in violation of 8(a)(5) of the Act.

(Tr. 149:10-18; Tr. 151:20-152:1; GC Ex. 1(m)).

The General Counsel’s case rests on the premise that US Foods was required to negotiate separate terms and conditions of employment for the four drivers who voted to join the existing bargaining unit, rather than to apply the terms previously negotiated for Boise-based drivers in the existing Labor Agreement. That premise is wrong. US Foods had no duty to bargain new terms for the four drivers where US Foods and the Union previously agreed to terms and conditions of employment specifically for Boise-based drivers. Based on the results of the *Armour-Globe* election, US Foods was correct

in applying the previously negotiated terms for Boise-based drivers to the new bargaining unit members.

For these reasons, and for the reasons fully set forth below, the unfair labor practice allegations in the Complaint should be dismissed.

THE GENERAL FACTS

I. US Foods.

A. US Foods' Business and the Boise, Idaho Resident Yard.

US Foods is in the food distribution business. (Tr. 154:24-25). It distributes all kinds of food products to its customers, which include hospitals, hotels, schools, restaurants of all sizes, cruise ships, and military bases. (Tr. 47:10-24; Tr. 155:1-5).

US Foods operates through 60 broadline divisions across the United States, including a division based in Salt Lake City, Utah. (the "Salt Lake Division"). The Salt Lake Division operates a resident yard in Boise, Idaho where seven drivers are domiciled. (Tr. 155:6-156:1). The Boise drivers receive trailers of product from the Salt Lake City warehouse for local delivery to customers in and around Boise. (Tr. 46:12-19; Tr. 156:8-10).

II. The Union.

The Union has a long bargaining history with US Foods. The parties' most recent labor agreement became effective in 2013 and expires on March 1, 2017. (J. Ex. 5). The current labor agreement is a multi-state, multi-local agreement between US Foods and four separate Teamsters locals – Locals Nos. 117, 162, 483 and 690. (J. Ex. 5). The parties' prior labor agreement, which was in effect from 2008 to 2013, included five

separate Teamsters locals as signatories – Locals 58, 117, 162, 483, and 690. (J. Ex. 4; Tr. 157:1-10).

The drivers covered by the Labor Agreement are under the jurisdiction of one of the Teamsters locals based on the drivers domicile: Local 58 covers the resident Longview, Washington drivers; Local 117 covers the Seattle area drivers and warehouse workers; Local 162 covers the Portland area drivers; Local 483 covers the Boise drivers; and Local 690 covers the Spokane area drivers. (Tr. 24:20-25).

III. The Parties' 2006 Settlement Agreement.

On September 29, 2006, US Foods and Teamsters Local 162 entered into a Memorandum of Agreement that related to Boise-based drivers (the "Boise Memorandum"). (J. Ex. 2). The Boise Memorandum was entered into as a non-Board settlement agreement to resolve two unfair labor practice charges. (*Id.*) Of relevance to this case, the Boise Agreement set forth that Boise-based drivers hired after September 30, 2011 would not be part of the existing bargaining unit covering Boise-based drivers:

This agreement will remain in effect for five years from the date of signing of this document. At the conclusion of this agreement, the bargaining unit members and/or their successors will be covered by the labor agreement between the Union and the Employer and will remain members of the Union under the labor agreement then in place. However, new workers hired after September 30, 2011, will not be part of the bargaining unit unless through the processes of the National Labor Relations Act, a new bargaining unit is created.

(Tr. 23:22-25).

In 2007, Teamsters Local 483 took over jurisdiction for the Boise-based drivers from Teamsters Local 162.² (Tr. 22:9-5). This change is reflected in the parties' September 11, 2007 Extension Agreement Between US Foodservice, Inc. Portland Division and Teamsters Locals 58, 162 and 483. (J. Ex. 3 at 3). The purpose of this Extension Agreement was to extend the labor agreement that expired on July 15, 2007. The Extension Agreement specifically provided that "Local 483 will be accepted as the representative for the currently organized drivers located in Boise, Idaho." (J. Ex. 3; Tr. 37:3-10).

Notwithstanding the 2006 Boise Memorandum with Local 162, after Local 483 became the representative of the Boise drivers, Local 483 and US Foods bargained over the terms and conditions of employment for any newly-hired, Boise-based drivers. (J. Ex. 5 at 11). Article 8, Section 8.01 of the 2013 to 2017 Labor Agreement specifically contains a wage rate scale for newly hired Boise drivers. (*Id.*). Similarly, Section 11.01 of the Labor Agreement provides a vacation benefit schedule for employees within Local 483's jurisdiction (the Boise resident yard) that provides the vacation allotments for employees after one and two years of employment. (*Id.* at 14).

IV. The 2015 Petition and Election.

A. The Filing of the Petition.

On May 26, 2015, the Union, through former Union Secretary-Treasurer Mark Briggs, filed an RC petition seeking to represent "all drivers" at US Foods Boise resident

² Local 162 did not become Local 483 – the two are separate and distinct Teamsters locals. (Tr. 36:20-23).

yard. (J. Ex. 6). The Petition identified the number of Boise drivers to be included in the proposed unit as "8". (*Id.*) The Petition further identified Teamster Local 483 as the bargaining representative and noted the "Expiration Date of Current or Most Recent Contract" as March 1, 2017. (*Id.*). At the time of the filing of the Petition, Local 483 represented three Boise-based delivery drivers. (J. Ex. 1 at 17). Five additional US Foods delivery drivers were based in Boise as of the filing date, all of whom were hired after the September 30, 2011 cut-off date set forth in the Boise Memorandum: Lucas Toomey (hired on December 16, 2013); Kenneth Mann (hired on January 27, 2014); Rosendo Contreras (hired on February 4, 2014); Daniel Koeppel (hired on November 9, 2014); and Cody Eisenbrandt (hired sometime between January 21, 2015 to June 6, 2015).³

B. The Drivers Who Sought to Be Represented through the Petition.

As of the date of the *Armour-Globe* election, seven drivers dispatched out of the Boise resident yard: three drivers represented by Teamsters Local 483 and four unrepresented drivers. (Tr. 51:9-12; Tr. 160:4-17).

Both the represented and unrepresented drivers reported to the same supervisor, Gary Andreson. (Tr. 45:13-14; Tr. 48:11-12). Both the represented and unrepresented drivers started their day by performing a pre-trip inspection. (Tr. 48:24-49:3). After performing the pre-trip inspection, drivers were responsible for hooking up their trailers, delivering the product, and finishing up with a post-trip inspection. (Tr. 48:11-

³ One of the drivers, Cody Eisenbrandt, was no longer working for US Foods in Boise at the time of the election. (Tr. 120:10-23).

49:6). Boise driver Lucas Toomey admitted that their work, uniforms, and the equipment that they used was identical to that of the represented drivers:

Q. Now, in your work as a relief driver alongside these four other drivers, was there any difference in your work and the work performed by the drivers who were represented by the Union?

A. Not the work, no.

Q. Was there any difference in the equipment that you used between you and the drivers who were represented by a union?

A. No.

Q. Was there any difference in the uniforms that you wore?

A. No.

Q. To your knowledge, was there any difference in the product that you were driving?

A. No.

(Tr. 50:2-24; *see also* Tr. 160:18-161:2).

Only two differences were identified at the hearing concerning the work performed by the non-represented employees. According to the drivers, they sometimes drove out of state, whereas the represented drivers did not, and they sometimes carried a larger volume of product and made more stops than did the represented drivers. (Tr. 50:2-51:8). Toomey, however, explained that these distinctions were not based on their unrepresented status, but rather, were based on their relative seniority and the route bidding process:

Q. . . When you had Union drivers in Boise and nonunion drivers in Boise back prior to July of 2015, the - - the work performed by the drivers was basically the same; is that correct?

A. That's correct.

Q. and you operated essentially the same equipment?

A. Correct.

Q. You mentioned, however, that the --that the actual workload and -- and where the routes may go were different between the Union and the nonunion drivers, correct?

A. That's correct.

Q. Now, is that a function of seniority largely?

A. Yeah. Yes. I would say yes.

Q. Right. And the routes themselves actually get bid by seniority, correct?

A. Correct.

Q. And that happens twice a year?

A. That is correct.

Q. Okay. And the three or four Union drivers that were there when you started, all had more seniority that you did, correct?

A. That is correct.

Q. And of the drivers who -- who voted in the election, who were eligible to vote in the election, did you have the most seniority amongst that group?

A. I did.

Q. Okay. And you still had less seniority than the Union drivers had?

A. That is correct.

(Tr. 84:7-85:9).

C. The Stipulated Election Agreement.

On June 2, 2015, the parties reached a stipulated election agreement. (J. Ex. 8).

Pursuant to the Stipulated Election Agreement, an *Armour-Globe* election would be

conducted to determine whether the four drivers would be included in the existing bargaining unit.⁴ (J. Ex. 8). The Stipulated Election Agreement identified the Unit and Eligible Voters as:

Included: All full-time and regular part-time domicile delivery drivers employed by the Employer at its premises located at 4719 Market St., Building 2, Boise, Idaho.

Excluded: Office clerical employees, managers, guards, and supervisors as defined in the Act.

(J. Ex. 8). The Stipulated Election Agreement further explained:

[i]f a majority of valid ballots are cast for INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 483, they will be taken to have indicated the employees' desire to be included in the existing multi-state delivery driver bargaining unit currently represented by the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 483 and other Teamsters Locals.

(*Id.*).

The Stipulated Election Agreement included a list of the five eligible voters:

Lucas Toomey, Daniel Koeppl, Rosendo Contreras, Kenneth Mann, and Cody Eisenbrandt.⁵ (J. Ex. 1 at ¶22; J. Ex. 8).

D. Conversations with the Unrepresented Drivers Prior to the Representation Election.

Prior to the election, US Foods held three meetings with the drivers to discuss issues related to union representation. (Tr. 59:19-24). The first meeting was held sometime in mid-May 2015 at a restaurant in Boise. (Tr. 60:2-6; Tr. 103: 22-23). Present

⁴ An *Armour-Globe* election is based on two Board decisions: *Globe Machine & Stamping Co.*, 3 NLRB 297 (1937); *Armour & Co.*, 40 NLRB 1333 (1942).

⁵ As set forth above, Eisenbrandt was no longer employed by US Foods at the Boise yard at the time of the election. (Tr. 120:10-23).

during this meeting were three of the drivers, Toomey, Contreras, and Mann, and three US Foods management personnel, Brad Forney, Transportation Manager Daryk Butler, and Supervisor Gary Andreson. (Tr. 60:10-18; Tr. 103:24-104:1; GC Ex. 1(m)). During the meeting, the three drivers discussed with the managers some of their work-related issues, including the routes that they received, wanting more Saturdays' off, and receiving coverage to attend events such as a truck rodeo and company picnic that Contreras and Toomey allegedly wanted to attend but were not able to attend due to coverage. (Tr. 61:3-62:14; Tr. 104:21-195:11).

About a week later, a second meeting was held with the drivers at the Courtyard Marriott Hotel. (Tr. 67:24-68:7; Tr. 110:6:17). Present during this meeting were Forney, Butler, HR Representative Dorian Long, Matt Reynolds,⁶ Contreras, Toomey and Mann. (Tr. 68:19-23; Tr. 90:5-9; Tr. 110:20-111:13; Tr. 154:17-18). The meeting started with US Foods' management greeting the drivers and introducing each other. (Tr. 69:16-25; Tr. 111:14-20). During this meeting, Forney informed the drivers that he had learned that the drivers would be "under the same contract as the current guys in Boise." (Tr. 71:9-17). Then Long talked to the drivers about the benefits that US Foods offered non-bargaining unit employees versus the benefits offered through the existing Labor Agreement. (Tr. 70:20-71:8; Tr. 111:16-25). Long showed the drivers a PowerPoint presentation that covered a comparison of the medical plans and other benefits. (Tr. 71:9-23; Tr. 112:1-4).

⁶ Driver Toomey testified that Reynolds was either the VP or the GM of the Utah center. (Tr. 68:24-69:4).

Toomey testified that Long's presentation was neutral and indeed highlighted for the drivers that the benefits offered under the Labor Agreement were overall better than those offered directly through US Foods to the non-represented drivers:

Q. And that she even said that the Oregon Teamsters' fund that you would go into was a pretty good fund, correct?

A. Yes.

Q. And you actually found her - - her presentation to be very neutral, correct?

A. It was - - I would say it was like 49/51. The - - the one percent not being her fault; it's just that it adhered to something that would have wanted more than not. So, yes.

Q. Okay. You actually took her presentation as - - as favoring the Union contract over what you had with U.S. Foods?

A. Just with my opinion, correct.

(Tr. 90:15-25).

After the PowerPoint presentation, Long explained that under the existing Labor Agreement the drivers' pay would be different, and that Forney would provide their individual pay rates under the Labor Agreement. (Tr. 71:9-25). After the meeting, Forney stayed behind and spoke to each driver separately. (Tr. 72:5-15). When each driver met with Forney, Forney pointed to a line in his notebook with the number of hours the employee had worked (documented on the left-hand side of the notebook), and the pay rate which correlated with that number of hours worked under the existing Labor Agreement (documented on the right-hand side of the notebook). (Tr. 72:5-73:20; Tr. 112:1-113:1-10). These pay rates were based on the "Break-in Rates" for recently

hired drivers set forth in the existing Labor Agreement. Specifically, the Labor Agreement provides in relevant part:

8.03 Break-in Rates: New employees hired after date of ratification shall be paid the following rates of pay:

0-2080 hours	60% of classification rate
2081-4160 hours	70% of classification rate
4161-6240 hours	80% of classification rate
6241-8320 hours	90% of classification rate
Thereafter	Full Classification Rate

(J. Ex. 5 at 12). Thus, the pay rate shown to each of these more recently hired drivers corresponded to the number of hours they had worked at the time of the meeting.

About a week later, and about a week before the originally scheduled election, a third meeting was held. (Tr. 76:18-23; 113:8-25). This meeting was held at the SpringHill Suites in Boise. (Tr. 113:18-19). Present for this meeting were HR Manager Steve Boyak, Forney, Butler, Long, Toomey, Contreras, Mann and Koeppel. (Tr. 77:8-19; Tr. 113:20-23). During this third meeting, Long showed the drivers a video with footage from a strike at US Foods' Corona, California facility and showed them letters that the Teamsters union had sent to its customers accusing US Foods of various things, including providing spoiled product. (Tr. 78:5-79:20; Tr. 91:4-20; Tr. 114:13-26; Tr. 116:20-117:13; Tr. 132:6-24).

In addition to these meetings, Forney also met with Toomey and Koeppel individually. (Tr. 74:4-75:20; Tr. 132:25-133:8). Forney offered to review the Labor Agreement with Toomey and to answer any questions Toomey had about the Labor Agreement. (Tr. 75:12-20). Toomey declined. (Tr. 75:12-20).

Forney also met with Koepl and showed him Section 8.03 of the Labor Agreement, which set forth the "break-in rates" based on hours worked. (Tr. 134:3-Tr. 135:10; J. Ex. 5 at 12). Forney calculated Koepl's rate of pay under the Labor Agreement based on the hours Koepl had worked. Forney also noted that Koepl's vacation time would change under the terms of the Labor Agreement. (Tr. 134:3-24; *see* J.Ex. 5 at 14-17).

E. The Election and Election Results.

The representation election took place on June 23, 2015.⁷ (Tr. 28:24-Tr. 29:1). The question on the ballot, as set forth in the Stipulated Election Agreement was: "Do you wish to be represented for purposes of collective bargaining by INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 483?". (J. Ex. 8). A majority of the employees voted to join the bargaining unit. (Tr. 29:2-3). On July 2, 2015, the Region issued the Certification of Election Results. (J. Ex. 12). This was followed by a Corrected Certification of Representation dated September 16, 2015. (J. Ex. 13).

V. Communications Between US Foods and the Union After the Certification of the Election.

After the results of the election were certified, US Foods Vice President of Labor Relations, Bob Blyth, reached out to Union Business Agent Mark Briggs to coordinate the transition of the four previously non-bargaining unit Boise-based drivers into the bargaining unit. (Tr. 29:8-12). Blyth called Briggs on July 16 and left him a voicemail message stating that the parties "needed to get together and find a date to transition the

⁷ The election was originally scheduled for June 16, 2015. "Through no fault of the parties," the election did not take place until June 23, 2015. (J. Ex. 1 at 23).

employees.” (Tr. 29:15-17; Tr. 164:19-165:6). Blyth followed-up his voicemail message to Briggs with a July 16, 2015 letter, stating:

This letter is a follow-up to my voice mail to you regarding transitioning the four (4) US Foods drivers into the existing CBA between the parties. We need to establish an effective date for the transition in an effort to avoid any gap in benefit coverage for the employees.

Please contact me at the above address or by phone at ... in order to establish a mutually convenient transition date.

(J. Ex. 14). Blyth explained that his letter addressed the parties’ concerns over how to transition the drivers due to a potential in gap in benefits coverage:

[w]e were concerned that when the transition of employees into the CBA would occur that unless we were mindful of that effective date for health and welfare employees may experience a gap in coverage and be out there with no benefits for themselves and dependents. So it was important that we coordinated that date so they went from one plan right to the other plan.

(Tr. 165:12-18).

After the July 16 letter, Blyth and Briggs had a conversation about the effective date for the transition of the employees from the Company health and welfare plan into the multi-employer health and welfare plan. Briggs informed Blyth that he needed to look into the date. Briggs subsequently called Blyth back on either July 24 or 26 and advised Blyth that August 1 was the appropriate date. (Tr. 30:12-24; Tr. 166:3-12; J. Ex. 16). Briggs testified that during this call:

we discussed the terms of getting them moved over. My opinion was that we should do it just as quickly as possible. Bob [Blyth] indicated that that was a little bit of problem because, as you referred to earlier, there was a timing mechanism so there would be no gaps in coverage. So eventually in the conversation we agreed on August 1st as the transition date.

(Tr. 31:3-10).

After the discussion with Briggs, Blyth checked internally to make certain that the August 1 date would work. Blyth then left Briggs another voicemail message letting him know that the August 1 transition date was acceptable. (Tr. 166:3-25). Blyth then sent Briggs a second letter, stating:

This letter is a follow-up to my voice mail to you regarding the effective date of the transition of the four (4) US Foods drivers into the existing CBA between the parties. Pay and benefit changes will be effective on 08/01/15.

(J. Ex. 15; Tr. 166:3-12).

On July 30, 2015, the Union responded to Blyth's letter via a letter from Phil Haueter, Secretary Treasurer, stating:

Per the phone message you left it appears that US Foods may be attempting to unilaterally implement a change in wage for the four new bargaining unit employees. The Union is aware that Mark Briggs spoke with you about red circling the wage-rate of these employees until they progress past their current wage-rate.

The current wage for these employees cannot be changed without further negotiations. We are concerned that US Foods may be making these wage changes in retaliation against employees who joined the Union.

Please be advised, there is no negotiated wage-rate change for these employees. Should US Foods unilaterally implement this change prior to a negotiated agreement; the appropriate NLRB charges will be filed.

(J. Ex. 16).

Blyth had not spoken to Haueter prior to his receipt of this letter. (Tr. 167:7-14). Indeed, Briggs explained that Haueter stepped in because Briggs was out for a two-week period and advised Haueter to reach out to Blyth. (Tr. 39:16-40:1). Blyth had not communicated with Briggs about employees' wages, including red circling them. Blyth testified:

Q: Now the second sentence states the Union is aware that Mark Briggs spoke with you about red circling the wage rate of these employees until they progressed past their current wage rate. Did you speak to Mr. Briggs prior to July 30, 2015 about red circling the wage rates of the four employees?

A. No.

(Tr. 167:22-168:2).

A day later, Blyth responded to Haueter's letter, stating:

Please be advised that I did not have a conversation with Mr. Briggs regarding red circling the four (4) employees that will be covered by the CBA.

The Company maintains that the change in wage rate is not a unilateral change or an issue subject to 'further negotiations.' Rather, the Company is simply applying the existing CBA (including the hourly wage rate progression set forth therein) to these four (4) employees per the election agreement. As a reminder, the election agreement stated:

'If a majority of valid ballots are cast for INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 483, they will be taken to have indicated the employees' desire to be included in the existing multi-state delivery driver bargaining unit currently represented by the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 483 and other Teamsters Locals. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.'

Given this language, as well as the certification of the election results showing that the employees wished to be included in the existing bargaining unit, we are simply respecting the employees' wishes and complying with what is required of us under CBA and the National Labor Relations Act.

(J. Ex. 17).

Pursuant to Blyth's and Briggs' communications, US Foods transitioned the drivers into the appropriate health and welfare plan and pension plan for Boise-based

employees under the Labor Agreement effective August 1, 2015. (Tr. 167:1-3). US Foods also transitioned the drivers' other terms and conditions of employment, including their pay rates, sick pay and vacation benefits. (See, e.g., J. Ex. 18). On August 7, 2015, Finance Supervisor Shawn Burkhammer sent the Union an email providing the four drivers' new rates of pay "based on their break in rates in article 8.03 in the CBA." (J. Ex. 18).

The Union filed the charge underlying the instant complaint on August 24, 2015. (GC 1(a)).

ARGUMENT

I. The General Counsel Bears the Burden of Proof.

The General Counsel bears the burden of proof on each allegation in the Complaint. See *Nations Rent, Inc.*, 342 NLRB 179, 180 (2004) ("The General Counsel has the burden of proving every element of a claimed violation of the Act."); *Des Moines Register & Tribune Co.*, 339 NLRB 1035, 1037 n.5 (2003); *Western Tug & Barge Corp.*, 207 NLRB 163, 163 n.1 (1973). Because the General Counsel failed to meet that burden of proof on each allegation, the Complaint should be dismissed in its entirety.

II. The General Counsel Did Not Establish that US Foods Violated the Act by Applying the Existing Labor Agreement's Terms to the Drivers Who Voted in the 2015 election.

Based on the terms of the Stipulated Election Agreement and the Certification of Representation, US Foods was legally obligated to place the newly-represented drivers into the existing multi-state bargaining unit and to apply the previously negotiated terms and conditions of employment for Boise-based drivers to those drivers. The

General Counsel argues, however, that US Foods had an obligation to bargain with the Union over separate terms and conditions for the four Boise-based drivers who voted in the election. (Tr. 9:19-12:9). The General Counsel takes this position despite the fact that the previously unrepresented drivers voted to join the existing multi-state bargaining unit working under the terms of an existing Labor Agreement containing terms and conditions of employment specifically negotiated for employees in the driver classification domiciled at the Boise resident year. (J. Ex. 5). According to the General Counsel, this position is premised on the Board's decision in *Federal-Mogul Corp.*, 209 NLRB 343 (1974). The Board's majority decision in *Federal-Mogul* (a 3-2 decision) was based on readily distinguishable facts and has no application here.

A. The Facts in *Federal-Mogul* Are Distinguishable and Not Applicable to the Instant Case.

1. The Facts of *Federal-Mogul*.

In *Federal-Mogul*, the union had represented a bargaining unit comprised of 2,000 production and maintenance employees from 1941 to 1971. *Id.* at 343. There was a separate group of approximately 140 setup men at the plant who "were never included in the production and maintenance unit." *Id.* at 343. "In fact, they were specifically excluded from the current collective-bargaining agreement between Respondent and the Union." *Id.* In 1971, an election was conducted among the setup men, and the setup men voted to be included in the existing production and maintenance employee bargaining unit.

The Regional Director's certification stated that the union "may bargain for the employees in the above-named category as part of the group of employees which it currently represents." *Id.* (internal quotation marks omitted). In response, the employer informed the union that it considered the setup men to be covered by the existing labor agreement and that it would apply the terms of the agreement to the setup employees. *Id.* The union objected, but the employer applied the terms of the existing labor agreement to the setup men. As a result, the setup employees' terms and conditions of employment changed. *Id.*

The Board found a violation, noting:

Though in some industries, parties commonly provide for coverage of 'after-acquired' plants, stores, or groups, that was not the case here. On the contrary, as previously indicated, the applicable, current contract specifically excluded set up men, and no 'bargain' can be said to have been consciously made by the parties for them. When the Union became certified as the newly designated exclusive agent, the Administrative Law Judge found – and we agree – the Respondent became obligated to engage in good-faith bargaining as to the appropriate contractual terms to be applied to this new addition to the previous unit.

We do not perceive either legal or practical justification for permitting either party to escape its normal bargaining obligation upon the theory that this newly added group must somehow be automatically bound to terms of a contract which, by its very terms, excluded them.

Id. at 343-44.

The Board noted that their reasoning was based on the Supreme Court's holding in *H.K. Porter Co., Inc. v. NLRB*, 397 US 99 (1970). *Id.* In *H.K. Porter*, the Supreme Court held that the Board does not have the power to require any party to agree to any substantive contractual terms. *H.K. Porter Co., Inc. v. NLRB*, 397 US 99 (1970) ("while the

Board does have the power under the National Labor Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.”). Based on the Supreme Court’s holding, the Board concluded:

Our decision promotes bargaining stability, since a major consequence of the opposite view would be that in contract negotiations both parties would be held to be making agreements for groups of persons whose identify and number would be totally unknown to, and unpredictable by, either party.

To be sure, in 1974, when it comes time to negotiate a new contract, the Union and the Employer must bargain for a single contract to cover the entire unit, including the setup men. In the meantime, the Union must, of course, fairly represent all employees in the unit, including both setup men and those previously included in the unit. But we fail to perceive anything divisive, or even unusual, about requiring interim bargaining for this new group.

Id.

2. The Facts of the Instant Case.

The instant facts are materially distinguishable from those which drove the divided Board majority opinion in *Federal-Mogul*. In *Federal-Mogul*, a new classification of employees (setup men) previously excluded from the bargaining unit voted to be added to an existing bargaining unit. No terms and conditions of employment had ever been negotiated by the parties to the labor agreement to cover employees in this excluded classification. In stark contrast, the four Boise-based drivers voted to be a part of a bargaining unit that already included Boise-based drivers with a labor agreement that includes terms specifically negotiated by Local 483 to cover Boise-based drivers. (J.

Ex. 5 at 11-12 (“Drivers - New Hires” and “Break-in Rates”); J. Ex. 5 at 14 (vacations for Local 483 jurisdiction employees); J. Ex. at 16 (Sick Leave); J. Ex. at 21 (Pension Plan)).

As set forth above, the newly added drivers perform the same work, report to the same supervisor, work out of the same facility, and operate the same equipment as the already represented Boise-based drivers. In short, the Boise-based drivers are indistinguishable and no purpose of the Act is served by requiring separate bargaining for employees in the same classification in the same location after US Foods and the Union previously agreed on terms and conditions of employment for that specific classification and location.

Additionally, the reasoning behind the Board’s decision in *Federal-Mogul* does not apply to the instant case. The Board’s reasoning was based on *H.K. Porter* and concluded that “[w]ere the Board to require unilateral application of the existing contract to the setup men we would, in effect, be compelling both parties to agree to specific contractual provisions in clear violation of the *H.K. Porter* doctrine.” *Id.* at 344. Here, the application of the existing Labor Agreement would not run afoul of *H.K. Porter* because the parties already bargained terms and conditions of employment for Boise-based drivers. The Board would not be requiring either party to “agree to any substantive contractual terms,” to which either US Foods or the Union has not already agreed to be bound. Those terms agreed to by US Foods and Local 483 expressly included wage rates, vacation benefit schedules, sick leave, and pension benefits for newly-hired drivers. (J. Ex. 5 at 11-12 (“Drivers - New Hires” and “Break-in Rates”); J. Ex. 5 at 14 (vacations for Local 483 jurisdiction employees); J. Ex. at 16 (Sick Leave); J.

Ex. at 21 (Pension Plan)). Thus, the reasoning arguably supporting the majority's position in *Federal-Mogul* does not support the General Counsel's position here.

Further, the General Counsel's position would not promote bargaining stability, but would foster quite the opposite. Under the General Counsel's theory, Boise-based drivers in a single bargaining unit who perform the same work, report to the same supervisor and receive the same representation from the same Union would be subject to separate bargaining and, inevitably, separate terms and conditions of employment for at least the duration of the current Labor Agreement. Such a result does not foster stable bargaining relationships, and no justification exists for creating this absurd result where the Union previously agreed to terms for this specific class of employees. In short, the General Counsel simply seeks to bail the Union out after it persuaded a group of unrepresented drivers to join a bargaining unit where newly-hired employees (like the four drivers at issue) receive materially lower wages and vacation and sick pay benefits until their fifth year of employment with the Company. That is not a role the Board should countenance.

3. Under the Circumstances of this Case, *Federal-Mogul* is Inapplicable Here.

The Division of Advice has noted that *Federal-Mogul* does not apply *sua sponte* simply because employees are "Globed-in" to an existing bargaining unit. *Robert Wood Johnson Univ. Hosp.*, 34 NLRB AMR 78, 34 NLRB Advice Mem. Rep. 78, 2007 WL 7567770, Case No. 22-CA-27693 (May 29, 2007). Indeed, the Division of Advice in *Robert Wood Johnson Univ. Hosp.* recommended that the Region apply accretion principles to a

case where employees had been added to an existing bargaining unit through an *Armour-Globe* election. Based on the accretion principles, the Division of Advice recommended that the Region dismiss the case.

In *Robert Wood Johnson Univ. Hosp.*, the union had been certified as the bargaining representative of registered nurses (RN) since 1978. The bargaining unit had specifically excluded a group of about 25 RN Case Managers. *Id.* at 2. On June 30, 2006, the parties' labor agreement expired and a *Globe* self-determination petition was filed seeking to include the RN Case Managers into the RN unit. *Id.* On August 30, 2006, the Region certified the union as the bargaining representative of the Globed-in employees. Bargaining took place between the union and the employer from April to September 2006. *Id.* The parties met about 20 times and reached an agreement on September 18, 2006, effective from that date through June 30, 2009. *Id.*

Based on these facts, the Division of Advice concluded that the employer had an obligation to apply all of the terms of the newly ratified agreement to the Globed-in employees and only upon the union's request, to bargain over any other terms specific to the case managers:

We first conclude that the Employer had an obligation to apply terms of the new agreement germane to the entire unit to the 'Globed-in' employees and then, upon request, to bargain with the Union about terms specific to the Case Managers that were not covered by that agreement.

Id. at 2-3. In making this conclusion, the Division of Advice found that *Federal-Mogul* did not apply:

We conclude that *Federal-Mogul* is inapposite here. The Board in *Federal-Mogul* concluded that requiring the parties to apply their existing

agreement to the 'Globed-in' employees would violate the principles of *H.K. Porter* because it would 'force on these employees and their Union, as well as the Employer, contractual responsibilities which neither party has ever had the opportunity to negotiate.' In clear contrast, the parties here had a full opportunity to bargain over these employees.

Rather, we conclude that this case is more appropriately analyzed under accretion principles as described in *Baltimore Sun Co.* In that case, existing bargaining agreement terms applicable to the unit as a whole were immediately applicable to accreted employees and the parties were only required to bargain over terms not covered by that agreement, namely, terms unique to the accreted employees. Applying the existing agreement to accreted employees does not contradict the holding in *H.K. Porter* because the basis for an accretion 'is that added employees share a community of interest with the unit employees and functionally [already were] within the existing bargaining unit but had not yet been formally included.'

The status of accreted employees, as functionally within the unit when the existing agreement was negotiated, is similar to the status of the 'Globed-in' employees here, who were certified into the unit during negotiations for the new agreement. Just as the principles of *H.K. Porter* do not apply to bar application of an existing agreement to accreted employees, they do not apply to bar application of the successor RN agreement to the 'Globed-in' Case Manager. In view of the similar legal status of accreted employees and these 'Globed-in' employees, we apply accretion principles to this case.

Id. at 3. The Division of Advice further explained why equitable public policy considerations required that the employer apply the existing contract to the case managers:

Equitably, the Employer should not be allowed to argue that contract terms of general applicability do not apply to these unit employees when the Employer not only negotiated and agreed to those terms after the Board's certification, but issuance of that certification recovered the Employer's only objection to bargaining over these employees. Applying the parties' new agreement also is not burdensome because the Employer is required under accretion law to bargain over only noncovered, unique terms and conditions that apply to the 'Globed-in' employees. Pragmatically, the parties will not re-bargain issues to which they have already agreed, but will concentrate on issues which have not yet been

bargained and need to be resolved. Indeed, as discussed below, this is precisely what the Employer attempted to do even while it maintained, as a legal matter, that the new RN agreement did not apply to the Case Manager.

The Division of Advice found that dismissal of the case was warranted because the employer applied the general terms of the bargained contract to the "Globed-in" group. *Id.* at 3-4.

In the instant case, the facts are more compelling than in *Robert Wood Johnson Univ. Hosp.* that the Board's holding in *Federal-Mogul* does not apply. Here, the drivers unlike the case managers, are not a new job classification to be added to the bargaining unit. The drivers are one of only two job classifications covered by the agreement. (J. Ex. 5). Moreover, the labor agreement specifically sets forth provisions for the Boise-based drivers. (*Id.*) Thus, US Foods and the Union have already bargained over this job classification. In *Robert Wood Johnson Univ. Hosp.*, the fact that the parties had an opportunity to bargain over the terms relevant to the new group was a basis for finding that the application of *Federal-Mogul* was inappropriate under the distinguishable circumstances of that case. The same finding is warranted here.

Yet, here, unlike in *Robert Wood Johnson Univ. Hosp.*, there are no additional issues to be bargained for outside of the existing labor agreement. Here, the labor agreement already covers all of the terms applicable to the Boise-based drivers, including new hire rates for drivers added to the Boise resident yard. Thus, no justification exists for requiring the parties to bargain over new terms for drivers already considered and covered under the existing Labor Agreement. Simply put, no

purpose of the Act is served by requiring either party to renegotiate terms and conditions of employment previously agreed to for Boise-based drivers.

B. This Case Should be Analyzed under the Accretion Principles.

Like in *Robert Wood Johnson Univ. Hosp.*, accretion principles should apply to this case. "The Board has defined an accretion as 'the addition of a relatively small group of employees to an existing unit where these additional employees share a community of interest with the unit employees and have no separate identity.'" *Safety Carrier*, 306 NLRB 960, 969 (1992) (internal citations omitted). To be accreted, the petitioned-for classification must have "little or no separate group identity" to the existing bargaining unit, and must have an overwhelming community of interest with the unit. *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981).

To determine whether an overwhelming community of interest exists, the Board considers a number of factors. *See, e.g., United Operations, Inc.*, 338 NLRB 123, 123 (2002) ("whether the employees are organized into a separate department; have distinct skills and training; having distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised."); *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001) ("In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common

functions; frequency of contact and interchange with other employees; and functional integration.”)

C. The Community of Interest Factors Support Finding that Accretion Should Apply Here, and thus, that the Terms of the Existing Labor Agreement Apply to the Drivers Who Voted in the 2015 Election.

Here, all of the community of interest factors support a finding that the seven Boise-based drivers share an overwhelming community of interest. The Board has held that the two most important factors in determining whether a community of interest exists are interchange and common day-to-day supervision. *Fontier Tel. of Rochester*, 344 NLRB 1270, 1271 (2003) (“the two factors that have been identified as ‘critical’ to an accretion finding are employee interchange and common day-to-day supervision.”).

A review of these two factors under the facts present supports a finding that all of the Boise-based drivers share an overwhelming community of interest. It is undisputed that all drivers report to the Boise resident yard, where they perform their pre-trip, check their loads, hook up their trailers, deliver their products, and return to the Boise resident yard. (Tr. 46:12-19; Tr. 156:8-10). It is also undisputed that all of the drivers, even before the election, obtained their routes by bidding, which is done in seniority order. (Tr. 121:23-122:22). Additionally, all drivers report to the same day-to-day supervisor, Gary Andreson. (Tr. 95:18-19). Given the facts present, employee interchange and common day-to-day supervision supports the application of accretion principles to the expansion of the existing bargaining unit.

Although these two factors are the “critical” factors in the accretion analysis, additional factors support US Foods’ position. All of the drivers have the same job

functions and perform the same work. While the three drivers who testified at the hearing testified that they performed more work outside of the state than did the bargaining unit drivers, this work was based on the routes available to them through the bid process based on their lower seniority. (Tr. 121:23-122:22). Moreover, Toomey testified that he took on more of the out-of-state work than his less senior coworkers because he likes the work and wanted to help his coworkers who had children:

A. Because I had the highest seniority of the relief drivers, I wasn't technically a relief driver myself, I still took those routes so the other guys who had children here in town, were more important with taking those routes.

Q. Could you have asserted your seniority in that situation and force the other drivers to take that drive?

A. 100 percent.

(Tr. 85:15-17; Tr. 87:20-88:8); see *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

Similarly, the skills and qualifications required of all seven drivers are identical. All of the drivers must possess the appropriate drivers' licenses to drive US Foods' vehicles and possess the skills needed to drive the vehicles and perform customer deliveries. (Tr. 48:15-21).

The General Counsel provided no evidence of any material distinction in the work performed by the four previously unrepresented drivers relative to the three represented drivers or in the supervision of these drivers. Indeed, it was the General Counsel's own witnesses who established that the work performed by drivers domiciled in Boise is indistinguishable. The overwhelming community of interest

among the seven drivers supports US Foods' position that the terms of the existing Labor Agreement negotiated for Boise-based drivers should be applied to all.

III. The General Counsel Did Not Establish that US Foods Violated the Act by Allegedly Threatening Employees.

The Board's well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

American Freightways Co., 124 NLRB 146, 147 (1959); *see also Miami Sys. Corp.*, 320 NLRB 71, n. 4 (1995), *enfd in relevant part sub nom.*, 111 F.3d 1284 (6th Cir. 1997) ("The test to determine interference, restraint, or coercion under Section 8(a)(1) is an objective one . . ."). The General Counsel bears the ultimate burden of proving under this objective standard, interference, restraint or coercion in violation of the Act. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998); 29 U.S.C. § 160(c) (violations of the Act can be adjudicated only "upon the preponderance of the testimony" taken by NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.").

With respect to these allegations, the General Counsel must prove that US Foods "engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Tissue Corp.*, 336 NLRB 435, 441-42 (2001). In making this determination, the Board must consider the totality of the

circumstances, including the context in which the allegedly unlawful conduct occurred and the protections provided to employers in Section 8(c) of the Act. *See id.* at 442.

A. US Foods Made No Threatening Statements.

According to the General Counsel, US Foods threatened employees via Forney's statements that if they voted to be represented by the Union their pay and vacation benefits would change based on the terms of the existing Labor Agreement. (Tr. 71-72:25; Tr. 112:1-113:10).

First, the analysis for these Section 8(a)(1) allegations depends on the Administrative Law Judge's ("ALJ") findings as to whether US Foods had a duty to apply the terms of the existing Labor Agreement to the four employees. If the ALJ finds that US Foods' application of the terms of the Labor Agreement to the employees was appropriate, then the statements at issue cannot be threats. The statements would be accurate statements regarding how an employee's vote might impact his terms and conditions of employment under the existing Labor Agreement.

Even if the ALJ finds that US Foods misunderstood its bargaining obligation, the statements alleged are still not threats under Section 8(a)(1) of the Act. The Board has found that misstatements made by an employer, as would be the case here, do not arise to violations of the Act if the misstatements are not coupled with statements of affirmative action that the employer would take on its own accord in response to the protected activity. *See, e.g., Laverdiere's Enters.*, 297 NLRB 826, 826 (1990) (finding no violation where Respondent "encourage[ed] its employees to sign a decertification petition by misleading them concerning the effect of their signatures on such a

petition." The respondent "failed to explain that the signatures [in a decertification petition] could be used by the Respondent as the basis for a good-faith doubt regarding the Union's continued majority status that would permit the Respondent to lawfully withdraw recognition from the Union without an election ever being held. Contrary to the judge, we find that this statement, while misleading, is not in violation of Section 8(a)(1)," because the employer's statement contained no threat to interfere with the employees' right or promise of a benefit.); *New Process Co.*, 290 NLRB 704, 707 (1988), *enf'd*, 872 F.2d 413 (3rd Cir. 1989) (Board held that the employer did not violate the Act by telling employees that the union would likely seek a contract provision conditioning continued employment on membership, so that an employee who lost their membership could lose their job. Although the statement misrepresented the law, it did not constitute a threat of job loss, as the discharge was based on the union's termination of the employees' membership, a fact that was not in the employer's control.); *Daniel Construction Co.*, 257 NLRB 1276, 1276 (1981) (The Board found that the employer's misstatement that if the union won the election the employee would have to join the union was not unlawful. The Board noted that the employer made no express threat that it by "its own action would impose dire consequences, . . . , on the employees and no implicit threat to the employees' rights.").

As articulated in *New Process Co.*, 290 NLRB 704, 707 (1988), for an employer to violate the Act, the employer must make a statement concerning an action that is in the employer's control. Here, US Foods did not tell the drivers that the employer would choose to change their rates of pay and vacation benefits if they voted for the Union.

Rather, Forney explained that he “did not want to have to do that [reduce benefits]” but explained that the benefits that would apply to them would be those bargained for by the Union in the existing Labor Agreement. (Tr. 134:14-16).

IV. The General Counsel Did Not Establish that US Foods Changed the Drivers’ Pay and Vacation and Sick Benefits in Retaliation for Selecting the Union as Their Representative.

As set forth above, the analysis for this allegation depends on the ALJ’s finding with respect to whether US Foods had a duty to apply the terms of the existing Labor Agreement to the four employees. If the ALJ finds that US Foods did not violate the Act by applying the existing terms of the Labor Agreement to the four employees, then US Foods’ changes to the drivers’ rate of pay and vacation and sick benefits cannot constitute a violation of Section 8(a)(3) of the Act.

Even if the ALJ disagrees with US Foods’ understanding of its obligation, US Foods still did not violate Section 8(a)(3) of the Act because the General Counsel cannot prove union animus. To prevail on this allegation, the General Counsel must show that: 1) the drivers engaged in protected concerted activity and/or union activity; 2) US Foods was aware of this activity; 3) the employer harbored union animus; and 4) that there was a nexus between US Foods’ union animus and its decision. *See Wright Line*, 251 NLRB 1083, 1089 (1980).

Here, the General Counsel cannot establish that union animus played any role in US Foods’ decision to apply the terms of the Labor Agreement to the drivers. Blyth testified that he made the decision to change the pay and benefits of the four employees,

and that his decision was solely based on what he believed US Foods' obligation were in response to the election results. (Tr. 168:19-23).

Q. And as of July 31, 2015 did you understand the changes to be made effective August 1, 2015, to the pay and benefits of the four previously unrepresented Boise drivers to be consistent with the terms of the CBA admitted into evidence as Joint Exhibit 5?

A. Yes.

Q. Did you shift the four previously unrepresented Boise drivers to lower pay rates effective August 1, 2015 to retaliate against them for joining the bargaining unit?

A. No.

Q. Did you shift the four previously unrepresented Boise drivers to the vacation schedule set forth in the collective bargaining agreement effective August 2, 2015 to retaliate against them for joining the bargaining unit?

A. No.

Q. Okay. And why did you change their pay rates and their benefits and their vacation and their sick leave entitlements?

A. The view was that they were now part of the multistate bargaining unit and the multistate collective bargaining agreement subject to full terms and conditions.

(Tr. 168-24-169:25).

Not only did Blyth testify as to the reasons for his decision, which shows that the decision was not based on Union animus, but the General Counsel failed to introduce any evidence to support an ulterior, retaliatory motive. All of the evidence introduced at the hearing supports a finding that US Foods took the actions that it did based on its understanding of the duties imposed on it by the election result. The drivers testified that prior to the election, US Foods explained and/or offered to explain the terms of the

Labor Agreement, that they received information concerning their rate of pay that conformed with the provisions in the Labor Agreement, and that when the changes were made to their benefits, these changes did not deviate from the terms of the Labor Agreement. (J. Ex. 18). Blyth's communications to Briggs further support this finding. Those communications show that Blyth was moving to transition the newly-represented drivers to the terms and conditions of employment set forth in the parties' negotiated agreement. (*See, e.g.*, J. Ex. 14; J. Ex. 15; J. Ex. 17). As Blyth stated in his July 31, 2005 letter, "the Company is simply applying the existing CBA (including the hourly wage rate progression set forth therein) to these four (4) employees per the election agreement." (J. Ex. 17). Because the General Counsel failed to introduce any evidence of union animus, this allegation should be dismissed.

V. Conclusion

In sum, the General Counsel failed to prove the allegations set forth in the Complaint. Accordingly, US Foods respectfully requests that the Complaint be dismissed in its entirety.

RESPECTFULLY SUBMITTED this 8th day of March, 2016.

US FOODS, INC.

By 

Joseph Turner
Seyfarth Shaw LLP
131 S. Dearborn St., Suite 2400
Chicago, Illinois 60603
(312) 460-5000

CERTIFICATE OF SERVICE

I, Joseph Turner, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing RESPONDENT'S POST-HEARING BRIEF to be served on all parties of record in the manner listed below on this 8th of March, 2016:

Amita Baman Tracy
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103

Paula S. Sawyer
Regional Director - Region 27
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street
Suite 13-103
Denver, CO 8029

Julia Durkin
Field Attorney
National Labor Relations Board
Byron Rogers Federal Office Building
1961 Stout Street
Suite 13-103
Denver, CO 8029

International Brotherhood of Teamsters
Local 483
225 N. 16th Street
Suite 112
Boise, ID 83702-5187

James M. Piotrowski, Esq.
225 N. 16th Street
Suite 112
Boise, ID 83702-5187



Joseph Turner