

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

METALSA STRUCTURAL PRODUCTS, INC.

and

Case 25-CA-165965

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

GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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Comes now Counsel for the General Counsel and respectfully submits this General Counsel's Brief to the Administrative Law Judge in support of the General Counsel's position in the cause herein, and states as follows:

I. INTRODUCTION

This case involves the General Counsel's allegations that Metalsa Structural Products, Inc. (herein called Respondent) violated Section 8(a)(1) of the National Labor Relations Act (herein called the Act). These violations occurred during an organizing campaign by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (herein called the Union), during the fall of 2015. In response to the organizing campaign, Respondent violated Section 8(a)(1) by, *inter alia*, interrogating employees about their union sympathies. Respondent further violated Section 8(a)(1) by informing employees that they could lose wages and benefits if they selected the Union as their collective-bargaining representative, that it would be futile for them to select the

Union as their bargaining representative, and that bargaining would start from zero if they selected the Union as their collective-bargaining representative. Additionally, Respondent violated Section 8(a)(1) by threatening employees with job loss and plant closure if they selected the Union as their collective-bargaining representative.

II. STATEMENT OF FACTS

Respondent is a corporation with an office and place of business in Owensboro, Kentucky. (TR 20). Respondent is in the business of manufacturing structures for the automotive industry, including front engine cradles and full perimeter frames. (TR 20). Respondent's customers include Toyota and Chrysler. (TR 194). Respondent began its operations at its Owensboro facility¹ in 2010. (TR 20). Prior to 2010 another company, Dana, operated the Owensboro facility. (TR 20). Respondent employs approximately 230 employees in various job classifications, including production technicians, maintenance technicians, and E-coat technicians. (TR 22). The facility operates two shifts for assembly and three shifts for maintenance and E-coat. (TR 22). Assembly first shift operates from 6:30 a.m. to 3:00 p.m., and assembly second shift operates from 6:00 p.m. to 2:30 a.m. (TR 22). Maintenance shifts operate as follows: first shift from 7:00 a.m. to 3:30 p.m., second shift from 3:00 p.m. to 11:30 p.m., and third shift from 11:00 p.m. to 7:30 a.m. (TR 22).

Respondent's Plant Manager, Jarrod Rickard, oversees the entire operations of the plant, including safety, quality, customer objectives, and financial stability. (TR 20, 21). Rickard has held this position since March 2010. (TR 20). Respondent's leadership team reports to Rickard, which includes the production manager, quality manager, maintenance and facilities manager, safety manager, human resources and finance department, logistics, and materials. (TR 21).

¹ Respondent also operates facilities at Elizabethtown, Kentucky and Hopkinsville, Kentucky. (TR 321-322). Respondent's Owensboro facility is the only facility at issue in this case.

Rickard reports to the Vice President of USA Operations, Galo Leon. (TR 21). Respondent's current Quality Coordinator, Joshua Kirby, previously served as a Production Coordinator, specifically from August 2012 until January 2016. (TR 198). As a Production Coordinator, Kirby supervised Production Tech employees, including Employee Michael Poore, during October 2015. (TR 198).

The Union began an organizing campaign to seek representation of Respondent's employees sometime during September 2015. (TR 23). During October 2015, Respondent held a series of captive audience meetings in response to the Union organizing campaign. (TR 23). Captive audience meetings were held on October 9, October 19,² October 21, and October 29. (TR 158). Three meetings were held each day, one meeting per each shift. (TR 24). The meetings were held in the cafeteria, with the exception of a small third-shift maintenance meeting that was held in a conference room. (TR 23-24). The first shift meetings were attended by all first shift employees, which amounted to around 150 employees. (TR 27, 62). Plant Manager Rickard spoke at all of the captive audience meetings. (TR 24). At the October 29 meeting, a human resource representative from Respondent's corporate office, Clifford Cameron, also spoke. (TR 24). During the October meetings, Rickard would begin the meetings by reading from a script, but he then proceeded to answer questions from employees while not using a script. (TR 28, 82, 130, 110). Rickard would move away from the podium as he spoke and answered employee questions. (TR 125, 126, 150). Throughout the captive audience meeting in October, Rickard told employees in response to the union campaign that they could lose wages and benefits (TR 94, 103), that they would start at zero (TR 103, 120), and that he would not negotiate with the

² The October 19 meeting contained a discussion of Respondent's solicitation and distribution policy (TR 164, Resp. Exh. 2), and is not at issue with regard to the complaint allegations.

Union or agree to their proposals (TR 104, 112). Rickard also stated that any disruptions caused by unions to the supplies to its customer Toyota would lead Toyota to pull out. (TR 112).

Specifically, during the October 9 meeting, an employee asked a question about whether Rickard would bargain in good faith. (TR 37). Rickard responded that in negotiations with the union the employees would start with zero on pay and benefits and that they could wind up with less than what they already had. (TR 28, 37). Rickard also stated that he would not bargain with the union. (TR 41). Rickard also made statements that if production was interrupted with Toyota in the event that the Union went on strike that Toyota would pull out. (TR 29, 92). Rickard also stated that “we knew how Toyota felt about the union, and that they didn’t have any tier one suppliers that were union.” (TR 63).

Around 2:30 p.m. on October 9 after the captive audience meeting, then-Production Coordinator Joshua Kirby approached Employee Michael Poore about the Union while Poore was working on the Tundra service line. (TR 29, 53-54). Also present during the conversation was temporary production employee Victor Selle. (TR 29-30, 53-54). While Poore and Selle were stocking parts for the next day, Kirby approached Poore and asked what he thought about the activity. (TR 30, 54). Poore asked Kirby, “What activity?”, to which Kirby replied, “The union activity.” (TR 30). Poore responded, “Well, I don’t know. What do you think?” (TR 30, 54). Kirby then proceeded to tell Poore about the plant where he previously worked that had a union and how the union never did anything for him. (TR 30, 54). Kirby also told Poore that every time that they got a pay raise that their insurance premiums would go up. (TR 30). In addition, Kirby told Poore that if they were to unionize that Toyota would come in and pull out the robots on the Sienna and Highlander line. (TR 30). At the time of this conversation, Poore

had not openly discussed the union with any supervisors and had not shown support for the union. (TR 30-31).

During the October 21 captive audience meeting, Rickard stated that Respondent did not have to bargain with the union, and that employee benefits, perks and pay will go to zero. (TR 64, 131). Rickard stated that they would start from ground zero and that it was very possible that employees would lose benefits. (TR 82, 93, 103). Rickard stated that he did not have to agree to anything and that he would not. (TR 64, 84, 94). When an employee asked how benefits and pay would go back to zero, Rickard explained that he would not have to bargain with the union or accept their final offer and employees would be forced out on a strike and employees would be replaced. (TR 131, 139). When an employee asked if that meant employees would lose their jobs, Rickard responded, “Yes.” (TR 112, 120, 131, 139-140, 144, 150). Rickard also stated that he did not see how a union would help employees. (TR 149).

Also during a meeting at the end of October, in response to employee questions about the union, Rickard told Employee Tracy Ferguson, “[W]hy do you want to hurt this plant, anyway?” Rickard also stated, “You know that Toyota is the only thing keeping us afloat, and we have to take care of them. The Viper is going to end – the Viper contract ends in 2017.” (TR 68). When an employee asked if Toyota could pull out the fixtures, Rickard responded that Toyota would pull out the tooling³ in front of the fixtures, but not the fixtures. (TR 132). Rickard also stated that without Toyota they had no business. (TR 145). Rickard also told employees that he did not know how the Union could help employees. (TR 132).

³ Tooling, which is owned by Toyota, creates the gap in between the parts and makes sure the parts are aligned correctly and holds them in place. (TR 143, 151). Fixtures pull the tooling to a certain spot. (TR 143, 151). Without tooling, a good part cannot be made. (TR 151).

III. CREDIBILITY

Throughout the hearing, Jarrod Rickard gave vague testimony, was purposely evasive, self-serving and gave outrageously false and implausible accounts of events. As example, Rickard stated that when Respondent found out about the union activity of employees, it trained its salary team members on how to “lawfully respond to any questions regarding the union activity, and also the – the dos and don’ts, as far as such things as do not threaten, do not interrogate, do not make promises, and never spy on team members.” (TR 157-158, 182). However, as Rickard admitted during cross-examination, he wrote an e-mail to Production Manager Jonathan Cecil (TR 194) on October 27, 2015, instructing him to tell then-Production Coordinator Joshua Kirby to text Rickard if he saw additional cars of employees at Employee Jeremy Riney’s⁴ house. (G.C. Exh. 5, TR 182-183). As Rickard testified during cross-examination, and was later confirmed by Joshua Kirby’s testimony, Kirby lived “pretty much right beside” and “[w]ithin seeing distance” of Employee Jeremy Riney. (TR 183, 210). Rickard went so far in his e-mail to say that he wished The Eagles, a club or bar where Respondent heard employees were meeting, “wasn’t out of the way to see that parking lot,” and Rickard concluded by saying, “I don’t want us to get caught though.” (G.C. Exh. 5, TR 184). Clearly, Rickard’s October 27, 2015, e-mail demonstrates that the training he received for how to lawfully respond to union activity did not take, and completely contradicts his testimony indicating that he knew how to lawfully respond to the employees’ union campaign because of his training.

Another example of Rickard’s contradictory and unreliable testimony involves his self-serving description of the October 2015 meetings by claiming that he stuck only to the script and that employees did not ask questions to which he responded with unlawful statements. Rickard testified that at the October 9 and October 21 meetings “we didn’t allow any questions or have

⁴ The employee is referred to as Jeremy Ronnie throughout the transcript.

any questions.” (TR 179). Rickard claimed he “used the script and followed the script” and that he did not leave any point of the script out. (TR 160, 162). However, if it were true that Rickard only read from the script as he claims and that he “didn’t allow any questions,” then that contradicts the scripts themselves from both the October 9 and October 21 meetings, which clearly open the door for employee questions. (Resp. Exh. 1 pg. 9, Resp. Exh. 3 pg. 10). Further contradicting Rickard’s testimony that employees did not ask questions at the October 9 meeting is an e-mail sent by Rickard to his boss Steve Ballenger and USA Human Resource Coordinator Michael Marsh (TR 186) on October 9 after the first shift and second shift captive audience meetings. (G.C. Exh. 2). In the e-mail Rickard clearly states, “1st shift asked several questions.” (G.C. Exh. 2). Despite Rickard’s attempt during cross-examination to justify that portion of the e-mail by claiming that first shift asked questions throughout the day, one-on-one, Rickard’s October 9 e-mail further contradicts his testimony when he wrote how a team member “asked the most perfect question for the setting ever...What would Toyota think if our plant went union? This opened the door up for me!” (G.C. Exh. 2). Rickard’s comment in the e-mail about the employee Toyota question directly supports the testimony of Employees Michael Poore, Tracy Ferguson, and Rendell Ferguson’s account of the October 9 meeting. (TR 29, 63, 92).

In addition, it is worthy of noting that Respondent’s witnesses testified in response to continual leading questions, rather than giving an independent account of their testimony. When Respondent’s witnesses were cross-examined about their recollection of the October meetings, they admitted that they could not recall all of the events of the meetings. (TR 237, 258-259, 277). Furthermore, their testimony was inconsistent. For example, Employee Leeann Breedlove⁵ initially testified that Rickard stated that there was no indication of losing jobs or losing wages or anything. (TR 222). However, Breedlove later contradicted herself and said that after Employee

⁵ The witness is referred to as “Breedlbe” in the transcript.

Darrell Payne asked a question regarding job loss, Rickard said that Respondent had to stay competitive and that there was no guarantee that employees would lose them or there is no guarantee that employees would keep them. (TR 225-226, 229). Similarly, Employee Ramona Keller also provided inconsistent testimony regarding loss of wages and benefits. (TR 246, 256). Initially, Keller stated that Rickard did not say that employees could or would lose wages or benefits, but then she immediately turned around and said that employee wages could go up or they could go down. (TR 246, 256).

In contrast, General Counsel's witnesses testified in a straight forward and honest manner and should be credited over the Respondent's witnesses wherever their testimonies conflicted with each other's. Additionally, all of General Counsel's witnesses, with the exception of Victor Selle, are still employed by Respondent and most of them are long-time employees of Respondent. The Board has stated that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests ... [t]hus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." Advocate South Suburban Hospital, 346 NLRB 209 fn. 1 (2006), citing Flexsteel Industries, 316 NLRB 745 (1995), *enfd.* 83 F.3d 419 (5th Cir. 1996).

Attempts by Respondent's Counsel to discredit these witnesses simply failed. Respondent may try to point to Employee Tracy Ferguson's testimony that she did not wear her glasses when she provided an affidavit to an NLRB Board Agent (TR 71), and that her testimony is somehow unreliable because of that fact. However, as Tracy Ferguson clarified, she had an opportunity to review her statement, the Board Agent went over it with her, and she affirmed that she did not sign her affidavit with false information in it. (TR 71). Tracy Ferguson testified

in an honest and straightforward manner, she provided a detailed recollection of the October meetings, and she affirmed that her testimony was to the best of her recollection.⁶ (TR 87).

Furthermore, any inconsistencies in the testimony of the General Counsel's witnesses which occurred during cross-examination many times was precipitated by the confusing nature of the questions asked by Respondent's representative. Thus, where material conflicts arise, General Counsel's witnesses should be credited over Respondent's witnesses.

IV. ARGUMENT

A. Respondent Violated Section 8(a)(1) When It Interrogated Employees About Their Union Membership, Activities, and Sympathies

On October 9, 2015, Respondent, by its then-Production Coordinator Joshua Kirby, interrogated employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1). In determining whether an interrogation violates the Act the basic test is whether under the totality of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act. Rossmore House, 269 NLRB 1176, 1177 (1984). Among the factors that may be considered in determining whether an interrogation is unlawful are the identity of the questioner, the place and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. Scheid Electric, 355 NLRB 160 (2010).

⁶ During Respondent's case-in-chief its witnesses Materials and Continuous Improvement Manager Scott Quinn and Environment Health and Safety Manager Derek Fogle testified that they saw Employees Tracy Ferguson and Rendell Ferguson taking notes during the October meetings. (TR 287, 307). No adverse inference should be drawn because no employee notes (that, frankly, do not exist) from Tracy Ferguson or Rendell Ferguson were presented at the hearing. Respondent's representative did not take the opportunity to question or confront Tracy Ferguson or Rendell Ferguson on cross-examination about whether they took notes during the meetings like he questioned Employee Michael Poore. (TR 33). Furthermore, Respondent's witnesses Quinn and Fogle testimony about any employee note-taking is unreliable given that they were admittedly "some distance away" and as much as 20 feet away to see what alleged notes were being taken (TR 296, 308), the alleged notes could not be directly seen and were not read (TR 295), and the employees "could have been drawing cartoons" (TR 296).

Employee Michael Poore testified that his then-immediate supervisor, Joshua Kirby, interrogated him about his union sympathies shortly after a captive audience meeting on October 9. (TR 29-30). This was corroborated by the testimony of former temporary employee, Victor Selle,⁷ who was working with Poore on the Tundra service line when Kirby approached Poore. (TR 29, 53-54). Kirby began by questioning Poore about what he thought about the activity. (TR 30, 54). After Poore asked, “What activity?”, Kirby signaled to Poore that he was eliciting his union sympathies by stating, “The union activity.” (TR 30). Poore, who was not an open supporter of the union at that time (TR 30-31), attempted to deflect the question by asking, “Well, I don’t know. What do you think?” (TR 30, 54). Kirby then pushed the issue by stating that the union at his previous plant never did anything for him and that every time they got a pay raise their insurance premiums would go up. (TR 30, 54). In addition, Kirby told Poore that if they were to unionize that Toyota would come in and pull out the robots on the Sienna and Highlander line. (TR 30). Kirby’s statements to Poore were coercive in that as his supervisor he caught Poore off guard while Poore was finishing up the work day and interrogated him about his union sympathies in the same afternoon as an anti-union captive audience meeting. Kirby asked Poore specifically what he thought about the “union activity” in order to elicit his response confirming or denying his union sympathies, after Respondent had just discussed at the captive audience meeting that it was aware of the union organizing activity of employees (Resp. Exh. 1, pg. 1). All of this was done at a point when Poore was not an open and notorious supporter for the Union. (TR 30-31). Therefore, Respondent illegally interrogated Poore in violation of Section 8(a)(1) of the Act.

⁷ Selle’s corroborating testimony regarding this conversation should be credited. Selle has nothing to gain from this proceeding because he is no longer employed at Respondent’s facility. He testified in a direct and forthright manner, and did not attempt to evade questions.

Although Respondent may try to argue that Poore testified about Kirby's interrogation of him because Kirby disciplined him in April 2013, any possible previous discipline that occurred two and a half years prior to the interrogation is irrelevant. As Poore testified, he described the April 2013 incident as, "I've had a talking to, but nothing sufficient." (TR 43). Poore further testified that he did not have any issues or problems with Kirby because of any discipline. (TR 44). In addition, as to any attempt by Respondent to discredit Victor Selle's testimony because he was wearing earplugs, both Selle and Kirby testified that they were able to hear someone speaking while wearing the earplugs, which were mandatory for all employees to wear. (TR 59, 209).

B. Respondent Violated Section 8(a)(1) of the Act When It Threatened Employees With Job Loss and Plant Closure and Informed Employees That It Would Be Futile for Them to Select the Union, That They Could Lose Wages and Benefits, and That Bargaining Would Start from Zero If They Selected the Union As Their Collective-Bargaining Representative

In determining whether an Employer statement violates Section 8(a)(1) of the Act, the Board considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker. Frontier Hotel & Casino, 323 NLRB 815, 816 (1997); Williamhouse of California, Inc., 317 NLRB 699 (1995). The Board considers the totality of the circumstances in deciding whether statements are unlawful. Among the factors the Board considers is the presence of other unfair labor practices. Fieldcrest Cannon, 318 NLRB 470, 512 (1995). Based on the totality of the evidence, it is clear that Respondent violated Section 8(a)(1) of the Act in its statements by Plant Manager Jarrod Rickard during the October 2015 meetings. The totality of the evidence at the hearing establishes that Respondent threatened employees with job loss and plant closure if they selected the Union, informed employees that selecting the Union would be futile, that employees could lose wages and

benefits, and that they would start at zero in terms of wages and benefits if the Union was selected as their collective bargaining representative. Respondent's statements, coupled with the unlawful interrogation of Employee Michael Poore, were coercive and tend to discourage employees from engaging in protected concerted activities and constitute a violation of Section 8(a)(1).

1. Threats of Job Loss and Plant Closure

The standard for assessment of employer predictions of adverse circumstances for employees is that, to be lawful, the prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. ... If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion." NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). In Aldworth Co. Inc., 338 NLRB 137 (2002), the employer told employees that if the employees selected the union and a contract was negotiated that did not allow the employer to be competitive, a contracting business entity could cancel its contract with the employer and give its business to a competitor who did not have to recognize a union. The Board found the Employer's statements about job loss and plant closure violative of the Act and considered the shared context of the employer's three mandatory employee meetings, which were held solely to convince employees not to choose union representation as part of the employer's focused antiunion campaign. Id. at 142. The Board found a link between supporting the union and the reiteration of a consistent theme through the meetings, which was the threat of plant closure and a repeated association between union contracts and loss of jobs. Id. at 144.

Here, the statements made by Rickard during the October meetings about Toyota, a major customer, shared a common threat that employee selection of the Union would mean job loss and plant closure. Rickard made it clear that if production was interrupted with Toyota, such as any disruptions caused by the union, that “Toyota would pull out.” (TR 29, 92, 112). When an employee asked a follow-up question to Rickard’s statement if that meant employees would lose jobs, Rickard responded, “Yes, that is what that means.” (TR 112, 120). After Rickard further explained to employees that Toyota could pull out its tooling in response to the union, Rickard stated that without Toyota Respondent did not have business. (TR 145). Rickard also stated that the employees knew how Toyota felt about the union, and he told the employees that Toyota did not have any tier one suppliers that were union. (TR 63). Rickard drove the point home of how selecting the Union would result in job loss and plant closure by stating, “You know that Toyota is the only thing keeping us afloat, and we have to take care of them.” (TR 68).

Rickard’s statements about Toyota pulling out would reasonably tend to coerce an objective employee in the exercise of their right to join or support a union. Because of his position of authority, employees could reasonably believe that Rickard had knowledge of the Respondent’s plans which would not be known to the employees, including a plan to close in the event of unionization and Toyota pulling out its tooling. Furthermore, Rickard did not provide employees with an objective basis for his statements.

2. Statements of Futility

Statements conveying the message to employees that selection of a union would be futile violate the Act. Even though Respondent may try to argue that Rickard read from the script and stated that Respondent would bargain with the union, such statements do not negate the coercive effect of his later statements that he would not bargain with the union. Paoli Chair Co., 231

NLRB 539 (1977) (“Mere expressions of the intention to ‘abide by the law’ and ‘bargain in good faith’ do not insulate an employer’s campaign statements from further scrutiny.”); Fisher Island Holdings, LLC, 343 NLRB 189 (2004) (Employer’s general statements that it would bargain in good faith and “follow the rules” did not render lawful its more specific statements that it would “absolutely reject” any union proposal that would increase costs).

Rickard clearly stated that he would not bargain with the Union. (TR 41). Rickard went so far as to say that he did not have to cooperate or agree to anything with the Union, and that he would not agree. (TR 64, 84, 93). Rickard further specified that he did not have to work with the union or agree to any of their proposals. (TR 112). Although some of General Counsel’s witnesses testified that Rickard’s statements about not bargaining with the Union occurred sometime in the middle of October, Employee Justin McDaniel testified that at the October 21 meeting, in response to Employee Darrell Payne’s question about how benefits and pay would go back to zero, Rickard stated that he did not have to bargain with the union or accept their final offer, and that if Respondent did not accept the Union’s final offer then employees would be forced out on strike. (TR 131, 139-140, 144).

3. Statements about Loss of Wages and Benefits

It is well settled by the Board that in the context of a union campaign employers may violate Section 8(a)(1) by making direct or implied threats to reduce employee benefits. Hamilton Plastic Products, 309 NLRB 678 (1992); Kenrich Petrochemicals, 294 NLRB 519 (1989). However, statements comprising the alleged threats must be evaluated within the overall context in which the statements are made. Bi-Lo Foods, 303 NLRB 749 (1991). As multiple employee witnesses testified, during the anti-union captive audience meetings in October 2015, Rickard stated that employees could wind up with less than what they already had with regard to

pay and benefits. (TR 28, 64, 94). In response to an employee question during the October 9 meeting, Rickard responded that in negotiations with the union the employees would start with zero on pay and benefits and that they could wind up with less than what they already had. (TR 28, 37). Statements about loss of wages and benefits were also recalled to have been stated in the meeting during the middle of October, around October 21. (TR 82).

As to Respondent's Motion to Dismiss Portion of Complaint that was presented at the start of the hearing on May 24, 2016, Respondent's Motion should be denied. Respondent requests dismissal of complaint paragraphs 5(b) and (c)(iv), which allege that on October 9 and October 21, 2015, respectively, Respondent informed its employees that they could lose wages and benefits if they selected the Union as their collective-bargaining representative. (TR 5-6). After having the complaint for almost three months since its issuance on February 26, 2016, Respondent's attempt at a last-ditch effort to dismiss part of the complaint is irrelevant. Respondent relies on International Filling Co., 271 NLRB 1591 (1984), in which the Board found an employer's statement in a letter to employees that employees could lose wages and benefits in collective bargaining was not unlawful considering that the letter indicated that benefits were subject to negotiations. However, the circumstances here are unlike International Filling Co. As previously discussed, the testimony is clear that Respondent did in fact make statements to the effect that employees could lose wages and benefits if they selected the Union as their collective-bargaining representative, and Rickard was adamant that he did not have to bargain with the union, nor would he bargain with the union (TR 41, 64, 84, 94, 104, 131). Given the testimony of employee witnesses provided during the hearing, Respondent's Motion should be denied.

4. Statements of Starting from “Zero”

It is well settled Board law that employer statements to employees during an organizing campaign that bargaining will start from “zero” or from “scratch” are considered “dangerous phrases” which carry with them “the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.” Coach & Equipment Sales Corp., 228 NLRB 440 (1977). The Board considers the context in which the statements are made in order to determine if they “effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the union can induce the employer to restore,’ or-conversely-whether they indicate that any ‘reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.’” Federated Logistics & Operations, 340 NLRB 255 (2003), quoting Plastronics, Inc., 233 NLRB 155, 156 (1977).

Rickard’s statements about starting from zero were not simply an explanation as to how collective bargaining works, but a bald threat to employees. Rickard stated during the meetings that in negotiations with the union that employees would start with zero on pay and benefits and could wind up with less than what they already had. (TR 28, 93). Employee Justin McDaniels testified that at the October 21 meeting Rickard stated that all employee benefits, perks, and pay will go to zero and that it would start all over again. (TR 131). This is further corroborated by Employee Tracy Ferguson’s testimony that during the meeting in the middle of October Rickard stated that employees would start from ground zero and that they could end up with less benefits than what they had now. (TR 64).

V. CONCLUSION AND REMEDY REQUESTED

For the reasons stated above, and based on the record as a whole, the General Counsel respectfully submits that Respondent has violated Section 8(a)(1) of the Act as alleged in the Complaint. The Administrative Law Judge is requested to find the aforementioned conduct to be in violation of the Act and to recommend an appropriate remedy for said violations including an order that Respondent: (1) cease and desist from all of its unlawful conduct; and (2) post an appropriate notice to its employees. The Judge is further requested to grant all other appropriate relief.

VI. PROPOSED NOTICE

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT tell you that we will not bargain with UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, or any other labor organization, if you choose them, as your collective bargaining representative.

WE WILL NOT tell you that you will lose wages and benefits if you select a union as your collective bargaining representative.

WE WILL NOT tell you that negotiations over wages and benefits would start at zero if you select the United Steelworkers Union, or any union, as your bargaining representative.

WE WILL NOT threaten you with plant closure and job loss if you select a union as your collective bargaining representative.

WE WILL NOT ask you about your union activities, the union activities of other employees or the union's organizing campaign.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

METALSA STRUCTURAL PRODUCTS, INC.

SIGNED at Indianapolis, Indiana, this 29th day of June 2016.

Respectfully submitted,

A handwritten signature in black ink that reads "Caridad Austin". The signature is written in a cursive, flowing style.

Caridad Austin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge has been filed electronically with the Division of Judges through the Board's E-Filing System this 29th day of June 2016. Copies of said filing are being served upon the following persons by electronic mail:

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