

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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

Caridad Austin, Esq., for the General Counsel.

Michael D. Carrouth, Esq. and *Reyburn W. Lominack, III, Esq.*
(*Fisher & Phillips, LLP*), of Columbia, South
Carolina, for the Respondent.

Benjamin Brandon, of Roanoke, Virginia, for the
Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. In September 2015, the United Steelworkers began an organizing campaign of production and maintenance employees at Metalsa Structural Products, Inc. (the Respondent) in Owensboro, Kentucky. After learning of the campaign, the Respondent decided, as employers often do, to hold captive audience meetings with its employees to provide the Company's view as to whether they should unionize. However, the Respondent here took an unusual approach to insure that its supervisory speakers at these meetings did not violate the National Labor Relations Act (the Act). The Respondent prepared scripts for the supervisors to read, rather than having them speak off the cuff. The problem with the approach was that, after reading the scripts, Plant Manager Jarrod Rickard took questions from employees and went off script to answer them. As discussed fully herein, I conclude that, during the question-and-answer portions of two meetings in October 2015, the Respondent violated Section 8(a)(1) of the Act in multiple manners. I also find that Supervisor Josh Kirby unlawfully interrogated employee Michael Poore about his union activities, following the first captive audience meeting on October 9, 2015.

STATEMENT OF THE CASE

On December 11, 2015, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC (the Union) filed a charge against Metalsa Structural Products, Inc. (the Respondent). On January 29, 2016, the Union filed an amended charge. On February 26, 2016, the General Counsel issued a complaint, which alleges the Respondent violated Section 8(a)(1) on multiple occasions in October 2015. The General Counsel specifically claims that the Respondent, by Jarrod Rickard, informed employees they could lose wages and benefits, stated that bargaining would start from zero, and threatened employees with job loss and plant closure, if they selected the Union as their bargaining representative. The complaint also alleges Rickard informed employees it would be futile for them to select the Union as their bargaining representative. Finally, the complaint alleges that the Respondent, by Josh Kirby, interrogated employees about their union activities. The Respondent filed a timely answer to the complaint, in which it denied the allegations. I conducted a trial on the complaint on May 24 and 25, 2016, in Owensboro, Kentucky.

On the entire record, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacturing of vehicle structures and frames, including at a facility in Owensboro, Kentucky. In conducting its business operations in the last 12 months, the Respondent sold and shipped from its Owensboro facility goods valued in excess of \$50,000 directly to points outside the State of Kentucky. Accordingly, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint. The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent builds structures for the automotive industry from its Owensboro manufacturing plant. In particular, the Company provides parts to Toyota and Chrysler. The plant has been in existence since 1999; the Respondent purchased the plant in March 2010. When the Respondent took over operations, Jarrod Rickard became the plant manager. Rickard has worked at the plant since its opening. The Owensboro facility has approximately 230 employees, including a variety of technicians. The Respondent operates three shifts each work day. All of the alleged unlawful conduct in this case occurred at meetings held in October 2015 during the first shift from 6:30 a.m. to 3:30 p.m. On that shift, assembly and maintenance operations are in effect. Joshua Kirby was a production coordinator, a supervisory position, on the first shift in October 2015. He has worked at the plant since 2002.

At the hearing, the General Counsel called five current employees and one former employee to testify concerning what Rickard said at the October 2015 meetings. The current employees were Joshua Emery, Tracy Ferguson, Rendell Ferguson, Justin McDaniels, and Michael Poore. The former employee was Victor Selle. In turn, the Respondent called four current employees: Leeann Breedlove, Kevin Foster, Ramona Keller, and William McCaslin.¹ Supervisors Rickard, Kirby, Scott Quinn, and Derek Fogle also testified. Resolution of all of the General Counsel’s complaint allegations rests on credibility determinations as to the testimony of these witnesses.

A. Background on the Respondent’s Captive Audience Meetings

In September 2015, the Respondent learned that the Union had begun an organizing campaign for production and maintenance employees.² In response, the Respondent conducted training of its supervisors, including Rickard and Kirby, about how to lawfully respond to the campaign. This included “TIPS” training on conduct that supervisors could not engage in: threats, interrogations, promise of benefits, and surveillance.

In October 2015, the Respondent began holding captive audience meetings with employees, including on first shift, to discuss its position on the possibility of a union coming in. The meetings that month took place on October 9, 19, 21, and 29 in the plant cafeteria. This large room accommodated the roughly 150 total employees on first shift, all of whom attended. The employees were seated at lunchroom tables or standing in the back of the room. All of the Respondent’s supervisors at the facility, including Rickard and Kirby, likewise were present. For the October 29 meeting, Clifford Cameron, a corporate human resources representative who does not normally work out of the Owensboro facility, also attended.

At each meeting, Rickard stood at a podium and read from a script to the gathered employees. (R. Exhs. 1–4.) Cameron also read a portion of the script at the October 29 meeting. No other supervisor spoke at the meetings. The scripts detailed the Respondent’s opposition to employees being represented by a union. Rickard also took questions from employees after the scripted portions of the October 9 and 29 meetings.³

¹ The transcript incorrectly states Breedlove’s name as “Breedlbe.” The transcript is corrected to include the proper spelling of her last name.

² All dates hereinafter are in 2015 unless otherwise specified.

³ These facts are undisputed, except as to the dates when Rickard took questions from employees, what point in the meeting he took questions, and whether he remained at the podium when doing so. (Tr. 110, 125, 136, 150, 237, 248, 262–263.) I do not view resolution of these disputed issues as necessary to decide this case. Nonetheless, I conclude that Rickard took questions, at a minimum, on October 9 and 29. Witness testimony was consistent that employees asked questions at the October 29 meeting. For reasons discussed in section II(B)(2), I also find that an employee asked a question at the October 9 meeting. Moreover, I conclude that Rickard did not take questions until after reading the scripts, in conformance with the text therein. (R. Exh. 1, p. 8; R. Exh. 3, p. 10; R. Exh. 4, p. 22.) Finally, I find it inherently likely that Rickard walked around the cafeteria when taking questions from employees in order to hear them, given the number of attendees and the size of the room.

B. The October 9 Captive Audience Meeting

1. Findings of fact

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At the first meeting on October 9, an employee asked Rickard what Toyota thought about a union. Rickard responded that “Toyota would pull out” if they heard employees were trying to get a union in there.

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Later that same day, Rickard sent an email to both his boss, Steve Ballenger, and to Michael Marsh, a human resource coordinator for the Respondent. In the email, Rickard stated:

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I completed the communication on 1st and 2nd shift today. Received some positive feedback from 1st shift on the communication. They were glad we did it. 1st shift asked several questions. Mainly about new business opportunities. One of the team members 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! I think overall this communication was very beneficial.

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(GC Exh. 2.)

2. Credibility resolutions upon which these findings of fact are based

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In making these findings of fact concerning the question and its timing, I credit the testimony of the Respondent’s own witness, LeeAnn Breedlove, a product technician. Breedlove testified that one of the questions asked by employees was “What did Toyota think about a union?” (Tr. 224.) Although Breedlove stated this occurred at the October 29 meeting, Rickard’s email establishes that the question actually was asked on October 9.⁴

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I do not credit Rickard’s implausible claim that the “setting” he was referring to in the email was the shop floor, not the captive audience meeting. (Tr. 186–188.) The plain text of the email makes clear that Rickard was discussing the “communication” that day to the 1st and 2nd shifts, meaning the captive audience meetings. Thus, the email directly contradicts Rickard’s repeated claim that employees did not ask questions at this meeting. (Tr. 162, 186.) It also contradicts Rickard’s contention that he did not make any comments about Toyota during the first meeting. (Tr. 163.)

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As to Rickard’s answer, I credit Rendell Ferguson’s testimony that Rickard stated Toyota would pull out. (Tr. 92.) Breedlove claimed that Rickard answered by saying the company had

⁴ At the hearing, witness testimony concerning the specific dates when statements were made and whether the statements came in response to questions was understandably inconsistent. In addition to the October meetings, the Respondent held meetings in November and December that are not at issue in this case. Given the quantity of meetings and repetitiveness of certain information presented, the lack of exact recall from witnesses is to be expected.

to stay competitive and do what they needed to do to keep Toyota happy. (Tr. 224.) Indeed, Rickard repeatedly made the comment about the Respondent having to remain competitive as part of the scripts for the meetings on October 9, 21, and 29. (R. Exh. 1, p. 2; R. Exh. 3, p. 7, 9-10; R. Exh. 4, pp. 19-21.) But Breedlove also conceded that she could not remember if Rickard said anything else about Toyota. This means that Rickard could have made both comments. Thus, Breedlove's testimony does not actually conflict with Rendell Ferguson's statement.⁵

I also note that Rickard's overall credibility was further undermined on cross-examination when he testified about other emails he sent during the same month. (Tr. 181-185, 189-192; GC Exhs. 3-5.) The plain text of those emails makes clear that Rickard was discussing the Union's organizing campaign and the Company's response to it. Instead of acknowledging that obvious fact during questioning, Rickard gave convoluted and evasive explanations as to what he was saying in the emails or what the purpose of the emails was.

The most glaring example of this is an email Rickard sent to Production Manager Jonathan Cecil on October 27. (GC Exh. 5.) Rickard stated:

Tell Kirby to text me tonight if he sees additional cars at Rineys. I wish somehow the eagles wasn't out of the way to see that parking lot. I don't want us to get caught though.

Rickard testified that employee Jeremy Riney's home was located "pretty much right beside" Supervisor Kirby's house and apparently was a place where employees who supported the Union were meeting.⁶ (Tr. 183-184.) "Eagles" was a bar that "we had heard that they were meeting at." Thus, Rickard's email addressed the potential observation of meetings attended by union supporters. But Rickard unconvincingly claimed Kirby had come to him concerned that he would be accused of spying, if employees met at Riney's house and Kirby happened to see them. Rickard stated he sent the email to Kirby, so Rickard would be "aware" if this happened. The tenor of Rickard's email language and the inclusion of "I don't want us to get caught" belie this claim. In any event, Kirby testified at the hearing and did not corroborate Rickard's testimony in this regard.

Finally, Rickard's demeanor when testifying about all of his emails noticeably changed and suggested the testimony was unreliable.

⁵ The Respondent argues that both Rendell Ferguson and Tracy Ferguson should be discredited, because the Union did not turn over notes that the two allegedly took during the captive audience meetings, in response to the Company's subpoena. I decline to do so. The Respondent's subpoena is not a part of the official record. Even assuming a proper subpoena was issued, the Respondent subpoenaed the Union, not the Fergusons. No basis exists for presuming the Union had custody or control of any notes that the Fergusons may have taken. Finally, the Respondent elicited no testimony from either Ferguson on this issue at the hearing.

⁶ The transcript incorrectly states Riney's name as "Ronnie." The transcript is corrected to include the proper spelling of his name.

*C. The Conversation Between Supervisor Josh Kirby and
Employee Michael Poore on October 9*

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1. Findings of fact

After the meeting on October 9, production technician Michael Poore and Kirby had a conversation on the shop floor. Poore was stocking parts for the next workday. Victor Selle, a temporary employee, was present and performing the same work. At the time, Poore was not an open union supporter. Kirby approached Poore and asked Poore what he thought about the activity. Poore responded, what activity? Kirby said the union activity. Poore then asked Kirby what he thought. Kirby replied that they had a union in a plant he previously worked at and the union never did anything for him. Kirby added that every time they got a pay raise, the insurance premiums would go up.

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At the time of this conversation, Kirby was Poore's direct supervisor and had frequent conversations with Poore. It was normal for Kirby to be walking around the shop floor near the end of first shift, when this conversation took place. Kirby and Poore have known each other since 2002, when Poore started working at the plant. They also previously worked together on the production floor. Poore had a "great relationship" with Kirby. (Tr. 42-43.)

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2. Credibility resolutions upon which these findings of fact are based

In this regard, I credit Poore's testimony, including where it conflicts with Kirby's concerning their conversation. (Tr. 30-31, 45-47, 199-203.) The two testified consistently concerning most of what each of them said. However, Kirby denied that he asked Poore what Poore thought about the "activity." Instead, Kirby claimed that Poore initiated the conversation and asked him the question. This is not a case of he said-he said though. Selle testified at the hearing and corroborated that it was Kirby who initiated the conversation by asking Poore what Poore thought about the Union. (Tr. 53-59.) At the time of the hearing, Selle was no longer employed by the Respondent and had no stake in this case. Selle testified consistently during cross examination and also provided detailed foundational facts for the conversation. For those reasons, I also credit Selle's testimony.⁷

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⁷ Poore and Kirby also agreed at the hearing that they discussed Toyota's possible reaction to a union coming in. They concurred that Kirby talked about Toyota pulling its tooling from the plant. Such a move by Toyota effectively would shut down part production. (Tr. 150-151.) However, they disagreed as to whether Kirby said Toyota "would" or "could" do so, if the employees chose to unionize. As to this conversation, I simply do not know any reliable way to determine which word Kirby used. The discussion was not long and each witness testified briefly about what was said. Given the brevity, their demeanors did not provide any clues on credibility. The parties also did not explore this specific difference in testimony with either witness. Selle could not remember any discussion about Toyota and thus did not corroborate Poore's account. Kirby also conceded that other people were around when the conversation occurred, but no other witness corroborated his account. At the end of the day, though, no resolution is necessary as to whether Kirby said "would" or "could." The General Counsel does not argue that Kirby's statement to Poore about Toyota supports either the unlawful interrogation or threat of job loss allegations. (GC Br. pp. 9, 13.)

I reject the Respondent's contention that Poore was biased against Kirby because of discipline Kirby issued to him back in April 2013 for throwing a part. A minor write-up of that nature which occurred more than 2 years prior to the conversation is too insignificant and remote in time to have affected Poore's testimony. This is especially so, given Poore's frankness as to the "great" relationship he had with Kirby.

D. The October 29 Captive Audience Meeting

1. Findings of fact

At the meeting on October 29, a portion of the Respondent's script read by Cameron addressed collective-bargaining negotiations. In particular, Cameron stated:

As a result of negotiations, your wages, benefits, and terms of employment can remain exactly the same, they can go up, or they can go down. No one can really predict what will happen in union negotiations.

Wages and benefits can go up. But they can stay exactly the same—and they can even go down.

(R. Exh. 4, pp. 12, 15.) Clifford also addressed strikes, saying:

Ask them [the Union] if they would be willing to call a strike in an attempt to force the Company to agree to the proposal. And, ask that union supporter who will pay your wages and benefits while you are out on strike. I am not predicting a strike. Only the union knows whether or not you would have to strike. We certainly do not want one. But the bottom line is—we are a business. We have customers. If we don't supply our customers, we could lose them. So, we would have to prepare for a strike.

(R. Exh. 4, p. 19.)

Following the script reading, Rickard provided several unscripted responses to employee questions related to these topics. As to negotiations, Rickard first stated that employees' pay and benefits would go back to zero and they could wind up with less than they already had. Rickard then stated in response to a question that the Respondent did not have to bargain with the Union or accept their final offer. Rickard added, if the Union did not accept the final offer, employees would be forced out on strike and the Company would replace them. An employee asked Rickard if that meant they would lose their jobs. Rickard said yes. Rickard continued that a strike would hurt workflow, the Company would not be able to produce enough cradles and frames, and Toyota would have to take other measures. An employee asked if Toyota could pull the fixtures at the plant. Rickard said no, Toyota did not own the fixtures, but Toyota did own the tools in front of the fixtures. An employee asked if Rickard was saying Toyota could or would pull out their tooling. Rickard responded "would."

2. Credibility resolutions upon which these findings of fact are based

5 In making the findings of fact regarding Rickard's statement that he would not bargain
with the Union, I credit the testimony of technician Justin McDaniels. (Tr. 131, 139, 147.)
Overall, I found that McDaniels came across as the General Counsel's most reliable witness. He
offered specific, consistent testimony and was confident in his demeanor when testifying. To the
extent any of the Respondent's witnesses testified contrary to McDaniels, I do not credit that
10 testimony unless otherwise noted. Moreover, multiple employees corroborated McDaniels's
testimony that Rickard said he would not bargain, although the exact words they remembered
Rickard using slightly differed.⁸ As previously noted, in light of the number of meetings the
Respondent held and the time that had elapsed once the hearing took place, this is to be expected.

15 As to Rickard's comment about benefits going to zero, I credit the testimony of
McDaniels, Poore, Tracy Ferguson, and Rendell Ferguson. (Tr. 28, 37, 64, 82, 85, 93, 103, 131,
138-139.) In this regard, the employees testified consistently on both direct and cross
examination. I also note that the testimony of these current employees which contradicts
Rickard's and the other supervisors' testimony is likely to be particularly reliable, because these
witnesses are testifying adversely to their pecuniary interests. *Portola Packaging, Inc.*, 361
20 NLRB No. 147, slip op. at 1 fn. 2 (2014). Specifically, longtime employee Tracy Ferguson was
direct, detailed, and forthright in her testimony. She also appeared genuinely uncomfortable with
testifying against her employer, as well as Rickard's statement at one of the captive audience
meetings that she was hurting the plant.⁹

25 For the same reasons as stated above, I also credit McDaniels' testimony regarding
Rickard's statement that Toyota would pull out and employees would lose their jobs if they went
on strike. (Tr. 131-132, 139-140, 145-147.) In addition to McDaniels' demeanor, Emery and
Poore corroborated different aspects of his testimony. (Tr. 28-29, 112, 122.) Breedlove, the
Respondent's own witness, conceded that an employee asked Rickard if they would lose their
30 jobs at the October 29 meeting. (Tr. 224.) Similarly, Rickard and Quinn stated that an employee
asked a question about whether Toyota owned the tooling, but nothing beyond that. (Tr. 178-
179, 291-292.) It is illogical this was a stand-alone question and that no additional discussion
occurred either before or after it. Several other Respondent witnesses contended that, when
discussing Toyota, Rickard just said they would have to continue to be competitive. Once again,
35 the scripts establish that Rickard did, in fact, make repeated comments about the company
needing to stay competitive. But that does not mean he made no additional comment about

⁸ Tracy Ferguson testified that Rickard stated he "didn't have to agree to anything" and "he wouldn't." (Tr. 64, 84-85.) Rendell Ferguson testified that Rickard said he did not have to cooperate with the Union and he would not cooperate, that he would not negotiate. (Tr. 93, 104.) Emery testified that Rickard said he did not have to work with unions or agree to any of their proposals. (Tr. 112.) That Rickard was conveying the Respondent would not bargain is evident from each of those recollections.

However, I do not rely on the testimony of Michael Poore in this regard. (Tr. 41.) Poore did not claim in his initial affidavit to the Board that Rickard said he would not bargain with the Union, as he testified to at the hearing.

⁹ I find it immaterial that the Fergusons remembered Rickard using the term "ground zero," rather than "zero," at the hearing. The implication is the same in either respect.

Toyota pulling out and employees losing their jobs if they struck.¹⁰

5 The Respondent argues that Rickard and numerous other witnesses it called to testify denied that Rickard said he would not bargain with the Union, stated pay and benefits would go to zero, or made any of the other statements attributed to him by the General Counsel's witnesses. (Tr. 204-205, 221-223, 235-236, 247-248, 250, 268-270, 289-290, 310-312.) I do not credit this testimony, which was elicited through leading questions generating the expected "no" response. I find these denials unreliable and of little probative value because, if and when 10 these same witnesses were asked open-ended questions concerning what Rickard said, their responses were brief, vague, and lacking assurance. Apropos of this was technician Kevin Foster's entire answer as to what Rickard said at the meetings: "Union activity and things that were going on, just making us all aware." (Tr. 235.) I conclude it is unlikely that Foster and the other witnesses who had an obvious lack of recollection as to what Rickard actually said 15 nonetheless would be able to deny with certainty the specific statements attributed to him by the General Counsel's witnesses. See, e.g., *Weis Markets, Inc.*, 325 NLRB 871, 888-889 (1998), citing to *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995) ("The essentially bare denial that events occur or that any specific statements were made is not a persuasive or helpful aid to an evaluation of credibility"); *Staten Island Bus Co.*, 312 NLRB 416, 422-423 (1993).

20 The more likely scenario is that the Respondent's witnesses could not recall all the questions that employees asked or all the statements Rickard made in the October meetings. (Tr. 179, 237, 241-242, 250, 256-257, 281, 292, 305, 307, 309, 314.)

25 Finally, with respect only to the start-from-zero allegation, many of the Respondent's witnesses confirmed that Rickard said employees "could" lose wages and benefits depending on negotiations and that wages could go up, they could go down, or they could stay the same. (Tr. 221, 235, 247, 289, 311.) I do not doubt that, at some point, Rickard did make those statements, in light of the text in the script. (R. Exh. 3, p. 4.) Nonetheless, even if this testimony is credited, it does not necessarily mean that Rickard did not make the start-from-zero statements. The two 30 statements are not mutually exclusive.

ANALYSIS

35 Section 8(a)(1) of the Act states that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction. *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011).

40 The bulk of the General Counsel's complaint allegations involve Rickard's statements at the October captive audience meetings. The purpose of each of these meetings was for the

¹⁰ McDaniels and Emery did not agree as to what prompted Rickard to tell employees they would lose their jobs. McDaniels testified the statement occurred after Rickard said the Company would replace employees if they went out on strike. (Tr. 131.) Emery recalled that Rickard said it after commenting that Toyota would pull out as a customer. (Tr. 112.) What prompted the comment is irrelevant, because the two agreed that Rickard told employees they would lose their jobs if they unionized.

Respondent to communicate its opposition to employees choosing to unionize. Accordingly, the statements Rickard made must be evaluated within that context. *Aldworth Co.*, 338 NLRB 137, 141 (2002).

5 Moreover, Rickard, the plant manager, was the highest ranking official at the facility and spoke at all the meetings. By the fourth meeting, the Respondent brought in Cameron, a corporate human resources representative, to speak to employees as well. When evaluating alleged coercive statements, the identity of the speakers and their positions of relative power in the workplace must be considered; when an employer uses high-level managers to voice its antiunion message, as the Respondent did here, that message takes on an especially coercive quality that is unlikely to be forgotten. *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

I. THE ALLEGED THREAT OF PLANT CLOSURE AND JOB LOSS

15 The General Counsel's complaint alleges that, about October 21, Rickard unlawfully threatened employees with plant closure and job loss if they selected the Union as their collective-bargaining representative.¹¹

20 An employer's prediction to employees of plant closure or job loss must be based on objective facts or refer to demonstrably probable consequences beyond the employer's control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969). Conveyance of an employer's sincere belief that unionization will or may result in the closing of the plant is not a statement of fact, unless the eventuality of closing is capable of proof.

25 The facts and Board decision in *Aldworth Co.*, supra, 338 NLRB at 142-144, are directly on point to this case. The employer there operated a warehouse and provided product transportation to Dunkin' Donuts through a contractual relationship. When the employer learned of an organizing campaign by its drivers, it held three captive audience meetings to present its position that employees should not unionize. The employer's executive vice president spoke at these meetings. At one meeting, this high-ranking official told employees that, if they selected the union and a contract was negotiated that did not allow the company to remain competitive, Dunkin' Donuts could get rid of Aldworth and choose a nonunion competitor instead. At another meeting, the official described a hypothetical scenario where the union was voted in, costs would increase, and Dunkin' Donuts would terminate the contract. He further stated that, if that happened, no one would have a job. The Board concluded that the statements, taken collectively and in light of the entire context in which they were made, constituted an unlawful threat of plant closure. See also *Dallas & Mavis Specialized Carrier Co.*, 346 NLRB 253, 253 (2006) (employer which transported Chrysler engines and automobile parts violated Sec. 8(a)(1), when the manager told employees that the company would have to close the doors if employees went union and the employer had to ask Chrysler for more money).

In this case, Rickard's statements to employees regarding what would happen to the Respondent's relationship with Toyota if they unionized conveyed the notion that such a move

¹¹ The General Counsel does not base this complaint allegation, or any other, on text in the Respondent's scripts that were read at the captive audience meetings. Rather, all of the allegations are based on statements made by Rickard during the question-and-answer portions of those meetings.

could put their jobs in jeopardy. Rickard stated at the first meeting that Toyota would pull out if employees unionized. At the third meeting, Rickard told employees that Toyota “would have to take other measures” if the employees went out on strike. He also said that Toyota would pull their tooling, implying that the Company’s work with Toyota would cease and effectively shut down the plant. Finally, Rickard stated that unionized employees would be forced out on strike and would lose their jobs. Based upon these statements and the context in which they were made, I conclude the Respondent violated Section 8(a)(1) by threatening employees with plant closure and job loss if they unionized.

II. THE ALLEGED STATEMENTS THAT BARGAINING STARTS FROM ZERO
AND EMPLOYEES COULD LOSE WAGES AND BENEFITS

The General Counsel’s complaint alleges that the Respondent violated Section 8(a)(1) when Rickard told employees that bargaining would start from zero. The complaint also alleges that Rickard violated the Act by informing employees on two occasions that they could lose wages and benefits if they selected the Union as their bargaining representative. The complaint alleges these violations occurred about October 9 and about October 21.

Employer statements to employees during an organizing campaign that bargaining will start from “zero” or from “scratch” are “dangerous phrase[s],” which carry with them “the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.” *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007), citing to *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003), *enfd.* in relevant part 400 F.3d 920 (D.C. Cir. 2005). Such statements are unlawful when, in context, “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 on what the Union can induce the employer to restore.” On the other hand, statements that employees could lose benefits as a result of bargaining have been found lawful, where they “merely [state] what could lawfully happen during the give and take of bargaining.” Other contemporaneous threats or unfair labor practices may lend additional coercive meaning to an employer’s remarks.

Here, Rickard told employees that their pay and benefits would go to zero and they could wind up with less than they already had. Although the Respondent’s scripts merely described the give and take of bargaining, Rickard’s zero statement did not include a qualifier that compensation could go up, could go down, or could stay the same. He made additional threats during the same portion of the October 29 meeting. Thus, the statements, in combination, are unlawful. *Consolidated Biscuit Co.*, 346 NLRB 1175, 1175 fn. 5 and at 36 (2006) (statement that bargaining starting “from zero” and “with a clean slate,” accompanied by a further statement that employees would “probably lose” certain benefits, constituted unlawful threat of loss of benefits); *Federated Logistics*, *supra*, 340 NLRB at 255–256 (employer comments that “we would start from scratch and would negotiate from that,” the union would strike, and if a strike occurred the operation would be shut down and moved to another of the employer’s facilities in 3 days violated the Act).

The Respondent argues that Rickard’s statements to employees that they could lose wages and benefits cannot, as a matter of law, be found unlawful. The Respondent attempts to draw a distinction between an employer’s use of the word “could” and “would” when discussing

a loss of benefits. By the Company's theory, the former is lawful and the latter is not. However, Board decisions support a different distinction, when an employer states that employees could lose wages and benefits. In isolation, such a statement does not violate the Act. However, the statement does violate the Act where, as here, it is accompanied by other unlawful statements producing a message whose crux is that employees will lose benefits if they unionize and their union will have to attempt to restore those benefits in negotiations.

The cases relied upon by the Respondent are distinguishable from this one. In *International Filling Co.*, 271 NLRB 1591, 1591-1592 (1984), an employer stated to employees in a letter that, if a union came in, "all your present and future benefits are negotiable. Negotiations would start with a blank sheet of paper, and each present wage and present benefit would be negotiated." The Board found that the employer's statement did not violate the Act, because the overall context of the statement was that benefits were subject to negotiations. However, the letter there did not contain any other unlawful statements or threats. Similarly, in *George L. Mee Memorial Hospital*, 348 NLRB 327, 330 (2006), the Board did not find unlawful an employer statement that benefits could go down. The Board suggested the outcome would be different if the representative had said would. But the statement there was not accompanied by a further comment that negotiations would start from zero, nor did that conversation involve other unlawful statements.

Accordingly, I find Rickard's statements, in combination, violated Section 8(a)(1).¹²

III. THE ALLEGED STATEMENTS THAT CHOOSING A UNION WOULD BE FUTILE

The General Counsel's complaint alleges that, about October 21, the Respondent informed its employees that it would be futile for them to select the Union as their bargaining representative.

A direct statement that an employer will not bargain with a union constitutes an unlawful threat that unionization will be futile. *Redwing Carriers, Inc.*, 165 NLRB 60, 83 (1967) (employer violated Sec. 8(a)(1) when company president told employees "he would not 'sit down at a table and negotiate with the Teamsters'"). A statement with multiple, reasonable constructions still violates Section 8(a)(1), where at least one of those constructions is that the employer would not bargain with the union. *Flagstaff Medical Center*, 357 NLRB at 663-664.

In this case, Rickard told the gathered employees at the October 29 captive audience meeting that the Company did not have to bargain with the Union or accept their final offer.

¹² At the hearing, the Respondent filed a motion to dismiss complaint pars. 5(b) and 5(c)(iv), based upon the same argument. For the same reasons stated in this section, I deny the Respondent's motion.

As detailed in the findings of fact, I conclude that Rickard's statements about losing wages and benefits were made at the October 29 captive audience meeting. Thus, I find merit to complaint allegation 5(c)(iv). However, the record evidence does not establish that Rickard made the same statement at the October 9 meeting. The only witness who testified that the statement was made at the first meeting was Poore. (Tr. 28, 37.) But the October 9 timing was provided to him by counsel as part of a leading question on cross examination, not during his direct. Thus, I recommend dismissal of complaint allegation 5(b).

While the latter portion of the statement is true, the first part is not. A reasonable employee could interpret the statement, in its entirety, to mean that the Respondent would not negotiate with the Union if employees voted the Union in. Rickard stated thereafter that employees would be forced out on strike and ultimately would lose their jobs. In combination, these statements conveyed that selecting the Union would be futile. *Harbor Cruises, Ltd.*, 319 NLRB 822, 838-840 (1995) (statement that the employer could bargain up to a year without reaching agreement and oblige the union to call a strike during which employees could be lawfully replaced was an unlawful threat of futility).

The Respondent argues that its script establishes Rickard told employees the Company would negotiate in good faith, but had the right to say no to proposals. (R. Exh. 3, p. 4.) However, Rickard's general statement that the Company would bargain in good faith does not negate or render lawful his more specific, subsequent statements that he would not bargain with the Union and, if and when the Union forced employees out on strike, they would lose their jobs. *Fisher Island Holdings, LLC*, 343 NLRB 189, 190 (2004).

Therefore, the statement violates Section 8(a)(1).

IV. THE ALLEGED INTERROGATION

The General Counsel alleges that Kirby unlawfully interrogated Poore during their conversation on the shop floor following the October 9 captive audience meeting.

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), *affd. sub nom Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). A nonexhaustive list of factors to consider includes the background between the employer and union; the nature of the information sought; the identity of the questioner; the place and method of interrogation; the truthfulness of the employee's reply; and whether the employee was an open and active union supporter. *Westwood Health Care Ctr.*, 330 NLRB 935, 939-940 (2000); *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). None of these factors are to be mechanically applied in each case. *Rossmore House*, *supra*, at 1178 fn. 20.

The totality of the circumstances here establishes that Kirby unlawfully interrogated Poore. As to background, the conversation took place shortly after the Respondent's first captive audience meeting. During that meeting, Rickard made clear, through the script, that both he and the company opposed a union coming in. While a perfectly lawful position, that view impacts the likelihood that an interrogation almost immediately following the meeting is coercive. Moreover, as detailed above, Rickard went beyond lawful commentary and violated Section 8(a)(1) by telling the 150 gathered employees that Toyota would pull out if a union did come in. On the heels of that unfair labor practice, Kirby approached Poore, in the presence of Selle, and sought to learn whether he favored having a union or not. At the time, Poore was not an open union supporter. Poore was not comfortable answering the question and instead deflected by asking Kirby what he thought about the Union. These circumstances more than outweigh the

facts that Kirby and Poore had known each other for years and had a great relationship; the conversation took place on the shop floor rather than in an office or other, more formal location; and Kirby routinely would walk the shop floor and speak to employees at the end of a work day. Kirby's attempt to discover Poore's position on unionization under these circumstances, and at a time when Poore's sentiments were not known, is coercive. See, e.g., *Manorcare Health Services-Easton*, 356 NLRB 202, 218-219 (2010); *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004).

For all these reasons, I conclude that Kirby's questioning of Poore about his and other employees' union activities and sympathies violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) by the following conduct:
 - (a) On or about October 9, 2015, interrogating employees concerning their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees;
 - (b) On or about October 9 and October 29, 2015, threatening employees with job loss and plant closure if they selected the Union as their collective-bargaining representative;
 - (c) On or about October 29, 2015, informing employees that bargaining would start from zero and they could lose wages and benefits if they selected the Union as their bargaining representative; and
 - (d) On or about October 29, 2015, informing employees that it would be futile to select the Union as their bargaining representative.
4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
5. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

5 Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

15 The Respondent, Metalsa Structural Products, Inc., Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

20 (a) Coercively interrogating employees concerning their union membership, activities, and sympathies, and the union membership, activities, and sympathies of other employees.

(b) Threatening employees with job loss and plant closure if they select a union as their collective-bargaining representative.

25 (c) Informing employees that bargaining would start from zero and they could lose wages and benefits if they select a union as their collective-bargaining representative.

30 (d) Informing employees that it would be futile for them to select a union as their bargaining representative.

35 (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."¹⁴ Copies of the

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

5 notice, on forms provided by the Regional Director for Region 25, after being
signed by the Respondent's authorized representative, shall be posted by the
Respondent and maintained for 60 days in conspicuous places including all
places where notices to employees are customarily posted. In addition to
10 physical posting of paper notices, notices shall be distributed electronically,
such as by email, posting on an intranet or internet site, and/or other electronic
means, if the Respondent customarily communicates with its employees by
such means. Reasonable steps shall be taken by the Respondent to ensure that
the notices are not altered, defaced, or covered by any other material. In the
15 event that, during the pendency of these proceedings, the Respondent has
gone out of business or closed the facilities involved in these proceedings, the
Respondent shall duplicate and mail, at its own expense, a copy of the notice
to all current employees and former employees employed by the Respondent
at any time since October 9, 2015.

- (b) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the
Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., August 26, 2016.



Charles J. Muhl
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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 threaten you with job loss and plant closure if you select the UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC, or any other union, as your collective-bargaining representative.

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

WE WILL NOT tell you that we will not bargain with the United Steelworkers Union, or any other union, if you choose a union as your bargaining representative.

WE WILL NOT ask you about your union membership, activities, or support, or the union membership, activities, or support of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

METALSA STRUCTURAL PRODUCTS, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it

investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/25-CA-165965 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.