UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

John J. Walsh, Jr., Regional Director, Region 1, National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD **Petitioner** vs **W.B. MASON CO., INC.** **Respondent**	C.A. No. 1:16-cv-11934 - NMG

PETITIONER'S REPLY TO RESPONDENT'S MEMORANDUM OF LAW OPPOSING INJUNCTIVE RELIEF

Petitioner files this reply to Respondent's Memorandum of Law in Opposition to Petition for Injunction under Section 10(j) of the National Labor Relations Act to the extent necessary to (1) correct Respondent's misrepresentations of fact, (2) demonstrate the likelihood of irreparable harm and remedial failure in the absence of injunctive relief, and (3) refute the argument that the Petition for Injunctive Relief is untimely.

1. RESPONDENT MISREPRESENTS SEVERAL KEY FACTS

In its Memorandum, Respondent misrepresents and/or omits certain critical facts in the administrative record. The most significant of these are corrected below.[1]

First, the Petitioner is not seeking final relief for the six employees unlawfully discharged, as Respondent claims (M-5 and 11). Final relief would include reinstatement and back pay. In this proceeding, Petitioner seeks only interim reinstatement during the pendency of this case

[1] Petitioner includes citations to the administrative record so that the court can evaluate Respondent's misrepresentations. Citations to the administrative record will be designated "T-(page number)" for transcript references and "GC-(exhibit number)" for General Counsel exhibits. Citations to Respondent's Memorandum will be designated "M-(page number)".

until the Board issues an order. In the event that the Board dismisses the relevant allegations concerning these individuals, the Employer can separate them from its payroll.

Second, the administrative record strongly suggests that Respondent knew, prior to October 1, 2015, about the incident for which Oscar Castro was fired, but did nothing about it until after the Union demanded recognition. Respondent asserts, without any support in the record, that it did not learn about the incident until October 1 (M-7). What the record actually shows is that branch manager DeAndrade learned of the incident on about October 1 from human resources manager Hallinan (T-815), who was not questioned on this critical issue, despite his testimony on other matters. Respondent also failed to call anti-union activist Sidney Inglese, who allegedly reported the incident to Hallinan. If the evidence supported Respondent's claim that it suspended and then discharged Castro as soon as it learned of his conduct, Respondent surely would have produced this evidence in the administrative hearing. Because the company failed to produce any evidence on the critical timing issue, it appears that Respondent was aware of the incident well before October 1 but did nothing about it until after the Union was on the scene. Respondent's claim that Castro engaged in egregious misconduct is therefore undermined by substantial evidence that Castro's conduct was condoned until the Union appeared.

Third, the record evidence clearly demonstrates that Marco Becerra was fired for conduct identical to that of employee Matt Cadoff, who was neither disciplined nor discharged. Respondent deliberately misrepresents the evidence, stating that the Petitioner compared Becerra's conduct to that of an unnamed employee (M-9). Respondent's own records, however, as well as the testimony of human resources manager Hallinan, clearly identified the individual, highlighted the disparate treatment, and demonstrated that Cadoff was not even mildly disciplined for the same conduct that led to Becerra's discharge (GC-45; T-318).

Fourth, the laid-off employees were not seasonal employees. Respondent asserts, without support in the administrative record, that three laid-off employees understood their jobs

to be seasonal (M-9). The two former employees who testified at the administrative hearing insisted they were not informed of this at the time of their hire (T-501; 516), and Respondent's witnesses did not dispute this testimony, despite their availability and their testimony on other matters (T-271-74; 356-57).[2]

Fifth, Petitioner has clearly demonstrated that the withholding of the 2015 wage increase was motivated by Respondent's anti-union animus. In its Memorandum, Respondent simply ignores the facts when it claims there is no evidence that its delay in granting the wage increase was unlawfully motivated (M-13). Several witnesses testified that Respondent's supervisors blamed the Union for the delay (T-229, 570, 574, 575). Additionally, although Respondent asserts that the timing of the annual increase fluctuates, it has never been delayed beyond January (T-937). Finally, the eventual granting of the wage increase supports a finding that the delay was indeed motivated by a desire to coerce employees: the scale of the eventual wage increase is arguably the clearest evidence of Respondent's unlawful motivation. Notably, Respondent omits from its Memorandum any discussion of the fact that the June 2016 wage increase *averaged* seven times the normal annual increase.[3] Respondent has yet to address the unprecedented nature of this increase.

Sixth, Petitioner has produced uncontroverted evidence that at least three employees, including Sean Brennan, received offers of transfers, promotions, and raises as inducements to abandon the Union. Respondent baldly denies making such an offer to Brennan, but makes no mention of the other two employees who also received offers. John Edwards (T-722-23; GC-25 at p. 19), Damon DeRosa (T-541), and Brennan (T-368-69) all testified that they received such offers within days of the Union's demand for recognition, and Respondent produced no

[2] Respondent also asserts that the three were not eligible to vote in the election, but neglects the fact that it is the employer who creates the eligibility list. Neither the Union nor the Region agreed they were ineligible.

[3] See Petitioner's Memorandum of Points and Authorities in Support of its Petition for Temporary Injunction, pages 52-53.

evidence refuting any of that testimony, despite the availability of witnesses who made the offers.

The facts corrected above are only the most critical misrepresentations in Respondent's Memorandum. Again and again, Respondent misleads the Court by asserting "facts" that are not in the administrative record, by misstating the procedural posture of the case, and by mischaracterizing the applicable law. As Petitioner has meticulously demonstrated, the Respondent conducted an aggressive and unlawful anti-union campaign, in which it terminated six union supporters for discriminatory reasons; offered promotions, transfers, and raises to at least three others; solicited employee grievances, promised to remedy them, and in fact remedied them; withheld employees' expected wage increase and blamed the Union for it; and granted employees an unexpected, unexplained, and unprecedented 21.7 percent raise. Respondent's conduct had the predictable and intended effect: it destroyed the organizing campaign, turned employees against the Union, and made it impossible for employees to vote in a free and fair election. Now, Respondent self-righteously argues that the very election its conduct made impossible is the only way to gauge employee support for the Union.

2. IN THE ABSENCE OF COURT INTERVENTION, REMEDIAL FAILURE IS LIKELY

One of the central rights protected by the National Labor Relations Act is the right of a majority of employees in an appropriate unit to choose, free of employer interference, whether to be represented by a labor organization. It is well established that authorization cards are an appropriate way to establish majority status. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969). In an environment free of unfair labor practices, an employer may decline to recognize a Union, effectively forcing a Board-conducted election to determine majority status. More than seventy-five years of Board jurisprudence establishes the "laboratory conditions" the Board insists on to assure the free and fair expression of employee sentiment.

The administrative record in this case clearly establishes that no Board remedy in the ordinary course is likely to restore conditions sufficient to ensure an election free of coercion and interference. There is a strong probability that the Board will conclude that but for the Union organizing campaign, the highly visible discharge of six employees would not have occurred. Promises and threats to employees, promulgated by senior managers, were disseminated to the entire unit. Finally, the whip-saw of delaying an expected pay raise – and attributing the delay to the Union – coupled with the subsequent, out-of-scale pay raise forecloses the possibility that a Board cease and desist order will restore a fair semblance of what employee sentiment might have been in the absence of unfair labor practices.

These types of violations are precisely the circumstances that led the Supreme Court to validate bargaining orders based on card majority in *Gissel*. An interim bargaining order, based on record evidence of employee sentiment prior to the onslaught of unfair labor practices, is required to dissipate the effects of the Employer's egregious unfair labor practices, and offers the best opportunity to vindicate the statutory policy protecting employee free choice and favoring the institution of collective bargaining.

Having poisoned the well of employee opinion, the Respondent cannot complain that an alternate, well-accepted means of determining employee support for the Union is utilized in this case.

3. RESPONDENT'S DELAY ARGUMENT LACKS MERIT

There has been no undue delay in the investigation and litigation of the matters underlying this petition,[4] and Respondent is simply wrong when it asserts that the Petitioner's delay undermines the need for injunctive relief (M-3,10). This case involved a succession of charges and amended charges; multiple employee witnesses, many of whom were reluctant to

[4] See Petitioner's Memorandum of Points and Authorities in Support of its Petition for Temporary Injunction, pages 91-93.

cooperate in the face of an avalanche of unfair labor practices; and grudging or no cooperation by Respondent in the Board's investigation. Respondent continued to engage in flagrant unlawful conduct, committing unfair labor practices right up to the time of the administrative hearing. See *Asseo v. Pan American Grain Co., Inc*., 805 F.2d 23, 26 (1st Cir. 1986)(irreparable harm likely to result from employer's continuing hallmark violations). That the Agency took the time necessary to evaluate the Employer's defenses and establish a factual and legal predicate for its action in a complex case does not constitute delay. Moreover, employees, who expressed their sentiments regarding unionization via signed authorization cards, should not be punished for any delay caused by Respondent or by the administrative process.

The true issue before this Court is whether interim relief now offers a genuine prospect of averting remedial failure. Interim relief is necessary to preserve the Board's remedial authority and to effectuate the policy set out in the National Labor Relations Act of fostering employee choice and encouraging collective bargaining. An order of this Court requiring the interim reinstatement of six discharged union supporters and interim bargaining with the Union, as well as a cease and desist order enjoining Respondent from further unlawful action, will offer employees powerful reassurance that the rule of law applies to their work place, and will give meaning to the choice employees made before Respondent's coercive conduct took root. *Kendellen v. Evergreen America Corp*., 428 F.Supp.2d 243 (2006)(distinguishing *Hialeah Hospital*, 343 NLRB 391 (2004), and holding interim bargaining order appropriate despite passage of four years, where employer threatened plant closure and gave widespread wage increases far in excess of the norm).

It is crucial that this Court vindicate the national policy of employee free choice – a vindication far less likely in the absence of the Court's intervention. The continuing passage of time exponentially amplifies the corrosive effects of Respondent's actions. Employees will surely consider the extended period of time that their coworkers were out of work, waiting for the legal system to address their situation before publicly supporting the Union; the Union's ability to

represent employees effectively will be undermined by extending the period that it appears irrelevant, eroding the possibility of gaining employee support.

The balance of hardships favors entering an injunction: the Board and courts have consistently held that the danger that a union would lose support because of an employer's unfair labor practices outweighs any harm that granting injunctive relief would cause an employer. See *Asseo v. Centro Medico del Turabo*, 900 F.2d 445, 455 (1st Cir. 1990); see also, *Rivera-Vega v. ConAgra, Inc*., 70 F.3d 153, 164 (1st Cir. 1995)(the strong likelihood of success on the merits further shifts the balancing of harms against the employer). Respondent's argument gives the benefit of the doubt to the party engaging in unlawful conduct, rather than to employees who clearly expressed their representational desire through valid authorization cards, and who have done no wrong.

Case law supports the Petitioner's argument, as Circuit Courts have granted interim bargaining orders pursuant to petitions filed far later than this one.[5] Respondent's reliance on *Ohr v. Arlington Metals Corp*., 148 F.Supp. 3d 659, 674 (N.D. Illinois 2015), is a bold mischaracterization of controlling precedent. The undue delay in *Arlington Metals* included the filing of an injunction petition several months after the administrative law judge had issued his decision. The court found that the significant delay was unjustified and therefore dispositive, noting that the Board could decide the case promptly. In contrast, as Respondent notes in its Memorandum of Law in Opposition to Petitioner's Motion to Try Section 10(j) Injunction Petition Based on the Administrative Record, this case involves multiple, factually distinct allegations and complex factual disputes which necessitated a complete administrative record before the filing of the injunction petition.[6]

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[5] See, e.g., *Overstreet v. El Paso Disposal*, 625 F.3d 844, 856 (5th Cir. 2010)(19-month delay); *Muffley v. Spartan Mining*, 570 F.3d 534, 544 (4th Cir. 2009)(18-month delay: "[c]omplicated labor disputes like this one require time to investigate and litigate"). See Petitioner's initial brief at footnote 96.

[6] It is worth noting that Respondent attempts to avoid an injunction by arguing that a final Board order is imminent, when (a) the Administrative Law Judge's decision has not yet issued; (b) it is likely that any ruling adverse to Respondent will be vigorously litigated before the Board; and (c) the normal Board

Contrary to the Respondent's contention, it is not too late for injunctive relief. Employees discriminatorily discharged will be living evidence of the Union's power – and the government's – if they are quickly reinstated to their former positions. Their presence, along with the court-imposed bargaining obligation, will breathe new life into the organizing campaign Respondent snuffed out. This double-edged temporary remedy will re-create an environment in which the Union can preserve its remaining support, attempt to restore lost support, and bargain effectively on behalf of W.B. Mason's employees. Without injunctive relief, it *will* be too late for the Union to resurrect lost support, and Respondent will have achieved its unlawful objective.[7] While it is impossible to pinpoint with accuracy the precise moment when harm becomes irreparable, one thing is crystal clear: the party engaging in egregiously unlawful conduct, denying employees their statutory right to select their own bargaining representative, should not benefit from a premature determination that it is too late to do anything about it.

The very purpose of a *Gissel* bargaining order is to restore the status quo that existed *before* an employer interfered with employees' right to choose a bargaining representative through a free and fair election. *Ley v. Wingate of Dutchess, Inc*., __ F.Supp.3d __, 2016 WL 1611598 (S.D.N.Y. April 22, 2016)(bargaining order does not alter status quo because "loss of support for a union <u>after</u> an employer's unfair labor practices is no defense to an interim bargaining order." [Emphasis in original]). An interim bargaining order here is the only way to turn back the clock to a time when the vast majority of employees supported the Union, before Respondent began trampling on their rights. Respondent's argument that a bargaining order would change the status quo by requiring the company to recognize and bargain with the Union without benefit of an election misses the point: the company itself created the coercive

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process includes substantial additional time after an Administrative Law Judge's decision for the filing of Exceptions, the responsive filing of briefs, and the time necessary for an administrative agency to review the multiple issues presented.

[7] As discussed in Petitioner's initial brief, the decision of the Administrative Law Judge, which has not yet issued in this case, is not final. Without injunctive relief, enforcement of a *Gissel* bargaining order will be substantially delayed while the case is litigated before the Board and in the Circuit Court.

environment precluding employee choice, and it must be ordered to recognize and bargain with the representative its employees selected when they signed authorization cards. The relevant status quo is that of employee support for the Union prior to the onset of unfair labor practices. Petitioner respectfully urges this Court to restore the status quo that existed before Respondent poisoned the well with its unlawful conduct.

Based on the foregoing and on its initial brief, Petitioner urges the Court to reject Respondent's arguments and to grant a temporary injunction in order to protect employee free choice, prevent further erosion of employee support for the Union, and preserve the effectiveness of a final Board remedy.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing on October 21, 2016.

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