

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

SYSCO GRAND RAPIDS, LLC

Respondent/Employer

Cases 07-CA-146820

07-CA-148609

07-CA-149511

and

07-CA-152332

07-CA-155882

07-CA-166479

**GENERAL TEAMSTERS UNION
LOCAL NO. 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

07-RC-147973

Charging Party/Petitioner

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,
Colleen Carol
Steven Carlson
Counsels for the General Counsel
National Labor Relations Board
Region Seven, Resident Office
Grand Rapids, Michigan

TABLE OF CONTENTS

I. Introduction 1

II. The ALJ’s Credibility Determinations Should Be Affirmed..... 1

III. Respondent’s Evidentiary Exceptions Are Without Merit and Should Be Denied 2

A. The ALJ Correctly Determined GC 39 Is Not Privileged..... 2

B. Exhibit GC 58 is Not Privileged and Was Properly Admitted 4

IV. The ALJ’s Finding that George Brewster’s Termination Violated Section 8(a)(3) is Supported by Substantial Record Evidence 6

A. Record Evidence Supports the ALJ’s Statement of Facts 6

B. The ALJ’s Legal Conclusions are Firmly Rooted in Board Precedent and Must be Affirmed..... 9

1. Record Supports a Finding that Brewster Engaged in Union Activity and Respondent Knew of That Activity 10

2. The Record Conclusively Established Respondent’s Animus..... 10

3. The ALJ Correctly Found that Respondent’s Investigation of Brewster Demonstrated Pretext..... 12

4. The ALJ Properly Found that Strong Evidence of Pretext Rendered Further Examination of Respondent’s Proffered Defense Unnecessary 13

a. There is No Evidence Brewster was Insubordinate 14

b. Brewster Did Not Threaten to Abandon His Route 15

c. Brewster Did Not Disclose Confidential Information 16

d. Disparate Treatment Evidence Supports the ALJ’s Findings 17

V. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) Repeatedly During Several Captive-Audience Meetings During the Critical Period 19

A. The ALJ Correctly Found that Respondent Threatened Loss of Wages and Benefits During Multiple Captive-Audience Meetings 19

B.	The ALJ Correctly Found that Respondent Threatened Employees with Loss of Seniority During Multiple Meetings	22
C.	The ALJ Correctly Found that Respondent Violated 8(a)(1) During the March 19 Meeting in Alanson	24
1.	Threats of Loss of Access to Supervisors and Management	24
2.	Threats of Loss of Benefits	26
3.	Solicitation of Employee Grievances and Promises to Remedy.....	26
D.	The ALJ Correctly Found that Respondent Further Violated Section 8(a)(1) During the March 26 and April 21 Meetings in Alanson	27
1.	Threat to Eliminate Employee Exchange Program Benefit	27
2.	Unlawful Promise to Remedy Grievances at April 21 Meeting	29
E.	The ALJ Correctly Found that Respondent Threatened Employees with Job Loss in Late April in West Branch	29
F.	The ALJ Correctly Found that Respondent Threatened that a Strike was Inevitable and Made Related Threat of Job Loss	30
VI.	Respondent Reinforced its Unlawful Message and Violated 8(a)(1) During Numerous Individual Conversations with Unit Employees	32
VII.	The ALJ Correctly Found that Respondent Unlawfully Reduced Jesse Silva’s Scheduled Hours.....	33
VIII.	The Revised Safety Incentive Program.....	35
IX.	The ALJ Correctly Found that Respondent Made Unlawful Threats of Plant Closure	38
X.	ALJ’s Determination that Respondent’s Refusal to Recognize and Bargain with the Union Violated 8(a)(5) Is Supported by the Record and Board Law	40
XI.	The ALJ’s Proposed Remedy is Appropriate	41
A.	The Record Evidence Established that the Union Achieved Majority Status on December 18, 2014	41
B.	The ALJ’s Determination that a Bargaining Order is Necessary is Supported by the Record.....	43

C. The ALJ Considered and Properly Rejected Evidence of Changed Circumstances....	47
D. The ALJ’s Recommended Additional Remedies are Appropriate Under the Circumstances	50
XII. Conclusion	50

TABLE OF AUTHORITIES

Cases

2 Sisters Food Group, Inc., 357 NLRB 1816 (2011).....13

Advoserv of New Jersey, Inc., 363 NLRB No. 143 (2016).....14, 18

Aladdin Gaming, LLC, 345 NLRB 585 (2005).....33

Aliante Gaming, LLC d/b/a Aliante Casino and Hotel 364 NLRB No. 78 (2016).....12

Allegheny Ludlum Corp. 320 NLRB 484 (1995).....29, 33

Amerace Corp., 217 NLRB 850, 852 (1975).....31

Amglo Kemlite Laboratories, 360 NLRB No. 51 (2014).....9

Amptech, Inc., 342 NLRB 1131, 1137 (2004)27, 39

Andronaco Industries, Inc., 364 NLRB No. 42 (2016)16

Armstrong Machine Company, 325 NLRB 1109 (1998)10

Atlantic Veal & Lamb, Inc., 342 NLRB 418 (2004).....39

Audubon Regional Medical Center, 331 NLRB 374 (2000)49

B&D Plastics, 302 NLRB 245 (1991)37

Boaz Spinning Co., 177 NLRB 788 (1969)31

BP Amoco Chemical, 351 NLRB 614, 617–618 (2007).....20

Brunswick Food & Drug, 284 NLRB 663 (1987)11

California Gas Transport, Inc., 347 NLRB 1314 (2006).....41

Casa San Miguel, 320 NLRB 534 (1995).....12

Cast-Matic Corp., 350 NLRB 1349, 1389 (2007)40

Coach & Equipment Sales Corp., 228 NLRB 440, 440–441 (1977).....20

Cogburn Healthcare Center, Inc. 342 NLRB 98 (2004).....49

<i>Crown Cork & Seal Co.</i> , 308 NLRB 445, fn. 3 (1992)	30
<i>Davis Electrical Contractors</i> , 291 NLRB 115 (1988).....	10
<i>Desert Aggregates</i> , 340 NLRB 289, 298 (2003)	29, 37
<i>Detroit Newspaper Agency</i> , 342 NLRB 268 (2001).....	12
<i>DHL Express, Inc.</i> , 355 NLRB 1399 (2010)	26
<i>Dlubak Corp.</i> , 307 NLRB 1138 (1992)	43
<i>DMI Distribution of Delaware</i> , 334 NLRB 409 (2001)	37
<i>Donaldson Bros. Ready Mix, Inc.</i> , 341 NLRB 958 (2004).....	9
<i>Dunkin’ Donuts Mid-Atlantic Distribution Center</i> , 363 F.3d 437 (D.C. Cir. 2004)	48
<i>Eagle Comtronics</i> , 263 NLRB 515 (1983)	32
<i>EPI Construction</i> , 336 NLRB 234, 237, fn. 17 (2001).....	40
<i>Evergreen America Corp.</i> , 348 NLRB 178, 180-181 (2006)	45
<i>Farris Fashions</i> , 312 NLRB 547, 554, fn. 3 (1993).....	2
<i>Flexsteel Industries, Inc.</i> , 316 NLRB 745 (1995).....	2
<i>Foley Material Handling Co.</i> , 317 NLRB 424 (1995)	29
<i>Fred Wilkinson Associates</i> , 297 NLRB 737 (1990).....	31
<i>G4 Secure Solutions, Inc.</i> 364 NLRB No. 92 (2016).....	33
<i>Garda CL Great Lakes, Inc.</i> , 359 NLRB 1334 (2013)	27
<i>Garvey Marine, Inc.</i> 328 NLRB 991 (1995).....	47
<i>Golden State Foods Corp.</i> , 340 NLRB 382 (2003)	13
<i>Guard Publishing Company</i> , 344 NLRB 1142 (2005)	38
<i>HarperCollins Publishing</i> , 317 NLRB 168 (1995).....	48, 49
<i>Highland Plastics, Inc.</i> , 256 NLRB 146 (1981)	48

<i>Heck’s, Inc.</i> , 191 NLRB 886, 887 (1971).....	50
<i>Holly Farms Corp.</i> , 311 NLRB 273, 274 (1993).....	37
<i>House Calls, Inc.</i> , 304 NLRB 311 (1991)	33
<i>Hyatt Regency Memphis</i> , 296 NLRB 259 (1989)	33
<i>In Home Health, Inc.</i> , 334 NLRB 281, 284 (2001)	37
<i>International Door</i> , 303 NLRB 582 (1991).....	48
<i>Interstate Bakeries Corp.</i> , 357 NLRB 15, 17 (2011).....	24
<i>Intersweet, Inc.</i> 321 NLRB 1 (1996)	47, 49
<i>Jefferson Smurfit Corp.</i> , 325 NLRB 280, 283 (1998).....	29
<i>Jamaica Towing, Inc.</i> , 247 NLRB 353 (1980).....	44,47
<i>JAMCO</i> , 294 NLRB 896 (1989)	11
<i>Jensen Enterprises, Inc.</i> , 339 NLRB 877 (2003).....	33
<i>Jonbil, Inc.</i> , 332 NLRB 652, 652 (2000)	50
<i>Laidlaw Corp.</i> , 171 NLRB 1366 (1968).....	32
<i>Limestone Apparel Corp.</i> , 255 NLRB 722 (1981).....	13
<i>L.S.F. Transportation, Inc.</i> , 330 NLRB 1054, 1066 (2000)	32
<i>Lucky Cab Company</i> , 360 NLRB No. 43 (2014).....	9, 12, 13
<i>McDonnell-Douglas Corp. v. Green</i> , 411 U.S. 792 (1973).....	9
<i>McEwan Manufacturing Co.</i> , 172 NLRB 1990 (1968)	41
<i>Merle Lindsey Chevrolet, Inc.</i> , 231 NLRB 478 (1977)	29
<i>Mesker Door</i> , 357 NLRB 591 (2011).....	9
<i>Metro Transport d/b/a Metropolitan Transportation Services</i> , 351 NLRB 657 (2007).....	13, 14
<i>Metro-West Ambulance Service, Inc.</i> 360 NLRB No. 124 (2014).....	33

<i>Michael’s Painting, Inc.</i> , 337 NLRB 860, 861 (2002)	44
<i>Miller Industries Towing Equipment, Inc.</i> , 342 NLRB 1074 (2004).....	33
<i>M.J. Metal Products</i> , 328 NLRB 1184, 1185 (1999)	45
<i>Multi-Natl. Food Serv.</i> , 238 NLRB 1031, 1036 (1979).....	29
<i>Murtis Taylor Human Service Systems</i> , 360 NLRB No. 66 (2014).....	10
<i>National Steel and Shipbuilding Co.</i> , 324 NLRB 499 (1997)	33
<i>Nichols Aluminum</i> , 361 NLRB No. 22 (2014).....	10
<i>Nichols Aluminum LLC v. NLRB</i> 797 F.3d 548 (8 th Cir. 2015)	9
<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405, 409 (1964)	37, 44
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	1, 22, 23, 30, 39, 40, 41, 42, 45
<i>NLRB v. L.B. Foster Company</i> , 418 F.2d 1 (9 th Cir. 1969)	47
<i>NLRB v. M&B Headwear Co.</i> , 349 F.2d 170 (4 th Cir. 1965).....	11
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	9
<i>Novelis Corporation</i> , 364 NLRB No. 101 (2016)	19, 41, 47, 48, 49
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686, 687 (2006).....	34
<i>Oklahoma City Collection District of Browning Ferris</i> , 263 NLRB 79 (1982)	33
<i>Ona Corp. v. NLRB</i> , 729 F.2d 713 (11 th Cir. 1984).....	42
<i>Overnite Transportation Co.</i> , 296 NLRB 669 (1980)	30
<i>Overnite Transportation Co.</i> , 329 NLRB 990 (1999)	33, 47
<i>Paradise Post</i> , 297 NLRB 876 (1990).....	11, 14
<i>Patrick Cudahy</i> , 288 NLRB 968 (1988).....	3, 6
<i>Peaker Run Coal Co.</i> , 288 NLRB 93 (1977)	41
<i>Pease Co.</i> , 237 NLRB 1069, 1070 (1978).....	31

<i>Pilot Freight Carriers, Inc. and BBR of Florida, Inc.</i> , 223 NLRB 286 (1976).....	40
<i>Prestige Ford, Inc.</i> , 320 NLRB 1172 (1996).....	29
<i>Red's Express</i> , 268 NLRB 1154, 1155 (1984)	37
<i>Regency Service Carts</i> , 345 NLRB 671 (2005)	31
<i>Respond First Aid</i> , 299 NLRB 167 (1990)	4
<i>Riser Foods</i> , 309 NLRB 635, 636 (1992).....	24
<i>Robert Orr/Sysco Food Systems</i> , 343 NLRB 1183 (2004).....	10
<i>Salon/Spa at Boro, Inc.</i> , 356 NLRB 444 (2010).....	16
<i>Shearer's Foods, Inc.</i> , 340 NLRB 1093 (2003).....	39
<i>Simon v. G.D. Searle Co.</i> , 816 F.2d 397 (8 th Cir. 1987).....	6
<i>Schaumburg Hyundai, Inc.</i> 318 NLRB 449 (1995)	33
<i>Smithfield Packing Co.</i> , 344 NLRB 1(2004)	3, 6
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950)	1, 32
<i>Stanley Works, Stanley Air Tools Division</i> , 171 NLRB 388 (1968).....	43
<i>State Materials</i> , 328 NLRB 1317 (1999).....	48
<i>Stevens Creek Chrysler</i> , 353 NLRB 1294 (2009).....	33
<i>Stevens Creek Dodge</i> , 357 NLRB 633 (2011)	9, 13, 41
<i>Struthers-Dunne, Inc.</i> 228 NLRB 49 (1977)	43
<i>Stumpf Motor Co., Inc.</i> , 208 NLRB 431 (1974)	20
<i>Southern Maryland Hospital</i> , 288 NLRB 481 (1988)	14, 15
<i>Taylor-Dunn Mfg. Co.</i> , 252 NLRB 799, 800 (1980)	20
<i>Teamsters Local 435 (Super Valu, Inc.)</i> , 317 NLRB 617, 617 fn. 3 (1995).....	24
<i>Textile Workers v. Darlington Mfg. Co.</i> , 380 U.S. 263, 274, (1965).....	23

<i>Texas Electric Cooperatives, Inc.</i> , 160 NLRB 440 (1966).....	41
<i>Thorgren Tool & Molding, Inc.</i> , 312 NLRB 628, 632 (1993).....	38
<i>Traction Wholesale Co.</i> , 328 NLRB 1058 (1999).....	41
<i>Trader Horn of N.J.</i> , 316 NLRB 194 (1995).....	4
<i>Tri-Cast, Inc.</i> , 274 NLRB 377 (1985).....	33
<i>Tri-City Paving, Inc.</i> , 205 NLRB 174 (1973).....	33
<i>TRW United Greenfield Division</i> , 245 NLRB 1135 (1979).....	20
<i>T.V. Sys., Inc.</i> , 206 NLRB 841, 845 (1973).....	39
<i>Uarco, Incorporated</i> , 216 NLRB 1 (1974).....	29
<i>Unifirst Corp.</i> , 335 NLRB 706, 707 (2001).....	32
<i>United Artists Theatre Circuit, Inc.</i> , 277 NLRB 115, 121 (1985).....	29
<i>United Dairy Farmers Cooperative Assn.</i> , 242 NLRB 1026, 1029 (1979).....	50
<i>United States Service Industries</i> , 319 NLRB 231, 232 (1995).....	50
<i>United States v. Adlman</i> , 134 F.3d 1194 (2d Cir. 1998).....	3
<i>Upjohn Co. v. United States</i> , 449 U.S. 383 (1981).....	3
<i>Vemco, Inc.</i> , 304 NLRB 911, 913, 925-26 (1991).....	25
<i>Village Thrift Store</i> , 272 NLRB 572 (1983).....	37
<i>Vista del Sol Services Inc. d/b/a Vista Del Sol Healthcare</i> , 363 NLRB No. 135 (2016).....	4
<i>Vulcan Waterproofing Company</i> , 327 NLRB 1100 (1999).....	15, 16
<i>W.E. Carlson Corporation</i> , 346 NLRB 431 (2006).....	10, 26
<i>West Maui Resort Partners</i> , 340 NLRB 846 (2003).....	12
<i>Westwood Health Center</i> , 330 NLRB 935 (2000).....	33
<i>Whiting Milk Corp.</i> , 145 NLRB 1035 (1964).....	24

Wright Line, 251 NLRB 1083 (1980).....9

Treatise

The Developing Labor Law at 155-156 (6th ed. 2012).....20

I. Introduction

On March 2, 2017, Administrative Law Judge Michael A. Rosas (hereinafter “ALJ” or judge) issued his Decision (hereinafter “ALJD”) finding that Respondent, in response to a union organizing drive that began in fall 2014, engaged in numerous, sustained and egregious unfair labor practices that interfered so effectively with employee free choice that it destroyed any possibility of a fair representation election on May 7, 2015.¹ Furthermore, the ALJ determined that the nature of the violations, the resulting loss of employee support for the Union and Respondent’s continued violations of the Act beyond the election showed that the Board’s traditional remedies would be wholly inadequate and that a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) was appropriate. On April 28, 2017, Respondent filed exceptions to nearly all of the ALJ’s factual findings and legal conclusions. The exceptions should be denied because the ALJ’s factual findings are based on overwhelming credible record evidence and his legal conclusions are firmly rooted in current and long-standing Board precedent.²

II. The ALJ’s Credibility Determinations Should Be Affirmed [Exceptions 38, 41, 81, 88, 95, 99, 106, 114-115, 121-122, 129-131, 134, 142-143]

Most of Respondent’s exceptions are premised on objections to the ALJ’s credibility rulings. The Board has a long-standing policy of attaching great weight to an administrative law judge’s credibility findings unless the clear preponderance of all relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). The testimony of the General Counsel’s witnesses in this case was simple, straightforward

¹ For the sake of brevity, all notations to the record will indicate the Transcript page as [Tr. at #]. General Counsel Exhibits are referenced as GC # and Respondent Exhibits as R #. All dates are 2015 unless otherwise specified.

² Respondent argues, based on Exception 32, that the ALJ committed a material error in referencing the Charging Party as General Teamsters Union Local No. 646, International Brotherhood of Teamsters. Despite the fact that Respondent continuously uses the erroneous designation in its own pleadings, it is clearly a clerical error that has no impact on the merits of the case. The Formal Papers (GC1), the authorization cards (GC2) and all the available record testimony indicates that the proper local number is 406. To the extent such a clerical error cannot be rectified by the Board in issuing its decision, Counsel for the General Counsel moves that the caption, as well as all references to Local 646 be changed to Local 406 by the Board.

and sincere. Indeed, the Board has long recognized that the testimony of employee witnesses that is adverse to their employer is particularly reliable because the employees are testifying adversely to their pecuniary interests.³ In contrast, Respondent's witnesses were objectively unreliable.⁴ The clear preponderance of the evidence supports the ALJ's credibility resolutions and they should be upheld by the Board.

III. Respondent's Evidentiary Exceptions Are Without Merit and Should Be Denied

A. The ALJ Correctly Determined that GC39 Is Not Privileged (Ex. 29, 286, 287)

Respondent excepts to the admission of GC 39 on the grounds of attorney-client privilege, attorney work product and hearsay. Respondent's objections on all three grounds were overruled in a written Order Overruling Objections by the Respondent Regarding Admissibility of General Counsel's Exh. 39 (hereinafter "Order") issued on August 16, 2016.⁵ The ALJ's Order was based on extant Board law, and Respondent's continued objections are baseless and should be denied.

As identified on the record and in the Order, GC 39 consists of a spreadsheet created in December 2014 by management as a tool for supervisors and managers to track, record and share observations about employees and their union support during the campaign. The document contained notations about certain individual employees and identified discriminatee George Brewster as "a confirmed union committee leader." None of the individuals on the attached email or listed on the spreadsheet was an attorney for Respondent.⁶

³ *Flexsteel Industries, Inc.*, at 745 citing *Farris Fashions*, 312 NLRB 547, 554, fn. 3 (1993), enfd. 32 F.3d 373 (8th Cir. 1994); *Circuit Wise, Inc.*, 309 NLRB 905, 909 (1992).

⁴ Compare: Tr. at 1335 versus GC74(b) at 17, 21-22, 34-35; Tr. at 1896 versus GC 25; GC 58 versus GC 40; Tr. 924 versus GC 39 and 58.

⁵ In its Brief in Support of Exceptions, Respondent argues that the ALJ admitted the documents "in contravention of prior rulings without explanation." (Respondent's Brief in Support of Exceptions, page 15). This is demonstratively false. The ALJ ruled on GC 39 more than once on the record and pursuant to a written Order, as referenced here. Because GC 58 was never objected to on privilege grounds, no ruling was made.

⁶ It was sent by email from the Vice President of Human Resources Amy Campbell to Vice President of Operations Ted Twyman, President Tom Shaeffer, corporate Labor Relations Manager Robert Jordan and Mideast Market President Tom Barnes. The document was then forwarded by Twyman to Mideast Market Vice President Lucas Jackson.

Respondent now argues that the subsequent testimony (appropriately discredited by the ALJ) of Twyman and Campbell establish that GC39 is privileged. The record does not support such a finding. Even had the inconsistent testimony of those two managers been credited, the testimony did not establish that GC 39 was a communication to or from an attorney for the purpose of legal advice. Campbell specifically testified that she “built the template” for the document [Tr. at 950] and that she did not “believe” that an attorney was present or involved in the creation of the document [Tr. at 951]. Twyman provided no testimony regarding GC 39, its origin or its use.⁷

The Board has long held that communications made in confidence between an attorney and his or her client for the purpose of seeking and obtaining legal advice is privileged. *Patrick Cudahy*, 288 NLRB 968 (1988). Because the evidence did not establish that GC 39 contained communications to or from an attorney to or from a client for the purposes of legal advice, the ALJ properly determined in his Order that the document was not privileged.⁸ Neither Twyman nor Campbell’s testimony change the fact that the document contains no communication to or from an attorney for the purpose of legal advice.

Respondent’s argument that the document is privileged under the attorney work-product doctrine also fails. The record shows that it was Campbell, not legal counsel, who created the document [Tr. at 950-951]. Furthermore, the evidence supports the ALJ’s determination that the creation and use of GC 39 was primarily to gauge employee interest in the union and was not created in anticipation of litigation. *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998). At the time of its creation in December 2014, no charges or petitions had been filed, no union organizers had yet been terminated and there was no reasonable indication that litigation was

⁷ Furthermore, former supervisor Adam Middleton testified that he was responsible for entering information into the document on a daily basis at the instruction of Campbell and other supervisors [Tr. at 1139]. He did not mention the presence of any attorneys at any juncture of the creation or maintenance of the document nor did he testify that the document was sent by or to any attorney [Tr. at 1167-1169, 1172].

⁸ See also, *Smithfield Packing Co.*, 344 NLRB 1 (2004)(privilege only applies to testimony or evidence that reveals the substance of communications to or from an attorney or his /her subordinate); *Upjohn Co. v. United States*, 449 U.S. 383 (1981)(primary purpose of communication must be for legal advice).

forthcoming.⁹ As such there was no reasonable basis to conclude that the document was created with even an attenuated anticipation of litigation. As found by the ALJ, GC 39 is not privileged under the attorney work product doctrine. The ALJ's rulings on the record and in his Order that GC 39 is properly admissible are substantially supported by the record evidence and by Board precedent and should be affirmed.

B. Exhibit GC 58 Is Not Privileged and was Properly Admitted [Exceptions 30, 286, 287]

Despite making no argument on the record regarding the admissibility of GC 58, Respondent now asserts that the document is inadmissible because it contains attorney client privileged material. Respondent's argument regarding this document is baseless.

General Counsel Exhibit 58 (GC 58), which is identified as "Straw Poll #1" is a spreadsheet dated January 9, 2015, that lists every unit employee, assigns each a number indicating the strength of their union support and predicts how they would vote in a representation union election. The document contains several notations, including one identifying union organizer George Brewster as being on the "union committee." None of the individuals listed on the document is an attorney, nor is there any part of the document that indicates that it was communicated to an attorney at any time.

In its exceptions, Respondent asserts that the document was, at some point, ruled to be privileged by the ALJ, but such an assertion is demonstrably false. Respondent appears to conflate GC 58 with *Document #58* as identified by the ALJ when making his rulings on Respondent's

⁹ Lastly, Respondent's argument that the document is inadmissible hearsay is similarly incorrect. Testimony adduced after the ALJ's August 16, 2016 Order by Middleton showed that the document was only accessible by supervisors and managers and thus any statements made within that document was an admission by a party opponent [Tr. at 1169]. The ALJ specifically rejected Respondent's argument that in order for the statement to be attributable to Respondent, the individual who made the statement must have supervisory authority over Brewster. There is no such requirement under Board law. *Vista del Sol Services, Inc. d/b/a Vista Del Sol Healthcare*, 363 NLRB No. 135 (2016). Furthermore, the document was offered as evidence of knowledge of Brewster's union activities and not for the truth of the matter asserted. *Trader Horn of N.J.*, 316 NLRB 194, 198 (1995), citing *Respond First Aid*, 299 NLRB 167, 169, fn.13 (1990). Lastly, the document is clearly a business record under FRE 803(6).

privilege log [Tr. at 178].¹⁰ When making his rulings on the privilege log, the ALJ numbered each document provided by Respondent as it corresponded to the number on the log. The record clearly shows that the ALJ identified *Document 58* as an email from “Mr. Twyman to a group of managers ... it is preceded by an email from Mr. Jackson to a group of managers copying Mr. Linzey and the subject is question marks, attachment Straw Poll #7” [Tr. at 178].¹¹ Because *Document 58* included a communication between Respondent and an attorney Mr. Linzey, it was deemed privileged and was not provided to the General Counsel nor was it identified or entered into evidence by any other party.

In contrast, GC 58, identified as “Straw Poll #1” was not provided pursuant to subpoena or listed on Respondent’s privilege log. It was offered into evidence pursuant to the testimony of former supervisor Middleton weeks after the discussion regarding privileged documents [Tr. at 1173]. When the document was offered, Respondent objected solely to relevance. The ALJ overruled the objection and the document was received into evidence [Tr. at 1173]. No privilege of any kind was asserted by Respondent.¹²

The document is not a communication made by an attorney to or from a client for the purpose of legal advice. The document indicates that to the extent it was circulated, it was only shared amongst local managers. There is no indication the document was ever communicated to or

¹⁰ The ALJ engaged in an exhaustive and thorough examination of each document listed on the privilege log. While some of Respondent’s straw polls were excluded based on being part of a communication to an attorney, others that were not included in such communications were required to be produced. In all, the ALJ required Respondent to provide six straw polls and upheld the privilege claim for fourteen others. None of those was GC 58/Straw Poll #1.

¹¹ The privilege log numbers can be seen on some of the documents in the record. For example, GC 39 has a handwritten “7” at the top, identifying the document as the seventh document of Respondent’s privilege log and discussed as such by the ALJ on the record.

¹² Even had such an argument been made, it would have appropriately been overruled. Twyman’s testimony (again, discredited by the ALJ) indicated that he believed that an attorney may have been present during the creation of GC 21, which is Straw Poll #4 [Tr. at 884] but made no such claim regarding GC 58. Furthermore, Twyman admitted that an attorney was not present during the creation of all the straw polls [Tr. at 886-887]. To the contrary, Middleton’s credible testimony showed that he was active in the creation and maintenance of several straw polls, including GC 58, and that he never witnessed an attorney present for the making of any of the documents [Tr. 1171 -1174].

by an attorney at any time. Thus, there is no basis for finding privilege.¹³ *Patrick Cudahy*, supra; *Smithfield Packing, Inc.* supra.¹⁴ Respondent's exception regarding the admission of GC 58 should be denied and the ALJ's ruling affirmed.

IV. The ALJ's Finding that George Brewster's Termination Violated Section 8(a)(3) is Supported by Substantial Record Evidence (Exceptions 36-37, 50-74, 216-238)

A. Record Evidence Supports the ALJ's Statement of Facts

Grand Rapids driver George Brewster was one of the main Union organizers in late 2014 [Tr. at 36-40, 81, 495, 738]. He distributed and gathered authorization cards and spoke to other employees about the benefits of unionization.¹⁵ Respondent was clearly aware of his position as an organizational leader as he was identified on two of Respondent's internal documents as a "union committee" member [ALJD 7 (14); GC 39, GC 58].

The ALJ's description of the events leading to Brewster's discharge are strongly supported by the record evidence and in some cases, are entirely unrefuted [ALJD 7-8]. The evidence established that Brewster, a 15 year employee, was terminated following an incident on February 17, 2015. While making a delivery that morning, Brewster left his keys in his truck, which was not an uncommon practice. While he was making the delivery, Transportation Supervisor Jim Brown, who was watching Brewster from another parking lot, took Brewster's keys, hid them and left

¹³ Even if the straw polls were created after local managers were told by attorneys that such documents needed to be created, it would be insufficient to establish privilege. The privilege only applies to testimony or evidence that reveals the *substance of communications* to or from an attorney or his/her subordinate. *Smithfield Packing Co.*, supra.. "It is the communication between the attorney and the client related to the giving of legal advice that is privileged not simply the documents that pass between them. Thus non-privileged documents – e.g. ordinary corporate records...cannot be swept within the privilege simply by being transmitted from a client to an attorney or vice versa." *Patrick Cudahy*, supra at 971, fn. 13. See also, *Simon v. G.D. Searle Col*, 816 F.2d 397, 402-404 (8th Cir.), cert denied 484 U.S. 917 (1987)("Risk management" documents used to keep track of control and anticipate costs for product liability litigation for business planning purposes held not privileged).

¹⁴ Furthermore, there is no basis for a finding that the document is attorney work product. There is no indication that the document was created by or at the instruction of an attorney in anticipation of litigation. Instead, much like GC 39, the document was created and used for one purpose – to track the employees union organizing activities.

¹⁵ Furthermore, he participated in two meetings where the union was discussed in December 2014 and January 2015, challenging Respondents position on the effects of unionization [ALJD 8(1-5); Tr. at 44-46].

without giving Brewster any indication as to the location of the keys [ALJD 8(11-31); Tr. at 48-50, 1474-1475, 1475, 1481, 1489; GC 30, GC 36].

When Brewster discovered that his keys were missing, he sent a text message to Brown, which was not answered by Brown for over 40 minutes. In the meantime, he informed the employee inside the customer's premises that his supervisor had taken his keys and that as a result, he was stuck in the parking lot until the matter was resolved. Brewster called supervisor Joe Quisenberry and informed him that Brown's actions were "fucking bullshit" and that unless someone was able to tell him where his keys were, he would have to take sick leave and someone else would have to finish the route [ALJD 9(1-18), Tr. at 50-51, 65, 1476, 1489, 1525¹⁶, GC 36, R 10]. Upon receiving the location of the keys from Brown 42 minutes after sending his original message, Brewster located his keys and finished his routes for the day without any complaint or further incident.¹⁷

Despite the fact that three of his immediate supervisors were involved with the incident, none of them discussed the matter with Brewster on that day. Transportation Manager Todd Yocum, however, did notify the Vice President of Operations Ted Twyman about the incident the following morning. Twyman in turn involved the Vice President of Human Relations Amy Campbell, who then proceeded to discuss the matter again with Brown, Quisenberry and Yocum. Twyman then contacted the customer, Charlie's Pub, who informed Twyman that she had no complaints about Brewster [GC 19].¹⁸

¹⁶ Brewster's supervisors contacted each other several times about Brewster and the location of his keys, but nobody bothered to inform Brewster of the location of his keys for 40 minutes.

¹⁷ The ALJ found, as established by the record evidence, that Brown was observing Brewster pursuant to Respondent's emphasis on conducting observations of drivers who had high "idle time." Driver observations were not entirely unusual. Respondent's procedure was for supervisors to observe drivers in the field, assess the driver based on a 20-point Driver Observation Report, review the report with the driver and have the driver sign the report [Tr. at 1420, 1806, GC 14, GC 15]. Hiding a driver's keys was not regular procedure and had not been done by any supervisor in 10 years [Tr. at 1505].

¹⁸ The customer did indicate that it had issues with a different driver on a different date, but there was no indication that complaint was pursued further by Twyman.

On February 19, Twyman, Campbell and Yocum interviewed Brewster about the incident at length. While Brewster was relatively unrepentant and referred to the entire incident as “bullshit” several times, he was not loud or insubordinate and answered all the questions posed to him truthfully. Despite his candor, Brewster was called in the following day and was terminated. Brewster was not given a reason for the termination nor did the Employer prepare or keep any documentation reflecting the underlying reasons [ALJD 10(7-19); Tr. at 53-57; R 10].¹⁹

Despite the fact that Respondent had yet to state a reason or record any justification for Brewster’s termination, Respondent continued to backfill its investigation even after Brewster was terminated.²⁰ Most notably, four days after Brewster was terminated Twyman sought out the only witness to Brewster’s actions on February 17 – Doug Emery, the employee from Charlie’s Pub. Emery informed Twyman that he had no complaints about Brewster’s performance, but did indicate to Twyman that he had complaints about two other drivers on other occasions [ALJD 10(22) – 11(3); Tr. at 1286, 1429; GC 38].²¹

¹⁹ Respondent argues in Exceptions 232 and 235, that the ALJ erred in not finding that it was Respondent’s regular practice not to provide employees with written reasons for discharge nor maintain any records in its own files about the reasons for employee terminations. Respondent makes its argument based on the discredited testimony of Campbell, who asserted that Respondent only began documenting terminations in February 2016, *after* the union campaign. She further testified that despite the fact that Respondent documented all other types of discipline, at the time of Brewster’s discharge, it did not keep written records for terminations. While not specifically cited by the ALJ, such testimony is inherently incredible. The idea that the country’s largest broad-line food supplier would have a practice to keep no recorded reason for terminations – when keeping track of written and verbal warnings - is ridiculous. Such a practice would necessarily make it vulnerable to various legal challenges, including unemployment proceedings. As such, the ALJ appropriately made no such finding. Furthermore, even assuming *arguendo* this incredible practice was true, it would have no bearing on the other facts establishing Respondent’s discriminatory motive.

²⁰ Campbell sought testimony from other employees who would be willing to “testify” that having keys hidden was not a “big deal,” and requested that supervisors review and authorize interview notes from the prior week [GC 37]. On March 2, six days after Emery confirmed that Brewster had not engaged in misconduct, Campbell again contacted Brown to review notes about Brewster and provide the driver observation forms for the other employees observed by him on February 17 [GC 34].

²¹ There was a plethora of evidence that other employees who did not support the Union who engaged in similar or more egregious behavior were issued substantially more lenient types of discipline. One anti-union employee even engaged in similar conduct as Brewster a day later, on February 18, and was merely issued a written warning. Notably, that discipline was not issued to that employee until March 12, well after the unfair labor practice charge regarding Brewster’s termination had been filed by the Union [ALJD 11(9-34); GC 41, 68-73, R 26].

B. The ALJs Legal Conclusions are Firmly Rooted in Board Precedent and Must Be Affirmed²²

The ALJ properly analyzed the above facts under the long-standing and Supreme Court approved standard set forth in *Wright Line*, 251 NLRB 1083(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) and its progeny.²³ The record clearly demonstrated that Brewster's termination was motivated entirely by union animus. The record evidence conclusively establishes that Brewster was engaged in union activity, that Respondent knew of his union activities and that it harbored animus toward those activities. *Id.*; *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014). Furthermore, the ALJ correctly determined that Respondent failed to sustain its burden that it would have terminated Brewster even in the absence of his union activity. *Mesker Door*, 357 NLRB 591 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958961 (2004).²⁴ The ALJ appropriately found that the manifest weight of the evidence established the pretextual nature of Brewster's discharge and that such a finding defeated the Respondent's attempt to meet its rebuttal burden. *Stevens Creek Dodge*, 357 NLRB 663 (2011).

²² Exceptions 36, 37, 50-52; 216-225.

²³ Respondent's Exceptions 217-220 seek to have the Board abandon the thirty-seven year old, court approved and consistently applied standard and for it to adopt the standard set forth in *McDonnell-Douglas Corp v. Green*, 411 U.S. 792 802-804 (1973) or in *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554 (8th Cir. 2015). Respondent's position merits little discussion. The *Wright Line* analysis has not only been specifically approved by the United States Supreme court, it has been required by various Boards over the past thirty years and ubiquitously utilized by NLRA practitioners. The burden shifting structure places the onus on both parties to show whether or not an adverse employment decision would have been taken in the absence of protected concerted activity, and has resulted in the Board both finding violations of the Act and exonerating Employers of such allegations. In *McDonnell-Douglas Corp.*, the Supreme Court analyzed the various burdens of proof under Title VII of the Civil Rights Act and makes no mention of the NLRB or its applicability to other statutes. In *Nichols Aluminum*, supra, the 8th Circuit court of appeals specifically reaffirmed the appropriateness of *Wright Line* in analyzing 8(a)(3) cases.

²⁴ Merely asserting a legitimate reason for an adverse action is not enough, particularly when the evidence shows that the asserted reason was either false, or not in fact relied on by Respondent in making its decision. *Lucky Cab Company*, 360 NLRB 271, 276 (2014).

1. The Record Supports a Finding of Brewster’s Union Activity and that Respondent Knew of That Activity

The evidence clearly demonstrated both that Brewster engaged in union activity and that Respondent was aware of such activity [ALJD 7 (39) – 8(7), Tr. at 35-45, 81, 738, GC 39, GC 58]. None of Respondent’s witnesses contradicted Brewster’s testimony. Respondent’s arguments to the contrary are baseless and the ALJ’s finding in this regard should be affirmed [ALJD 32 (1-7)].²⁵

2. The Record Conclusively Established Respondent’s Animus

Respondent’s position that the record does not demonstrate union animus is similarly meritless. Here, as found by the ALJ, there was substantial circumstantial evidence that showed Respondent’s strong and growing animus toward Brewster’s activities on behalf of the Union and toward the union organizing campaign in general. *Robert Orr/Sysco Food Systems*, 343 NLRB 1183 (2004)(evidence of animus can be direct or circumstantial).

Specifically, while Respondent’s avalanche of unfair labor practices did not pick up speed until after the petition was filed on March 11, it had, as of December 9, 2014, already violated 8(a)(1) by threatening Josh Meyers with a loss of wages. The ALJ appropriately determined that such threats of wage loss not only violate 8(a)(1), but are evidence of Respondent’s animus [ALJD 32(7-12)]. *W.E. Carlson Corporation*, 346 NLRB 431 (2006).

The ALJ also appropriately relied on the long standing Board precedent finding that the discharge of a union supporter in relatively close proximity to that individual’s union activity – as with Brewster – is an indication of animus [ALJD 32(14)]. *Nichols Aluminum*, 361 NLRB No. 22 (2014); *Murtis Taylor Human Service Systems*, 360 NLRB No. 66 (2014).

²⁵ Although not relied on by the ALJ, the record shows that both Twyman and Yocum identified Brewster as having a “bad attitude” which they equated with him being more likely to be a union supporter [Tr. at 138, 1431]. *Davis Electrical Contractors*, 291 NLRB 115, 122 (1988); *Armstrong Machine Company*, 325 NLRB 1109 (1998)(“bad attitude” is often a euphemism for pro-union sentiments.)

The ALJ further found that the entire course of Respondent's conduct both during and after Brewster's termination clearly demonstrated substantial animus. The evidence fully supports the ALJ's determination that Brown's observation of Brewster – a known union organizer - was not only different than the observations conducted with the other individuals that day²⁶, but was outside the established company protocol for such observations [ALJD 32(15); Tr. at 705, 1476, 1494-1495, 1505; R13, R14]. *JAMCO*, 294 NLRB 896 (1989)(departure from practice evidence of animus).²⁷

In departing from Respondent's established practice, Brown created a completely untenable situation for Brewster. By taking his keys and hiding them from him, then failing to answer his inquiries, Brown left Brewster stranded in a customer's parking lot without the capability to carry out his job functions or with any legitimate explanation to give to the customer. Respondent then allowed the situation to fester when Brown, despite communicating extensively with other supervisors in the fifteen minutes between him leaving Brewster and arriving at the next observation, failed to respond to Brewster's inquiry about his keys. It was entirely foreseeable on the part of Respondent that Brewster would react negatively both when speaking to Quisenberry that day and when asked about the incident during the interview two days later. Respondent took advantage of the situation to carry out its discriminatory discharge of the main union organizer.

²⁶ The record shows that on February 17, Brown observed two other employees – Dave Heflin and Eric Thelen -after Brewster. In both of those observations, Brown followed the established procedures, including filling out the appropriate paperwork and reviewing the observation with the drivers. When Brown found Thelen's keys in the ignition like Brewster, he merely took them out and handed them back to Thelen [Tr. at 1476-1478, R13, R 14].

²⁷ Furthermore, as noted by the ALJ, Brown's actions appeared to be an attempt to bait Brewster into either losing his temper or engaging in misconduct [ALJD 32(17-20)]. Brown's failure to follow even the most basic of Respondent's policies regarding the observation of employees shows that while the initial observation may have had a legitimate justification, the manner in which it was carried out evidenced animus toward Brewster and his protected concerted activities. The Board has found that an employer cannot intentionally provoke a response from an employee by illegal action and then subsequently hold that action as the basis for the employees' discharge. *Paradise Post*, 297 NLRB 876 (1990)(employer could not use employee's outburst in response to Employer's own malfeasance as a legitimate basis for discharge See also, *NLRB v. M&B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965) enfg. 146 NLRB 1634 (1965)("unjust and discriminatory treatment gave rise to an antagonistic environment in which [the] remarks were made"); *Brunswick Food & Drug*, 284 NLRB 663 (1987). While many of those cases relate directly to an employee's reaction to an employer's unfair labor practice, the general theory remains applicable to the present situation and was properly applied to the present case.

3. The ALJ Correctly Found that Respondent's Investigation of Brewster Demonstrated Pretext

The ALJ also appropriately noted that Respondent's elaborate investigation of the events of February 17, given the relatively minor nature of the offense, showed that the reasons for the discharge were a sham [ALJD 32(32-46)]. Such a finding is supported by the record.

Despite the fact that there were no complaints about Brewster's job performance on February 17, Yocum and Twyman subsequently re-interviewed Brown and Quisenberry, contacted Campbell and eventually involved Shaeffer in the investigation the following day. The intricacy of the internal investigation, given the minor nature of the conduct demonstrates animus and evidences the pretextual nature of Respondent's decision to terminate Brewster.²⁸ Furthermore, it was on this date that the tentative decision was made that Brewster should be terminated.²⁹

Respondent's interview with Brewster on February 19 was a meaningless formality. Respondent had already determined that Brewster was to be terminated and was merely attempting to give him an opportunity to legitimize Respondent's actions by either lying or acting inappropriately. Instead, Brewster answered all of the questions truthfully and was open about his feelings on the matter.

Only after going through all the motions and buttressing its own position did Campbell and Twyman inform Brewster that he was terminated. He was not given a reason. Furthermore, Respondent did not fill out a single piece of paper that indicated the reasons for his termination [ALJD 32 32-46; Tr. at 137]. Such a failure to present such a reason for discharge is further evidence of animus and pretext. *Lucky Cab Company*, supra. Furthermore, Respondent continued

²⁸ See, e.g., *West Maui Resorts*, 340 NLRB 846 (2003); *Casa San Miguel*, 320 NLRB 534, 564 (1995)(unusual, hasty conduct, contrary to usual practice, evidence of pretext); *Aliante Gaming, LLC d/b/a Aliante Casino and Hotel*, 346 NLRB No. 78 (2016). Employer's numerous failure to follow internal procedures in course of investigation "compelling" evidence of animus.)

²⁹ Respondent made such a decision without any consideration of his fifteen year service or the fact that he had only been disciplined twice in those fifteen years for different, yet equally minor, infractions. *Detroit Newspaper Agency*, 342 NLRB 268 (2004).

to investigate the matter even after it had completed its mission of terminating a union organizer, which demonstrates pretext.³⁰

4. The ALJ Properly Found that Strong Evidence of Pretext Rendered Further Examination of Respondent’s Proffered Defense Unnecessary [Exceptions 66, 68-74]

The record fully supports the ALJ’s determination that the substantial record evidence established Respondent’s proffered defense was pretextual and that Brewster was unlawfully terminated [ALJD at 32 (28-45)]. Such a strong showing essentially “defeats the Employer’s attempt to meet its rebuttal burden.” *Lucky Cab Company*, supra slip op. at 8 (2014) citing *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633 (2011). Accordingly, the ALJ determined that Respondent failed by definition to show that it would have taken the same action irrespective of the Brewster’s protected activity.³¹ While the ALJ properly determined that the weight of the evidence so conclusively established unlawful conduct that Respondent’s defenses need not be examined in detail, such an examination would not render a different result.

All three of Respondent’s proffered reasons for Brewster’s discharge arose entirely based on Brown’s unprecedented behavior toward Brewster on February 17 and all three are contrived, exaggerated and ultimately baseless. The Respondent not only seized on Brewster’s actions that day

³⁰ At that point, Brewster was gone and Respondent’s plan to rid itself of the main union supporter was effectively completed. However, Respondent continued its “investigation” [ALJD 32(40-46)]. As mentioned supra, for some unexplained reason, Twyman felt it necessary to speak to Charlie’s Pub employee Doug Emery a week later on February 24 [GC 38]. Campbell testified that there was certainly no intention of bringing Brewster back to work based on Emery’s testimony [Tr. at 1287], which suggests some other motive on the part of Respondent. Respondent, however, provided no explanation. In fact, there was no reason – other than a post-hoc attempt to justify an unlawful termination – for Respondent to follow up with anyone at Charlie’s pub about an incident that resulted in the termination of an employee five days prior or for it to obtain paperwork for a termination that had already taken place. Respondent’s attempt to retroactively legitimize Brewster’s termination is, as found by the ALJ, evidence of pretext. See *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1837 (2011)(Respondent’s post termination investigation into discriminate wrongdoing evidence of animus.).

³¹ *Metro Transport d/b/a Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382 (2003); A finding of pretext “necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, leaving intact the inference of wrongful motive established by the General Counsel.” *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

as the basis for the discharge, it exaggerated them to maximum effect to attempt to hide the true, discriminatory motive for his discharge.

a. There is No Evidence that Brewster was Insubordinate

While Respondent repeatedly mentioned “insubordination” as a basis for Brewster’s discharge, Respondent never outlined exactly what part of the conversation constituted insubordination. There was no evidence presented to show that Brewster refused to perform any of his tasks that day or that he refused any supervisory instructions. In fact, there is no evidence that any instructions were given to him at all – the source of his frustration lay with the fact that no supervisors would give him information on how to keep performing his job in a timely fashion. As such, Respondent’s position that Brewster engaged in any insubordination is specious. *Southern Maryland Hospital*, 288 NLRB 481, 495 (1988) (Exaggerated claim of insubordination evidence of unlawful motive); *Metro Transport LLC d/b/a Metropolitan Transportation Services, Inc.*, supra.

There is no dispute, however, that when Brewster spoke with Quisenberry on February 17, he used profanity in expressing his displeasure with the fact that Brown had taken his keys. As stated above, the reaction was not unexpected given the position that Brown had placed him in when he removed and hid his keys. This frustration was no doubt exacerbated by the fact that the longer Brewster remained stranded without the ability to make deliveries, the longer he went without getting paid by Respondent. This frustration was exhibited in the tone and language used by Brewster when he called Quisenberry.³²

³² In fact, the evidence shows that while Brewster was angry and used profanity when speaking to Quisenberry, he did use such language disparagingly *toward* Quisenberry, Brown or any other employee. He was spontaneously utilizing the language to punctuate his frustration with *the situation* and the Respondent’s apparent inability to solve it. Since Brewster was unable to get any information or support from Quisenberry that could remedy the situation, the language used was relatively “mild” compared to the gravity of the provocation. *Paradise Post*, supra at 895, fn. 2 (1990). The evidence showed that the use of fleeting profanity by employees and supervisors is not particularly rare [Tr. at 1390, 1525]. There was no evidence presented to show that any employee had been disciplined at any level for the use of profanity nor was there any evidence to show that Brewster had ever engaged in or been warned for the use of such language while working. *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

As such, the evidence demonstrably shows that the Respondent's attempt to use Brewster's use of profanity as a legitimate basis for termination is completely contrived. This exaggeration of the incident to attempt to show a legitimate basis for the discharge is evidence of pretext. *Southern Maryland Hospital*, supra.

b. Brewster Did Not Threaten to Abandon His Route

Respondent's second basis for termination is similarly specious. Respondent places much emphasis that Brewster "threatened" to abandon his route. There is no dispute that Brewster said that if he did not get his keys back, he would take a sick day and someone would have to cover his route for him [Tr. at 51]. He did *not* indicate that he was going to abandon his route even if his keys were returned to him. The distinction is crucial.

Brewster literally could not perform his work unless and until his keys were returned to him. Thus, his statement to Quisenberry was a simple, truthful statement of fact. Furthermore, Brewster's comment about having someone else finish his route was again a truthful, factual statement about Respondent's procedures if and when the keys for a truck are missing or locked in the cab [Tr. at 1382]. If Brewster had never found his keys, a supervisor would have, in fact, had to finish his route. Again, the "threat" here is predicated upon the fact that the Respondent had removed his ability to perform his job and that he could not go back to his duties unless Respondent removed that impediment.³³

Lastly, the evidence shows that as of 10:30 a.m. on February 17, Yocum and Quisenberry knew that Brewster had not abandoned his job and that he was continuing to the next customer. Brewster finished all his deliveries that day without incident or complaint. Despite Respondent's

³³ While the Respondent attempted to place emphasis on the fact that Quisenberry and Yocum were forced to "make other arrangements" to cover Brewster's route, there is no evidence to show they did anything other than check the tracking system, which showed Brewster going to his next delivery. There is no evidence that one supervisor, driver or manager was mustered to go to Charlie's Pub to take over, no schedules were shifted or rearranged, nothing was canceled or rerouted and no customers were affected. [Tr. at 1371, GC 65]. Again, Respondent exaggerated facts in order to hide its discriminatory motive. *Vulcan Waterproofing Company* 327 NLRB 1100, 1110 (1999)(exaggerated misconduct evidence of unlawful discharge.)

insistence that the course of events was serious, Brewster returned to the facility without so much as a word from Yocum and Quisenberry let alone having discipline issued to him. See *Advoserv of New Jersey*, supra at 4 (2016) (supervisors present during conversation that served as basis for discharge and yet took no action, evidence of pretext.)

c. Brewster Did Not Disclose Confidential Information to a Customer

The pretextual nature of the decision to terminate Brewster is also evidenced in Respondent’s final reason for discharging him, which is that he shared confidential information with a customer about Respondent’s internal business [Tr. at GC 73].³⁴ As with the purported “threats,” this reason a complete sham and as such, shows the Respondent’s unlawful motivation for Brewster’s termination.

Brewster did not deny that he spoke to Emery on February 17 and that he told Emery that his supervisor had taken his keys. There was no evidence to show that Brewster provided Emery with “confidential information concerning an associate, customer or company,” nor did Respondent indicate in its testimony what constituted the “confidential” disclosure [GC 73].³⁵ Again, Respondent’s basis for terminating Brewster – even when combined with the other spurious and baseless allegations described above, is a complete exaggeration of what would have otherwise been determined to be minor conduct. *Vulcan Waterproofing Co.*, supra.³⁶

³⁴ Respondent’s Exception 216 argues that the ALJ erred in finding that Respondent’s Confidentiality policy served as a basis for Brewster’s discharge, but Respondent’s own witness Twyman referenced the rule as the basis for Respondent’s position that Brewster engaged in misconduct [GC 73, Tr. at 1922].

³⁵ Brewster stated in his interview with Respondent that he told Emery because he was concerned about being stuck in the parking lot and wondered if he was going to be sitting “there all day” [R 10].

³⁶ As for Respondent’s assertion that Brewster involved a customer in Respondent’s business, it seems to take the position that Brewster’s mild complaint about a supervisor taking his keys – made to Emery, another employee – constitutes legitimate grounds for termination. However, the Board protects the rights of employees - even those of different employers – to speak with each other about their concerns about working conditions without fear of reprisal. See *Andronaco Industries, Inc.*, supra; *Salon/Spa at Boro, Inc.*, 356 NLRB 444 (2010)(employees discussing grievances with other employees is preliminary groundwork necessary to initiate group activity.)

Furthermore, Respondent's argument in this regard is undercut by the fact that its own manager – on two different occasions –involved the customer in an internal matter. There was no complaint *about Brewster* that required any follow up by Twyman. Even after Twyman confirmed with the customer that there was no issue on February 18, he again involved the customer in its internal business when he followed up with Emery a week later. By February 24, Twyman had more contact with the customer and provided it with more information about the incident than Brewster ever had on February 17.

Respondent's defense regarding Brewster's conversation with Emery is not only potentially unlawful on its face, it is implausible under the circumstances and provides evidence of pretext.

d. Disparate Treatment Evidence Supports the ALJ's Findings

Respondent further argues that the ALJ did not properly consider its evidence of comparable discipline to show that it would have taken the same action irrespective of Brewster's Union activity. Specifically, Respondent argues that the written warning issued to employee Keith Purvis in 2013 absolves it of its discriminatory motive and that the ALJ failed to address it directly or accord it the weight it deserved [R 26]. Purvis' suspension, however, is completely distinguishable. In fact, it supports a finding that Respondent's engaged in disparate treatment absent union activity.

Purvis was suspended in September 2013 for allegedly complaining to customers about his fear that he would be terminated for using his cell phone while driving [R 26]. The suspension was based on two customer complaints [Tr. at 1256, R 26].

In contrast, there were no complaints about Brewster, even when such complaints were solicited by Twyman. Unlike Purvis, Brewster was not written up or suspended – he was terminated. Purvis suspension shows again that in the absence of union activity, the Respondent issued lesser discipline to employees even if their transgressions resulted in an actual complaint made by a customer.

Respondent's disparate treatment of employees outside the union campaign setting is further demonstrated, as found by the ALJ, by the failure of Respondent to discipline employees even when those employees engaged in behavior much more egregious than Brewster. One employee, Gary May, had three separate complaints made about him by customers for using profanity, rudeness and failure to adequately perform his tasks in 2010 and 2014. He was issued no discipline for the two complaints in 2014 and only issued a write up for the other in 2010. Employee David Achorn had customers complain both about his complaints about Respondent's policies, but also about his bad attitude and yet was issued no disciplinary action.³⁷

Perhaps the most egregious piece of evidence establishing Respondent's post-hoc attempt to retroactively legitimize Brewster's termination involves discipline issued to another driver James Koepsell on March 12 [GC 41].³⁸ On February 18 – the day after the incident that led to Brewster's termination – Koepsell apparently sent an “inappropriate email” regarding his route to two supervisors. Then, on February 19 Koepsell refused to work the route that had been assigned to him and took what Respondent considered to be a sham sick day [GC 41]. However, despite what the Respondent considered to be “insubordination,” Koepsell was issued no discipline that week, the week after or the week after. In fact, Koepsell was not issued the discipline until almost a full month after the incident and well into the unfair labor practice investigation [GC 41].³⁹ Such lenient treatment of a non-union supporter for similar treatment is further evidence of Respondent's unlawful motivation. *Advoserv of New Jersey*, supra.

³⁷ Gary May: 11/13/14 complaint by customer for rudeness and a failure to properly deliver the products, no discipline [GC 67]; 11/24/14 customer complaint for use of profanity, no discipline [GC 68]; write up for inappropriate comments made about fellow driver to customer [GC 69]. Achorn: Customer complaint about rudeness no discipline [GC 70]; Customer complaint about rudeness and company policy no discipline [GC 71].

³⁸ Koepsell, another Grand Rapids delivery driver, was designated on Straw Poll 4, dated March 16 as a “1” and a likely vote against the Union. (GC 21).

³⁹ Koepsell, like Brewster, made some sort of inappropriate comments to his supervisor (or in his case, two supervisors). Koepsell, however, went beyond what Brewster did and actually used a sick day to abandon a route that he did not want to work. And yet, Twyman was not notified, Campbell and Shaeffer were not involved and no contemporaneous investigation resulting in fourteen pages of notes was performed. Koepsell was not terminated or even suspended, but was only issued a written warning.

V. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) Repeatedly During Several Captive-Audience Meetings During the Critical Period [Exceptions 145, 148, 152, 158-163; 185, 189-194; 263-264, 267]

Less than a month after the termination of Brewster, on March 11, 2014, the Union filed the petition seeking an election for all drivers and warehouse employees in the Grand Rapids facility [GC 1(c)]. Starting soon after the petition was filed and continuing through the critical period, Respondent conducted numerous weekly captive-audience meetings [Tr. at 132; GC 5].⁴⁰

There were two major themes at these meetings: (1) threatening employees with loss of wages and benefits by telling them that if they chose to be represented by the Union, that bargaining would begin with “a blank page” and (2) threatening employees that if they chose to be represented by the Union, they would lose seniority in Respondent’s pending merger with U.S. Foods. Respondent’s highest level managers committed numerous other serious and substantial unfair labor practices during these meetings, including: threatening employees with loss of access to supervisors and management, job loss, and that a strike was inevitable; and soliciting and promising to remedy employee grievances. As it often is in *Gissel* cases, the totality of Respondent’s misconduct is much greater than the individual violations with respect to the lasting effect on the employees.⁴¹

A. The ALJ Correctly Found that Respondent Threatened Loss of Wages and Benefits During Multiple Captive-Audience Meetings

It is undisputed that during a series of captive audience meetings, Respondent’s two highest ranking officials, Shaeffer and Twyman, repeatedly told the employees that if they chose to be represented by the Union, bargaining would start with a “blank page,” that there would be “nothing

⁴⁰ Occasionally, Respondent used power point presentations and visual aids when speaking to the employees [GC 6, 7 and 8]. These meetings were otherwise unscripted, with the sole exception of a written statement read to the employees by President Shaeffer in the final days before the mail ballot and manual elections [Tr. at 1339; GC 54(b) at 23-24].

⁴¹ The Board’s description of an employer’s actions in a similar case is particularly apt : “The Respondent’s misconduct coalesced into a potent theme of contrasting its current personal commitment to the employees with the prospect of a “third-party” union that would lead only to dire economic consequences for them.” *Novelis Corporation*, 364 NLRB No. 101, slip op. at 6 (2016).

on the table” and that they would “start from ground zero” [GC 8, GC 53(b), GC 54(b)].⁴² Some of the statements were recorded.⁴³

‘Bargaining from scratch’ statements violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. “For the duty to bargain ordinarily forecloses unilateral changes, and bargaining begins with existing wages and conditions.” *The Developing Labor Law* at 155-156 (6th ed. 2012).⁴⁴ In reviewing such statements the Board has stated that “‘bargaining from scratch’ is such a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.” It emphasized that when such a statement can be reasonably read in the context of a threat to either end existing benefits prior to bargaining or to “adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees” for selecting the union, it will find a violation. *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977).⁴⁵

In applying the standard to the facts here, the ALJ found that Respondent’s repeated references to bargaining from a “blank page” and similar statements went beyond descriptions of

⁴² Shaeffer and Twyman were not the only ones to make such threats to the employees. Bobby Jordan, Director of Labor Relations for Respondent’s corporate parent, Sysco Corporation, came to the Grand Rapids facility and made similar threats [Tr. at 450-451, 466-467, 517-518, 670-671, 678-679; ALJD at 13, fn. 49].

⁴³ For example, at the March 26 meeting in Alanson, Twyman referenced Shaeffer’s “blank page” visual aid and stated: “What we do in reality is we start at A, meaning we put everything on the table – sorry, well, let me say this. **We put nothing on the table. We put a blank sheet of paper, and you just start making proposals, and you build it from there.** You don’t start with what we’ve got and build from there, and that’s what we just want to make it clear to everybody how this thing works. And unfortunately **it becomes a hell of a lot more of a business decision at that point than B, which is more of what we have now, is what we’re trying to work on now.** what we have been working on since I got here nine months ago” [GC 53(b) at 6-8].

⁴⁴ On the other hand, such statements do not constitute a violation when the employer’s other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

⁴⁵ In so finding, the Board stressed that “the presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer’s remarks,” and concluded that the employer’s statements, taken together, constituted an unlawful threat. See also, *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) citing *TRW United Greenfield Division*, 245 NLRB 1135 (1979); *Stumpf Motor Co., Inc.*, 208 NLRB 431 (1974); *BP Amoco Chemical*, 351 NLRB 614, 617–618 (2007).

the normal give and take of collective bargaining, and are more reasonably construed as a result of union selection versus a possible outcome of good faith bargaining. Respondent told employees that unionization would not result in increased benefits or wages. In fact, it is clear from the transcripts of the recorded meetings that Respondent's statements reasonably could be understood by the employees to be threats to their existing wages and benefits if they unionized. Furthermore, when viewing the context in which the statements were made, the evidence conclusively establishes that Respondent communicated to employees that what they would ultimately receive in bargaining would depend on what the Union would be able to induce Respondent to restore.⁴⁶

Indeed, during the same meetings where Respondent made its "blank page" threats, it showed the employees a series of slides describing how Respondent intended on approaching collective bargaining should the employees choose to be represented by the Union [Tr. at 1345; GC 6]. The presentation included a slide stating: "COLLECTIVE BARGAINING – ***If*** (emphasis added) you decide to hire the Union to represent you ... The Company's Only Concern Will Be to Do What Is Best for the Company – Nothing Will Happen That The Company Does Not Want to Happen" [GC 6 at 17].

Similar threats surrounding the "blank page" presentation occurred outside of the captive-audience meetings. The same week that Respondent began making its "blank page" remarks, it mailed a letter to the employees' families falsely stating that the Union's "only weapon" to try to get the Company to agree to its demands is to call a strike [GC 23]. The letter then threatened that the employees and their families "can lose everything by being permanently replaced in an

⁴⁶ For example, at the March 26 meeting in Alanson, Ted Twyman told the employees that Respondent would "**put nothing on the table. We put a blank sheet of paper, and you just start making proposals, and you build it from there.** He went on to threaten that if Respondent was forced to engage in collective bargaining with the Union, Respondent would view the employees' terms and conditions as "**a hell of a lot more of a business decision at that point than B (the employees current wages and benefits), which is more of what we have now, is what we're trying to work on now.**" During the same meeting, Twyman told the employees: "**I just know as a fact, when a third party gets involved, it doesn't become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here?**" [GC 54(b) at 9-11].

economic strike called by the union over its demands at the bargaining table,” “and the only way to avoid running the threat of a union strike and losing everything is to vote no in the election.”⁴⁷

In *Gissel*, the Supreme Court observed that in evaluating the employer’s statements, the Board must take into account “the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.* supra at 617 (1969). In the context of its other serious and substantial unfair labor practices, the “blank page” statements conveyed to the employees an intent by Respondent to adopt a regressive bargaining posture for the purpose of penalizing the employees for selecting the Union (e.g. “it (the employees’ wages and benefits) becomes a hell of a lot more of a business decision at that point (if the employees are represented by the Union) than B, which is more of what we have now, is what we’re trying to work on now” [GC 53(b) at 6-8]. Respondent’s infrequent, perfunctory asides regarding the normal give and take of bargaining were rendered meaningless in the context of its repeated, explicit threats regarding the ultimate futility of the bargaining process.⁴⁸ In this context, Respondent’s “blank page” and similar statements unlawfully threatened the employees with a loss of wages and benefits in violation of Section 8(a)(1).

B. The ALJ Correctly Found that Respondent Threatened Employees with Loss of Seniority During Multiple Meetings

The ALJ appropriately found that on various dates during the critical period, Respondent threatened employees that they would lose their seniority if the employees chose to be represented

⁴⁷ In the context of these additional threats to the employees’ existing wages and benefits, Respondent told its employees that it would “**put nothing on the table. We put a blank sheet of paper**” [GC 53(b) at 6-8]; “**You’re starting with nothing**” [Tr. at 466-467]; “**Everyone would start on a blank page** and we would take our chances with the Union. We’re going to **start at minimum wage**” [Tr. at 555-556]; “He pointed to just this **blank piece of paper and said this is where your contract begins** [Tr. at 261-262]; “We were going to start with a blank slate and everything, **we start from ground zero and we have to build from there**” [Tr. at 518-519].

⁴⁸ For example: “Negotiations With A Union Gets You NOTHING That The Company Refuses To Give!” and “If There Is No Agreement What Is The Union’s Only Weapon: STRIKE!” and “The only way to avoid running the threat of a union strike and losing everything is to vote no” [GC 23].

by the Union.⁴⁹ During the meetings, Respondent showed employees a series of slides, indicating that their seniority was at risk in the event of the possible merger with U.S. Foods, but only if they chose to be represented by the Union [GC 6 at 32-34]. Both Twyman⁵⁰ and Shaeffer repeatedly made baseless predictions about the employees' seniority in the event of a merger, during captive audience meetings at Respondent's Grand Rapids and Cadillac facilities.⁵¹

When an employer makes a prediction as to what effects unionization may have on its company, it must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control. "If there is an implication that an employer may or may not take action on his own initiative for reasons 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.*, supra at 618 citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, (1965).

Respondent's multiple threats that its employees' seniority rights were at risk if they chose to be represented by the Union was not a reasonable prediction based on available facts; nor was it a demonstrably probable consequence beyond Respondent's control. Instead, it was factually baseless and a gross misrepresentation of well-established law regarding the merging of seniority lists when employees are hired into an existing unit.

⁴⁹ By way of background, during the organizing campaign a planned merger between Respondent and its competitor U.S. Foods was pending [Tr. at 141]. The possible merger was a matter of concern to the employees, especially as it pertained to seniority in the event that U.S. Foods employees came to work at Respondent's facilities [Tr. at 142; 244; 1005-1006].

⁵⁰ During the March 19 meeting, Ted Twyman told the employees that if they remained non-union, Respondent would "respect" their seniority in the face of a merger with U.S. Foods. Later at the March 26 Alanson meeting Twyman stated, "**I would feel a lot more confident, in your guys' shoes, if it's a non-union company, knowing that we are going to respect your guys' seniority**" [GC 53(b) at 25-26]. In contrast, he told employees that the union would "value that...seniority of that U.S. Foods guy"...and that "If we go union, that discussion is out of our hands and frankly that's – don't give a shit." [GC 53(b)].

⁵¹ Shuttle driver Thomas Holton testified to similar remarks made by Shaeffer during a meeting at the Cadillac facility [Tr. at 415]. Former Warehouse Supervisor Adam Middleton testified regarding a discussion of seniority during the Grand Rapids meetings that Shaeffer told employees that a non-union Sysco driver would be given preference over the union U.S. Foods employees unless the Sysco employees voted for the union [Tr. at 1176-1177].

Respondent's prediction that the Union would favor the seniority rights of the employees transferring from U.S. Foods because they had been in the Union longer was not only entirely baseless factually,⁵² it was not possible as a matter of law. It is unlawful under the Act to place employees at the end of the seniority list because they were not represented by a particular union or any union in their prior employment. *Whiting Milk Corp.*, 145 NLRB 1035 (1964).⁵³ As such, the ALJ correctly found that these statements were threats based on misrepresentation and coercion in violation of 8(a)(1).

C. The ALJ Correctly Found that Respondent Violated Section 8(a)(1) During the March 19 Meeting in Alanson

The ALJ's determination that Respondent made numerous and severe unlawful statements to employees at the March 19 captive-audience meeting in the Alanson depot are supported by substantial record evidence, including an audio recording of the meeting [GC 52(a) and (b)].

1. Threats of Loss of Access to Supervisors and Management

In that meeting, Twyman repeatedly informed employees that the relationship between the employees and supervisors and the manner of communication would fundamentally change. He suggested that the current non-union paradigm allowed Respondent to address employees' problems and concerns and that unionizing would destroy that positive relationship.⁵⁴ Twyman's suggestion

⁵² Indeed, Respondent presented no evidence of any objective facts supporting its claims to the employees that jeopardized seniority vis-à-vis merging U.S. Foods employees was a "probable consequence beyond Respondent's control" if the employees chose to be represented by the Union.

⁵³ It is well established that a union and an employer may contract to vest certain employment rights based on seniority in a represented unit. *Interstate Bakeries Corp.*, 357 NLRB 15, 17 (2011) (Parties to collective-bargaining agreement do not engage in unlawful discrimination by placing a group of employees hired or merged into the unit at the end of the seniority list on the grounds that they lacked seniority in the unit). Thus, contrary to Respondent's slides and its remarks to the employees, the best way for the Sysco employees to protect their seniority in the event of U.S. Foods employees merging into their unit, would have been to vote in the Union and negotiate an agreement with Respondent placing any employees hired or merged into the unit at the end of the seniority list on the grounds that they lacked seniority in the Sysco unit. See *Riser Foods*, 309 NLRB 635, 636 (1992) (End-tailing of new bargaining unit employees' seniority lawful when it is based on unit rather than union considerations). See also *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617, 617 fn. 3 (1995) ("the unions advocated granting less seniority to one of the employee groups on the impermissible basis that the employees in that group had not been represented by a union as long as the employees in the other group").

⁵⁴ During the meeting, Twyman indicated that "the way we were talking would fundamentally change," and "I would just encourage you guys to continue to remember that....the relationship we have here and our ability to take your

that everything would be filtered through the Union reasonably implied that employees would lose their right to directly communicate grievances or other concerns to management, contrary to Section 9(a). The Board has held that employer statements that misrepresent employee rights under the Act and lead employees to believe that the employer is privileged to take some unlawful action in response to their union activities constitute threats of retaliation for engaging in those activities, and therefore violate Section 8(a)(1).⁵⁵

Twyman was not merely predicting changes based on objective facts beyond Respondent's control – such as the likely negotiation of a contractual grievance procedure or the statutory requirement that the Union be offered an opportunity to be present during the adjustment of individual grievances – he was threatening employees with the revocation of an important benefit, i.e., the ability to communicate with management directly that Congress explicitly carved out for individual employees to retain. Respondent also explicitly threatened that unionization would result in a less harmonious relationship with management in general.⁵⁶ Even standing alone, without the backdrop of an intense organizing campaign and Respondent's other unfair labor practices, Twyman's statements go beyond just a simple explanation of how the relationship between Respondent and the employees will change. Rather, Twyman misrepresented employee rights

comments and me and Todd's feed those up..." and further "...but I just know as a fact, when a third party gets involved, it doesn't become hey, how – what can we do for the employees? It becomes how do we stop this thing right here?" [GC 52(b) at 9-11].

⁵⁵ Moreover, Twyman misstated the law by misrepresenting the second proviso to Section 9(a), which only requires that the union be given the opportunity to be present during the adjustment of grievances. Section 9(a) of the Act grants certified bargaining representatives the authority to serve as the exclusive representative of all employees in a given unit, but it also contains two provisos qualifying such exclusivity. Those two provisos state: "[t]hat any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment. See e.g., *Vemco, Inc.*, 304 NLRB 911, 913, 925-26 (1991) (finding employer coerced employees by misrepresenting that it could lawfully close its plant in response to an organizing drive and reopen with new employees).

⁵⁶ Twyman reinforced this threat during the final Alanson meeting on April 21, when he told the employees how he would deal with any issues they brought to him if they chose to be represented by the Union: "... if it's not a contractual issue, I'll put it on the back burner back here. I've got to deal with all the grievances first and all the other things that are stacking up and with the timelines up." [GC 54(b) at 67-68].

under Section 9(a) and threatened employees with a broken relationship with management, an unlawful threat of retaliation in violation of Section 8(a)(1).

2. Threats of Loss of Benefits

During the March 19 captive audience meeting in Alanson, Transportation Manager Todd Yocum and Twyman informed employees that the annual cost-of-living increase that employees normally received [Tr. at 1070] would not be forthcoming and that wages would be “frozen until the contract is ratified” [GC 54(B) at 13].

Respondent’s representation that the normal and expected COLA increases would be frozen is coercive and interfered with the employees’ Section 7 rights. In *DHL Express, Inc.*, 355 NLRB 1399 (2010), the Board found a violation where the employer, in a memo to employees, said that, if they selected the union as their bargaining representative, “all of your wages and benefits would be frozen pending the outcome of negotiations.” *Id.* Twyman’s statement here suggests that the employees’ annual COLA increase would cease if they chose to be represented by the Union and is a violation of Section 8(a)(1) of the Act. See also *W. E. Carlson Corp.*, supra at 443 (2006).

3. Solicitation of Employee Grievances and Promises to Remedy

As noted above, during the March 19 captive audience meeting in Alanson, Twyman told the assembled employees that their concerns were being addressed by the highest levels of management and that their concerns would be more likely to be remedied if the employees remained non-union.⁵⁷

⁵⁷ Twyman informed employees: “I would just encourage you guys to continue to remember that, remember that the relationship we have here and our ability to talk and our ability to take your comments, and me and Todd’s feed those up – and you’ve got to believe me, they’ve been fed up lately...The comments have gone to a level of corporate that I didn’t know existed, but they’ve never talked to us before... So I’ll say this with faith or with confidence, that the issues and the conversations that we’re having are going at all times to the highest level of corporate, and there’s a lot of thought going on about what those comments mean ... those are the kernels of information that we take and push up. You know, the guaranteed 40 issue, that’s come up, and some of the pay issues and safety bonus – safety bonus is a big one. That’s gone up to the levels of everyone understanding that that was an issue here, and that’s one thing that’s driven some of the discomfort and unhappiness here in Grand Rapids.” [GC 54(b) at 9-11]; “[B]ut I just know as a

The solicitation of employee grievances during an organizing campaign “raises an inference that the employer is promising to remedy the grievances,” an inference that is “particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances.”⁵⁸ In the instant case, there is no evidence of any past practice of addressing employee concerns [Tr. at 267].

Here, Twyman’s statements could not have been a clearer invitation to the employees to express their grievances to Respondent. Twyman then stated “as a fact” that “when a third party gets involved, it doesn’t become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here?” This remark conveyed to the employees that while Respondent would concede as little as possible to the Union, without the Union, the highest levels of Sysco Corporation management were willing to address the issues driving the employees’ “discomfort and unhappiness.” The message could not have been any clearer – the employees could expect more generous treatment from Respondent, but only if they rejected the Union. Given this highly coercive context, the ALJ was correct to find that Twyman’s statements constituted unlawful solicitation and implied promises to remedy the employees’ grievances in violation of 8(a)(1).

D. The ALJ Correctly Found that Respondent Further Violated Section 8(a)(1) During the March 26 and April 21 Meetings in Alanson

1. Threat to Eliminate Employee Exchange Program Benefit

On March 26, Twyman and Yocum conducted another captive audience meeting⁵⁹ at Respondent’s Alanson facility, where they discussed an intercompany employee exchange program

fact, when a third party gets involved, it doesn’t become hey, how – what can we do for the employees? It becomes how do we stop this thing right here?” [GC 52(b) at 9-11].

⁵⁸ *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013) (citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004) (Employer’s unprecedented visits to a facility during which manager spoke to employees and revealed employer’s knowledge of the concerns motivating a union organizing campaign was an unlawful solicitation of employee grievances and an implicit promise to remedy those grievances).

⁵⁹ This meeting was also recorded [Tr. at 1055; GC 53(a) and (b)].

utilized by Respondent to ease its employees' workload during the extremely busy summer tourist season in northern Michigan [Tr. at 1435; 1379].⁶⁰

The exchange program was an important benefit to the employees, easing their workloads during Respondent's very busy summer months [Tr. at 1379]. Twyman told the employees that the program was "on hold" and "in flux" for the upcoming summer because of the employees' organizing activity.⁶¹ Moreover, Twyman threatened that the program would be discontinued permanently if its employees chose to be represented by the Union to prevent employees from discussing and comparing their terms and conditions of employment with employees from other operating companies.⁶²

Respondent's statements threatening elimination of the exchange program were not predictions of consequences of bargaining or the result of an agreement with the Union. Rather they were explicit threats to diminish the quality of employee working conditions should the employees select the Union. Such statements "cannot but effect employee sentiment regarding the

⁶⁰ Essentially, Respondent would request additional manpower from other Sysco operating companies for the summer. In turn, Respondent would allow its employees to work on a temporary basis at other operating companies (in Florida, for example) during the winter [GC 53(b) at 27-28].

⁶¹ At the meeting, Twyman stated: "Inter-company employee exchange. Okay. We currently switch people with West Coast Florida, North Texas, South Florida. Guys, I'm going to say that it's highly unlikely that independent intercompany exchange will continue after, after a potential union – unionization effort, okay... I had four guys lined up to come in this summer, and that's all on hold right now. There's very little interest from Florida to send those guys up here because of the noise that's going on (i.e. the Union organizing campaign), and I would probably do the same thing if there were noise going on in Florida about sending a guy, you know, asking one of you guys to go down there. We just don't – the Company doesn't encourage that." And further, at the April 21 meeting: "I'll be honest, the way things are right now with – we had on our books and a plan to this summer to bring up four guys from the west coast of Florida. That got scrapped because of what we had going on out there. That has thrown a wrench into the planning of the summer. Now, we've talked about other plans. We've got a working plan in place. But with what we've got going on here, that plan is in a constant flux. Now, I'm confident we're going to get the summer covered in terms of other staffing, but in terms of what we went through, it's just premature with this right now, until after May 7th (i.e. the day of the election), to really do a deep dive on that "[GC 54(b) at 31].

⁶² Yocum also stated: And were there times we could have used some drivers? Absolutely. But it was never even brought up on the table that we bring other people in, union or non-union. You know, even union people because you don't want, you know, hey, these people have this contract, these people have this in their contract, and you start getting people talking ... These guys are making more than these guys. So then they start talking and then you just – you're causing problems for everybody. So basically, you know, when you're in that environment, you're not going to put guys together [GC 53(b) at 27-28].

decision to support or oppose the Union.” *United Artists Theatre Circuit, Inc.*, 277 NLRB 115, 121 (1985).⁶³

2. Unlawful Promise to Remedy Grievances at the April 21 Meeting

On April 21, Tom Shaeffer and Ted Twyman returned to Alanson to meet with the northern depot employees for the final time before the beginning of the mail ballot election [GC 54(b) at 23-24]. During the meeting, Shaeffer informed employees, in response to complaints about working conditions, that Respondent would “develop, implement, initiate local programs” to help address those issues [GC 54(b) at 47-48]. Shaeffer then asked the employees to “give [Respondent] a year” and if Respondent had not succeeded in “progressing [employees’] earnings potential” within that year, employees could “vote it in.” [GC 54(b) at 53]. Shaeffer’s remarks coupled with Twyman’s earlier solicitation and implied promise to remedy grievances at the March 19 meeting violated the Act and unlawfully interfered with the conduct of the election.⁶⁴

E. The ALJ Correctly Found that Respondent Threatened Employees with Job Loss in Late April in West Branch

The ALJ correctly determined that in late April, Tom Shaeffer told employees during a captive audience meeting in the West Branch depot that Respondent’s customers preferred to have a non-union carrier, and that if the employees chose to be represented by the Union, Respondent would lose customers jeopardizing the employees’ jobs [Tr. at 419-420].⁶⁵

⁶³ See also *Prestige Ford, Inc.*, 320 NLRB 1172 (1996) (threatening salesmen with loss of demonstration car privileges violated 8(a)(1)); *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995) (illegal to threaten loss of flexible schedule); *Foley Material Handling Co.*, 317 NLRB 424 (1995) (threats to discontinue breaks and to stop driving workers to and from work site constituted unlawful reprisal).

⁶⁴ *Desert Aggregates*, 340 NLRB 289, 298 (2003) (Employer statements that union campaign had “rung bells all the way to the top” of company coupled with an appeal that employees should “give the company a year” and see what changes would be made was an unlawful solicitation and promise to remedy employee grievances); *Jefferson Smurfit Corp.*, 325 NLRB 280, 283 (1998) (Employers entreaty to employees “if you have further problems or there’s things here in the plant that you don’t like, why don’t you give us a chance to address them” found to be unlawful solicitation and implied promise to remedy grievances in violation of Section 8(a)(1)). See also *Multi-Natl. Food Serv.*, 238 NLRB 1031, 1036 (1979) citing *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977), citing *Uarco, Incorporated*, 216 NLRB 1 (1974).

⁶⁵ Shaeffer made similar statements during a meeting on April 21, in Alanson [GC 54(b) at 34-35].

Shaeffer's remarks were not "carefully phrased on the basis of objective fact to convey (Respondent's) belief as to demonstrably probable consequences beyond (its) control." *NLRB v. Gissel Packing Co.*, supra at 618 (1969). As such, Shaeffer's remarks at the West Branch facility in late April 2015, threatening employees with job loss resulting from the loss of customers if the employees unionized violated Section 8(a)(1).⁶⁶

F. The ALJ Correctly Found that Respondent Threatened that a Strike was Inevitable and Made a Related Threat of Job Loss

During several captive audience meetings in March 2015, Respondent showed the employees a slide presentation, including several slides describing how it intended on approaching collective bargaining if the employees voted to be represented by the Union [Tr. at 1345; GC 6 at 15, 17, 27]. The slides informed employees that negotiations with the Union gave employees "NOTHING That The Company Refuses to Give," that the Company would only do what was "Best For The Company" and that "Nothing Will Happen That the Company Does Not Want to Happen." The slides further stated that if there was no agreement with the Union, the only weapon the Union would have would be a strike [GC 6 at 15, 17, 27]. A few days later, Respondent compounded the message when it sent a letter to the employees and their families, threatening that they could "LOSE EVERYTHING BY BEING PERMANENTLY REPLACED IN AN ECONOMIC STRIKE CALLED BY THE UNION OVER ITS DEMANDS AT THE BARGAINING TABLE." The letter further stated that the **ONLY** way to avoid the strike and "losing everything" was to vote against the Union [GC 22].

In the instant matter, the thrust of Respondent's slides and letter (i.e., the only thing the Union can do (its "only weapon") to try to get the Company to agree to its demands is to call a

⁶⁶ *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3 (1992) decision vacated on other grounds 36 F.3d 1130 (D.C Cir. 1994) (Employer's predictions of layoffs and job loss due to plant's lack of competitiveness if union won election, was unlawful; anti-competitiveness theme in its speeches and literature was not carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond its control). See also *Overnite Transportation Co.*, 296 NLRB 669, 670 (1980) (When an employer equates unionization with dire consequences, without reference to collective bargaining or to the give-and-take of the bargaining process, it violates the Act).

strike) was to convince the employees that striking would be the only way to obtain concessions. Not satisfied with threatening its employees, Respondent extended its scare tactics to the employees' families warning them that they "can lose everything" if they voted for the Union.⁶⁷

To meet its statutory obligation to engage in good faith bargaining, an employer is required to make reasonable efforts to compromise its differences with the labor organization which represents its employees. *Regency Service Carts*, 345 NLRB 671 (2005). An employer violates the Act when it "engage[s] in a pattern of conduct evidencing a preconceived determination not to reach agreement except on its own terms, irrespective of the Union's bargaining powers, approach or technique." *Pease Co.*, 237 NLRB 1069, 1070 (1978).

A preconceived determination not to reach agreement except on its own terms is precisely what Respondent communicated to the employees in its slide presentation in March. By telling them: "***If you decide to hire the Union to represent you ... The Company's Only Concern Will Be to Do What Is Best for the Company***"⁶⁸ [GC 6 at 17]; and that Respondent would neither compromise with, nor concede anything to, the Union at the bargaining table (i.e. "***Nothing will happen that the Company does not want to happen***" [GC 6 at 15]), it would be entirely reasonable for the employees to conclude that Respondent would not engage in good faith bargaining if the employees selected the Union as their bargaining representative.

⁶⁷ In arguing against unionism, an employer is free to discuss rationally the potency of strikes as a weapon and the effectiveness of the union seeking to represent his employees. It is, however, a different matter when the employer leads the employees to believe that they must strike in order to get concessions. A major presupposition of the concept of collective bargaining is that minds can be changed by discussion, and that skilled, rational, cogent argument can produce change without the necessity for striking. Employees should not be led to believe, before voting that their choice is simply between no union and striking. *Fred Wilkinson Associates*, 297 NLRB 737 (1990) citing *Amerace Corp.*, 217 NLRB 850, 852 (1975) and referencing *Boaz Spinning Co.*, 177 NLRB 788 (1969).

⁶⁸ This "If-Then" threat was made in the context of the March 19 captive audience meeting at the Alanson facility when Twyman told the employees: "the issues and the conversations that we're having are going at all times to the highest level of corporate ..." (but) ... "I just know as a fact, when a third party gets involved, it doesn't become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here." [GC 52(b) at 9-11]. The message could not have been clearer – the employees could expect more generous treatment from Respondent, but not if they chose to be represented by the Union.

Respondent compounded these unlawful threats when it warned the employees that their only recourse “to try to get the Company to agree at the bargaining table” would be to strike, at which point they could be permanently replaced – causing the employees and their families to “lose everything” [GC 22]. This was an unlawful threat of job loss. *Unifirst Corp.*, 335 NLRB 706, 707 (2001).⁶⁹

In their totality, the slides and March 23 letter exceeded the permissible bounds of free speech permitted under Section 8(c).⁷⁰ Respondent’s unconscionable scare tactics directed at the employees and their families, heightened the aura of fear and intimidation that undoubtedly interfered with the employees’ free choice in the election and violated Section 8(a)(1).

VI. Respondent Reinforced its Unlawful Message and Violated 8(a)(1) During Numerous Individual Conversations with Unit Employees

As stated supra, the ALJ’s credibility resolutions are supported by the clear preponderance of all the relevant evidence. *Standard Drywall Products*, supra. The ALJ properly determined that in addition to threatening employees in mass captive audience meetings, Respondent reinforced its message by singling out employees that perceived to be persuadable⁷¹ and coercing those employees in various ways to abandon their support for the Union. Because those findings were based entirely upon witness credibility, and that such credibility resolutions were proper and should

⁶⁹ The coercive and threatening nature of the slides and the March 23 letter is even more serious given the context of several false, misleading or unsubstantiated statements Respondent made to the employees regarding strikes.

⁷⁰ In *Eagle Comtronics*, 263 NLRB 515 (1983), the Board held that an employer does not violate the Act when it truthfully informs employees that they are subject to permanent replacement in the event of an economic strike, since such a statement is consistent with the Board’s holding in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). However, *Eagle Comtronics* by its own terms applies to statements that are unaccompanied by threats. Where comments about striker replacement are part and parcel of a threat of retaliation for choosing union representation, as they were here, any ambiguity should be resolved against the employer. *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000) (employer’s statement that employees could bring the Union in, but when they went on strike he would bring in temporary or replacement workers to replace them, is an unlawful threat of job loss; employer’s statement could reasonably be interpreted “to mean that Respondent would not be averse to, and indeed might encourage, a strike so that it could hire replacements and discharge the striking employees”).

⁷¹ GC 21, which is Straw Poll #4 from March 2015, indicates that all of the employees who were approached and interrogated or threatened were determined by Respondent to either be non-union supporters or unknowns.

be affirmed, the record contains ample evidence that such unlawful statements were made.⁷²

Furthermore, the ALJ properly applied extant Board law when analyzing whether such statements violated the Act. As such, Respondent's Exceptions 75-78, 83-85, 96-97, 101-102, 107-113, 116-120, 123-128, 146-147, 154, 163-166, 174-175, 178, 183-188, 195-205 and 226. must be denied and the ALJ's decisions affirmed.

VII. The ALJ Correctly Found that Respondent Unlawfully Reduced Jesse Silva's Scheduled Hours [Exceptions 239 -249. 266]

During the April 9 captive audience meeting at the Alanson facility, Tom Shaeffer initiated a conversation about strikes [GC 74(b) at 16; Tr. at 1077]. Employee Jesse Silva challenged several of Shaeffer's assertions, including his claim that the Union could authorize a strike without the consent of the employees [Tr. at 21-24]. As the discussion continued, Shaeffer became frustrated, lost his temper, and exclaimed "Jesus Christ, Jesse!" [Tr. at 1077-1078]. The meeting came to an

⁷² December 9 threat of loss of wages Tr. at 85-86, 696; See, *Oklahoma City Collection District of Browning Ferris, Inc.*, 263 NLRB 799, 800 (1980), enf. mem. 679 F.2d 900 (9th Cir. 1982)(statements that unionization would result in loss of wages violate 8(a)(1)).

Threats of more onerous working conditions/discipline and wage loss on February 21, 24 [Tr. at 87-89, 1497-1481] and March 23 [Tr. at 510-516]. See, *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004)(threat to strictly enforce break times if unionized unlawful); *Schaumburg Hyundai, Inc.* 318 NLRB 449 (1995)(telling employees working conditions would be strictly governed by union contract violates 8(a)(1)).

Interrogations on March 20 [Tr. at 313, 548], March 21 [Tr. at 405-408]; March 23 [Tr. at 548-550], April 3 [Tr. at 553], April 6 [Tr. at 554], April 22 [Tr. at 561 -562]; Tr. 716]. See, *Westwood Health Center*, 330 NLRB 935 (2000)(unlawful interrogations balance the background, the nature of the information sought, the identity of the questioner, the place and method of the interrogation and truthfulness of the reply); *Metro-West Ambulance Service, Inc.*, 360 NLRB NO. 124 (2014).

Threats of Job Loss on March 20 [Tr. at 3131 to 315], April 28 [Tr. at 1014, 1087]; *Overnite Transportation Co.*, supra at 990, fn. 11 (1999)(threats of job loss are highly coercive and have lasting effect on election conditions); *Tri-City Paving, Inc.*, 205 NLRB 174 (1973). Threat of Job Loss on April 28 by Kevin Lauer (whose 2(11) status will be discussed further supra), Tr. at 1012-1014, 1086-1087, 1239-1240; *House Calls, Inc.* 304 NLRB 311 (1991); *Overnite Transportation*, supra.

Threat of loss of benefit on April 17 [Tr. at 558-560]; ; *Hyatt Regency Memphis*, 296 NLRB 259 (1989)(Employer's indication that employees would not "get away with things" threat of loss of benefit); *Tri-Cast Inc.*, 274 NLRB 377 (1985).

Promulgation of Overly Broad Solicitation Rule [Tr. at 627-633, 713, 718-719]; See *G4 Secure Solutions, Inc.*, 364 NLRB No. 92 (2016)(prohibitions on talking about union unlawful unless employer prohibits all other non-work discussion as well); *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003); *Allegheny Ludlum Corp.*, supra.

Surveillance [Tr. at 266] and Impressions of Surveillance [Tr. at 1139 -1144]; *Aladdin Gaming, LLC*, 345 NLRB 585 (2005)(taping employees without past practice or legitimate justification, unlawful); *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997); *Stevens Creek Chrysler*, 353 NLRB 1294 (2009).

abrupt end [Tr. at 1079]. The following day Kevin Lauer⁷³ contacted Silva by telephone to tell him that his route schedule for the following week had changed and that his previously scheduled double route was being reassigned to another driver.⁷⁴ Silva asked Lauer if the double run was reassigned because Tom Shaeffer was angry with him following their heated discussion during the April 9 captive audience meeting [Tr. at 1083]. Lauer replied: “You know why. I’m sure you know why.” [Tr. at 1084]. Because of the change to his schedule, Silva worked approximately three or four less hours and lost pay [Tr. at 1084].

The record supports a prima facie case of 8(a)(3) discrimination. It is undisputed that the day before the reduction of his scheduled hours, Silva, an active and outspoken Union supporter, engaged in a heated discussion with President Shaeffer challenging several of his assertions about

⁷³ Respondent’s exceptions to the ALJ’s finding on 2(11) status of lead driver Kevin Lauer are without merit. The General Counsel showed, by a preponderance of evidence that (1) Lauer holds the authority to engage in any *one* of the 12 supervisory functions enumerated in Section 2(11); (2) his exercise of such authority was not routine or clerical, but required independent judgment; and (3) his authority was held in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). It is undisputed that Lauer is responsible for scheduling all drivers and temporary employees working out of the northern depots [Tr. at 687; 984; 1028; 1433; 1746]. Joe Quisenberry, an admitted supervisor, testified that he is similarly responsible for scheduling the Grand Rapids drivers and the drivers working at Respondent’s southern depots (Niles and White Pigeon) and that scheduling drivers requires the exercise of independent judgment [Tr. at 685; 1085].

Transportation Manager Todd Yocum testified that Lauer, like Quisenberry, creates schedules that include standard routes and that he is responsible for filling in routes for drivers who are on vacation [Tr. at 1376]. In addition to creating the schedules for the northern depots, Lauer is also responsible for adjusting the schedules based, in part, on his judgment regarding the drivers’ knowledge of different routes [Tr. at 1376]. Shuttle drivers Jesse Silva and Harley Vaughn testified that Lauer communicates schedule changes to the drivers and often consults with the drivers regarding route changes and any problems the drivers encounter while on their routes [Tr. at 1029, 1747].

Lauer is responsible for communicating with the temporary agency; he interviews prospective temporary employees and exercises independent judgment in determining whether prospective employees should be referred to Grand Rapids for hire. He also schedules the temporary employees work [Tr. at 1437; 1375; 1031]. Furthermore, it is undisputed that Lauer has also fired temporary employees [Tr. at 1031].

Respondent has other employees with the title “lead driver.” But they do not schedule routes. In fact, Lauer schedules the routes of all of the northern depot lead drivers [Tr. at 1433-1434]. The other lead drivers are not authorized to make changes to routes [Tr. at 1434; 1095]. The other lead drivers do not communicate with temporary agencies. They do not interview, effectively recommend for hire, or fire temporary employees. Lauer is the only lead driver with an office and the only one assigned a computer by the Company. It is also noteworthy that Respondent’s entire transportation management team is located more than 200 miles away from the Alanson facility, and, the presence of any other manager or supervisor at any of the northern depots is a rarity, at best [Tr. at 1437].

⁷⁴ The route was reassigned to another employee, Brance Sluiter, who was known to be opposed to the Union [Tr. at 1080- 1081, 1442, GC 50, GC 21]

strikes during a captive audience meeting.⁷⁵ Also beyond dispute is Respondent's animus toward its employees' Union activity generally, and Shaeffer's hostility toward Silva specifically, as expressed during the April 9 meeting. Respondent's unlawful motive for reducing Silva's hours is further evidenced by Silva's undisputed testimony regarding Lauer's response when Silva asked him if his schedule had been changed because of his confrontation with Shaeffer the previous day: "You know why." The record thus establishes that Silva's protected activity was a motivating factor in Respondent's decision to reduce his scheduled hours.

Given this evidence of unlawful discrimination, it was incumbent on Respondent to show that it would have reduced Silva's schedule hours even in the absence of his protected activity. Respondent cannot meet its burden because it produced absolutely no evidence explaining the decision to change Silva's schedule.⁷⁶ Respondent has failed to rebut the General Counsel's prima facie case of unlawful discrimination and the ALJ correctly found that Respondent unlawfully reduced Jesse Silva's hours.

VIII. The Revised Safety Incentive Program [Exceptions 140, 176, 206-215, 265]

The salient facts underlying this allegation are largely undisputed. On or about January 28, and again on February 14, 2015, Respondent made significant changes to its existing safety incentive programs [GC 23]. Prior to the changes, the terms of the programs were "all or nothing" meaning that if one employee – or, in the case of the drivers, two employees – had an injury, everyone became ineligible for the incentive pay [GC 27].⁷⁷

⁷⁵ Respondent did not ask Shaeffer to testify about his confrontation with Silva during the April 9 meeting.

⁷⁶ Instead, Respondent proffered generalized testimony from Transportation Supervisor Yocum that it is not uncommon for drivers' routes to be cut. But on cross-examination, Yocum acknowledged that the route taken away from Silva following his heated confrontation with Shaeffer, was not a route cut, but a transfer of a route to another driver [Tr. at 1441-1442]. Even after being confronted with this critical distinction, Respondent produced no evidence of a non-discriminatory motive for its actions.

⁷⁷ As Ted Twyman explained: "Essentially, if an entire group, meaning the warehouse, for example, could be safe and have no accidents for 90 days, we would do a drawing, and the drawing was for a variety of gift cards. I think they ranged from 100 to \$500. And if that entire department could remain safe for that 90-day period, we put everyone's name in a hat, and we draw their names out of a hat, and then certain people would be awarded one of those gift cards."

The programs that Respondent implemented in January 2015 were markedly different. Payout under the incentive programs implemented by Respondent in early 2015 no longer depended on the entire department being injury free, or, in the case of the drivers, one or less recordable injuries. This change increased dramatically the odds of an employee receiving the incentive pay.⁷⁸

It is undisputed that at the time Respondent changed the safety incentive programs it knew about the employees organizing efforts [GC 39]. The record also makes clear that Respondent was well aware that the employees were unhappy about the elimination of a more lucrative safety bonus they had received in the past [Tr. at 1961].⁷⁹

It is undisputed that Respondent granted the enhanced safety bonus to the warehouse employees during the mail ballot election [GC 61] and about a week before May 7, the date of the manual portion of the election in which the warehouse employees and Grand Rapids drivers would be voting [GC 26 “Gift Card distributed on or near April 27, 2015,” Tr. at 835-836; 1899]. It is worth noting that Respondent distributed the safety incentive awards to its employees before the

The one in transportation was very similar. The only difference was in that case there could be more than one injury during that time period [Tr. at 1894-1895].

⁷⁸ An employee’s odds of receiving the incentive pay were increased further by Respondent’s elimination of the raffle-style payout in which only some of employees received the award (10 – \$500 cash cards and 10 – \$100 cash cards for the warehouse workers and the same for drivers) [Tr. at 1961-1962; GC 27]. In terms of the number of employees receiving the incentive pay the programs revised in January and February 2015 were extremely effective. Under the prior programs no drivers received incentive pay [Tr. at 1971-1972]. Under the revised program, 65 of the drivers received the incentive pay [GC 24]. Similarly, the number of warehouse employees receiving the bonus increased from 20 – based on the terms of the prior program limiting the number of awards to only 20 employees [GC 27; Tr. at 1970-1971] – to 49 as the employees no longer needed to win a raffle to receive the incentive pay [GC 26].

⁷⁹ The safety bonus issue came up during the small group meetings that Respondent held in December 2014 [GC 32 and 33 (“Get the benefits we lost back – Employees used to have a lucrative annual safety bonus (\$1500 – \$4000 depending on tenure)” [Tr. at 694; see also Tr. at 771 and GC 39]. During the March 19 meeting, Ted Twyman told the employees: “I keep coming back to the conversations that we’re having right here and saying – and taking the little data points like, you know, Jesse, when we talked last week or when, you know – issue, you know, just all the comments and little stuff like that, those are the kernels of information that we take and push up. You know, the guaranteed 40 issue, **that’s come up, and some of the pay issues and safety bonus – safety bonus is a big one.** That’s gone up to the levels of everyone understanding that that was an issue here, and that’s one thing that’s driven some of the discomfort and unhappiness here in Grand Rapids” [GC 52(b) at 9-11].

eligibility period had closed [GC 23 – January 28 to April 28, 2015]. Respondent offered no explanation for its decision to issue the awards early.⁸⁰

The Supreme Court has held that an employer violates the Act when it grants a wage increase or other benefits “while a representation election is pending, for the purpose of inducing employees to vote against the union.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Court explained that Section 8(a)(1) “prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” *Id.* The *Exchange Parts* standard applies to allegations both that an employer unlawfully announced a benefit in violation of Section 8(a)(1), *Village Thrift Store*, 272 NLRB 572 (1983), and that it unlawfully implemented a benefit in violation of Section 8(a)(3); *In Home Health, Inc.*, 334 NLRB 281, 284 (2001).⁸¹

In the instant matter there is no doubt that the timing of Respondent’s decision to modify its safety program was motivated by the organizing campaign. In a March 2, 2015 email between Twyman and Campbell titled “Enhanced Safety Initiatives,” Campbell describes the program as a “union avoidance” action item [GC 25].⁸²

⁸⁰ There was a 10-day delay between the end of the closing period of the drivers incentive program – May 15 [GC 23 at 2], and the date of Respondent distributed the gift cards – May 25 [GC 24]. Twyman attributed this delay to Respondent needing “a reasonable amount of time to go back through the records to find out who would have qualified and who wouldn’t have” [Tr. at 873-874]. But if that’s true, then the warehouse employees likely would not have received their gift cards until May 8 – one day after the election.

⁸¹ Accordingly, an employer’s legal duty in deciding whether to grant a benefit during the critical period before an election is to act as it would have if the union were not present. *Red’s Express*, 268 NLRB 1154, 1155 (1984). Thus, while the Board has inferred from the timing of such a grant of benefit that it was unlawful, the Respondent may rebut this inference by showing that the timing of its action is explained by reasons other than the pending election. *B&D Plastics*, 302 NLRB 245 (1991); *DMI Distribution of Delaware*, 334 NLRB 409, 410 and fn. 9 (2001) (same analysis applies to unfair labor practice cases as to objections cases); *Desert Aggregates*, 340 NLRB 289, 290–91 (2003) citing *Holly Farms Corp.*, 311 NLRB 273, 274 (1993).

⁸² Ted Twyman testified that he was motivated to implement the “enhanced” safety program in early 2015, because, in his words: “it wasn’t driving safer performance” [Tr. at 1896]. But during cross-examination, Twyman acknowledged that the “all or nothing” program for warehouse employees that took place in late 2014 (specifically, October 29 to January 27 see GC 27 at page 3) resulted in no injuries! Nevertheless, Respondent “enhanced” the program in early 2015. When asked to explain why he decided to change a program that had resulted in no Twyman obfuscated [Tr. at 1964-1968].

Respondent unlawfully interfered with the employees' exercise of their Section 7 rights, in violation of Section 8(a)(1), on or about January 28 and February 14, 2015, when it announced the "enhanced" safety incentive programs. *Guard Publishing Company*, 344 NLRB 1142 (2005). Furthermore, because Respondent's changes in the safety program were motivated by anti-union animus, the resulting conferral of the incentive payouts to the warehouse employees on April 27, and to the drivers on May 25, violated Section 8(a)(3). *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 632 (1993).

IX. The ALJ Correctly Found that Respondent Made Unlawful Threats of Plant Closure [Exceptions 3, 12, 14, 28, 141, 273, 277]

There is no dispute that during several captive audience meetings at the Grand Rapids facility on November 4, 2015, Mideast Market President Tom Barnes informed employees that he would never allow a union into Sysco Grand Rapids; the Company's employees were replaceable; Grand Rapids was only a small piece of the Sysco Corporation and they could run Sysco's work out of the Detroit facility; that he had no problem breaking the rules, he did it before and always got away with it⁸³ [Tr. 268-269, 366-370, 452-457, 520-521, 612-614, 634-639, 674-675, 1089, 1146-1148, 1179-1180].⁸⁴ Furthermore, the record established that Barnes' statements were widely

⁸³ A few days before the meeting, on October 30, the Union filed, and the Region served on Respondent, amended charges in Cases 07-CA- 152332 and 07-CA-155882 [GC 1(t)-(w)]. Through the amended charge in Case 07-CA-155882, the Union put Respondent on notice for the first time that it was asking the General Counsel to seek a *Gissel* bargaining order in this matter [GC 1(v)]. As Market President, Barnes has oversight responsibilities for several operating companies located in the mid-east United States, including Respondent [Tr. at 110, 845]. Barnes is Tom Shaeffer's direct superior but he is not typically present at the Grand Rapids facility, and few of the employees knew who he was prior to the November 4 meetings [Tr. at 369, 422, 453, 520]. Nevertheless, Barnes was well aware of the employees' efforts to organize a union at the Grand Rapids facility, receiving several communications (i.e., "union avoidance updates") from Respondent during the campaign [Tr. at 162-164; GC 39].

⁸⁴ In its brief, Respondent acknowledges that it "does not dispute that Barnes must have mentioned the possibility of closing the Grand Rapids facility" during his November 4 visit [R. Br. at 36]. Nevertheless, Respondent argues that the ALJ erred in crediting the accounts of the General Counsel's witnesses regarding Barnes' remarks, pointing to differences in the witnesses' accounts. What Respondent neglects to mention in making this argument is that Barnes spoke at, and the employees attended *several different* meetings on November 4 [GC 5 at 10; Tr. at 616] including a meeting at 1:30 a.m. for Respondent's night operations (i.e., warehouse) employees [Tr. at 452-457; 612-614; 634-637; 1179-1180]; and meetings at 2:30 a.m., 3:30 a.m. and 4:30 a.m. for the Grand Rapids drivers [Tr. at 268-269; 366-370; 520-521; 1146-1148]. The record shows that only employees who attended the 1:30 a.m. meeting testified that Barnes used the phrase "shut this puppy down" [Tr. at 613, 619, 637, 675]. Similarly, only witnesses at the 1:30 a.m. meeting testified that Barnes commented about "breaking the rules" [Tr. at 456, 613, 637, 675]. Indeed, later in its brief,

disseminated among the employees at the Grand Rapids facility and at the depots [Tr. at 637-639, 1015-1017, 1089, 613, 675, 369-370, 423-424]. Barnes, who is still employed by Respondent, was never called as a witness nor was his absence explained. Not a single Respondent witness was asked about the statements made at the state of the OPCO meeting in early November.⁸⁵

Threats to close a facility if a union is elected are unlawful if they are not based on objective facts. Absent the necessary objective facts, employer predictions of adverse consequences arising from unionization are not protected by Section 8(c), but constitute threats that violate Section 8(a)(1). *Amptech, Inc.*, 342 NLRB 1131 (2004) (employer's statement to employees that it viewed union organizing drive to be a "personal attack" and would "explore all of [its] options for the future" constituted an unlawful implicit threat of plant closure).⁸⁶

The evidence makes clear that Barnes' remarks regarding Respondent's relative insignificance in the context of Sysco Corporation's larger operation and its ability to continue to run its business without Respondent were implied threats intended to frighten and intimidate the employees from continuing to pursue unionization that violated Section 8(a)(1).⁸⁷

Respondent acknowledges that "Barnes was not speaking from a script and ... his remarks were presumptively different in front of different audiences [R Br. at 49]. Even where government witnesses who attended the same meeting differed slightly in their accounts, the variances are insignificant and do not warrant overturning the judge's credibility resolutions. In this regard, it has long been recognized that in some instances "minor discrepancies in testimony enhances rather than impairs credibility." *T.V. Sys., Inc.*, 206 NLRB 841, 845 (1973).

⁸⁵ Instead of having its management officials testify about the November 4 meetings, Respondent called several employees. This testimony yielded virtually no evidence refuting the testimony of the General Counsel's witnesses. Most of Respondent's employee witnesses could not even recall attending the meetings. Those who did recall attending, either were not asked about anything said by Barnes, or were led by Respondent's counsel to deny being concerned about anything said by Barnes. The ALJ correctly did not credit this subjective testimony. The Board has long held, with Supreme Court approval in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), that the test of whether or not an employee or employees were threatened respecting Section 7 rights and activities was objective rather than subjective. Thus, the employees actually involved in the contested events are not asked if they felt threatened by particular conduct, but rather the test applied is whether or not a reasonable employee would be threatened by the conduct.

⁸⁶ See also, *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004) (statement that if union was elected the employer would "close the business and move to Indiana" violated the Act); *Shearer's Foods, Inc.*, 340 NLRB 1093 (2003) (employer violated 8(a)(1) when manager told employees that if company president "had his say, the plant would shut down if the Union came in.").

⁸⁷ There is absolutely no evidence of any objective facts substantiating Barnes' threats of shutting down the Grand Rapids operating company made in the context of discussing the union at the November 4 meetings.

Similarly, Barnes additional statements that he was willing to “break the rules” when it came to the Union – again, made in the context of the amended unfair labor practice charges filed a few days before the November 4 meeting – were blatant threats of futility.⁸⁸ The Board has found in numerous cases that an employer’s statement to employees that it is willing to break the law to defeat their organizing efforts is highly coercive and violative of Section 8(a)(1).⁸⁹

X. The ALJ’s Determination that Respondent’s Refusal to Recognize and Bargain with the Union Violated 8(a)(5) Is Supported by the Record and Board Law [Exception 7, 8, 32, 278]

The ALJ’s decision to attach the bargaining obligation of Respondent to the date of Brewster’s termination, February 20, 2015, is firmly rooted in Board precedent. The Supreme Court held in *Gissel*, 395 U.S. 575 (1969), that an employer violates Section 8(a)(5) of the Act when it refuses to recognize and bargain upon demand with a union whose majority status is established by valid authorization cards when the contemporaneous unfair labor practices of the employer are likely to destroy the union's majority and seriously impede the election process. Citing the *Gissel* decision, the Board has held, that a violation of Section 8(a)(5) occurs "whether the unfair labor practices triggering the finding that the employer was under an obligation to bargain occur before, at the same time, or after the actual refusal to bargain." *Pilot Freight Carriers, Inc. and BBR of Florida, Inc.*, 223 NLRB 286 (1976). Accordingly, as found by the ALJ, Respondent’s refusal to bargain violated Sections 8(a)(5) of the Act.

Because the Union did not make a demand for recognition until the day before the election⁹⁰, the ALJ appropriately ordered Respondent to bargain with the union, after it attains

⁸⁸ There is no evidence that Barnes made any similar threats of futility at the subsequent November 4 meetings.

⁸⁹ *Cast-Matic Corp.*, 350 NLRB 1349, 1389 (2007) (statements that company’s management was “not afraid to break the law” and that they would do whatever they had to do to keep the Union out is an unlawful threat of futility); *EPI Construction*, 336 NLRB 234, 237, fn. 17 (2001).

⁹⁰ Respondent Excepts to the ALJ’s finding that the Union demanded recognition on March 6, 2015, but based on the record evidence, the date is obviously a typographical error [ALJD 37 (18-23)]. The evidence establishes that the union’s demand for recognition was made the day before the election on May 6, 2015 [TR. at 278, 526, R 36]. As such, Respondent’s Exception 7 should be denied.

majority status (as discussed more below) from the “approximate date thereafter that Respondent embarked on its course of unlawful conduct.” In this case, the bargaining commenced on the date of Brewster’s unlawful termination on February 20. *California Gas Transport, Inc.*, 347 NLRB 1314 (2006). *Stevens Creek Chrysler Jeep Dodge, Inc.* supra; *Peaker Run Coal Co.* 228 NLRB 93 (1977).

XI. The ALJ’s Proposed Remedy is Appropriate

The violations in the instant case are so serious and substantial that the Board’s traditional remedies would be unable to erase their effects and restore the conditions necessary to conduct a fair election. Accordingly, the ALJ appropriately determined that a bargaining order was necessary. *NLRB v. Gissel Packing Co.*, 385 U.S. 575 (1969).⁹¹

A. The Record Evidence Established that the Union Achieved Majority Status on December 18, 2014 (Exceptions 1, 2, 13, 19, 22, 257, 272)

The ALJ’s finding that the Union achieved majority status on December 18, 2014 is well supported by the record [ALJD 35, GC 2, 2(a)-2(e), GC 59]⁹². Eighty-four cards out of one hundred sixty-one were appropriately authenticated by the judge using methods that have consistently been accepted by the Board.⁹³ Respondent contends, however, that the ALJ’s determination of majority status should be overturned because Respondent was not allowed to

⁹¹ The Supreme Court held that the Board may disregard the normal election process for certifying a union and may rely on authorization cards establishing a union’s majority support to order an employer which has engaged in sufficiently serious and pervasive unfair labor practices to recognize and bargain with the Union without an election. The Court also recognized that “Category II” cases are marked by “less pervasive practices” which nonetheless have the tendency to undermine a union’s majority strength and impede the fair election process. *Gissel*, 395 U.S. at 613-15.

⁹² While the list provided by Respondent in GC 59 includes 166 names on it, one of them is supervisor Kevin Lauer. Additionally, it includes Ruben Gomez, Jacob Juarez, Tyler Meyers and Robert Venlet who were all terminated before December 18, 2014. None was a card-signer. A such, there were 161 eligible employees as of that date. Even assuming arguendo that Lauer was not a supervisor and the employee complement is 162, 84 cards remains a majority of the unit.

⁹³ The ALJ authenticated thirty-three cards pursuant to handwriting exemplars in the Amended Order Partially Granting the General Counsel’s Motion to Authenticate Union Authorization Cards, which was issued on August 16, 2016. He further authenticated thirty-four by direct testimony of the card-signers and thirty-six by witnesses who credibly testified to observing the signer execute the card. All are accepted means of authentication. *Novelis Corporation*, 364 NLRB No. 101(2016); *Texas Electric Cooperatives, Inc.*, 160 NLRB 440 (1966); *McEwen Manufacturing Co.*, 172 NLRB 990(1968)(signed cards returned to solicitor properly authenticated by testimony of solicitor); *Traction Wholesale Co.*, 328 NLRB 1058 (1999), enf. 216 F.3d 92 (D. C. Cir. 2000)(judge or expert may properly authenticate cards by comparing to handwriting samples).

present evidence that nine employees either stopped supporting the union or never supported the union for reasons other than Respondent's unfair labor practices. This argument fails.

First, each card submitted into evidence unequivocally states that the purpose of the card was to designate the union as the employees collective bargaining representative [GC 2].⁹⁴ When the purpose of the card is stated in unambiguous language, such as here, the Board may not, in the absence of misrepresentations, inquire into the subjective motives or understanding of the card signer to determine what the signer intended when signing the card. *Gissel Packing Co.*, 395 U.S. 575 (1969). The Court specifically rejected "any rule that requires a probe of an employees' subjective motivations as involving an endless and unreliable inquiry" due to the tendency many months after a card drive and in response to questions by employer's counsel to give testimony damaging to the union, particularly where the employer has threatened employees in violation of 8(a)(1) of the Act. *Id.* at 608. Rather, employees are bound by the clear language of what they sign unless there is a deliberate effort to induce them to ignore the card's express language. *Id.*

Respondent is seeking to do exactly what the court explicitly prohibited in *Gissel*. It seeks to elicit testimony from card-signers that, despite reading and signing a single purpose and unambiguous authorization card, they did not, in fact, intend to do so. Such an inquiry is by definition an inquiry into employees' subjective states of mind at the time the cards were signed and is expressly prohibited by the Board. *Id.*⁹⁵

⁹⁴ Each card is labeled as "Authorization for Representation Under the National Labor Relations Act" and indicates that the signer "authorize[s] the [Union] to "represent me in negotiations for better wages, hours and working conditions." None of the cards makes any statement inconsistent with the stated purpose of designating the union as the employees' collective bargaining representative. As such, they are single-purpose authorization cards. *Ona Corp. v. NLRB*, 729 F.2d 713, 723-724 (11th Cir. 1984).

⁹⁵ None of the nine testified that there were any contrary instructions or statements made when they were given the card or that the Union organizers acted in any way that would contradict the plain language of the card. *Ona Corp. v. NLRB*, supra. As such, those nine cards are appropriately included in the majority finding. To the contrary, each of the nine employees cited by Respondent testified that they read the card before they signed it: King [Tr. at 1597]; Moore [Tr. at 1605]; Wirtz [Tr. at 1677]; Koepsell [Tr. at 1738]; Winter [Tr. at 1752]; Bolo [Tr. at 1768]; Loonsfoot [Tr. at 1787]; Purvis [Tr. at 1873]; Rocco [Tr. at 2016]; Versluis [Tr. at 1573-1574]. At most, the nine employees' testimony on the record coupled with Respondent's offers of proof indicate that at some point *before the election*, these employees abandoned their support for the Union. Such a change of heart made after the cards were signed – particularly in the

Furthermore, there was no evidence that these nine employees ever sought to have their cards returned to them by the Union.⁹⁶ The employees' executed and authenticated cards were properly included in the assessment of majority status. Respondent's attempt to exclude the cards of the nine employees in question is without basis and Respondent's exceptions to the ALJ's findings on that issue should be denied. See *Stanley Works, Stanley Air Tools Division*, 171 NLRB 388, 394 (1968).⁹⁷

Respondent's position that the ALJ should have considered evidence about employees subjective intentions at the time they signed the card, is completely unsupported by Board law, as is any inquiry into whether those employees abandoned their support for the union at some point after signing such unambiguous cards. Respondent presented no evidence to show that the employees who signed the cards were given instructions contrary to the plain language of the card, that they were misled or that any card collected before December 18, 2014 was lawfully revoked. Because the evidence establishes that the Union achieved majority status on December 18, 2014, Respondent's Exceptions 9, 15-16, 24, 271 and 274-276 must be denied.

B. The ALJ's Determination that a Bargaining Order is Necessary is Supported by the Record [Exceptions 6, 10, 12, 31, 250, 251, 262, 270, 277, 278]

In determining whether a bargaining order is appropriate, the Board examines the severity of the violations committed, the present effects of the coercive unfair labor practices that would prevent the holding of a fair election, the identity of the perpetrator and the timing of the unfair labor practices, and the likelihood the violations will recur. In determining the need for a

light of such egregious unfair labor practices, cannot be used as a basis to attack majority status. Even Respondent's offers of proof did not indicate that there would have been any evidence that the employees in question ceased supporting the Union *before December 18, 2014*.

⁹⁶ Signed cards are considered valid unless properly revoked. Furthermore, employees can acquiesce to the use of their card for majority status purposes if a) the revocations are the result of unfair labor practices or b) if the employees attempts at revocation are half-hearted, particularly where the employees in question fail to follow up with the union to confirm revocation. *Dlubak Corp.*, 307 NLRB 1138 (1992); *Struthers-Dunne, Inc.*, 228 NLRB 49 (1977). Of course, none of the employees in question made *any* attempt at revocation in the current case.

⁹⁷ Furthermore, as found by the judge, the evidence showed that the Union continued to obtain authorization cards throughout early 2015. As of the date of the filing of the petition, the Union had 99 cards out of a unit of 154.

bargaining order, the Board and the courts recognize that certain types of violations, commonly called “hallmark violations,” are so coercive that their presence will support the issuance of a bargaining order. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980).⁹⁸

Here, Respondent met the Union’s organizing efforts with an orchestrated campaign of hallmark and other serious violations. Several violations directly affected the entire bargaining unit and emanated from high-level management officials. Two of Respondent’s hallmark violations – the 8(a)(3) discharge of “confirmed union committee leader” George Brewster, and conferral of the “enhanced” safety bonus suggest a calculated campaign to destroy employee support for the Union. These violations were highly coercive and cannot be easily forgotten by the employees.⁹⁹ The coercive nature of the unfair labor practices was compounded by the fact that many of the violations were committed by Respondent’s two highest level officials – President Tom Shaeffer and Vice President of Operations Ted Twyman – during mass captive-audience meetings. Upper management’s direct participation in the unlawful campaign serves to reinforce the coerciveness of the conduct, and together with the serious and widespread nature of these violations, makes it likely that these violations will have a continuing impact on all employees.¹⁰⁰

The “success” of Respondent’s unlawful actions is illustrated by the clear dissipation of Union support during the period of some of Respondent’s most egregious violations. At the time the Union filed its petition, it had obtained 99 valid authorization cards from a unit of approximately 158. Just eight weeks later, the Union received only 71 votes in the election [GC 1(xx) at 13]. It

⁹⁸ In such cases, “the seriousness of the conduct ... justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force ... [it] may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.” *Id.*

⁹⁹ *Michael’s Painting, Inc.*, 337 NLRB 860, 861 (2002)(discharge of a union supporter is one of the most flagrant forms of interference with Section 7 rights and is more likely to destroy election conditions for a longer period of time than other unfair labor practices because it tends to reinforce the fear of employees that they will lose their jobs if they persist in engaging in union activity); and *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (unlawful conferral of benefits is highly coercive because it acts as a reminder to employees that “the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if not obliged”).

¹⁰⁰ “When the highest level of management conveys the employer’s antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them.” *Id.*

was during this eight-week period – with the discharge of George Brewster still fresh in their minds – that Respondent repeatedly threatened the employees with loss of wages and benefits, threatened job loss, threatened that a strike was inevitable, threatened that the employees’ seniority was at risk, and conferred unlawful benefits, to name just some of Respondent’s unlawful actions.

Significantly, Respondent’s hallmark violations did not cease after the election, thus evidencing the substantial likelihood that violations will recur. *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999)(an employer’s continuing hostility toward the employees’ exercise of their Section 7 rights even after the election is strong evidence that its unlawful conduct will persist in the event of another organizing campaign). Nearly six months after the election, at a time when Respondent was well aware of the possibility of a rerun election, Tom Barnes, a high ranking official of Respondent’s corporate parent told the employees during mass meetings that Respondent’s operation was insignificant in the eyes of Sysco Corporation and could easily be shut down.¹⁰¹ During the 1:30 a.m. night operations meeting, Barnes went even further, making it absolutely clear to the employees that he was not above breaking the law to keep the Union out of Respondent’s operating company. These threats were widely disseminated amongst the employees [Tr. at 637-639, 1015-1017, 1089, 613, 675, 369-370, 423-424].¹⁰²

Any doubt that Respondent’s unlawful activity will recur, was laid to rest by the conduct of its highest-ranking officials during the investigation and trial of this case. Twyman and Amy Campbell falsely testified that Respondent did not suspect that George Brewster was engaged in Union activity prior to his discharge [Tr. at 924-925; GC 39 and 58]. Campbell allowed Respondent’s attorneys to file a position statement with the Government, also with false

¹⁰¹ The Board has long recognized that threats of job loss (i.e., plant closure, discharge, and loss of customers) are among the most flagrant interferences with Section 7 rights and are more likely to destroy election conditions for a lengthier period of time than other unfair labor practices. *NLRB v. Gissel* at 611, n. 31.

¹⁰² It is well established that violations are more likely to warrant a bargaining order when they are disseminated among employees to the extent of affecting all or a significant portion of the bargaining unit. *Evergreen America Corp.*, 348 NLRB 178, 180-181 (2006).

information regarding its knowledge of Brewster’s activity [Compare GC 40 with GC 39 and GC 58]. Twyman gave demonstrably false testimony regarding the reasons Respondent “enhanced” its safety program after learning about the employees organizing activity [Compare Tr. at 1896 with GC 25]. Tom Shaeffer gave false testimony during the hearing about his statements during a captive-audience meeting, unaware at the time of his testimony that the meeting had been recorded [Compare Tr. at 1333 and 1343 with GC 74(b) at 26; Compare Tr. at 1335, ll. 9-21 with 74(b) at 22-24 and 35]. Respondent’s disregard for the Board’s processes and the fundamental rights its employees, demonstrates unequivocally that it will do whatever it deems necessary to avoid recognizing the Union.

The Board should also consider the significant involvement of Respondent’s corporate parent in the unlawful activity. From the time it learned about the employees campaign, Respondent strategized with Sysco Corporation regarding its anti-union activities; received resources and advice; and engaged in regular communication – even going so far as to provide high-ranking officials of Sysco Corporation with observations of the body language of individual employees during anti-union meetings [GC 39; GC 20; GC 21; Tr. at 1366, 1464]. Sysco Corporation officials committed some of the most serious unfair labor practices at issue here, including Thomas Barnes’ threats of futility and plant closure made just days after the Union notified Respondent that it was seeking a bargaining order. Sysco Corporation’s Labor Relations Manager Bobby Jordan threatened employees with a loss of wages, and then lied about it at the hearing [Tr. 1357-1358, 1998-2000; ALJD at fn. 49].¹⁰³

¹⁰³ Perhaps Sysco Corporation’s disregard for the Act is best summarized in the “*Why Focus on Union Avoidance? Scared Straight Edition!*” presentation provided to Respondent by Corporate Labor Relations Manager Alison Trout and received by Shaeffer, Twyman, and Campbell, then forwarded to high-level Supervisor Yokum (and apparently Respondent’s lower level supervisors) [GC 15]. The presentation states plainly Sysco Corporations’ view that the NLRB is “ridiculous” (i.e., that its decisions and notices warrant neither respect nor adherence) [GC 15 at fifth page from the end]. This disdain for the Act and the Agency that enforces it, passed down to Respondent’s supervisors and management, makes the possibility of erasing the effects of Respondent’s past unfair labor practices and ensuring a fair election by the use of traditional remedies highly unlikely. It also renders absolutely meaningless Respondent’s

Under the circumstances of the instant case, simply requiring Respondent to refrain from unlawful conduct will not eradicate the lingering effects of the hallmark violations, and will not deter their recurrence. The employees' representation desires, once expressed through authorization cards would, on balance, be better protected by issuance of a bargaining order than by traditional remedies.

C. The ALJ Considered and Properly Rejected Evidence of Changed Circumstances [ALJD 9, 15, 16, 24, 271, 274-276]

In its exceptions, Respondent submits that the ALJ both improperly limited evidence regarding changed circumstances into the record and improperly disregarded the evidence that was presented when determining the appropriateness of a bargaining order under *Gissel*. Such an argument does not accurately reflect Board law and should be rejected.

Evidence of changed circumstances including employee and management turnover and passage of time since the commission of the unfair labor practices, is not traditionally considered by the Board. *Garvey Marine, Inc.*, 328 NLRB 991, 995 (1995), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Overnite Transportation Co.*, supra.¹⁰⁴ The appropriateness of a bargaining order rests on an evaluation of the situation “as of the time the unlawful conduct...was committed.” *Id.* To do otherwise would reward, rather than deter unlawful conduct and “put a premium upon continued litigation by the Employer.” *Id.*, citing *NLRB v. L.B. Foster Company*, 418 F.2d 1, 4-5 (9th Cir. 1969).¹⁰⁵

Despite acknowledging that such changed circumstances are not relevant to the determination of the appropriateness of a bargaining order, the ALJ allowed Respondent to present

argument that a bargaining order is unnecessary here because of turnover in the ranks of Grand Rapids facility supervisors.

¹⁰⁴ Bargaining orders, according to the Board, have “two basic purposes – to protect employee sentiment reached at the time of card signing by a majority of unit employees and to deter an employer’s future misbehavior.” *Jamaica Towing, Inc.*, 247 NLRB 353 (1980).

¹⁰⁵ See also *Overnite Transportation Co.*, supra; *Intersweet, Inc.*, 321 NLRB 1 (1996), enfd. 125 F.3d 1064 (7th Cir. 1997); *Novelis Corp.*, 364 NLRB No. 101 fn. 27 (2016)(refusing to consider “turnover among bargaining unit employees or management officials and the passage of time” when considering a bargaining order.)

evidence at the hearing of both employee and managerial turnover [ALJD 39, R 33(a)(b) and 35(a)(b)]. The evidence indicated that 29 employees left their positions at Respondent from December 2014 to September 10, 2016.¹⁰⁶ The ALJ found, however, that even with the departures of those employees, the vast majority of the employees employed by Respondent during the time of the unfair labor practices remain currently employed.¹⁰⁷ *Highland Plastics, Inc.* 256 NLRB 146, 147 (1981)(substantial employee turnover not mitigating factor warranting removal of *Gissel* bargaining order); *HarperCollins, Publishers, Inc.*, 317 NLRB 168 (1995), enf. denied in relevant part 79 F.3d 1324 (2d Cir. 1996)(the fact that only 32 employees remained out of an original unit of 74 irrelevant to appropriateness of bargaining order).

Respondent further argues that it has and will continue to hire new employees going forward. Even if such an allegation were proven and considered, the fact remains that the large majority of the unit consists of the exact same employees who were victims of Respondent's unfair labor practices in 2014 and 2015.¹⁰⁸ Any new employees hired will be working in direct proximity to both the employees who had suffered through the unfair labor practices, as well as the managers who engaged in the unlawful conduct. *HarperCollins Publishers, Inc.*, supra (foreseeable that continued presence of these officials could exert a coercive effect over unit employees including new employees).¹⁰⁹ Furthermore, those unfair labor practices were so egregious and pervasive that even if Respondent hires additional employees going forward, it is highly likely that the long term employees would inform any new employees of "what transpired during the Union's organizing campaign." *Novelis Corporation*, supra, citing *State Materials*, 328 NLRB 1317(1999).

¹⁰⁶ Such a number represents 17.3% of the unit, if Brewster is appropriately excluded as a discriminatee.

¹⁰⁷ From the record evidence, it appears that approximately 125 employees who were present during the unfair labor practices are still employed, with 73 of those employees having signed union authorization cards [GC2, GC 59, R33(a) and R 35(a)].

¹⁰⁸ Even if Respondent's 180 number is used to establish the size of the unit, 125 remains a majority.

¹⁰⁹ See also, *International Door*, 303 NLRB 582 (1991); *Dunkin' Donuts Mid-Atlantic Distribution Center*, 363 F.3d 437, 44, fn. 71 (D.C. Cir. 2004)(court stress that despite turnover, a core of employees remained who had experienced unlawful conduct.)

Respondent further argues that there has been a 50% turnover rate in managers¹¹⁰, but such a calculation obfuscates the fact that out of sixteen supervisors, managers and agents who were found to have committed unfair labor practices by the ALJ, thirteen remain employed in the same position as they occupied at the time of the unfair labor practices.¹¹¹ The continued employment of managers who engaged in unlawful conduct shows that the effects of the unfair labor practices linger and that a bargaining order remains appropriate. *HarperCollins Publishers, Inc.*, supra., *Cogburn Healthcare Center, Inc.*, 342 NLRB 98, 99 (2004)(presence of managers found to have violated the Act and absence of any evidence of change of ownership render arguments of changed circumstances unpersuasive; bargaining order maintained.)¹¹²

As such, even considering Respondent's argument regarding changed circumstances, a bargaining order remains appropriate. Respondent continues to employ supervisors and managers who engaged in egregious conduct in the same positions and interacting with the same employees that they threatened and coerced in 2014 and 2015. There is no indication that there was a change in ownership, hierarchy or any other structural change that would warrant a different result, nor has there been a significant passage of time that would show that the effects of those unlawful actions would have been forgotten or dissipated. As such, the Respondent's arguments that changed

¹¹⁰ Respondent further submits that Barnes' future plans to retire in 2018 militate against a bargaining order. There is no dispute, however, that he currently remains in his position and that he will for at least the next year.

¹¹¹ Such individuals include Mideast Market President Tom Barnes, who, six months after the election informed all the employees in Grand Rapids that he would shut the facility down if they chose to unionize, President Tom Shaeffer, who was found to have threatened employees in mass meetings with loss of wages, jobs, seniority and benefits and Vice President of Human Relations Amy Campbell, who was not only instrumental in the unlawful termination of Brewster, but also interrogated individual employees about their union sympathies and support. In addition to the high-ranking management, employees will also be working in close proximity to several lower level supervisors, including Todd Yocum, Joe Quisenberry, Jim Brown, Dean Mercer, Ryan Norman, Mike Scott and Craig Pung, who made repeated and significant coercive statements to employees throughout the campaign.

¹¹² *Audubon Regional Medical Center*, 331 NLRB 374 (2000), as cited by Respondent, is clearly distinguishable. In that case, the Employer had, subsequent to the unfair labor practices, not only been wholly acquired by an entirely different corporate entity, but had replaced 100% of the managerial staff. The opposite is true here: Respondent remains under the corporate leadership of Sysco, Inc., retains almost all of the high level leadership who committed unfair labor practices and a majority of the employees who were employed at the time the violations were committed. Furthermore, the passage of less than two years since the last unfair labor practice is not unusual and is more akin to the passage of time that occurs in the "normal course" of unfair labor practices litigation. *Intersweet, Inc.*, supra; *Novelis Corporation*, supra (two and a half year lapse of time not significant enough to warrant withholding bargaining order.)

circumstances militate against the finding of a bargaining order should be rejected and the ALJ's decision affirmed.

D. The ALJ's Additional Remedies are Appropriate Under the Circumstances

The Administrative Law Judge correctly recommended additional remedies in this case.¹¹³ Respondent's violations are so serious and widespread that such remedies are necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices.

XII. Conclusion

Based on the foregoing, Counsels for the General Counsel request that the ALJD be affirmed and Respondent's Exceptions be denied in their entirety.

Respectfully submitted this 2nd day of June, 2017,

/s Colleen Carol
/s Steven Carlson
Counsels for the General Counsel
National Labor Relations Board
Region Seven – Resident Office
Grand Rapids, Michigan
Colleen.Carol@nrb.gov
Steven.Carlson@nrb.gov

¹¹³ In determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices, the Board has broad discretion to fashion a remedy to fit the circumstances of each case. In this regard, the Board has recognized that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *United States Service Industries*, 319 NLRB 231, 232 (1995) quoting *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979). Access remedies assure employees that they can learn about unionization in an atmosphere free of the restraint or coercion generated by an employer's violations. *Jonbil, Inc.*, 332 NLRB 652, 652 (2000); *United States Service Industries*, supra; *Heck's, Inc.*, 191 NLRB 886, 887 (1971). In the instant case, the Respondent's unfair labor practices justify the additional remedies sought by the General Counsel.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

SYSCO GRAND RAPIDS, LLC

Respondent/Employer

Cases 07-CA-146820

07-CA-148609

07-CA-149511

and

07-CA-152332

07-CA-155882

07-CA-166479

07-RC-147973

**GENERAL TEAMSTERS UNION
LOCAL NO. 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

Charging Party/Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that the General Counsel's Brief in Response to Respondent's Exceptions to Administrative Law Judge's Decision was served on the parties by electronic mail on June 2, 2017, at the following addresses:

William Hester, Counsel for Respondent
WEK@Kullmanlaw.com

Mark A. Carter, Counsel for Respondent
mark.carter@dinsmore.com

Michael Fayette, Counsel for the Charging Party
mfayette@psfklaw.com

/s/ Steven Carlson
Counsel for the General Counsel