

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01

LIBERTY BAKERY KITCHEN, INC.

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 653

Cases 01-CA-181081
01-CA-191349

COUNSELS FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
EXCEPTIONS AND BRIEF OF THE RESPONDENT LIBERTY
BAKERY KITCHEN, INC.

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I. STATEMENT OF THE CASE

Administrative Law Judge (ALJ) Elizabeth M. Tafe heard this case in Boston, Massachusetts on January 31 and February 2, 2017. On May 25, 2017, Judge Tafe issued her decision, in which she made certain findings of fact and conclusions of law and recommended that Liberty Bakery Kitchen, Inc. (Respondent) be ordered to refrain from certain actions and to take certain affirmative actions in order to effectuate the purposes of the National Labor Relations Act, 29 U.S.C. §151, et seq. (the Act). ALJ Tafe correctly decided that Respondent violated Section 8(a)(5) of the Act by unilaterally withdrawing recognition from Teamsters Local 653 (the Union) on July 25, 2016 absent objective evidence of a loss of majority support and by refusing to bargain with the Union since that date; violated Section 8(a)(1) of the Act by interrogating an employee in mid-July 2016 about his Union support; and violated Section 8(a)(1), (3), and (5) of the Act by granting wage increases to bargaining unit employees on November 19, 2016 unilaterally and in order to discourage employees' Union support and encourage or reward employee disaffection from the Union.¹

On June 22, 2017, Respondent filed Exceptions and Brief of the Respondent Liberty Bakery Kitchen, Inc. (Respondent's Exceptions and Supporting Brief). Counsels for the General Counsel submit this brief in response to Respondent's Exceptions and Supporting Brief.

¹ On June 30, 2017, the Honorable Allison D. Burroughs of the United States District Court for the District of Massachusetts issued a Memorandum and Order Granting Motion for Preliminary Injunction, pursuant to Section 10(j) of the Act. (*Walsh v. Liberty Bakery Kitchen, Inc.* Civil Action No. 17-cv-10721-ADB) Judge Burroughs' order provides that from June 29, 2017 until June 29, 2018, Respondent be enjoined and restrained from engaging in certain activity and that Respondent take certain affirmative action, and that on June 14, 2018, the parties shall appear for a status conference, at which time the Court will consider whether to continue the injunction, order an election, or grant such other relief as the parties may request. A copy of Judge Burroughs' order is attached hereto as Exhibit A.

II. OVERVIEW

Respondent operates a commercial bakery located at 125 Liberty Street in Brockton, Massachusetts (the Brockton facility), which bakes doughnuts, muffins, bagels, cookies, and various other bakery products that it distributes to Dunkin' Donuts stores in the surrounding area.² On May 8, 2015, the National Labor Relations Board (the Board) certified the Union as the exclusive collective-bargaining representative of a bargaining unit of Respondent's full-time and regular part-time drivers (Unit employees) in Case 01-RC-148539. Between July 2015 and July 2016, the parties engaged in negotiations for an initial collective-bargaining agreement and reached tentative agreement on various non-economic matters. However, on July 25, 2016,³ Respondent abruptly notified the Union in writing that, effective that day, it was withdrawing recognition based upon its erroneous belief that the Union no longer enjoyed majority support among Unit employees and canceled the parties' upcoming bargaining sessions. Prior to withdrawing recognition, one of Respondent's supervisors interrogated a Unit employee about his Union support by asking him if he had signed a document circulating among employees which concerned the Union.

² The Union filed the charge in Case 01-CA-181081 against Respondent on July 27, 2016. The Union filed a first amended charge in Case 01-CA-181081 on October 26, 2016. The Complaint and Notice of Hearing issued on November 30, 2016. The Union filed a second amended charge in Case 01-CA-181081 on January 10, 2017. An Amended Complaint and Notice of Hearing issued on January 13, 2017. The Union filed the charge in Case 01-CA-191349 on January 17, 2017. The Union filed a first amended charge in Case 01-CA-191349 on January 26, 2017. Counsels for the General Counsel issued a Notice of Intent to Amend Complaint on January 27, 2017. The Administrative Law Judge granted Counsels for the General Counsel's motion to allow the Notice of Intent to Amend Complaint at the opening of the hearing in this matter, which was conducted on January 31, 2017 and February 2, 2017 in Boston, Massachusetts.

³ All dates hereafter are in 2016 unless otherwise noted.

Effective November 19, Respondent granted one Unit employee a wage increase of \$1.50 per hour; granted another Unit employee a wage increase of \$1.90 per hour; and granted its remaining 12 Unit employees wage increases of \$3.00 per hour. Respondent granted these unscheduled and unprecedented wage increases – the first raises drivers had received in nearly six years – unilaterally and without providing the Union notice and an opportunity to bargain over this mandatory subject of bargaining, and in an attempt to dissuade Unit employees from supporting the Union.

After setting forth these record facts, the legal analysis that follows will establish that, as the ALJ correctly found: Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act; Respondent's interrogation and solicitation of a Unit employee violated Section 8(a)(1) of the Act; and Respondent's unilaterally implemented wage increases violated Section 8(a)(1), (3), and (5) of the Act. Therefore, Respondent must be ordered to post an appropriate Notice to Employees; cease interfering with its employees' Section 7 rights; upon request by the Union, rescind the unlawful wage increases; and, upon request, recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit employees.

III. STATEMENT OF THE ISSUES

1. Did the ALJ improperly admit and consider GCX 4?⁴ (Respondent's Exception 1)
2. Did the ALJ err in finding that the wage increase "was designed to discourage Union activity and/or reward the drivers' perceived rejection of the Union" in violation of Section 8(a)(3) and (1) of the Act, and mistakenly rely on *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)? (Respondent's Exception 2)

⁴ Counsels for the General Counsel's exhibits will be cited as "GCX (number);" Respondent's exhibits will be cited as "RX (number);" and joint exhibits will be cited as "JX (number)." Transcript references will be cited as "T. (page number)." Respondent notes that JX 1, which runs to 44 pages, is internally Bates stamped and therefore citations to JX 1 will cite to the Bates stamped page number(s).

3. Did the ALJ err in finding that Respondent violated Section 8(a)(5) and (1) of the Act because it did not satisfy the standard for unilaterally withdrawing recognition set forth in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) (Respondent's Exception 3)
4. Did the ALJ err in finding that Respondent's supervisor, Marcelino Rodrigues, violated Section 8(a)(1) of the Act when he interrogated Unit employee Lawrence Leonard about his Union activity? (Respondent's Exception 4)
5. Did the ALJ err in finding that Respondent's General Manager, Paul Wright, was not a credible witness? (Respondent's Exception 5)
6. Did the ALJ err in recommending an affirmative bargaining order? (Respondent's Exception 6)
7. Should the Board overrule *Levitz, supra*? (Respondent's Exception 7)

IV. STATEMENT OF FACTS

A. **Respondent Unilaterally Withdrew Recognition from the Union on July 25, and Since that Date Has Refused to Meet or Communicate with the Union for Any Reason Concerning the Unit Employees.**

- (i) **On May 8, 2015, the Board Certified the Union as the Exclusive Collective Bargaining Representative of Respondent's Full-Time and Regular Part-Time Drivers, and the Parties Began Negotiations for an Initial Collective-Bargaining Agreement on July 23, 2015.**

On May 8, 2015, following an April 27, 2015 election in Case 01-RC-148539, the Board certified the Union as the exclusive collective-bargaining representative of Respondent's full-time and regular part-time drivers.⁵ (T 31; GCX 2; JX 1 at 35). Thereafter, the parties engaged in negotiations for an initial collective-bargaining agreement, meeting nine times between July 23, 2015 and July 14, 2016. (T 32; JX 1 at 1-2) Respondent's attorney, Geoffrey Wermuth (Wermuth), and Respondent's

⁵ Respondent employs 114 employees, including bakers, production employees, cleaners, and 14 Unit drivers. (T. 30)

general manager, Paul Wright (Wright) (who has held that position during his entire 10-year career with Respondent), represented Respondent in negotiations, while Union representative Brian McElhinney (McElhinney), Union attorney Nicholas Chalupa (Chalupa), and Unit employee Thomas Lydon (Lydon) represented the Union.⁶ (T 27, 32) The parties agreed that they would attempt to resolve non-economic matters before bargaining over economics, and they reached tentative agreement on a number of non-economic matters between April 6 and June 9. (JX 1 at 12-20, 33)

(ii) On May 25, Three Unit Employees Approached Respondent Asking How to Remove the Union. Shortly Thereafter, Respondent Provided These Employees with Information and Forms from the Board's Website.

On May 25, Unit employees Fred Robinson (Robinson), Manny Cunningham (Cunningham), and Emilio Depina (Depina) approached Wright, asking if there was a way to "get the Union out of here."⁷ (T 33-34; JX 1 at 36) At 8:19 that morning, Wright emailed Wermuth about, *inter alia*, the employees' visit and whether Wermuth could provide him with information responsive to their inquiry. (JX 1 at 36) Wermuth forwarded Wright a document containing excerpts from the Board's website about decertification elections and extant Board law concerning when an employer can unilaterally withdraw recognition from an incumbent union;⁸ a copy of a blank Representation Petition and its accompanying instructions, Form NLRB 502; and a copy of Form NLRB 4812, Description of Representation Case Procedures in Certification

⁶ Initially, Lydon and Union representative Mike Clark represented the Union in bargaining. (T. 103) The record does not indicate when or why Clark left the Union's bargaining committee, or when or why McElhinney and Chalupa joined the Union's bargaining committee.

⁷ None of these employees testified at the hearing.

⁸ In Respondent's position paper, Wermuth admittedly created this document solely "for informational purposes" and specifically acknowledged that it "accurately states the law and does nothing else," inasmuch as it "only [contains] an excerpt from the Board's website, and an excerpt from GC Memorandum 16-03, May 09, 2016." (JX 1 at 4)

and Decertification Cases. (T 34-36; JX at 37; GCX 3a; GCX 3b) Within a couple of days, Wright provided Robinson with the document containing the excerpts from the Board's website about decertification elections and extant Board law concerning when an employer can unilaterally withdraw recognition from an incumbent union. (T 36; JX 1 at 4, 37)

(iii) On July 18, Robinson Returned a Copy of the Document Containing the Excerpts from the Board's Website with Nine Undated Employee Signatures. On Wermuth's Advice, Wright Instructed Robinson to Add Additional Language to the Document. After Doing So, Robinson Returned the Document to Wright, and on July 25, Respondent Withdrew Recognition from the Union and Canceled the Parties' Upcoming Bargaining Sessions.

On July 18, Robinson provided Wright with a copy of the document containing the excerpts from the Board's website, which by then also contained nine undated employee signatures, including his own. (T 36; JX 1 at 38)⁹ Wright emailed Wermuth asking what he should do with the document Robinson gave him. (T 37) Shortly thereafter, Wermuth forwarded Wright additional language he had drafted to be added to the document Robinson gave to Wright. (T 37; JX 1 at 4) Wright subsequently explained to Robinson that Robinson should include the additional language Wermuth had drafted on the document containing the excerpts from the Board's website and the nine undated employee signatures. (T 37; JX 1 at 4) Robinson later returned the document to Wright, which by then also included the additional language Wermuth had provided, written in Robinson's own handwriting.¹⁰ (T 38; JX 1 at 4, 39)¹¹ The following

⁹ Wright identified the signers as Robinson, Depina, Cunningham, Thomas Pelletier, Colt Young, Hugues Pierre, Corey Garside, Adnilson Tavares, and Joseph Desena, and testified that he recognized their signatures at the time he received the document. (T 68-69)

¹⁰ The language Wermuth drafted is not in evidence. However, the language Robinson added reads, "This petition is to request our employer Liberty Bakery Inc. to withdraw recognition (sic) from [the Union]. I

day, Wright forwarded this document to Wermuth. (T 38) On July 25, Wermuth wrote Union Attorney Chalupa that, effective immediately, Respondent was withdrawing recognition from the Union as the exclusive collective-bargaining representative of its drivers because it had been "reliably informed via a petition signed by more than 50% of the bargaining unit members that they no longer wish to have [the Union] represent them." (T 38; JX 1 at 41) Wermuth also wrote that the parties' August 2 and August 25 bargaining sessions were "moot." (JX 1 at 41)

(iv) Since July 25, Respondent Has Refused to Meet or Communicate with the Union for Any Reason with Respect to the Drivers' Unit.

Wright testified that since Respondent withdrew recognition from the Union on July 25, he has not met with the Union for contract negotiations or for any other purpose, nor has he communicated with the Union for any reason, concerning Unit employees. (T 38-39) Wright also testified that he is not aware of any other Respondent representative meeting or communicating with the Union regarding the Unit employees since July 25. (T 38-39)

A. In Mid-July, Supervisor Marcelino "Charlie" Rodrigues (Rodrigues) Interrogated Unit Employee Lawrence Leonard (Leonard) About His Union Support and Solicited His Signature on the Document Concerning the Union Which Robinson Was Circulating Among Employees.

Frederick Robinson certify that all the people who sign (sic) this petition did so after May 25, 2016." Robinson signed his name below this language. (JX 1 at 39) There is no evidence that Robinson ever notified or consulted with any of the other signers either before or after adding this language to the document.

¹¹ The copy of JX 1, p.39 in evidence contains stray marks Counsels for the General Counsel made, and Respondent's counsel agreed that they were inadvertent and of no significance. Accordingly, Counsels for the General Counsel and Respondent's counsel agreed that a copy of that page without those stray marks need not be substituted for the copy in evidence. (T. 80-81)

In mid-July, Robinson approached fellow driver Leonard while drivers were unloading their trucks toward the end of their shift, between 5:00 a.m. and 6:00 a.m. (T 85) Robinson told Leonard that he had a paper for drivers to sign because they wanted to “vote out the Union,” and he asked whether Leonard wanted to sign it. (T 85)¹² Leonard told Robinson he did not wish to do so. (T 85)

As he was walking to his car, approximately half an hour later, Leonard spoke with his direct supervisor, Rodrigues, who is also Robinson’s father-in-law. (T 84-85, 86) Leonard said something to the effect of, “See you tonight,” and Rodrigues asked Leonard if he was going to “sign that,” to which Leonard replied, “Sign what?” (T 86) Rodrigues said, “You know what,” and when Leonard replied that he didn’t want to get involved, Rodrigues told Leonard that he (Leonard) was already involved. (T 86) Leonard testified that when he told Rodrigues he didn’t want to get involved, he meant that he didn’t want to be a part of “the commotion about the Union [being] gone.” (T 86-87)

Either that morning or the following morning, Leonard told Lydon, who is also the Union’s elected shop steward, about his interaction with Rodrigues: Leonard told Lydon that Rodrigues had asked him if he wanted to sign “that piece of paper,” that Leonard asked what Rodrigues was referring to, and that he told Rodrigues he didn’t want to get involved. (T 88-89, 94-95, 108-109) Lydon corroborated Leonard’s testimony that he told Lydon about the timing and substance of Rodrigues’ exchange with Leonard. (T 97-98)

¹² Leonard’s testimony that Robinson told him that the purpose of the petition was “to vote out the Union,” is the only record evidence indicating what Robinson told employees when he solicited their signatures.

B. On November 19, Respondent Unilaterally Granted Unit Employees a Substantial Wage Increase – the First Raise Respondent Had Given its Drivers, Other than Those New Hires Who Passed Their Probationary Period, in Almost Six Years.

The parties stipulated that from January 1, 2011 until November 18, 2016, the only Unit employees who received wage increases were those new hires who passed their probationary period; these employees received 50 cent per hour raises, bringing their hourly rate to \$11. (T 21, 126) The parties further stipulated that on November 19, Respondent unilaterally implemented wage increases without affording the Union notice and an opportunity to bargain and that these raises were not part of a regularly scheduled wage increase. (T 21-22) Wright, who testified that all employees, including drivers, receive raises based upon their tenure and job performance, acknowledged arbitrarily capping the raise at \$14.65 per hour, stating that “[t]here was really no reason” he chose that hourly wage. (T 138-139) Twelve Unit employees received a \$3 per hour raise; eleven of them saw their pay rates increase to between \$14 and \$14.65 per hour (representing pay raises of between 25 and 27 percent), while Adnilson Tavares (Tavares) saw his hourly rate rise from \$12.60 to \$15.60, a 24 percent increase.¹³ (JX 2) Wright testified that despite the arbitrary \$14.65 per hour cap he decided on, he granted Tavares the full \$3 per hour raise because he holds two positions – in addition to driving, Tavares performs mechanical work inside the kitchen. (T 60; JX 2) Of the remaining two Unit employees, Joseph Desena (Desena) received

¹³ During the parties' June 9, bargaining session, Respondent initially proposed a five cent per hour raise in each year of a three-year contract, and subsequently increased its offer to 25 cents per hour. (T 66; JX 1 at 3-4) In its position statement, Respondent notes that its latter proposal represented a roughly two percent increase in drivers' pay, which it asserts is “certainly within the ballpark of reasonableness” when compared to Bloomberg BNA data compiled through June 13, showing a 2.5 percent median wage increase and a 2.7 percent average wage increase in the first year of collective-bargaining agreements settled in 2016. (JX 1 at 3, 31)

a \$1.50 per hour raise, bringing him to \$18.30 per hour (a nine percent increase), and Lydon received a \$1.90 per hour raise, bringing him to \$14.65 per hour (a 15 percent raise).¹⁴ Wright testified that Desena received less than the full \$3 an hour raise because, although he was both a driver and a baker, he had transferred from another kitchen and had already been earning \$16.80 per hour, significantly more than the other drivers. (T 59, JX 2) Wright testified that Lydon didn't receive the full \$3 per hour raise because Lydon, who was earning \$12.75 per hour at the time of his raise, would have then exceeded the \$14.65 per hour cap. (T 59-60, 139; JX 2).

Wright testified that, prior to implementing the November wage increases, Respondent's owners granted him permission to give employees a raise but did not "give him a particular number," and that he did not first consult with either Respondent's owners or Respondent's Board of Directors in this regard.¹⁵ (T.40-41, 126, 139) However, he informed them in advance of implementing the November raise that he planned to do so and at Respondent's October Board meeting, he provided them with a chart he had prepared showing the impact various raise amounts would have on the cost-per-dozen of Respondent's product. (T 40-41, 51, 127; GCX 5).¹⁶ He did not specify to the owners or to the Board of Directors how large a raise he intended to give. (T 41) According to Wright, he did not provide owners or Board members with any

¹⁴ In this regard, Lydon testified that prior to the November wage increase, he had last received a raise in 2011 worth 40 cents per hour. (T. 100-101)

¹⁵ Respondent, which has gross annual sales of approximately eight million dollars, has 23 owners, seven of whom serve on Respondent's Board of Directors. (T 28, 52, 125) Board meetings are generally held every four to six weeks, except during the summer, and Wright attends them all. (T. 53, 125-126)

¹⁶ The chart included calculations showing the impact of 10 potential raise amounts for drivers, ranging between \$1 and \$3.75 per hour, and the impact of 10 potential raise amounts for bakers, production employees, and cleaners, ranging between \$.25 and \$1.30 per hour. (T. 54-57, 153-154; GCX 5) Wright testified that effective with the first payroll in January 2017 bakers, production employees, and cleaners received raises of "50 cents, give or take." (T. 57)

other documentation concerning the November raises, nor did they respond to him about it in writing. (T 41) Instead, Wright testified, they orally responded to his proposal, telling him to “do it when [he] saw fit,” stating that it was his option, and giving him “free reign to implement what [he] chose.” (T 41, 51, 133-134)¹⁷ According to Wright, this likely occurred at the October Board meeting, but he couldn’t be certain. (T 52) Wright further testified that Respondent does not prepare formal minutes of its Board meetings, and that he keeps reports in outline form on file but that “the rest of it’s verbal.” (T 49, 132) When asked whether anyone records what happens at Board meetings, Wright testified that he “sometimes” makes notes on his copy of his outline, but “that’s all,”¹⁸ that Board members generally don’t take notes at Board meetings, and that he didn’t recall any Board members taking notes at the meeting when he discussed the November raises. (T 69, 127-128) Wright confirmed that Dinarte Pimental (Pimental) serves as Secretary of Respondent’s Board of Directors but testified that Pimental does not keep minutes or notes of Board meetings, though he does sign documents, such as “government forms,” on Respondent’s behalf. (T 130) Wright also testified that he had prepared an outline for the Board meeting at which the wage increase was discussed, and that he “assume[d]” he kept a copy, but couldn’t be sure it referred to wages. (T 69-71)¹⁹ Wright further testified that he provides Board members with copies of his outline. (T 72) Despite this testimony, and notwithstanding Counsels

¹⁷ Wright testified that Respondent leaves many financial matters affecting the business to his sole discretion and that he did not consider the fact that he was contemplating such a significant wage increase a major decision worthy of bringing to the Board’s attention, despite not having granted its drivers a single raise in years. (T 52, 72-73) Wright nevertheless prepared the chart regarding the raise for the Board to review, after which they gave him authority “to do what [he] thought was right.” (T 134)

¹⁸ Wright acknowledged that there are matters which Board members must vote on, but testified that he merely notes how Board members voted on his outlines, which he keeps in his office. (T 131)

¹⁹ According to Wright, he “prepare[s] an outline and then do[es] verbally from the outline what [he] want[s] to cover that day.”

for the General Counsel's repeated requests and the ALJ's instruction that Respondent review Counsel' for the General Counsel's subpoena duces tecum and produce responsive material, Respondent produced no such documents at trial other than the chart Wright prepared showing the impact of various proposed raise amounts.²⁰ (T 22-24, 73-77; 118-120, 132-133; JX 3a; JX 3b) In addition, while Wright testified that he was "sure" there was back-and-forth discussion with the Board of Directors about the issue of raises at their meeting, he could not recall any specifics at trial. (T 134) Wright, who has worked as Respondent's general manager during his entire 10-year career there, testified that he does not know how Board members communicate the business they transact to the 16 owners who are not Board members. (T 22, 132)

According to Wright, the scheduled January 1, 2017 increase in the Massachusetts minimum wage – which impacted many of Respondent's bakers, production employees, and cleaners – prompted him to consider giving drivers a raise at the same time. (T 53, 134-135)²¹ Nevertheless, Wright did not wait until the New Year to give the drivers a raise, testifying that he "thought it would be good to put it in before the holidays [and] maybe help morale." (T 54) The bakers, production

²⁰ In this regard, on February 1, 2017, while the hearing was adjourned, Wright emailed Respondent's seven Board members about whether they had any "personal notes from [the] Board meetings regarding discussions of raises for the drivers." (RX 1) Board members Maria Zsambok, Pimentel, Bill Donovan, Victor Carvelho, Ivo Garcia, and Paul Cleary each responded that they had none. (RX 1) Board Member Kevin Donovan, who Wright believes was on then vacation, did not respond. (T. 128-129; RX 1)

²¹ Wright testified that when the mandated raise – i.e., the January 1, 2017 minimum wage increase – was implemented, "everybody would be wanting some kind of a raise." (T. 135) Wright conceded, however, that when the Massachusetts minimum wage rose in 2015 and 2016, Respondent did not grant drivers a raise. (T. 140-141) According to Wright, he decided to make up for this by giving drivers three years' worth of minimum wage increases at once in November 2016. (T. 141) Wright also testified that "[i]n the last three years" Respondent had given raises on a regular basis to its bakers, production employees, and cleaners, which were not capped and which were in many cases on the order of three or four percent, but had not given its drivers a raise because Respondent was "in negotiations with the Union." (T. 136, 141, 154) However, the record evidence clearly establishes that the parties bargaining occurred between July 23, 2015 and July 14, 2016, a period of one year, not three. (T. 32, 156; JX 1 at 1-2)

employees, and cleaners received raises effective with the first payroll in January 2017, most in the range of 50 cents per hour. (T 57)

Around January, Respondent's consultant, Jim Misercola, prepared a flier in connection with the Union's then-current effort to organize Respondent's bakers, production employees, and cleaners which reads, *inter alia*, that, "After two long years, the drivers still have no contract and want out of the [U]nion. We felt it was time to give them a fair raise and made the decision to do it. The raise was given because it was the right thing to do and **not because the drivers belonged to the [U]nion.**" (T 61-63, 174-176; GCX 4) (emphasis original) Wright testified that Respondent distributed the flier to all employees except drivers and also issued it in Portuguese, three dialects of which a substantial number of Respondent's bakers, production employees, and cleaners speak. (T 30, 63-64, 169-170)²² Wright initially testified that Respondent did not post the fliers at the Brockton facility, but subsequently admitted that they had, in fact, been posted there and that he had seen a flier posted on February 1, 2017, as well as prior to that date. (T 64, 159, 173-174) He also testified that because he does not read Portuguese, he would not know whether or not fliers had been posted, had they been written in Portuguese. (T 174)

Lydon testified that beginning on about January 20, 2017, and as recently as January 28, 2017, he saw laminated copies of the flier posted in English and in Portuguese, each measuring approximately two feet by two and one half feet, in the hallway between the break room and the main kitchen area, about three feet from the time clock, as well as two legal-sized laminated copies in Portuguese posted in the

²² Lydon testified that he, Depina, and Tavares also speak Portuguese. (T. 163)

break room, which all employees, including drivers, use to punch in and to take their breaks. (T 158-165, 168, 171-172) The hallway between the break room and the main kitchen area leads from the primary employee entrance of the building and to the kitchen area and the time clock. (T 165) Drivers walk back and forth down that hallway at least twice per shift, and probably more often than that, to punch in and punch out and to go to and from the break room. (T 165-66)

V. ANALYSIS

1. **The ALJ properly admitted and considered GCX 4. (Respondent's Exception 1)**

Respondent contends that the ALJ improperly allowed Counsels for the General Counsel to introduce GCX 4 (ALJD at 8:17-42, 16:39-17:6, and 16, n.33; T 61-62), which Respondent asserts is “completely irrelevant and prejudicial.” See Respondent's Exceptions and Supporting Brief at 1. In this regard, Respondent asserts – erroneously – that GCX 4 has “nothing whatever (sic) to do with the drivers' situation.” *Ibid.* To the contrary, GCX 4 is wholly relevant to establishing Respondent's unlawful motive in granting the November 19 wage increases. Thus, the text of GCX 4 expressly references the drivers' unit, stating, in relevant part, that “[t]he raise was given because it was the right thing to do and **not because the drivers belonged to the [U]nion.**” (emphasis original) As such, the ALJ correctly concluded that “Respondent articulated a connection between the wage increases and [U]nion representation when, in January 2017, it emphasized in a campaign poster that the drivers' wage increases were not the result of Union negotiations, but based on [Respondent's] sole discretion and desire to do the right thing. By the January 2017 poster, the Respondent takes credit for

rewarding the drivers with the wage increases in the context of the drivers' purported rejection of the Union." ALJD at 16, n.33²³

Next, Respondent's reliance on *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) is misplaced. See Respondent's Exceptions and Supporting Brief at 2. In *Clark County*, the Supreme Court wrote that "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" *Id.* at 273 (internal citations omitted). (emphasis supplied) Unlike in *Clark County*, however, the ALJ did not find Respondent unlawfully granted the November 2016 wage increases based on "mere temporal proximity." Rather, the ALJ concluded that the wage increases violated Section 8(a)(3) and (1) of the Act based on a number of grounds, including the fact that the general increase of \$3 per hour – purportedly to make up for the fact that the drivers had not received raises during the previous three years when the minimum wage increased – was "drastically larger" than raises which had been typically granted; the absence of any pattern or practice of Respondent granting even its lower wage employees a full \$1 raise when the minimum wage increased; the fact that Union steward Lydon received "the least favorable wage increase;" the fact that Respondent "established a wage cap of \$14.65 for no reason" (which, the ALJ reiterated, "negatively

²³ In further support of this objection, Respondent argues that the ALJ improperly relied on the January 2017 posting to "infer intent about a November wage increase for one group when there is no evidence of any organizing going on in any employee group." See Respondent's Exceptions and Supporting Brief at 2. However, Respondent directly contradicted this assertion, writing that the "document was used as part of an informational campaign for a pending election vote for [Respondent's] production employees in January 2017." See Respondent's Exceptions and Supporting Brief at 1. (emphasis supplied) In any event, as noted above, the ALJ properly received GCX 4 into evidence and appropriately relied on it in support of her finding that the November 2016 wage increase violated Section 8(a)(3) and (1) of the Act.

affected *only* the [U]nion steward” (emphasis original)); and the fact that Respondent admittedly had never before set a wage cap, which Respondent chose not to apply to employee Tavares, whose wage rate increased to \$15.60, well above the “cap,” when his wage rate had initially been comparable to Lydon’s. Therefore, the ALJ properly concluded – based on much more than mere temporal proximity – that Respondent failed to establish that its unprecedented and discretionary raises were granted for legitimate business reasons. ALJD at 16:5-21.

Accordingly, the ALJ properly admitted and relied upon GCX 4 in connection with her finding that Respondent’s November 2016 wage increases violated Section 8(a)(3) and (1) of the Act, and Respondent’s arguments in support of Exception 1 are unavailing.²⁴

2. The ALJ correctly found that the wage increases were “designed to discourage Union activity and/or reward the drivers’ perceived rejection of the Union” in violation of Section 8(a)(3) and (1) of the Act, and the ALJ properly relied on *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), in making this finding. (Respondent’s Exception 2)

The ALJ correctly found that the wage increases were “designed to discourage Union activity and/or reward the drivers’ perceived rejection of the Union, in violation of Section 8(a)(3) and (1) of the Act.” ALJD at 14:35-37. In this regard, Counsels for the General Counsel hereby incorporate the argument articulated above regarding Respondent’s Exception 1 in support of the ALJ’s finding that Respondent’s wage increases violated Section 8(a)(3) and (1) of the Act.

²⁴ Respondent’s claim that GCX 4 constitutes lawful Section 8(c) communication is irrelevant. See Respondent’s Exceptions and Supporting Brief at 2. Counsels for the General Counsel did not allege that the text of GCX 4 is unlawful, but rather, introduced it as evidence supporting the fact that Respondent’s wage increases violated Section 8(a)(3) and (1) of the Act inasmuch as it links Respondent’s unprecedented raises to its sudden largesse and makes clear – in literally bolded and underscored text – that the Union was in no way to thank for securing this benefit for Respondent’s drivers.

In addition, GCX 4 directly contradicts Respondent's assertion that there is no evidence that Respondent publicized the wage increases, or issued any "memos or postings or ballyhoo about what a good employer [Respondent] was." See Respondent's Exceptions and Supporting Brief at 3. Moreover, GCX 4 trumpets precisely the message that Respondent wished to convey about what a "good employer" it is: it applauds its decision to give the drivers a "fair raise," which the flier describes it as "the right thing to do." In addition, as explained in n.24, the flier explicitly derides the Union by emphasizing that the Union played no role in Respondent's decision to grant the raises. Even assuming, as Respondent asserts, that the wage increases were not a "quid quo pro for the petition" (see Respondent's Exceptions and Supporting Brief at 3), they were certainly intended to interfere with its employees' "freedom of choice for or against unionization," *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), as the ALJ correctly found.²⁵ ALJD at 14:39-15:6. GCX 4 also plainly undermines Respondent's claim that Wright didn't blame the Union for the lack of prior wage increases. See Respondent's Exceptions and Supporting Brief at 3.

Contrary to Respondent's assertion (see Respondent's Exceptions and Supporting Brief at 4-8), the ALJ properly relied on *NLRB v. Exchange Parts Co.* and correctly concluded that the preponderance of the evidence demonstrated that Respondent's wage increases violated Section 8(a)(3) and (1) of the Act. ALJD at 14:29-17:6. Thus, an employer's grant of benefits to employees in an effort to influence

²⁵ In this regard, the ALJ correctly concluded that the Union's status as the drivers' exclusive collective-bargaining representative was in issue, inasmuch as the Union contested Respondent's withdrawal of recognition. ALJD at 15:8-28. In fact, the Union filed the charge in Case 01-CA-181081 challenging Respondent's July 25, 2016 withdrawal of recognition on July 27, 2016. GCX 1(a); JX1 at 41. Therefore, Respondent's claims that "there was no [U]nion activity to discourage" on November 19 and that the ALJ erroneously articulated a "linkage" between the wage increase and the Union's status are groundless. See Respondent's Exceptions and Supporting Brief at 3, 5.

their union activity has long been recognized as a highly coercive "hallmark" violation of the Act. See *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980). In this regard, the Supreme Court stated that "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove," and "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. at 409. Despite Respondent's claims to the contrary, the ALJ rightly understood that this was Respondent's goal.

In finding Respondent's raises unlawful, the ALJ also properly applied analogous Board precedent holding that an employer may lawfully grant benefits to employees during union organizing activity only if it can demonstrate that factors other than a pending election or organizing activity governed its actions. See, e.g., *Vista Del Sol Health Services, Inc.*, 363 NLRB No. 135, slip op. at 1 n.2 (2016). To establish such a claim,

the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation. " If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. One way to do this is to show the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union."

Id., slip op. at 16 (internal citations omitted).

The ALJ also correctly applied settled Board precedent providing that "[a]bsent a showing of a legitimate business reason for the timing of the grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *ManorCare Health Services – Easton*, 356 NLRB

202, 222 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011), quoting *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); *Hogan Transports, Inc.*, 363 NLRB No. 196, slip op. at 4 and n.9 (2016) (finding wage increase granted during organizing campaign was intended to dissuade employees from supporting union, in violation of Section 8(a)(3) and (1) of the Act, and noting that the Board infers unlawful motivation and interference with employee rights in such circumstances unless employer can come forward with an explanation other than pending election for timing such benefits being granted). See also *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 545 (2002) (Board may separately scrutinize the timing of a benefit announcement to assess its lawfulness). Although the instant case does not concern an organizing campaign involving the drivers' Unit, the ALJ properly recognized that the foregoing principles apply with equal force in determining the lawfulness of the November wage increase Respondent granted to the Unit employees. ALJD at 15:8-20. The ALJ also correctly found Wright's testimony vague, non-specific, and evasive and that his explanation for the timing and size of the wage increase was simply not credible.²⁶ ALJD at 15:32-16:3. Accordingly, the ALJ aptly relied on the principles set forth in *NLRB v. Exchange Parts Co.* and on the Board precedent set forth above in finding that Respondent failed to establish a legitimate business reason motivated its November wage increases.²⁷

²⁶ In this regard, see Counsels for the General Counsel's argument, below, concerning Respondent's Exception 5.

²⁷ Respondent's assertion that the parties' negotiations were neither contentious nor adversarial and that the Union did not file any unfair labor practice charges related to the parties' bargaining (see Respondent's Exceptions and Supporting Brief at 6) has no bearing on the fact that the wage increases were unlawful. Rather, as the ALJ recognized, the relevant inquiry is whether, in all the circumstances, Respondent demonstrated a legitimate business reason for granting them. Applying this standard, the ALJ properly held that Respondent had not established a legitimate business reason for its decision and the ALJ's conclusion that Respondent's wage increases violated Section 8(a)(3) and (1) of the Act is fully supported by the record evidence. ALJD at 14:34-37.

Respondent's claim that, because it did not receive the petition until two months after the certification year ended, it cannot be characterized as "an employer who is out running around trying to get bargaining unit members to sign a petition to oust the Union. " (see Respondent's Exceptions and Supporting Brief at 6-7), is irrelevant to Counsels for the General Counsel's theory of violation and the ALJ's conclusion that Respondent's conduct was unlawful. Thus, Counsels for the General Counsel never alleged that Respondent violated Section 8(a)(2) of the Act regarding its response to the employee inquiry about their options regarding the Union, a fact which the ALJ acknowledged. ALJD at 9, n.18.²⁸ Likewise, the fact that the Union hadn't filed unfair labor practice charges prior to July 27, 2016 (see Respondent's Exceptions and Supporting Brief at 7) has no bearing on the merits of the case. The same is true regarding the fact that the Union filed its charge in Case 01-CA-191349 on January 17, 2017 and that Counsels for the General Counsel issued a Notice of Intent to Amend Complaint on January 27, 2017. See *id.* In this regard, pursuant to Section 102.17 of the Board's Rules & Regulations, Counsels for the General Counsel issued their Notice of Intent to Amend Complaint and the ALJ properly allowed it at the start of the hearing. GCX 1(r); T 7-8; ALJD at 2, n.2. Moreover, pursuant to Section 10062 of the NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (February 2017), the Union appropriately amended its unfair labor practice charges during the course of the investigation. See Respondent's Exceptions and Supporting Brief at 7; GCX 1(a), 1(c), 1(h), 1(m), and 1(o). Finally, the ALJ correctly found that Respondent's wage increase violated Section 8(a)(5) and (1) of the Act and Section 8(a)(3) and (1) of the Act,

²⁸ Respondent repeats this straw argument in regard to Respondent's Exception 6. See Respondent's Exceptions and Supporting Brief at 19.

notwithstanding the fact that, as the ALJ noted, the latter finding “may not materially affect the remedy.” ALJD at 14:20-37.

Based on the foregoing, Respondent’s Exception 2 lacks merit and the Board should affirm the ALJ’s finding that Respondent’s wage increases violated Section 8(a)(3) and (1) of the Act.

3. The ALJ correctly found that Respondent violated Section 8(a)(5) and (1) of the Act because it did not satisfy the standard for unilaterally withdrawing recognition set forth in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001) (Respondent’s Exception 3).

The ALJ correctly found that Respondent unlawfully withdrew recognition from the Union because it lacked objective evidence that the Union had lost majority employee support. ALJD at 11:9-13:19. The ALJ applied settled Board precedent holding that a union recognized as the collective-bargaining representative of a unit of employees is presumed to enjoy the support of a majority of the represented employees, and that an employer may only rebut this presumption when it can prove, by a preponderance of the evidence, that the union has suffered an actual loss of majority support at the time the employer withdrew recognition.” *Levitz*, 333 NLRB at 720, 723, 725. Thus, an employer may only unilaterally withdraw recognition from an incumbent union based upon objective evidence that the union has actually lost majority employee support. *Id.* at 725; *T-Mobile USA, Inc.*, 365 NLRB No. 23, slip op. at 2 (2017). Applying this precedent to the undisputed facts of the instant case, the ALJ correctly found that Respondent lacked objective evidence that a majority of Unit employees no longer supported the Union and, accordingly, Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union on July 25.

First, as Respondent admits, the document which Wright provided to employees “accurately states the law and indicates employees have *two options*.” See Respondent’s Exceptions and Supporting Brief at 9; JX 1 at 37 (emphasis supplied) The record evidence establishes that Robinson returned this same document to Wright in July after he and eight other drivers had signed it. T 36; JX 1 at 38. Critically, however, this document does not state that the signers no longer wanted the Union to represent them.²⁹ Thus, the document employees signed constitutes ambiguous – not objective – evidence that the Union had lost majority employee support, and Respondent’s claim that “[s]ince Mr. Robinson had returned the document with signatures of over 50% of the bargaining unit members, it seemed obvious that what employees sought was withdrawal of recognition rather than an election. ” is groundless speculation which falls short of the *Levitz* standard. See Respondent’s Exceptions and Supporting Brief at 10. Moreover, the fact that Respondent instructed Robinson to add language to the document to the effect that they wanted Respondent to withdraw recognition from the Union *after the employees had signed it* highlights that Respondent well knew the document Robinson returned was inadequate, a conclusion the ALJ also rightly reached, writing that “Robinson’s handwritten changes to the informative page did not transform an otherwise objectively unclear statement about the employees’ intent to one with sufficient strength to support a finding of actual loss of

²⁹ As the ALJ correctly explained (ALJD at 12:15-34), the Board carefully examines petition language to determine whether employees no longer desire union representation. See *Anderson Lumber Co.*, 360 NLRB 538, 538 n.1, 542-543 (2014), enfd. 801 F.3d 321 (D.C. Cir. 2015) (Board upheld ALJ’s finding that employer unlawfully withdrew recognition where four employees wrote statements concerning their desire to terminate their union membership, but did not indicate that they no longer wanted the union to represent them for purposes of collective bargaining). See also, *Highlands Regional Medical Center*, 347 NLRB 1404, 1406 (2006), enfd. 508 F.3d 28 (D.C. Cir. 2001); and *Wurtland Nursing & Rehabilitation Center*, 251 NLRB 817, 817-818 (2007). In this regard, Respondent is simply wrong when it asserts that the document employees presented to Wright “specifically requested [a] withdrawal of recognition [which] is objective evidence by any standard.” See Respondent’s Exceptions and Supporting Brief at 13.

majority.” ALJD at 13:7-9; T 37-38; JX 1 at 4, 39. Respondent’s casual assertion that “the additional handwritten language simply confirmed” Respondent’s assumption in this regard does not withstand scrutiny (see Respondent’s Exceptions and Supporting Brief at 10), and the ALJ correctly reached this same conclusion. ALJD at 12:36-13:9.³⁰ Likewise, Respondent’s subsequent attempts to justify its unlawful withdrawal of recognition (see Respondent’s Exceptions and Supporting Brief at 10-13) fall flat, and its assertion that Counsels for the General Counsel’s and the ALJ’s “only quibble is that supposedly [Respondent] did not have ‘objective evidence’ of [the Union’s] loss of majority status. . . is silly given the evidence ” actually *ignores* the evidence and cannot be trivialized as a “quibble.” See Respondent’s Exceptions and Supporting Brief at 13.³¹ *NLRB v. B. A. Mullican Lumber & Mfg. Co.*, 535 F.3d 271 (4th Cir. 2008), denying enf. to 350 NLRB 493 (2007), which Respondent cites, is distinguishable from the instant case: unlike there, where the court found that the employer withdrew recognition based

³⁰ Respondent nevertheless persists in making the flawed argument that because more than 50 percent of the unit employees signed the document which was returned to Wright, the employees wanted Respondent to withdraw recognition from the Union and did not want to proceed to a decertification election. See Respondent’s Exceptions and Supporting Brief at 13. Plainly put, Respondent may not substitute its judgment about what employees did or did not want by virtue of their having signed a facially ambiguous document, and the ALJ properly found that “Respondent could not rely on either the initial page or the updated page as objective evidence that the signatories no longer wished to be represented by the Union, as opposed to evidence of a desire for a Board-conducted election or of some other desire, purpose, or understanding.” ALJD at 13:2-5. Respondent effectively concedes that it unlawfully withdrew recognition from the Union, noting that it is undisputed that the document would satisfy the Board’s “good faith reasonable uncertainty” standard for obtaining an RM election (see *Levitz*, 333 NLRB at 717), and writing that “a fair read (sic) of [the ALJ’s] discussion is only that [Respondent] made a mistake in relying on the petition to withdraw recognition rather than to file an election petition.” See Respondent’s Exceptions and Supporting Brief at 19, 20. Indeed, the ALJ stated that the evidence adduced at trial supports a finding that “Respondent had, in good faith, a reasonable uncertainty” as to whether the Union continued to enjoy majority employee support (ALJD at 13:39-41), begging the question of why Respondent *didn’t* file an RM petition after Robinson presented it with the document containing his and eight other employee signatures.

³¹ Respondent’s contention that “neither [Counsels for the General Counsel] nor the ALJ disputed the fact that the Union did lose its majority status, or the fact that [Respondent] withdrew recognition only after being presented with actual proof of the loss” (see Respondent’s Exceptions and Supporting Brief at 13) is inaccurate. Thus, paragraphs 10 through 12 of GCX 1(e), paragraphs 11 through 13 of GCX 1(j), and ALJD 12:6-13 and 13:1-19 disprove Respondent’s claim.

on objective evidence that the union had lost majority employee support, the ALJ here correctly found that Respondent withdrew recognition from the Union based on evidence *it knew from the outset was not objective*. ALJD at 12:1-13 and 13:5-7

For all of the foregoing reasons, Respondent's Exception 3 lacks merit and the Board should affirm the ALJ's finding that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally withdrew recognition from the Union absent objective evidence that the Union had in fact lost majority employee support.

4. The ALJ correctly found that Respondent's supervisor, Marcelino Rodrigues, violated Section 8(a)(1) of the Act when he interrogated Unit employee Lawrence Leonard about his Union activity. (Respondent's Exception 4)

Respondent's assertion that the ALJ did not find did not find Rodrigues' interrogation impacted the document Robinson was circulating among employees or Respondent's withdrawal of recognition is irrelevant to her finding that Rodrigues' interrogation violated Section 8(a)(1) of the Act. See Respondent's Exceptions and Supporting Brief at 15 and ALJD at 9, n.18. Respondent's further contention that Rodrigues' unlawful interrogation "is meaningless and furthers nothing in this case" (see Respondent's Exceptions and Supporting Brief at 15 and n.7) is squarely at odds with one of the Act's fundamental purposes – protecting the rights which Section 7 guarantees to employees – and the ALJ's findings in this regard can hardly be characterized as "meaningless and further[ing] nothing in this case." Having properly found Leonard to be a credible witness, and having properly found that unit employee Thomas Lydon credibly corroborated Leonard's testimony (ALJD at 9:14-10:9 and 10,

n.19), the ALJ correctly concluded that Rodrigues' unlawfully interrogated Leonard in violation of Section 8(a)(1) of the Act. ALJD at 10:11-11:5.³²

In this regard, the ALJ appropriately applied the Board's *Rossmore House* analysis.³³ As the Board explained in *Rossmore House*, when assessing whether a supervisor's questioning of an employee constitutes an unlawful interrogation, the Board considers whether, under all of the circumstances, the questioning would reasonably tend to restrain, coerce, or interfere with rights the Act guarantees. See *Bloomfield Health Care Center*, 352 NLRB 252, 252 (2008), enfd. 372 Fed.Appx. 118 (2d Cir. 2010), quoting *Rossmore House*, 269 NLRB at 1178 n.20. Among the factors considered are: (i) the questioner's identity; (ii) the place and method of the interrogation; (iii) the background of the questioning and the nature of the information sought; and (iv) whether the employee is an open union supporter. *Scheid Electric*, 355 NLRB 160, 160 (2010).³⁴

Applying the relevant *Rossmore House* factors, the ALJ noted that Rodrigues, Leonard's direct supervisor, interrogated him at work at the end of Leonard's shift and that, significantly, Rodrigues raised the subject of whether Leonard had signed the document Robinson was circulating without any lawful, non-coercive reason for doing so, and that Leonard was neither a Union officer nor an open Union supporter. ALJD at

³² The ALJ's careful analysis of Leonard's testimony and of his credibility (ALJD at 9:14-10:9) undermines Respondent's contrary assertion. See Respondent's Exceptions and Supporting Brief at 15, n.7.

³³ 269 NLRB 1176, 1177 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

³⁴ Respondent asserts that, because Leonard did not testify that he felt coerced, nervous, upset, or frightened by Rodrigues' interrogation, Rodrigues' questioning could not have violated Section 8(a)(1) of the Act. See Respondent's Exceptions and Supporting Brief at 15. However, it is well settled that the Board uses an objective standard in evaluating such statements and an employee's subjective reaction is irrelevant. See, e.g., *Maremont Corp.*, 294 NLRB 11, 41 (1989); *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980).

10:21-25; T 84-87 The ALJ also noted that the Unit at issue is small³⁵ and that Rodrigues and Robinson have a family relationship,³⁶ context which contributed to the coercive nature of Rodrigues' questioning and which made it likely Leonard could assume Rodrigues knew about Robinson's active decertification efforts. ALJD 10:25-29. Moreover, the ALJ correctly found that Rodrigues' couched or evasive responses to Leonard's attempts to avoid answering Rodrigues' questions showed that Rodrigues was indeed referring to the employees' decertification efforts, and that Rodrigues knew he should not be pursuing that subject with Leonard. ALJD at 10:29-32; T 86-87 In addition, the ALJ properly found that Rodrigues impliedly and surreptitiously encouraged Leonard's participation in the decertification effort, further contributing to her finding that the inquiry was coercive. ALJD at 10:32-37; T 86-87 Finally, the ALJ noted that Rodrigues knew about other employees' Union activity, also contributing to the coercive nature of his inquiry. ALJD at 10:37-11:2; T 86-87

In all these circumstances, the ALJ correctly concluded that Rodrigues' questioning of Leonard was unlawfully coercive. ALJD at 11:4-5. In fact, the Board has found precisely such an inquiry unlawful. *See Ernst Home Centers*, 308 NLRB 848, 855 (1992) (manager asking employee if she was going to sign or had signed a petition violated Section 8(a)(1) of the Act). Accordingly, Respondent's Exception 4 is groundless and the Board should affirm the ALJ's finding that Rodrigues' interrogation of Leonard violated Section 8(a)(1) of the Act.

5. The ALJ correctly found that Respondent's General Manager, Paul Wright, was not a credible witness. (Respondent's Exception 5)

³⁵ JX1 at 35; GCX 2.

³⁶ Robinson is Rodrigues' son-in-law. T. 84-85.

The ALJ properly concluded that Wright was not a credible witness and that his explanation for granting the unprecedented wage increases to Respondent's drivers was pretextual. ALJD at 15:28-17:6.³⁷ Thus, as set forth in detail above regarding Respondent's Exception 2, the ALJ correctly applied Board law providing that an employer may lawfully grant benefits to employees during union organizing activity only if it can demonstrate that factors other than a pending election or analogous organizing activity governed its actions, i.e., that the employer acted for a legitimate business reason, and correctly noted that absent a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act.

The record amply supports the ALJ's finding that Wright lacked credibility. First, the ALJ noted that the raises were not regular, typical, or planned, which Wright conceded. ALJD at 15:28-30; T.21-22. The ALJ also noted that Wright admitted he had arbitrarily capped the raises at \$14.65 an hour and he acknowledged never before setting a wage cap. ALJD at 16:11-14.³⁸ In addition, the ALJ relied on the fact that the cap was, in any event, "malleable according to his discretion, as it did not apply to

³⁷ Respondent disingenuously writes that Wright "conclusively demonstrated his bona fides by – in response to [Counsels for the General Counsel's] sneering demand that [Wright] produce the emails after. . .testif[ying] that he sent emails to Board members seeking any notes they had taken of Board meetings dealing with wage increases, and their responses – actually having copies of those emails and the responses and providing them to [Counsels for the General Counsel]." See Respondent's Exceptions and Supporting Brief at 15; RX 1; T. 128-130). In fact, these documents were clearly encompassed by Counsels for the General Counsel's trial subpoena duces tecum (JX 3(a)), but were not produced until after the ALJ's instruction on the record that Respondent review that subpoena, and not until February 1, 2017, when the trial was adjourned, did Wright first inquire of his Board of Directors about whether they had any "personal notes from [the] Board meetings regarding discussions of raises for the drivers." (RX1; T. 75-77) Thus, contrary to demonstrating his "bona fides," Wright demonstrated his bad faith and lack of due diligence with respect to responding to the subpoena, further evidencing the ALJ's correct conclusion that Wright lacked credibility.

³⁸ Wright testified that "there was really no reason" he chose that hourly wage. (T. 138-139)

Tavares.” ALJD at 16:13-14; JX 2; T.59-60. Significantly, the ALJ concluded that it was not credible that Wright would have taken the time to prepare a detailed wage proposal, yet receive no substantive feedback from Respondent’s Board of Directors concerning the various options the proposal set forth, nor was it credible that Wright could not recall his discussions with the Board of Directors about the proposal, particularly in light of the pending unfair labor practice charge, by which the Union was challenging Respondent’s withdrawal of recognition. ALJD at 16:23-32; GCX 1(a), GCX 1(c), GCX 5; T 40-41, 49, 51-57, 69-73, 127-134, 153-154. Moreover, the ALJ rightly found Wright’s explanation for the timing of the raises unconvincing. ALJD at 16:34-42 and n.3; T 53-54, 57, 134-136, 140-141, 154. Finally, Respondent’s assertion that the ALJ “may not substitute [her] own business judgment for that of [Respondent] or act as a ‘super-personnel’ department” (Respondent’s Exceptions and Supporting Brief at 16) confuses the issue: the ALJ did not substitute her business judgment for Respondent’s, but rather, rightly concluded based upon the evidence that Wright’s explanation for granting the raises was simply implausible.

In all these circumstances, Respondent’s Exception 5 is without merit and the Board should affirm the ALJ’s conclusion that Wright was not a credible witness.

6. The ALJ correctly recommended an affirmative bargaining order as a remedy for Respondent’s unlawful withdrawal of recognition and refusal to bargain with the Union. (Respondent’s Exception 6)

Contrary to Respondent’s assertion (Respondent’s Exceptions and Supporting Brief at 17), the ALJ correctly recommended an affirmative bargaining order to remedy Respondent’s unlawful withdrawal of recognition and refusal to bargain with the Union. ALJD at 18:30-44. As the ALJ explained, an affirmative bargaining order is a

reasonable exercise of the Board's broad discretionary remedial authority. ALJD at 18:30-35. See *Caterair Int'l*, 322 NLRB 64, 64-68 (1996), on remand from *Caterair Int'l v. NLRB*, 22 F.3d 1114 (D.C. Cir. 1994). The ALJ also properly relied on *Anderson Lumber*, 360 NLRB at 538, citing *Caterair*, 322 NLRB at 68, in which the Board adhered to the view that an affirmative bargaining order is the traditional, appropriate remedy for a Section 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. ALJD at 18:31-35. Here, as there, an affirmative bargaining order is an appropriate remedy for Respondent's unlawful withdrawal of recognition and its refusal to bargain with the Union.³⁹

The ALJ also noted that in *Anderson Lumber*, the Board expressed its disagreement with the United States Court of Appeals for the District of Columbia Circuit regarding the propriety of affirmative bargaining orders,⁴⁰ but concluded that such a remedy was nevertheless warranted under the court's balancing test. ALJD at 18:35-39. As the Board found in *Anderson Lumber*, and as the ALJ found here, an affirmative bargaining order is also warranted on the facts of this case under the District of Columbia Circuit's balancing test. ALJD at 18:38-39. First, an affirmative bargaining order vindicates the rights of the Unit employees who have been denied the benefits of collective bargaining by Respondent's withdrawal of recognition and resulting

³⁹ Respondent's assertion that "even if there is a *Levitz* violation," the proper remedy is to order an election and preclude the Union from seeking to block it (Respondent's Exceptions and Supporting Brief at 20) is both untenable and self-serving, and would allow Respondent to profit from the fallout of its unremedied unlawful withdrawal of recognition and refusal to bargain with the Union, as well as its unremedied unlawful wage increases and employee interrogation.

⁴⁰ The District of Columbia Circuit requires that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' [Section] 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000).

refusal to bargain with the Union for an initial collective-bargaining agreement.⁴¹ In addition, here, as the Board noted in *Anderson Lumber*, 360 NLRB at 538, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued Union representation because the order lasts no longer than is reasonably necessary to remedy the ill effects of Respondent's violation. Moreover, to the extent such opposition exists, it may be, at least in part, attributable to Respondent's unfair labor practices. *Ibid.* See also *Lee Lumber Bldg. & Material Corp.*, 322 NLRB 175, 177 (1996) (an unlawful refusal to recognize and bargain with an incumbent union is presumed to taint any subsequent loss of support for the union). Second, an affirmative bargaining order serves the Act's policies by fostering meaningful collective bargaining and industrial peace by removing Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union, and ensures that Respondent's withdrawal of recognition will not pressure the Union to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order. 360 NLRB at 538. Third, a cease-and-desist order alone would be inadequate to remedy Respondent's refusal to bargain with the Union, because it would permit another challenge to the Union's majority status before the taint of Respondent's unlawful withdrawal of recognition has dissipated, and before employees have had a reasonable time to regroup and bargain through their representative in an effort to

⁴¹ In this regard, the parties' negotiations up until Respondent's unlawful withdrawal of recognition had been productive, resulting in a number of tentative agreements on a variety of proposals. JX 1 at 2, 12-20.

conclude negotiations for an initial collective-bargaining agreement. Such a result would be particularly unjust in circumstances such as those here, where the Respondent's withdrawal of recognition is likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. As the Board has long held, circumstances like those present here outweigh the temporary impact the affirmative bargaining order will have on the rights of those employees who may oppose continued union representation. See, e.g., *Caterair, supra*.

Respondent's reliance on *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147 (D.C. Cir. 2017), denying enf. to 362 NLRB No. 174 (2015), is misplaced. In vacating the Board's affirmative bargaining order, the court relied on the peculiar facts of that case, facts which are not present here. In that case, 29 of the employer's 54 bargaining unit employees signed a decertification petition asking the employer to immediately withdraw recognition from the union; one of the employees provided a copy of the petition to the employer, while another filed it with the Board. 849 F.3d 1150. Without informing the employer, the union persuaded six of the petition signers to revoke their signatures and two days later the employer, unaware of that fact, withdrew recognition. *Ibid*. The remaining employees, apparently believing they were free from the Union, withdrew the decertification petition. *Ibid*. The Union thereafter filed an unfair labor practice charge claiming that the employer had unlawfully withdrawn recognition. *Id.* at 1150-1151. On that record, the court vacated the bargaining order and remanded the case to the Board for further proceedings, writing that,

a bargaining order is an extraordinary remedy that, *on these facts*, is out of keeping with the Act's purposes. It rewards the [u]nion for sitting on its hands.⁴² It punishes Scomas for acting unwarily but in good faith. And it "give[s] no credence whatsoever to employee free choice," *Skyline Distribs. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996).

Id. at 1151. (emphasis supplied) The court further observed that Scomas' violation was unintentional because "the company acted in good faith on a facially valid decertification petition." *Id.* at 1157 Here, by contrast, Respondent *never* possessed valid evidence that a majority of Unit employees no longer desired Union representation, which it well knew, underscored by the fact that Respondent instructed Robinson – *ex post facto* – to add language to the document stating that the signers wanted Respondent to withdraw recognition from the Union. T 36-38; JX 1 at 4, 38, 39.⁴³ Accordingly, Scomas is distinguishable and fails to advance Respondent's argument.

In sum, Respondent's Exception 6 lacks merit and the Board should affirm the ALJ's finding, consistent with both well-settled Board precedent and the District of Columbia Circuit's balancing test, that an affirmative bargaining order is an appropriate remedy for Respondent's unlawful withdrawal of recognition and refusal to bargain.

7. The Board should modify, not overrule, *Levitz*. (Respondent's Exception 7)

Contrary to Respondent's argument that the Board should overrule *Levitz* (Respondent's Exceptions and Supporting Brief at 20-22), Counsels for the General

⁴² Unlike the union in *Scomas*, the Union here did not "sit on its hands." Rather, it challenged Respondent's withdrawal of recognition by filing an unfair labor practice charge a mere two days after receiving Respondent's July 25 letter withdrawing recognition. GCX 1(a); JX 1 at 41-42. See *Levitz*, 333 NLRB at 725 (specifically identifying an unfair labor practice proceeding as a means by which a union can contest an employer's withdrawal of recognition.)

⁴³ As set forth in n.10, above, there is no evidence that Robinson ever notified or consulted with any of the other signers either before or after adding this language to the document.

Counsel urge the Board to modify its framework to require employers to utilize the Board's representation procedures to determine whether their employees' exclusive collective-bargaining representative has, in fact, lost majority support. In this regard, Counsels for the General Counsel hereby incorporate the arguments set forth in their Brief in Support of Cross Exception to the Decision of the Administrative Law Judge, filed herewith.⁴⁴

Respondent's assertion that employers will be unable to lawfully withdraw recognition unilaterally because, e.g., the requirements *Johnnie's Poultry*⁴⁵ and *Struksnes Construction*⁴⁶ impose do not permit an employer to effectively poll its employees about their union sentiment, is not inconsistent with Counsels for the General Counsel's position that the Board should modify *Levitz* as set forth above, nor is it inconsistent with Counsels for the General Counsel's position that the Board should continue to adhere to the *Levitz* good-faith reasonable uncertainty standard for employers filing an RM petition. Thus, by requiring employers to utilize Board election procedures, the uncertainty Respondent complains of will be eliminated and whether or not a union continues to enjoy majority employee support can be accurately ascertained in every case.⁴⁷

⁴⁴ As noted therein, Counsels for the General Counsel do not seek any change to *Levitz's* holding that employers can obtain RM elections by demonstrating a good-faith reasonable uncertainty as to a representative's continuing majority status. 333 NLRB at 717.

⁴⁵ 146 NLRB 770 (1964).

⁴⁶ 165 NLRB 1062 (1967).

⁴⁷ Respondent's apparent contention (Respondent's Exceptions and Supporting Brief at 20) that, because the results of a Board election are determined by how a majority of employees who choose to participate in the election cast their ballots, as opposed to being determined by how a majority of all eligible employees vote, the election results may not accurately reflect the sentiment of a majority of bargaining unit employees, has long been settled. See, e.g., *Sitka Sound Seafoods, Inc.*, 325 NLRB 685, 686 (1998), citing *Lemco Construction, Inc.*, 283 NLRB 459, 460 (1987) (explaining that the Board's

VI. CONCLUSION

For all of the foregoing reasons, Counsels for the General Counsel respectfully urge the Board to deny each of Respondent's exceptions and affirm the ALJ's evidentiary rulings, findings of fact, and conclusions of law. Counsels for the General Counsel further respectfully urge the Board to affirm the ALJ's proposed remedy, including the affirmative bargaining order, in order to cure the effect of Respondent's unfair labor practices.

Dated at Boston, Massachusetts this 4th day of August, 2017

Respectfully submitted,

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"representative complement" rule is satisfied where (i) all employees have received adequate notice of the election, (ii) all employees have been given adequate opportunity to vote, and (iii) employees are not prevented from voting by the conduct of one of the parties or by unfairness in the scheduling or mechanics of the election. Notably, in *Lemco*, the Board certified the results of the election where only one of eight eligible voters – the employer's election observer – voted, because all of the above factors had been met. 283 NLRB at 460. By way of comparison, 15 of Respondent's approximately 16 eligible voters – nearly 94 percent – participated in the election in Case 01-RC-148539. JX 1 at 35.

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