

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Dura-Line Corporation, a subsidiary of
Mexichem,

Respondent

United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union, AFL-
CIO/CLC,

Case Nos. 09-CA-163289
09-CA-164263
09-CA-165972
09-CA-166481
09-CA-167265

Charging Party

United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union, AFL-
CIO/CLC, Local 14300-12,

Charging Party

CHARGING PARTIES' RESPONSE TO OBJECTIONS

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I. Introduction

This is a classic runaway shop case. When Mexichem bought Dura-Line Corporation (“Dura-Line” or “Company”), the new owner decided to shut down its one and only unionized plant and move the work elsewhere. The Company’s purported business justifications cannot hide the real reason for the move: to rid itself of the Union. Every document related to the shutdown mentions the Union. Supervisors made numerous threats, both before and after the shutdown was announced, to the effect that the plant would be shuttered because of the Union and grievance activity. And the Company’s Human Resources Manager stated explicitly that she did not want the Union President transferred to another location because he might try to organize a union there.

The ALJ found that the Company’s numerous threats violated Section 8(a)(1) of the National Labor Relations Act, and that the actual shutdown and removal of the work to other locations violated Sections 8(a)(1) and (3). The employer, Dura-Line Corporation, a subsidiary of Mexichem (“Dura-Line” or “Company”) has not excepted to the finding that the threats violated Section 8(a)(1). The Board must therefore adopt this finding.

As we demonstrate below, the Company’s exceptions to the finding of an 8(a)(3) violation must fail.¹ In its exceptions, the Company ignores the overwhelming evidence that it wanted to be rid of the Union. It also ignores the ALJ’s credibility findings, with no

¹ This Response addresses only the runaway shop findings and exceptions thereto. ALJ Olivero also found that the Company violated §§ 8(a)(1) and (5) by unilaterally changing the amount of the Thanksgiving bonus (ALJD at 36-37); that the Company violated §§ 8(a)(1) and (4) by destroying the property of Freddie Chumley after he gave testimony in support of an unfair labor practice charge (ALJD at 43-44); and that the Company violated Section 8(a)(1) by requiring employees to sign confidentiality agreements (ALJD at 44-46). The Company has excepted to these findings, and the Union defers to the General Counsel’s arguments in response to these exceptions. The ALJ also found that the Company did not violate §§ 8(a)(1) and (5) by failing to bargain over the decision to shut down the plant (ALJD at 34-36), and the Union does not cross-accept to this finding.

justification. And it ignores the case law against it. The Board should therefore adopt the Decision and Recommended Order of ALJ Melissa Olivero.

II. Respondent Has Waived Any Objection To The ALJ's Finding That Its Threats Violated Section 8(a)(1).

Section 102.47(f) of the Board's Rules and Regulations provides: "Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding." A failure to except to an ALJ's conclusion is tantamount to an admission that the conclusion is correct. *See, e.g., Butler Med. Transpt., LLC*, 365 NLRB No. 112, slip op. at 4 n.7 (2017).

ALJ Olivero made detailed factual findings to support her conclusion that "Respondent violated Section 8(a)(1) of the Act through multiple threats made to unit employees." (ALJD at 39-43.) Nowhere in its Exceptions does Respondent challenge this finding, and nowhere in its brief does it argue that the threats did not violate Section 8(a)(1). Indeed, Respondent does not even mention pages 39-43 of the ALJ's Decision anywhere in its Exceptions. Respondent merely argues (unsuccessfully, as we shall see below) that the threats did not constitute evidence of unlawful motivation in closing the plant. Thus, "[t]he Respondent has effectively admitted that" its threats were "unlawful, by failing to except to the Judge's conclusion" that the threats violated Section 8(a)(1). *Butler Med. Transpt.*, 365 NLRB No. 112 at 4 n.7. The Board must therefore adopt this conclusion.

III. Respondent Fails To Raise A Meritorious Challenge To The ALJ's Findings And Conclusion That Respondent Moved Production Because Of Employees' Protected Activity.

The most consequential section of ALJ Olivero's decision, and of Respondent's Exceptions, deals with the runaway shop allegations. The ALJ found extensive evidence of anti-union motivation in Respondent's decision to close the Middlesboro plant and move production

work to its other facilities. She found many of Respondent's asserted business justifications to be pretextual and found that Respondent had not met its burden of proving that it would have moved the work in the absence of anti-Union animus.

Respondent's challenge to the runaway shop finding ignores crucial evidence and case law. Further, Respondent's complete failure to challenge the ALJ's findings of independent 8(a)(1) violations undermines its (unsupported) denial of anti-Union animus.

A. Respondent's Argument That It Lacked Anti-Union Motivation Because It Made The Decision To Close The Middlesboro Plant In 2014 Lacks Merit.

Respondent opens its argument by pointing out that the decision to close the Middlesboro plant and move production work elsewhere was made in September 2014, contemporaneous with Mexichem's purchase of the Company. (Resp. Br. at 13-15.) Contrary to Respondent's contention, this fact actually supports the ALJ's finding of a runaway shop. Thus, where a new owner shuts down a unionized facility in order to rid itself of the Union, the Board has found violations of Sections 8(a)(1) and (3). *See In re Royal Norton Manufacturing Co.*, 189 NLRB 489 (1970). In *Royal Norton*, the employer and the union had an established bargaining relationship and a collective bargaining agreement in effect. Shortly after the company was acquired, the new owner said that he had received several grievances, "and that these grievances together with the filing of unfair labor practice charges . . . were the straw that 'broke the camel's back.'" *Id.* at 490. Based on this statement, along with other evidence, the Board found that the employer's decision to move its plant "was motivated almost entirely by Respondent's desire and purpose to eliminate the Union as bargaining agent of its employees." *Id.* at 492.

Thus, Respondent gets nowhere with its specious argument that the unionized status of the workforce and the contractual limitation on running lines 24/7 are too remote to constitute

motivation for the shutdown. (*See* Resp. Br. at 20.) Although it is true that the workforce had been unionized since 1987, and the limitation on operating 24/7 had been in place at least since April 2013, both of these factors gained renewed significance when Mexichem acquired Dura-Line in 2014. Middlesboro was the Company's only unionized location, and Mexichem did not like the Union. (*See* Tr. 118 (Wilhoit told Elmer Evans that Mexichem did not like the Middlesboro plant because it was unionized).)

Respondent makes much of the fact that only one of the 19 or 20 reasons it initially gave for closing the Middlesboro plant had anything to do with the Union. (Resp. Br. at 14-15.) However, Respondent ignores the ALJ's finding that "[e]very piece of evidence presented at trial regarding the closure of the Middlesboro facility or the transfer of the work also makes reference to the unionized work force in Middlesboro or the upcoming bargaining obligation there." (ALJD at 30-31.) Respondent argues that the most significant factor in its decision was the inability to expand the Middlesboro plant to accommodate a longer production line. (Resp. Br. at 14.) However, opening a new plant with longer lines would not necessarily require shutting down Middlesboro. Indeed, Respondent made the decision to close Middlesboro before it had even located its proposed new facility. (Resp. Br. at 15.)

B. Respondent's Argument Regarding The Subsequent Evolution Of Its Plan Does Not Prove That It Closed The Middlesboro Plant For Legitimate Business Reasons.

ALJ Olivero made detailed findings about events subsequent to the initial decision to shut down the plant. In its argument that its plan evolved based on legitimate concerns, Respondent virtually ignores its contemporaneous expressions of anti-Union animus.

Respondent argues that its plan changed based on four factors: (1) difficulty finding a suitable and affordable location in the Northeast; (2) a roof collapse at Middlesboro in February

2015; (3) a desire for a new state-of-the-art facility near its corporate headquarters in Knoxville; and (4) excess capacity at a facility in Georgia. (Resp. Br. at 15-16.) This shows that Respondent's plan was not fully formed when it initially determined that it would shut down Middlesboro, and that its plan was influenced by subsequent events.

Respondent does not even attempt to explain why the roof collapse and other business concerns influenced the evolution of its plan, while increased grievance activity allegedly did not. Respondent does not challenge the ALJ's findings that Human Resources Manager Wilhoit placed all grievances on a common drive available to Respondent's corporate headquarters and that Wilhoit discussed pending grievances with Corporate Human Resources Director Tamera Fraley. (*See* ALJD at 32.) Thus, corporate management knew about Robert Hatfield's increased grievance filing. Further, the grievances that were the subject of threats to close the plant began in 2014. (Tr. 158-59.)

Respondent merely relies on its discredited denials of animus. Where credibility findings are based on demeanor, the Board defers to the ALJ's credibility findings. *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). ALJ Olivero based her credibility findings largely on demeanor, as well as corroboration or contradiction by other testimony. (*See* ALJD at 20-30.) For example, the ALJ did not credit much of CEO Paresh Chari's testimony because he often talked over the attorneys questioning him and did not give direct answers. (ALJD at 21.)

As discussed above, Respondent does not challenge the ALJ's conclusion that its supervisors' numerous threats to shut down the plant violated Section 8(a)(1). Threats to retaliate against employees for protected activity are "extremely persuasive evidence" that

subsequent action following through on those threats was unlawfully motivated. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985).

Respondent attempts to argue that these threats do not show animus because they were made by non-decisionmakers after the decision was made. *Amcast Automotive*, 348 NLRB 836 (2006), on which Respondent relies, is distinguishable. *Amcast* involved a single supervisor's statements made shortly after management had decided to terminate a single employee. *Id.* at 837. The Board characterized the supervisor's statement as a "conjecture." *Id.* at 839.

Here, by contrast, no fewer than seven supervisors threatened, both before and after the shutdown was announced, that the plant would shut down because of the Union and its grievance activity. (ALJD at 39-43.) As the ALJ found, and Respondent does not dispute, "[e]veryone at Respondent's corporate headquarters knew of the presence of the Union at Middlesboro, of the limitation imposed by the Union on operating around-the-clock, and of impending negotiations." (ALJD at 32.) Additionally, top management in Respondent's corporate headquarters knew about the grievances. (*Id.*) Respondent does not dispute this knowledge, but merely contends, against all evidence, that it did not factor into the decision to close its one and only unionized plant. The threats here were not isolated remarks by a single supervisor, but were so pervasive that it would defy all reason to believe that they were not an indication of Respondent's motivation.

C. Respondent's Arguments Regarding Its Secrecy And Refusal To Transfer Bargaining Unit Employees Lack Merit.

Respondent claims that its secrecy about the new facility in Clinton is not evidence of anti-Union animus because it was concerned about "folks *and* the union" finding out, not "folks *in* the Union," as the ALJ mistranscribed, and the Union was therefore in the same category as Respondent's vendors and customers. (Resp. Br. at 23-24.) However, the Board has held that an

employer's secrecy is evidence of anti-union animus even where the employer keeps its plans secret not only from the union, but also from other interested parties. *See Vico Prods. Co.*, 336 NLRB 583, 589 (2001). In *Vico*, an employer relocated part of its operations and laid off 33 employees at a plant where a union had recently been certified. The Board found that the employer's "stealth in carrying out the relocation," including its failure to inform a major customer until a few days before moving its equipment, was evidence of unlawful motivation. *Id.*

Further, the ALJ's error in transcribing the content of Respondent's email is not significant, contrary to Respondent's contention. (*See Br. of Resp. at 24.*) If the Union had truly been in the same category as everyone else (vendors, customers, etc.), there would have been no need to mention the Union specifically.

Respondent also argues that its refusal to transfer bargaining unit employees to Clinton without an application is not evidence of anti-Union animus. (*See Resp. Br. at 22-23.*) Respondent's attempt to distinguish *Allied Mills, Inc.*, 218 NLRB 281 (1975), is unavailing. Although *Allied Mills* transferred all of its unrepresented employees to the new facility, and Respondent transferred only some, both required represented employees to go to the new facility and fill out applications if they were interested in employment there. And the employers in both cases stated that they did not want a union at the new facility. In *Allied Mills*, the plant superintendent told employees that the employer would not hire union members at its new facility. *Id.* at 284. Although Respondent was more discreet about it, Wilhoit stated in an email that she did not want Local Union President Robert Hatfield transferring to another of Respondent's plants because he might try to organize a union. (GC Ex. 10.)

Respondent also attempts to distinguish *Allied Mills* on the ground that the union there made proposals concerning the transfer of bargaining unit employees. (*See Resp. Br. at 23.*)

Here, the Union did not make any proposals to transfer employees to Clinton because it had not been notified that the work was moving there. (Tr. 560.)²

D. The ALJ's Remedy Is Proper Based On The Evidence Presented At Trial.

ALJ Olivero ordered Respondent to restore production work to Middlesboro and to offer reinstatement to any employee who lost his or her job as a result of the unlawful transfer of work. (ALJD at 48.) This is the Board's usual remedy in a runaway shop violation unless the employer can show that such a remedy would be unduly burdensome. *We Can, Inc.*, 315 NLRB 170, 174 (1994). Respondent here has not made such a showing, but merely mentioned that it was able to get out of its lease on the Middlesboro plant. (Tr. 387-88; *see* Resp. Br. 31). This does not prove that Respondent could not again obtain a lease on the facility. Respondent argues in its Brief that it has spent millions of dollars on the new plant and upgrades to existing facilities, but presents no evidence that the cost of reopening the Middlesboro plant would be prohibitive.

The two cases Respondent cites are easily distinguished. In *Frito-Lay Inc. v. NLRB*, 585 F.2d 62, 67-68 (3rd Cir. 1978), the court reversed the Board's finding of an 8(a)(3) violation because the work had not been transferred to another location, but had been discontinued due to decreasing demand. Because the court held that this was not a runaway shop situation, there was no need for a remedy. The court also observed that the plant at issue had been operating at a loss, and even if the runaway shop finding were correct, it would be inappropriate to order an

² Respondent also fails to establish its *Wright Line* defense. *See Wright Line*, 251 NLRB 1083 (1980). To establish this defense, "[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *T&J Trucking Co.*, 316 NLRB 771, 771. Respondent's argument regarding the affirmative defense relies on its discredited denials to downplay the overwhelming evidence of anti-Union animus. (*See* Resp. Br. at 26.)

employer to reopen a facility that was losing money. *Id.* at 68. Here, by contrast, Respondent's Middlesboro plant was not only operating at a profit, it was the Company's most profitable facility. (Tr. 474.)

Coronet Foods, Inc. v. NLRB, 158 F.3d 782 (4th Cir. 1998), was a review of a supplemental decision issued after detailed evidence had been offered at compliance proceedings. The employer had discontinued its trucking operations and hired outside contractors nine years earlier. *Id.* at 787. The court reversed the Board's restoration remedy based on specific findings that restoration of the in-house trucking department would require significant changes from the company's prior trucking operations. The company would have need to obtain common carrier status, gain access to a "considerably larger fleet of trucks," and locate an additional facility to house those trucks. *Id.* at 796. Thus, the court reasoned a restoration order "would essentially force Coronet to enter a business that it had demonstrated no aptitude whatsoever for in the past." *Id.*

Dura-Line has presented no evidence that the nature of operations has changed so much that restoring production at Middlesboro would require a complete change in its operations. Although the new facility at Clinton uses more modern equipment, Respondent has not shown that the equipment used at Middlesboro was obsolete.³ Thus, a restoration remedy will not "force [Dura-Line] to enter a business that it ha[s] demonstrated no aptitude whatsoever for." *Id.*

³ If Respondent has additional evidence that was not available at the time of trial, it may introduce that evidence at the compliance stage of the proceeding. *Duke Univ.*, 315 NLRB 1291, 1291 (1995) (citing *Lear Siegler, Inc.*, 295 NLRB 857 (1989)).

IV. Conclusion

Because Respondent raises no exceptions to many of ALJ Olivero's findings and conclusions, and fails to raise meritorious exceptions to others, the Board should adopt the findings, conclusions, remedy, and Order of the ALJ.

Date: August 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August, 2017, the foregoing Charging Parties' Response To Objections was sent by e-mail to the following:

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