

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON DC BRANCH OFFICE**

STANDARD REGISTER INC., D/B/A
TAYOR COMMUNICATIONS

Respondent

and

Case: 05-CA-194336

LOCAL 594-S, DISTRICT COUNCIL NO. 9
OF THE GRAPHIC COMMUNICATIONS CONFERENCE
OF THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Charging Party

BRIEF OF THE COUNSEL FOR THE GENERAL COUNSEL

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A. INTRODUCTION

The General Counsel's allegations against Standard Register, Inc., d/b/a Taylor Communications ("Respondent") concern Respondent's polls of its York, Pennsylvania facility's ("the facility") production and maintenance employees' ("unit employees") continued support for Local 594-S, District Council No. 9 of the Graphic Communications Conference International Brotherhood of Teamsters ("the Union") in December 2016 and March 2017, and its subsequent withdraw of recognition from the Union and consequent unilateral changes.¹ The Administrative Law Judge's ("ALJ") most difficult task is not deciding whether Respondent's polls and subsequent actions are unlawful - they are; rather, the more difficult task is synchronizing the many facts and legal theories that make Respondent's actions violative.

In August 2015, Respondent, a *Burns* successor, recognized the Union as the unit employees' bargaining representative after taking over operations at the facility. Because Respondent rejected the collective-bargaining agreement in place at the time it assumed operations, Respondent and the Union began negotiating an initial contract later that month. At the commencement of negotiations, Respondent expected little resistance in quickly securing a favorable collective-bargaining agreement incorporating many Taylor Corporation ("Taylor Corp."), Respondent's parent company, policies. During the very first bargaining session, Respondent demanded immediate agreement and implementation of several Taylor Corp. policies. When the Union refused, Respondent tested the waters by unilaterally implementing the policies at the facility. From that point on, Respondent regularly disregarded its bargaining obligation by engaging in stall tactics and unilateral changes.

¹ Unless otherwise stated, all dates are in 2016.

The Union handled Respondent's gamesmanship with patience and professionalism until Respondent crossed a line by unilaterally granting wage increases to nearly every unit employee at the end of February. Fed up with Respondent's conduct, the Union filed unfair labor practice charges with the Baltimore Regional office of the National Labor Relations Board ("NLRB Baltimore Regional office") regarding the wage increases. The charges ultimately settled with a condition requiring Respondent to bargain in good-faith with the Union.

Around the time of the Union's charges with the NLRB Baltimore Regional office, Respondent began hedging its bets against the growing likelihood that it would be unable to bully the Union into a contract by initiating an anti-Union campaign under the guise of negotiation updates. If Respondent could not get what it wanted at the bargaining table, it would get what it wanted by convincing the unit employees to reject their union.

Against the backdrop of Respondent's campaigning, negotiations between the parties continued through October. Then, in November, with many unresolved contract articles still separating the parties, Respondent tried to manufacture an agreement with several Taylor Corp. policies by falsely accusing the Union of having withdrawn its proposals. While the Union rebuffed Respondent's pronounced agreement, it did agree to permit the unit employees to vote on a contract with Respondent's proposals on unresolved articles. Again hedging its bets, before the unit employees' voted on a contract, Respondent prepared to poll the unit employees' support for the Union in the event the unit employees rejected Respondent's proposed contract.

When, on December 5, Respondent learned that the unit employees voted against a contract with Respondent's proposals, it immediately retaliated against the Union and the unit employees by announcing a poll. Secure in its efforts that it successfully campaigned against the Union, Respondent conducted its first poll on December 8. To its dismay, Respondent

underestimated unit employees' support for the Union and failed to oust it as the unit's bargaining representative.

Respondent, undeterred by the December poll results, immediately ratcheted up its smear campaign against the Union by, among other things, accusing it of intimidating unit employees from participating in the poll. This time, Respondent hoped to coax its unit employees away from the Union in anticipation of an NLRB conducted election. However, the NLRB Baltimore Regional office dealt Respondent a blow by refusing to process its petition because Respondent had not complied with the terms of its earlier settlement agreement concerning its February unilateral wage increases. With no place left to turn, Respondent had to continue negotiations with the Union.

When negotiations continued in February 2017, the Union outflanked Respondent by unexpectedly capitulating to Respondent's positions on nearly every open article in order to secure a contract. However, Respondent did not want an agreement; it wanted to rid itself of the Union. With so few issues separating the parties from finalizing a contract, Respondent felt the walls closing in. With no hole through which to escape, Respondent rammed through the wall by rushing to conduct a repeat poll.

The results of Respondent's March 2017 poll were predictable. After nearly six months of Respondent's pressure on its unit employees to reject the Union, it finally secured its desired result and threw off the shackles of its bargaining obligation. Respondent immediately withdrew recognition from the Union and commenced a series of unilateral changes to integrate the facility and the unit employees into the rest of Taylor Corp.'s non-unionized printing facilities, as it initially attempted to do at the first bargaining meeting.

Brief of the Counsel for the General Counsel

Counsel for the General Counsel relies primarily on three legal theories for the unlawfulness of Respondent's December and March 2017 polls. For two of the three theories, counsel for the General Counsel bears the burden of proof. The first, and simplest, of the two theories is that Respondent was prohibited from questioning the majority status of the Union in December and March 2017 due to Respondent's promise to bargain in good faith with the Union as a condition of its earlier settlement agreement concerning its unilateral wage increases. According to *Poole Foundry & Machine Co.*, 95 NLRB 34, 36 (1951), and its progeny, Respondent cannot question the majority status of the Union without first bargaining for a reasonable period of time after the approval date of the settlement agreement requiring bargaining as a condition of settlement. In the present case, Respondent failed to bargain for a reasonable period of time with the Union at the times it polled its unit employees in December and March 2017.

As its second theory, counsel for the General Counsel relies on *Struknes Construction Co.*, 165 NLRB 1062, 1063 (1967), and its progeny, to argue Respondent's failure to conduct its polls in an atmosphere free from coercion caused by its own conduct violated Sections (8)(a)(1) and (5) of the National Labor Relations Act ("the Act"). Regarding the December poll, Respondent held its poll at a time when its earlier unilateral wage increases undermined the Union and coerced unit employees during the poll. Then, at the time of its March 2017 poll, the unit employees were still coerced by Respondent's unilateral wage increases, and more recently, Respondent's unlawful December poll.

Finally, counsel for the General Counsel argues Respondent cannot, and did not, meet its burden to establish that it had a good-faith doubt, based on objective evidence, concerning the Union's majority status in order to hold its polls as required by *Allentown Mack Sales & Service*

v. NLRB, 522 U.S. 359 (1998), and its progeny. Respondent’s evidence of its good-faith uncertainty is a disjointed narrative of alleged employee “dissatisfaction” comprised of self-serving, second, and third-hand, hearsay statements with Respondent’s supervisors as declarants. Respondent desperately attempts to portray a tidal wave of disaffection sweeping over its unit members, when in actuality, the relevant and reliable evidence reveals a shallow, still pond of union oppositionists. Respondent’s evidence of good-faith uncertainty is primarily inadmissible, unreliable, insufficient, and post-hoc.

Counsel for the General Counsel argues the ALJ should find the violations alleged in the complaint and order Respondent to remedy its unlawful conduct. This brief is structured to easily assist the ALJ in making his determinations. Section C of this brief presents the facts, legal frameworks, and arguments regarding Respondent’s December 8 poll for those legal theories for which counsel for the General Counsel has the burden of proof. Then, in section D of this brief, counsel for the General Counsel concentrates on Respondent’s failure to establish it had a good-faith uncertainty of the Union’s majority status to conduct its December 8 poll. Finally, in section E, counsel for the General Counsel addresses all relevant facts, legal theories, and arguments concerning Respondent’s March 2017 poll.

B. ISSUES PRESENTED

1. On December 8, Respondent polled its unit employees to determine if they continued to desire the Union’s representation.
 - a. Did Respondent violate Sections 8(a)(1) and (5) of the Act by polling its unit employees three days after the Acting Regional Director of the NLRB Baltimore Regional office approved an informal settlement agreement requiring that Respondent, as a condition of settlement, bargain in good faith with the Union?

Brief of the Counsel for the General Counsel

- b. Did Respondent violate Sections 8(a)(1) and (5) of the Act by polling its unit employees in a coerced atmosphere caused by Respondent's unilateral wage increases?
 - c. Did Respondent meet its burden to establish it held a reasonable good-faith uncertainty of the Union's majority status, based on objective evidence, at the time it decided to hold its December 8 poll?
 2. On March 7, 2017, Respondent again polled its unit employees to determine if they continued to desire the Union's representation.
 - a. Did Respondent's March 2017 poll questioning the majority status of the Union, after only two bargaining sessions in two and a half months from the date of the approved settlement agreement, violate Sections 8(a)(1) and (5) of the Act?
 - i. As of March 7, 2017, did Respondent bargain with the Union for a reasonable period of time from the date of the approved settlement agreement?
 - b. Did Respondent violate Sections 8(a)(1) and (5) of the Act by polling its unit employees in March 2017 at a time with unremedied unfair labor practices caused by Respondent's December poll?
 - c. Did Respondent meet its burden to establish it held a reasonable good-faith uncertainty of the Union's majority status, based on objective evidence, at the time it decided to hold its March 2017 poll?
 3. Did Respondent violate Section 8(a)(5) of the Act by withdrawing recognition from the Union on March 8, 2017, on the basis of its March 2017 poll?

4. Did Respondent's unilateral changes to the unit employees' working conditions after its March 2017 withdraw of recognition from the Union violate Section 8(a)(5) of the Act?

C. DECEMBER POLL

I. FACTS

a. The Respondent

Standard Register Company ("SRC") was a corporation from Dayton, Ohio that owned and operated printing facilities in the U.S. and Mexico. (1: 36-37, Potts) On July 31, 2015, Taylor Corp., the third largest graphics production company in the U.S., with over 100 printing facilities in the U.S., Canada, and Mexico, purchased SRC's assets in a bankruptcy sale. (2: 260-262, Jackson) In its assets purchase, Taylor Corp. acquired approximately 15 SRC printing facilities throughout the U.S. and Mexico, including the facility at issue located in York, Pennsylvania.² *Id.* SRC operated the facility until July 31, 2015, then, on August 1, 2015, Taylor Corp. continued operations at the facility as the new owner. (1: 44, Potts)(2: 260, Jackson) Initially, Taylor Corp. continued operations at the facility through its subsidiary, SR Acquisition Corporation, then changed its name to Standard Register, Inc. d/b/a Taylor Communications.³ (2: 263, Jackson)(Jx7)

b. The Facility

The facility is a 214,000 sq. ft. building located in York. (4: 749, Warner) Currently, Respondent employs approximately 75 production and maintenance employees at the facility.⁴

Id. The unit employees are scheduled in three shifts over 24 hours. *Id.* at 750. The first shift has

² As part of its assets purchase, Respondent purchased a printing facility from SRC located in Fayetteville, Arkansas. Besides the facility at issue, the Fayetteville facility was SRC's only other unionized printing facility. Respondent closed the Fayetteville facility shortly after its assets purchase in 2015. (2, 262; Jackson)

³ On or about August 5, 2015, Respondent changed its name from SR Acquisition Corporation to Standard Register, Inc. (Jx7)

⁴ Between August 1, 2015 and March 8, 2017, the total number of unit employees fluctuated between approximately 73 and 80. (1, 42; Potts) (4: 749, Warner)(Jx4)

the most unit employees scheduled to it, and the second and third shifts have nearly the same amount of unit employees scheduled.⁵ *Id.*

Unit employees perform one of four job classifications: press operator, collator, material handler, or maintenance. *Id.* Press operators run printing presses. *Id.* Collators operate machines designed for multi-part forms. *Id.* at 751. Material handlers support press operators by delivering goods, taking away finished products, and recycling waste. *Id.* Maintenance employees perform repairs on the facility's machines. *Id.* The unit employees perform their duties on the facility's production floors. *Id.* at 753.

c. The Union

For over 50 years, the unit employees were represented for the purposes of collective-bargaining by Local 594-S of the Graphic Communications Conference. (1: 36, Potts) In or around 2006, the Graphic Communications Conference affiliated with the International Brotherhood of Teamsters, continuing its representation of the facility's unit employees as Local 594-S of the Graphic Communications Conference International Brotherhood of Teamsters ("Local 594-S"). (1: 34-35, Potts)(4: 640, Eckert) Local 594-S represented the unit employees until Respondent withdrew recognition on March 8, 2017. (Jx49)

Local 594-S was one of seven locals included in District 9 of the Graphic Communications Conference International Brotherhood of Teamsters ("District 9"). (1: 32-33, Potts) District 9 is an umbrella organization representing approximately 1,500 unit members in the printing industry in parts of Pennsylvania, Maryland, New Jersey, and Delaware. *Id.* District

⁵ GCx18 provides detail regarding individual unit employees' schedules.

9 was formed in 2008 in order to provide full-time representation and financial support to one-shop locals like Local 594-S.⁶ *Id.*

John Potts has held the position of District 9 Secretary-Treasurer since 2008. *Id.* As Secretary-Treasurer, Potts manages District 9's finances, dues collections, contract negotiations, grievances, and arbitrations. *Id.* Potts has negotiated renewal collective-bargaining agreements for Local 594-S with SRC in 2010, 2012, and 2014. *Id.* at 37. The 2014 collective-bargaining agreement between Local 594-S and SRC ("2014 agreement") had effective dates from May 1, 2014 through April 30, 2016, and contained both a union-security clause and dues check-off provision. (*Id.* at 41-42)(Jx1) (Local 594-S and District 9 are hereafter collectively referred to as the "the Union").

d. July 20, 2015: Taylor Corp. Announces It Will Reject the 2014 Agreement

Gregory Jackson, Taylor Corp. Executive Vice President, oversaw Taylor Corp.'s assets purchase of SRC. (2: 260, Jackson) On July 20, 2015, approximately ten days prior to finalizing Taylor Corp.'s assets purchase, Jackson visited the facility and spoke with all three shifts of SRC's unit employees about Taylor Corp.'s policies and benefits. (2: 266, Jackson) At the time of Jackson's visit to the facility, the unit employees' working conditions were determined by the 2014 agreement. (1: 52, Potts)

During his visit, Jackson told the unit employees that Taylor Corp. was rejecting the 2014 agreement, and specifically told them they no longer had to be union members or pay union dues. (2: 270, 310-311, Jackson) Jackson gave a PowerPoint presentation to the unit employees describing Taylor Corp.'s business model, hiring procedures (including mandatory drug-testing), employee benefits, and work policies. (2: 265-266, Jackson)(Jx2) Jackson told the unit

⁶ All locals included in District 9 have their own officers. At all material times, Ted Billet was President of Local 594-S. (1: 63, Potts)

employees that the Taylor Corp. policies he identified during his PowerPoint presentation would be the unit employees' work policies when Taylor Corp. began operations at the facility on August 1, 2015, and throughout its operation of the facility. (*Id.* at 266.)(1: 52, Potts)

From July 20 to 31, 2015, Taylor Corp. collected applications and drug-tests from SRC's unit employees interested in continuing employment at the facility with Taylor Corp. (2: 266, Jackson)(Jx2) On August 1, 2015, Taylor Corp. began operations at the facility with approximately 74 of 77 unit employees represented by Local 594-S.⁷ (1: 47, Potts)

e. The Union Seeks Recognition

The day after Jackson's announcement that Taylor Corp. would not honor the 2014 agreement, Potts sent Glen Taylor, Chairman and CEO of Taylor Corp., a letter demanding Taylor Corp.'s recognition of the Union as the unit employees' representative. (Jx4) On July 23, 2015, Nicholas Fiorenza, Respondent's labor relations counsel, sent Potts a letter claiming Potts' demand for recognition was premature because Taylor Corp's assets purchase had not been finalized. (Jx5)

After Taylor Corp. began operating at the facility on August 1, 2015, Kurt Freeman, District 9 President, sent Fiorenza a letter again demanding recognition of the Union on August 3, 2015. (Jx6) In his letter Freeman stated:

...It is our position that any unilateral change in terms and conditions of employment imposed by Taylor Corporation is a violation of the National Labor Relations Act. It is also this Union's position that the failure of Taylor Corporation to employ any of the individuals previously employed by Standard Register and its York, PA plant is also an unfair labor practice and a violation of the law...⁸ *Id.*

⁷ Potts testified that certain unit employees were not retained by Taylor Corp. because they failed Taylor Corp.'s drug tests. (1: 47, Potts)

⁸ The Union filed unfair labor practice charges with the NLRB Baltimore Regional office regarding changes to the unit employees' working conditions made at the time of Respondent's July 2015 acquisition. On September 30, 2016, the Office of the General Counsel issued a dismissal letter affirming the Regional Director's refusal to issue complaint regarding the Union's charge alleging Respondent unilaterally implemented new initial terms and conditions of employment on August 1, 2015. In the dismissal letter, the Office of the General Counsel identified

On August 5, 2015, Fiorenza sent Freeman a response letter stating:

... our client is amenable to meeting with your union for the purpose of entering into negotiations for a new collective bargaining agreement covering the former employees of Standard Register. To be specific, and based on the composition of employees hired and now employed, ***we do not dispute your union's status as collective bargaining representative.***

(Jx7) (emphasis added)

With Respondent's recognition of the Union as the unit employees bargaining representative, the parties began negotiating an initial contract on August 27, 2015.⁹ (1: 57-58, Potts)(3: 464, Fiorenza)

f. Negotiation Facts Not In Dispute

There are several important facts regarding the parties' contract negotiations not in dispute. First, the parties were negotiating an initial contract. (*Id.*)(Jx7) Second, the parties agreed that any tentative agreements they reached during negotiations would not be implemented unless an overall collective-bargaining agreement was finalized. (1: 73-74, Potts)(3: 559, Fiorenza) Third, both parties requested unit employees vote on an overall tentative agreement before implementing its terms.¹⁰ (3: 497, Fiorenza)(Jx12) Last, at no point during negotiations did the parties reach or discuss impasse, or offer final positions. (1: 105, 112, 134, Potts)(3: 505, 576, Fiorenza)(Jx25)

that Respondent was a *Burns* successor according to *NLRB v. Burns Security Services*, 406 U.S. 272, 292-295 (1972). (Jx16)

⁹ In paragraph 6(d) of its Amended Answer, Respondent admitted it recognized the Union as the exclusive collective-bargaining representative of the unit employees as of August 1, 2015.

¹⁰ At one point, Respondent seemed to portray the requirement for a unit employee vote as solely a Union requirement. (3: 497, Fiorenza) However, Respondent also required a unit employee vote. In its July 28 memorandum to the unit employees, Respondent states, "I can tell you that both the Company's and Union's current proposals call for an employee vote before any contract becomes final." (Jx12)

g. Respondent's Bargaining Strategy and Conduct

Taylor Corp. is a predominantly non-unionized printing company. (Jx51) Since Taylor Corp.'s acquisition of the unionized facility in July 2015, its stated goal has been to integrate the facility into the "Taylor family of companies." (Jx2)(Jx51) Respondent repeated the phrase throughout negotiations. (1: 124, Potts) Potts interpreted the phrase as referring to Respondent's insistence on several Taylor Corp. policies inclusion in a final contract. *Id.* at 67, 124. Fiorenza admitted his bargaining directive from Jackson was to quickly secure an agreement incorporating several Taylor Corp. policies. (3: 473-474, 556, Fiorenza)

During his career, Potts has negotiated hundreds of collective-bargaining agreements, 12 of which were initial contracts. (1: 58, Potts) According to Potts, on average, initial contracts took six months to one year to finalize, and the parties met two or three times per week, or nine to 12 times per month. *Id.* at 58, 60.

In the present case, the parties held approximately 25 bargaining sessions over 18 months which equates to less than two sessions per month. *Id.* at 59. Potts identified several reasons for protracted negotiations including: (1) single bargaining sessions from August 2015 to January 2016; (2) Fiorenza's difficulties answering the Union's questions; (3) impact on negotiations due to travel; and (4) Respondent's repeated unilateral changes throughout negotiations. *Id.* For each of Potts' stated reasons, detail is provided below.

1. Single Bargaining Sessions

Between August and December 2015, the parties met once per month. (GCx2) As a result, the parties made little progress during the first four months of negotiations. (1: 60, Potts)(GCx2) In his November 23, 2015, letter, Potts captured the state of negotiations after the first three months stating:

...Since the acquisition, the parties have met on three (3) occasions in order to bargain and reach agreement on the terms of a new collective bargaining agreement (CBA) covering the Local 594-S members working at the York, Pennsylvania facility. Thus far we have met on August 27, October 13 and November 5, 2015. All three of those negotiating sessions have been for a limited number of hours. While we have exchanged proposals and come to agreement on a very limited number of items, the union has continually requested that the company schedule multiple, back to back days in an effort to gain some continuity in an effort to work through the many issues on the table in order to successfully conclude negotiations and reach terms on a new CBA...

...The union requests that three or four consecutive days of collective bargaining negotiations be established by the parties. It is obvious that the “hit or miss” negotiations in which you have participated to date are not advancing the interest of the parties in reaching a collective bargaining agreement and, if anything, are still defying the bargaining process...

(GCx2)

After Potts’ November 2015 letter, Respondent did schedule back-to-back bargaining sessions, but those sessions occurred only once per month, and for only two days at a time. (1: 62-63, Potts) Despite increased bargaining sessions starting in early 2016, Fiorenza had difficulty answering questions regarding Respondent’s proposals, which limited the effectiveness of the early sessions. *Id.* at 91.

2. *Fiorenza Needs Help*

Prior to Taylor Corp’s assets purchase, Fiorenza had no experience at the facility or applying the 2014 agreement to the unit employees. (3: 549, Fiorenza) Fiorenza attempted to cure this deficiency by adding Troy Warner, Plant Manager, to Respondent’s bargaining committee.¹¹ *Id.* However, many of Respondent’s bargaining proposals were the same Taylor Corp.’s policies applied at its non-unionized printing facilities, where Warner had never worked. (1: 91, Potts) As a result, Respondent’s insistence on the implementation of Taylor Corp. policies caused the Union to have many questions, which neither Fiorenza nor Warner was

¹¹ In March, Chris Crump replaced Warner as the facility’s Plant Manager. (3: 358, Crump)

capable of answering. *Id.* Fiorenza's inability to answer many of the Union's questions slowed progress, ultimately resulting in Jackson joining negotiations for Respondent. *Id.* at 59.

3. A Frustrated Jackson Joins Negotiations

By the end of 2015, after only four months of bargaining, Jackson was frustrated that the parties had not reached a contract. (2: 272, Jackson)(3: 474, Fiorenza) Jackson attended a bargaining session in the spring of 2016 to see first-hand what the issues were between the parties. *Id.* During the session, Jackson learned that Fiorenza did not know how Taylor Corp.'s policies were applied in practice. *Id.* Able to directly answer the Union's questions regarding Taylor Corp.'s policies, Jackson decided, with Potts' encouragement, to regularly attend bargaining sessions. (*Id.*)(1: 91, Potts)

Despite their best intentions, Jackson's inclusion added new challenges due to his limited availability and busy travel schedule. (1: 92, Potts) Jackson traveled to and from Minnesota to attend bargaining sessions, but he frequently arrived late and left early. (*Id.*)(2: 273, Jackson) While Fiorenza had authority to reach agreement on simpler contract provisions; he had to consult with Jackson before Respondent could reach tentative agreements on larger provisions. (1: 192, Potts)(2: 346, Jackson) In reality, Jackson's limited availability caused by his travel further hindered the parties from reaching tentative agreements. (1: 59, Potts)

4. Respondent's Unilateral Changes

Throughout negotiations, Respondent made multiple unilateral changes to the unit employees' working conditions without first notifying or bargaining with the Union. *Id.* During the first bargaining session, Fiorenza informed Potts that Respondent expected Taylor Corp.'s policies regarding hours and overtime, paid-time-off (PTO), absenteeism, etc., to be agreed to by

the Union for immediate implementation. (*Id.* at 67.)(3: 474, 556, Fiorenza) When Potts did not immediately agree, Respondent unilaterally implemented the policies. (1: 68, Potts)(GCx4)

On September 22, 2015, prior to the second bargaining session, when Potts learned Respondent unilaterally implemented those policies, he immediately sent Fiorenza an e-mail stating:

Nick, the attached policies were distributed to York employees last week. These are mandatory subjects of bargaining as you know. At our August meeting, we did discuss limiting company changes in working conditions until we could meet and commence bargaining.¹²

(GCx4)

Respondent's unilateral implementation of Taylor Corp.'s policies had a significant effect on negotiations. (71-73, Potts). The next sessions were dominated by discussions of the implemented policies, with Respondent continuing to reoffer the implemented policies as its proposals and insisting upon their immediate implementation. (*Id.*)(GCx6)

Next, in late 2015, Respondent unilaterally changed its paid holidays to include the day after Thanksgiving. (1: 81, Potts) By way of background, the 2014 agreement included the day after Thanksgiving as a paid holiday. (*Id.*)(Jx1) When Taylor Corp. took over the facility it discontinued the holiday. *Id.* Since the parties first bargaining session, the Union proposed unit employees be given that day as a paid holiday. *Id.* at 63-64. After repeatedly rejecting the Union's proposal, Respondent, without first notifying or bargaining with the Union, reinstated the day after Thanksgiving as a paid holiday. *Id.* at 74-76. While this change is clearly beneficial to the unit employees, it occurred while Respondent was rejecting the Union's proposals to include the day after Thanksgiving as a paid holiday. *Id.* at 74-76. Respondent's

¹² After Potts' e-mail to Fiorenza regarding Respondent's implementation of Taylor Corp.'s policies, Fiorenza informed Potts that Respondent had allegedly rescinded its implementation of the policies. (GCx5)

change came only after Taylor Corp. implemented the change in all of its printing facilities, thus denying the Union of its ability to claim that it successfully bargained for the paid holiday. *Id.*

Respondent continued to make small scale unilateral changes without regard to their bargaining obligation until February, when Respondent made a large scale unilateral change by increasing the wages of nearly every unit employee.¹³

h. February 29: Respondent Unilaterally Calculates and Distributes Merit Pay Increases to the Facility's Unit Employees

Without first notifying, or bargaining with, the Union, Respondent determined and then distributed merit pay increases to approximately 67 of 72 unit employees on February 29. (1: 77, Potts)(Jx9) A week before the distribution, Warner provided performance data for the facility's unit employees in order to calculate wage increases. (4: 756, Warner) Despite his inclusion on Respondent's negotiating committee, Warner gave no notice, or opportunity to bargain, to the Union.¹⁴ *Id.*

In his February 27 e-mail to his supervisory staff, Warner states:

...The merit increase will be distributed based on personal performance. If you are a new employee in the last 6 months you are not eligible. If you are on a performance review or received a poor 2015 performance review you won't receive what those that are not will receive. .. I strongly suggest that you never share with anyone what someone else will be receiving. And that they do the same!...

(Jx8)

¹³ Respondent unilaterally changed unit employees' shoe allowance without first bargaining with the Union sometime before February. (Jx9)

¹⁴ The ALJ should reject Respondent's attempt to justify its unilateral wage increases by implying the Union waived its right to bargain over the increases due to a tentative agreement regarding merit pay language reached between the parties in early February. (3: 478, Fiorenza) Specifically, the parties agreed to the following language, "Bargaining unit employees shall be eligible for merit increases granted by the Company and payable in a manner consistent with how it administers merit pay for its other production plants." (3: 557, Fiorenza) First, the parties agreed that tentative agreements reached during negotiations would not be implemented until a final contract was reached. (1: 73-74, Potts)(3: 559, Fiorenza) Second, nothing in the provision's language indicates the parties agreed to criteria for determining merit increases, or the Union's review of those calculations. Potts testified that although he agreed to merit pay as a form of wage increases, he never agreed to criteria for determining merit pay prior to May and November. (1: 77-78, Potts) Finally, Fiorenza clearly admitted in his April 4 e-mail that it was improper for Respondent to calculate and distribute wage increases without first notifying and bargaining with the Union. (Jx9)

Respondent's unilateral merit increases ranged from 1 to 6 percent of the unit employees' annual salaries. (Jx9) Respondent continues to pay unit employees according to the wage increases it unilaterally implemented in February. (1: 84, Potts)

After Potts learned of Respondent's *fait accompli*, he complained to Fiorenza at the next bargaining session about Respondent's failure to bargain over the increases. *Id.* at 78. Fiorenza claimed the distributions were made in error and offered to rescind the increases. *Id.* Potts declined Fiorenza's offer to rescind the pay increases, but requested information regarding the criteria used by Respondent to determine the increases, and the amounts distributed to each unit employee. (*Id.* at 79)(Jx9)

On April 4, Fiorenza provided Potts with the requested information by e-mail. (Jx9) In his e-mail, Fiorenza stated:

...Merit pay was being administered corporate-wide by Taylor and the York increases were implemented along with the rest in error. I learned about the increases on March 28, just before our meeting. It was my intention to let you know what the Company was contemplating and to provide an opportunity to bargain in advance of anything being done. The added holiday for 2016 and the safety shoe allowance are similarly, corporate-wide changes that should only have been implemented with prior bargaining.

I certainly understand the Union's position about not wanting the Company to suspend and rescind the increases or other items. Nevertheless, I wanted to reach out to you to explore what we can do to correct this error. We have reinforced our directive to refrain from implementing any unilateral terms without prior communication and opportunity to bargain with the Union. We are also willing to take other steps including a written communication to all bargaining unit employees explaining that the increases should have been undertaken only with prior bargaining and Union involvement. We would also reinforce our obligations to bargain in good faith with your Union. We would also consider other things you may suggest as well.

Id.

Potts responded to Fiorenza's e-mail and suggestion to explore a joint solution on April 5

stating:

As per our discussions last week during negotiations, the Union is extremely upset over the unilateral implementation of merit pay without first meeting and negotiating with the Union on this mandatory subject of bargaining. As you mention in your email of April 4, 2016, this was not the first time the Union has seen unilateral implementation. Taylor implemented changes to holidays and safety shoe allowances without first negotiating. Merit pay increases adds to the Company's disregard for the Union's right to bargain. The Company's conduct in not honoring its bargaining commitment goes beyond unilateral changes and has now moved into a total disregard for the integrity of the bargaining relationship...

...While the Union does not wish to file additional unfair labor practice charges or file suite for "Infringement of Intellectual Property," I strongly suggest that we schedule multiple days in this month to meet and negotiate over merit pay and other open issues and to successfully conclude negotiations to enter into an agreement mutually acceptable to both parties. ***I would, depending on the progress made in our next round of negotiations, inform you of our decision on any future legal action.***¹⁵

(Jx10) (emphasis added)

In the last sentence of his e-mail, Potts clearly advised Respondent that he was reserving his decision on whether to file legal action regarding the unilateral wage increases until he could assess progress toward an overall contract. Potts never told Respondent he would not file a charge with the NLRB Baltimore Regional office. (1: 86, Potts) Potts testified that Respondent's unilateral wage increases undermined the Union at the bargaining table, and with the unit employees.¹⁶ *Id.* 81-85. In fact, Brett Eckert, the only unit employee to testify during

¹⁵ At hearing, Respondent implied the Union prevented it from curing its unlawful unilateral wage increases by refusing to explore a joint resolution with Respondent. The ALJ should reject any argument by Respondent that it cured its unlawful unilateral merit increases by offering to explore options with the Union. Respondent did not meet the factors of repudiating its unlawful conduct identified in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Respondent in no way communicated with the unit employees regarding its unilateral wage increases in order to clarify or repudiate its unlawful conduct. Respondent did not require the Union's permission to attempt to cure its unlawful conduct.

¹⁶ The ALJ should reject Respondent's attempt to undermine Potts' testimony regarding the impact of Respondent's unilateral wage increases using e-mails between Potts and Fiorenza after February 29. (Rx1-5). On cross-

the hearing, described how excited he was to receive a merit increase from Respondent. (4: 680, Eckert)

As requested by Potts in his e-mail, the parties turned their attention to negotiating future criteria for determining merit pay for the unit employees.¹⁷ (1: 88-90, Potts) In May, the parties tentatively agreed to criteria for operator positions.¹⁸ *Id.* at 90.

i. August 25: The Union Files Charges With the NLRB Baltimore Regional office Regarding Respondent's Unilateral Wage Increases

As indicated in Potts' April 5 e-mail, on August 25, the Union filed case 05-CA-182978 with the NLRB Baltimore Regional office alleging Respondent violated section 8(a)(5) of the Act by: (1) making unilateral changes to terms and conditions of employment by implementing wage increases to the facility's production and maintenance employees on February 29, 2016; (2) directly dealing with employees on or about February 29, 2016; and (3) prohibiting Wanda Stough from discussing her wages with other employees on or about February 29, 2016.

(Jx10)(Jx14)

examination, Potts explained the reasons he did not immediately address the unilateral merit increases with Fiorenza including: (1) his schedule didn't allow immediate conversation with respondent; (2) he was seeking his counsel's advice; and (3) Wanda Stough, Local Vice President, was out on leave and unable to provide information regarding the merit increases. (1: 177, Potts)

¹⁷ Respondent testified its willingness to negotiate merit pay criteria after its unilateral implementation was a courtesy to the Union. (3: 486, Fiorenza) Respondent offered this testimony in order to avoid the obvious contradiction that if it negotiated criteria in February, why did it negotiate criteria in May. Notice that Respondent, in its communications to the Union regarding the merit increases never once stated it was permitted to calculate or distribute pay increases based on the February merit pay language or criteria. (Jx9)(Jx10) As argued in footnote 13, the parties never negotiated criteria prior to March. After Respondent unilaterally calculated and distributed merit pay increases to the unit employees in February, the Union demanded Respondent immediately negotiate criteria, and Respondent complied with its bargaining obligation. (1: 89, Potts)(Jx10)

¹⁸ Additionally, the Union obtained language in its "side-letter" agreement regarding merit pay criteria that "...the Company will allocate a reasonable portion of the merit pool to advancing the pay of employees on a progression toward a higher pay rate in their classification. The Union will be provided the merit pay distribution in advance to review and provide its input as to same." (Jx11)

j. September 14: Respondent Informs the Unit Employees that the Union “Complained” to the NLRB About Their Merit Increases

Beginning on July 28, Respondent, by Chris Crump, Plant Manager, began distributing a series of memorandums to the unit employees for the alleged purpose of providing negotiation updates.¹⁹ (Jx12) However, Respondent often veered into subject matter unrelated to negotiations. For instance, Crump distributed Respondent’s September 14 memorandum to all unit employees informing them about the Union’s charge concerning Respondent’s unilateral wage increases that occurred six months earlier, stating:

...we were disappointed to learn that the Union has recently filed another unfair labor practice charge against us with the National Labor Relations Board’s Regional Office in Baltimore. The Union has alleged that we violated the law by “by implementing wage increases” to you, by “directly dealing with employees” about wages, and by prohibiting a union committee person “from discussing her wage with other employees.” It is, to say the least, disheartening that we again have to turn our focus to such legal proceedings and once again spend considerable time and money on them.

The NLRB paperwork indicates that the conduct the union complains of took place “on or about February 29, 2016”. While we understand and respect the right of the union to take legal action that they may feel is necessary, we believed that we had some time ago successfully resolved any issue the union had concerning this year’s employees increases. Though disappointed that the union has chosen this course of action, we will once again do everything we can to defend our company from these allegations.

(2: 363, Crump)(GCx13)

Significantly, at the time of its September memorandum, Respondent knew the Union was not seeking rescission of the wage increases, and therefore, that its charge would have no impact on the unit employees’ wage increases. (2: 366-367, Crump)(Jx9) Respondent promised

¹⁹ Although Crump’s name appears as the author of Respondent’s series of memorandums distributed to the unit employees, he did not draft the memorandums. Someone from Respondent’s corporate offices drafted the memorandums distributed to the unit employees. (2: 360, Crump)

to keep the unit employees updated on the “important matters” of Respondent’s increases, which it did, approximately one week before its December poll. (GCx13)(Jx26)

k. November Negotiations

The parties continued negotiating through October. (GCx13) Heading into the November bargaining sessions, Jackson and Fiorenza believed the parties were close to finalizing an agreement, which makes Respondent’s decision to renege on its earlier tentative agreement regarding the grievance-arbitration machinery so vexing. (3: 489, Fiorenza)(Jx17)

The Union rejected Respondent’s earlier proposals to include Taylor Corp.’s peer-review board in the Union’s grievance-arbitration procedure. (1: 101, 105, Potts) Crump’s July 28 memorandum confirms the Union’s rejection stating, “...*We have also tentatively agreed to replace the Company’s standard Peer Review Board with the Union’s grievance arbitration agreement.*” (Jx12) (emphasis added) Despite the parties’ agreement on a grievance-arbitration procedure, the day before the parties’ November 2 bargaining session, Fiorenza sent Potts a copy of Respondent’s latest contract proposal once again including the once “replaced” peer-review board into the grievance-arbitration procedure. (3: 562, Fiorenza)(Jx17) Fiorenza’s November 1 e-mail states, “...the main change is adding review board language to the grievance procedure.” *Id.*

Fiorenza testified that the peer-review board did not replace any part of the grievance-arbitration procedure, but that is not entirely true.²⁰ (3: 490, Fiorenza) The peer-review board inserted into Respondent’s November 1 grievance-arbitration proposal mandates a new procedural step for any discipline or termination. (Jx17) The new step required a hearing before

²⁰ Fiorenza described the peer-review board as a pre-grievance review of supervisory discipline as a means of avoiding grievance proceedings. (1: 489-490, Fiorenza) Fiorenza’s description is inaccurate. A review of the peer-review board language included in Respondent’s November 1 proposal clearly states that the peer-review board is a step that occurs after an employee files an official grievance. (Jx17)

employees and managers in order to advance a grievance to the next procedural step. *Id.* Respondent's peer-review board arguably binds a grievant to the decisions made by the peer-review board. *Id.* Additionally, the peer review board provision limits damages in the event of an improper discipline or termination, which could be less than damages awarded by an arbitrator or agency. *Id.* Respondent's inclusion of the peer-review board into the previously agreed to grievance-arbitration procedure was a significant alteration, and one that arguably replaced parts of the grievance-arbitration procedure.

Respondent's November 1 proposal identified all of the open articles between the parties as of November 2. (Jx17) The below list is a summary of the open articles as of November 1:

- Article 4, Hours and Overtime;
- Article 5, PTO Payout;
- Article 6, Paid Holidays;
- Article 8, Planned Paid Time Off;
- Article 9, Unplanned PTO;
- Article 10, Wages;
- Article 11, Grievance and Arbitration;
- Article 12, Management Rights;
- Article 14, Leave of Absence;
- Article 17, Miscellaneous (peer-review board proposal);
- Merit Pay Side Letter, non-operator classifications.

With so many unresolved issues, it is hard to justify Respondent's belief that the parties were close to an agreement on November 1.

During the November 2 session, the parties worked from Respondent's November 1 contract proposal, concentrating their attention on open non-economic issues. (1: 102, Potts) The only tentative agreement reached during the session concerned merit-pay criteria for non-operators. *Id.* The parties spent the remainder of the session discussing Respondent's new proposals on temporary workers and peer-review board. (1: 104, Potts)(3: 491, Fiorenza) Regarding the peer-review board, Potts told Respondent he believed the peer-review board

violated the Act and that he would have to consult with his attorney about its inclusion in the grievance-arbitration procedure. *Id.* at 103-104. No other open articles were resolved by the parties on November 2.²¹

I. November 3: the Union Decides to Take the Parties' Positions on Open Articles to the Unit Employees For A Vote

There is a dispute between the parties about whether they reached an overall tentative agreement on November 3. (1: 108-111, Potts)(3: 494, Fiorenza) Though the parties presented evidence regarding their versions of the November 3 bargaining session, the issue of whether the parties' reached a full-tentative agreement on November 3 is irrelevant to the allegations identified in the Amended Complaint and Notice of Hearing.²² Nevertheless, the preponderance of the evidence supports a finding that the parties did not reach an overall tentative agreement on November 3. Instead, the Union informed Respondent that it wanted to present the parties' positions on open items to the unit employees for a vote, with a recommendation to adopt Respondent's positions. (1: 109-110, Potts)

Since there was no significant change after the November 2 session to the open articles list identified in Respondent's November 1 proposal, the above-referenced list is a good starting point for considering the November 3 bargaining session.

On November 3, the parties agree they reached tentative agreements on several provisions including: (1) the use of temporary employees; (2) language that a general wage increase would not occur during the life of the current agreement; (3) accrued vacation payout upon plant closure; and (4) a one-year contract duration. (1: 106-108, Potts)(3: 492-493, 562-563, Fiorenza)

²¹ The parties may have agreed to language regarding temporary employees on November 2. (3: 566-567, Fiorenza)

²² The relevance of the November 3 bargaining session is that it motivated Respondent to hold its December 8 poll. (2: 279, Jackson)

The parties dispute the status of the following issues: (1) overtime calculation; (2) holidays and holiday pay rate; (3) vacation payout upon termination, retirement, and layoff; (4) FMLA use; and (5) inclusion of the peer-review board in the grievance-arbitration procedure. (1: 112, Potts)(3: 569, Fiorenza)

Potts testified that during the November 3 session, Respondent continued to take positions rejecting the Union's proposals on the above unresolved issues, so the Union requested a caucus. (1: 107-109, Potts) During the Union's caucus, Potts told the Union's bargaining committee that it appeared unlikely Respondent was going to move or alter its positions on open issues. *Id.* The Union committee decided to take the current tentative agreements and the parties' last proposals on the open issues to the unit members for a vote. *Id.* The vote would be whether a majority of the unit employees would accept the tentative agreements and Respondent's last proposals on the open issues in order to conclude a contract. *Id.* at 111.

After the Union's caucus, Potts informed Respondent that the Union committee felt the parties were at a point where the membership should vote on the parties' current positions on open issues. *Id.* at 110-111. Respondent asked when a meeting would be held, and how the Union would present a document for a vote. *Id.* Potts explained he would review each article with the unit employees and answer their questions as they proceeded through the document. *Id.* Further, Potts explained that when he discussed an open article, he would present Respondent's position fairly. *Id.* Potts told Respondent the Union committee was not going to make a recommendation regarding Respondent's latest proposals on open issues, but Potts would personally recommend that the unit employees accept Respondent's latest proposals on open items. *Id.* Despite Potts' assurance that he would personally recommend Respondent's proposals, he never withdrew the Union's proposals on open issues. *Id.* at 112.

Potts' testimony regarding the events of November 3 is supported by his November 3 bargaining notes which state, "we will fairly present the company's position on meeting with members, we will print out the difference in our proposals still open. Looking at meeting 1st week in December." (1: 113, Potts)(GCx7) Additionally, a thorough reading of Potts' notes supports that he never withdrew the Union's proposals on open issues, and never reached an overall tentative agreement with Respondent. (GCx7)

Respondent's version of November 3 is a tutorial on how not to conclude a contract. According to Fiorenza, after the Union's caucus, Potts allegedly sat down, extended his hand across the table and said, "we have a contract." (3: 493, Fiorenza)

Noticeably absent from Respondent's version of November 3 is the moment when Respondent clearly secured the Union's withdraw of its proposals on open issues. After allegedly hearing Potts say "we have a contract," no one from Respondent asked Potts to clarify his remark. (3: 494, Fiorenza)

The ALJ should give considerable weight to the evidence not in the record. Respondent failed to offer any bargaining notes from its negotiating committee members' as proof of its version of November 3. Crump took notes during the bargaining sessions, yet Respondent did not offer his November 3 notes.²³ (2: 364, Crump) Surely, Fiorenza, a labor attorney for 38 years would have, or should have, documentary evidence to support his claim that the parties reached a full tentative agreement on November 3. (3: 561, Fiorenza) However, not a single document was presented by Respondent to support its assertions. Rather, Respondent relies on "backslapping" and handshakes as proof of a concluded contract. (2: 329-330, Jackson)

²³ Crump's version of what occurred on November 3 is that the parties' "basically" reached a tentative agreement. (2: 431, Crump)

Even if the parties reached a full tentative agreement on November 3, they did so for only four days, because the Union clearly informed Respondent that issues were unresolved on November 7. (GCx18)

m. November 7: Potts Informs Respondent There Are Unresolved Issues

Either during the November 3 session, or shortly after it, Fiorenza requested information from the Union regarding its process for presenting a document to the unit employees for a vote. (1: 113-114, Potts)(3: 494, Fiorenza) A mere four days after the November 3 bargaining session, Potts responded to Fiorenza's request with the following information:

As requested by the Company, the process the Union will follow with the conclusion of our negotiations on November 3, 2016 will be:

- (1) Review by the parties of a "final" draft of the tentatively agreed items ***and last position of the parties on those issues not tentatively agreed to.***
- (2) Provide Local 594-S members with a final draft document for their review in advance of a membership meeting.
- (3) The meeting with the membership is tentatively set for December 4th wherein the union negotiating committee will review with the members the document provided to them, answer any questions, provide a review of discussions and negotiating positions exchanged between the union and the company on issues to include the economics of the company's proposal. ***The Union will fairly represent each parties position on items not agreed to in our bargaining sessions.***
- (4) The members will have the opportunity to vote via secret ballot on the agreement with the Company's proposals ***on open issues being considered as part of a new collective bargaining agreement (CBA).***

(GCx18) (emphasis added)

If Respondent, particularly Fiorenza, thought or assumed it reached a full tentative-agreement with the Union on November 3, Potts' November 7 e-mail should have disabused Respondent of that notion. Potts' clearly stated the Union believed there were unresolved contract items, and that the unit employees would vote on Respondent's ***last*** proposals on open

items. (*Id.*) (emphasis added) If there was an ideal time to raise an issue with the Union regarding November 3, it was at, or around, the time of Potts' November 7 e-mail. However, Respondent did not object to the Union's understanding of what was agreed to on November 3; rather, it thanked Potts for his response. *Id.*

Without objection from Respondent regarding the Union's identified process and vote date, on November 15, Billet distributed a memorandum to the unit employees regarding the vote stating:

...the union negotiating committee will be providing members with a draft document of "tentatively" agreed items negotiated between the parties which will include items that remain unresolved as to each parties [sic] proposal. In order to update the membership on the status of negotiations with Standard Register, Inc., review the tentative agreements, answer questions, discuss open issues and vote, I have scheduled the following membership meeting...²⁴

(Jx23)

n. November 17: Respondent Is Suddenly "Baffled" That The Union Believed There Were Unresolved Issues

At the conclusion of the November 3 bargaining session, Fiorenza offered to draft a document for the unit employees to vote on.²⁵ (3: 498, Fiorenza) On November 11, Fiorenza sent Potts an e-mail with Respondent's draft of a full tentative agreement. (GCx19) In the body of the e-mail, Fiorenza identified changes Respondent made to its November 1 proposal. *Id.* On November 12, Potts responded stating:

I will review Monday in total, however I do have an issue with the peer review being included as per my initial position that it violates the Act and the Union's "Duty to Represent." Please talk to the Company. I will get back to you on any other matters, Tuesday at the latest.

(GCx20)

²⁴ Billet's November 15 notice to the unit employees supports Potts' testimony regarding the November 3 bargaining session. (GCx23)

²⁵ Jackson testified that Potts requested Fiorenza to draft the document. (2: 332, Jackson) However, Fiorenza admitted he offered to draft the document. (3: 498, Fiorenza)

Potts followed up by e-mail on Tuesday, November 15, stating:

I have attached a “draft” of the CBA with: Tentatively Agreed, Company Final Position and Union proposal noted. This draft does not include; seniority list, quality policy or merit, however I am using what you sent on these agreed to items and they will be added to final copies for Local 594-S. I am waiting for a conference call with counsel concerning “peer review.”

(GCx21)

Potts attached the document he described in his e-mail which included a key on the front page for the unit employees to discern the differences in the parties’ proposals regarding unresolved articles.²⁶ *Id.*

Despite being told a week earlier that the Union believed the parties had not reached a full tentative agreement, Fiorenza responded, for the first-time, indicating confusion stating: “John, I’ll review but I’m not following...*didn’t the union withdraw the items* noted in italics when we reached the T/A? Are these still “on the table”?”²⁷ (GCx18)(GCx22) (emphasis added)

Potts responded that same day stating:

Nick, I thought I was very clear with the Company that the Union committee, while not “tentatively agreeing” on those open items, (we do have a tentative agreement on PTO) I would present the Company’s position “fairly” as to having the York plant remain “competitive” in the Taylor family of Companies and that we would be voting on the acceptance of the company’s proposals to get a contract in place to move forward...

(GCx22)

²⁶ Potts used the term “final position” on the key in the document he drafted to describe Respondent’s position on the open items. (GCx21) Potts explained that he meant Respondent’s latest positions on open items. (1: 121, Potts) Respondent never offered its “final position” on any open item. (3: 505, Fiorenza)

²⁷ Respondent’s phrasing in its e-mail suggests uncertainty regarding the Union’s alleged withdraw on November 3 of its proposals on open issues.

Fiorenza responded shortly after receiving Potts' e-mail stating, "...We were under the impression that our last tweaks got us a TA. I'll let my committee know and get back to you as to whether we should get on the telephone. Thanks."²⁸ (GCx24)

Rather than call Potts to discuss the parties' disagreements regarding November 3, on November 17, Fiorenza sent Potts a blistering e-mail accusing the Union of misleading unit employees regarding the basis for the vote, and renegeing on the peer-review board's inclusion in the grievance-arbitration procedure. (GCx25) Respondent now claimed to be "...baffled that the Union is claiming to still have open proposals on the bargaining table..." *Id.* As punishment, Respondent renegeed on its agreement regarding vacation payout upon plant closure. *Id.*

o. Mid-November: Jackson and Fiorenza Discuss Holding a Poll

Jackson was already frustrated that contract negotiations had not concluded by the end of 2015. (2: 272, Jackson) It is not surprising then, that by mid-November, Jackson felt negotiations had taken "way too long," and should have already concluded. *Id.* at 275. Now adding to his frustration was the Union's position that it did not reach agreement with Respondent on November 3. *Id.* at 274. Jackson reacted by considering the possibility of holding a poll of the unit employees to determine if they still supported the Union.²⁹ *Id.* at 276. Fiorenza prevailed upon Jackson to continue negotiations. *Id.* at 275.

p. November 29 Meeting

At Respondent's request, the parties met again on November 29. (1: 132, Potts)(3: 511, Fiorenza) During the meeting, Fiorenza said he thought the parties reached a full tentative

²⁸ On November 15, Potts sent Fiorenza an e-mail stating, "...The recommendation of the Union Negotiating Committee will be to accept the Company's proposals as per your draft." (Jx24) Potts explained that he mistakenly communicated that the Union Negotiating Committee would recommend Respondent's proposals. Rather, Potts intended to restate his earlier statement that he would personally recommend Respondent's proposals. (1: 127, Potts)

²⁹ During their mid-November conversation, Jackson and Fiorenza also discussed the possibility of filing an unfair labor practice charge with the NLRB against the Union, but decided against it. (2: 276, Jackson) There is no evidence that Jackson and Fiorenza discussed unit employee disaffection during their mid-November conversation.

agreement at the end of the November 3 session. (1: 132, Potts) Potts denied the Union reached an agreement. *Id.* Potts said “if any of you [Respondent’s committee] have notes saying we reached an overall tentative agreement, I would like to see them.” *Id.* No one from Respondent’s bargaining committee had notes supporting a full tentative agreement.³⁰ *Id.* Potts repeated the Union’s position that it never reached agreement on all articles, but rather, would recommend the unit employees vote for a contract with the tentative agreements and Respondent’s latest positions on open articles.³¹ (*Id.* at 133)(3: 576, Fiorenza)

By the end of the November 29 meeting, the parties understood there was no overall tentative agreement reached, and that the unit employees would vote on a document identifying the parties’ positions on unresolved provisions. (1: 133, Potts)(3: 576-577, Fiorenza) There is no record evidence that Respondent requested a postponement of the unit employees’ December vote in light of the parties’ failure to reach a full tentative agreement on November 29. On the contrary, Respondent permitted the Union to distribute the document with the tentative agreements and open issues to the unit members at the facility, during work time. (1: 135, Potts)

q. November 30: Frustrated, Respondent Drafts and Distributes a Memorandum to the Unit Employees About Their Merit Increases

Fiorenza initially denied that Respondent drafted its November 30 memorandum out of frustration. (3, 578, Fiorenza) However, confronted by his affidavit, Fiorenza reversed his testimony and admitted Respondent was motivated by its frustration with the Union when it drafted and distributed its November 30 memorandum. *Id.*

³⁰ Notice, Respondent did not present notes during the hearing either.

³¹ During their November 29 meeting, the parties reached agreement, for the first time, on including the peer-review board in the grievance-arbitration procedure. (1: 132-133, Potts)

At a plant wide meeting, Crump handed out the November 30 memorandum with the subject line: “Important Update” to all of the unit employees. (Jx26) The memorandum tells the unit employees:

...the Union filed yet another unfair labor practice charge against us. ***This one complained that the way that merit wage increases were given to you and your co-workers earlier this year violated the law. This could have resulted in these wage increases being taken away.***³²

We responded to the charge by denying that we violated the law by giving our employees merit increases. As of today we believe we are very close to a settlement with the NLRB that continues to preserve your merit increases and maintains our position that we have not violated the law.

Id. (emphasis added)

In its memorandum, Respondent then preemptively argued for its version of events on November 3 by attaching Fiorenza’s accusatory November 17 e-mail for all the unit employees to read. (2: 368, Crump) Respondent did not provide the unit employees with the Union’s version of the November 3 session, or the Union’s response to Fiorenza’s accusations. *Id.*

r. November 30: Respondent Settles the Union’s NLRB Charge Regarding the February Unilateral Wage Increases

As indicated in Respondent’s November 30 memorandum, Respondent signed an informal settlement agreement regarding Respondent’s February unilateral wage increases the same day it distributed the memorandum. (Jx31) True to its word, the Union did not seek, and had never sought, rescission of Respondent’s unilateral wage increases. *Id.*

³² Since April, the Union has stated that it would not seek rescission of the unilateral merit increases. (Jx9) On November 30, Respondent signed a settlement agreement with the Union and NLRB Baltimore Regional office regarding the February unilateral wage increases. The Union did not seek rescission of the wage increases. (Jx31) Respondent’s warning that the Union could have cost the unit employees their wage increases was an intentional mischaracterization.

s. The Settlement Agreement

On December 5, the Acting Regional Director of the Baltimore Regional office approved an informal settlement agreement between the parties concerning Respondent's unilateral merit increases. *Id.* The settlement agreement required a 60 day notice posting, 60 day intranet posting, and a notice e-mailing to the unit employees. *Id.* The settlement agreement and notice contained the following affirmative and negative obligations requiring Respondent to bargain in good faith with the Union:³³

- **WE WILL NOT** refuse to bargain with Local 594-S, District Council No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters as the exclusive collective-bargaining representative of the following appropriate unit of employees:

All production and maintenance employees performing the following work at the Company's York, Pennsylvania plant: Machine Operator (press and collator), Prepress Production, Bindery Production, Material Handling, Shipping/Receiving, Maintenance Technician (machinist/electrician) and Tool Crib.

- **WE WILL NOT** unilaterally make changes to our merit pay system in so far as such changes are applicable to employees in the above bargaining unit without first giving notice to Local 594-S, District Council No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters and affording the Union an opportunity to bargain collectively with respect to such changes.
- **WE WILL** meet and bargain in good faith with Local 594-S, District Council No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters regarding any proposed changes in your wages, hours, and working conditions before putting such changes into effect.

Id.

t. December 1: Jackson Instructs Fiorenza to Prepare For Polling

By December 1, Jackson was finished bargaining with the Union, so he sent Fiorenza instructions stating:

³³ Respondent, in paragraph 7(c) of its Amended Answer admitted the settlement agreement required it to bargain in good-faith with the Union as a condition of the settlement agreement.

Nick, Please have an outline of procedures circulated today including how to administer and form of [sic] ballot.

Assuming the vote doesn't happen or the contract is voted down, I want to be ready to move quickly next week.³⁴

(GCx11) (emphasis added)

Jackson admitted he meant that if any scenario resulted in continued bargaining with the Union, he wanted to poll the unit employees. (2: 281-282, Jackson)

u. December 4: Unit Employees Reject a Contract

Both prior to, and during, the December 4 vote, the Union distributed copies of the document containing the parties' tentative agreements and open items with the parties' last positions to the unit employees for their review. (1: 135, Potts)

On December 4 the Union met with the unit employees. *Id.* Approximately 54 of 77 unit employees attended the meeting. *Id.* at 136. Potts started the meeting by explaining that the purpose of the meeting was to vote on whether the unit employees would accept a collective-bargaining agreement with the tentative agreements and Respondent's latest proposals on the identified open items.³⁵ *Id.* at 136-137. Potts explained that he would go through each article of the document to discuss the current status of the article and answer any questions the unit employees had regarding those articles. *Id.* After all the articles were discussed, the present unit

³⁴ Jackson's e-mail clearly indicates that he was aware the unit employees' December 4 vote was a vote for a contract, and not a vote regarding the unit employees' support for the Union.

³⁵ The ALJ should discredit Eckert's testimony that Potts started the December 4 meeting by stating that the vote was to determine if the unit employees want the Union. First, as argued in section (D)(I)(c) of this brief, Eckert has an overt bias against the Union. (4: 640, 684, Eckert) Second, Eckert indicated that he did not accurately hear Potts' opening statement. *Id.* at 685. Third, Potts testified regarding his exact statement to the unit employees when he began the December 4 meeting, which did not include Eckert's attributed statement. (1: 136-137, Potts) Last, the vote did not concern the unit employee's support for the Union, which all parties understood. (Jx23) Therefore, it defies commonsense that Potts would announce that the purpose of the December 4 vote concerned the Union's continued status as the unit employees bargaining representative. Respondent will offer Eckert's testimony in its desperate attempt to color the unit employees' December 4 vote as a vote against the Union as bargaining representative, rather than a vote against a contract with Respondent. Even if Eckert legitimately heard Potts say what he claims, there is no evidence that any other unit employees understood the vote as a vote regarding the Union's representation.

employees would vote on the total package of the tentatively agreed provisions and Respondent's latest proposals on open items. *Id.*

As Potts went through each article, the unit employees asked questions about overtime, holidays, and vacation payouts. *Id.* at 137. After Potts responded to the unit employees' questions, he made a statement personally recommending the unit employees ratify the agreement with Respondent's latest proposals. *Id.* at 140.

Then, the Union took a vote of the unit employees. *Id.* Out of the 55 members in attendance, 43 voted against accepting a contract with Respondent's last positions on open items, and 12 voted for an agreement with Respondent's last positions. *Id.*

As previously instructed by Potts, the unit employees remained in the Union hall after the vote. *Id.* Potts asked the unit employees what they wanted in a contract. *Id.* The unit employees voiced support for the Union's positions on open economic issues such as overtime calculation and holidays. *Id.* No unit employee voiced opposition to the Union as the collective-bargaining representative. *Id.* Potts left the December 4 meeting with a sense of solidarity among the employees. *Id.* at 140-141.

v. December 5: The Union Informs Respondent that the Unit Employees Rejected A Contract, So Respondent Informs the Union It Will Poll the Unit Employees

Anxious to hear the vote results, Jackson sent Crump and Fiorenza an e-mail on December 4 stating:

Chris [Crump] – Since we haven't received word on the vote today, would you please ask Ted [Billet] first thing tomorrow for an update and then e-mail this group what you learn. ***Based on that feedback***, we can plan an appropriate course of action.

(GCx12) (emphasis added)

Jackson admitted the feedback he referred to was the unit employees' vote result, and the course of action he referred to was a poll of the unit employees. (2: 283, Jackson)

On the morning of December 5, Potts sent Fiorenza an e-mail stating:

Nick, we had two-thirds of the bargaining unit at yesterday's contract meeting which lasted 3 hours. The bargaining unit voted overwhelmingly to reject the Company final position. Other than today, I will be in the office the remainder of the week. (Jx27)

In furtherance of Jackson's instructions in the event of continued bargaining, Fiorenza responded by e-mail the same day stating:

John, The Company has asked me to let you know that we have decided to conduct a poll of all production employees at the York facility to determine whether they wish to be represented by GCC Local 5948. The poll will be conducted by secret ballot this Thursday, December 8, 2016 in the facility's temporary break room.

Let me know if the Union would like to have an observer present during the polling, if you have any questions or wish to discuss.

(Jx28)

On December 6, Respondent distributed a memorandum to the unit employees titled: Poll to Determine if Majority Union Support Exists. (Jx29) The memorandum states:

Given the information we currently have regarding our labor relations, we will be conducting a poll of all production employees this week. The sole purpose of the poll is to establish whether more than 50% of our production employees, currently represented by Graphic Communications Conference (IBT), Local 594-S, actually desire such representation. The result of the poll will be based on the total number of employees in our production unit, not on those who actually participate in the polling.

If a majority of our employees indicate that they do not wish to be represented by the Union, we will inform them that our Company no longer recognizes them as your representative...

...you will be given a ballot with the following question on it:

Do you want Graphic Communications Conference (IBT), Local 594-S to continue to represent you at Standard Register?

Yes No

Id. (emphasis in original)

w. The Union's Limited Response

The Union was given a two day notice of the poll. (1: 144, Potts)(Jx28) Potts had never experienced an employee poll, so after he learned of Respondent's intent to poll the unit employees, he spoke with his legal counsel. *Id.* at 145. Potts would have preferred to hold a meeting with the unit employees to discuss the poll, but given Respondent's short notice, he was unable to organize a meeting with the unit employees. *Id.* Potts did the only thing he had time to do: create and distribute a flyer to unit employees. (*Id.* at 144.)(Jx30)

On or about December 8, in front of Respondent's supervisors, several unit employees distributed the Union's flyer at the facility. (4: 633, Bupp) In its flyer, the Union specifically asked the unit employees to "REFUSE TO VOTE IN TAYLOR'S 'POLL.'" (Jx30) (emphasis in original)

y. December 8: Poll Results

On December 8, Respondent held its poll of the facility's unit employees. (2: 405-406, Crump)(Jx32) As requested by the Union in its flyer, 45% of the unit employees abstained from voting. (3: 590, Fiorenza)(Jx32) Out of 77 bargaining unit employees, only 43 voted in the poll. As a result, the Union maintained its majority status. (2: 370, Crump)(Jx32)

II. ARGUMENT

a. Respondent Violated Sections 8(a)(1) and (5) of the Act By Polling the Unit Employees On December 8 According to Poole Foundry and Its Progeny.³⁶

1. Settlement Bar Legal Framework

In *Poole Foundry & Machine Co.*, the Board stated:

³⁶ Paragraphs 7(a), (c), 11, and 12 of the Amended Complaint and Notice of Hearing.

It is well settled that after the Board finds that an employer has failed in his statutory duty to bargain with a union, and orders the employer to bargain, such an order must be carried out for a reasonable time thereafter without regard to whether or not there are fluctuations in the majority status of the union during that period. Such a rule has been considered necessary to give the order to bargain its fullest effect, i.e., to give the parties to the controversy a reasonable time in which to conclude a contract. ***Similarly, a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract. We therefore hold that after providing in the settlement agreement that it would bargain with the Union, the Respondent was under an obligation to honor that agreement for a reasonable time after its execution without questioning the representative status of the Union.***

95 NLRB 34, 36 (1951), enfd. 192 F.2d 740 (4th Cir. 1951) cert. denied 342 U.S. 954 (1952) (emphasis added). The critical time period for determining whether there was a reasonable time to bargain starts from the date of the approval of the settlement agreement. *AT Systems West, Inc.*, 341 NLRB 57, 61 (2004), citing *Gerrino Restaurant*, 306 NLRB 86, 89 (1992). In deciding whether the parties have bargained for a reasonable period of time under *Poole Foundry*, the Board considers the following five factors: (1) whether the parties were bargaining for an initial agreement; (2) the complexity of the issues being negotiated and the parties' bargaining procedures; (3) the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties were to agreement; and (5) and the presence or absence of a bargaining impasse. *Id.*

The requirement for a reasonable period of bargaining under *Poole Foundry* applies to informal Board settlements as well as formal settlements. *Id.* The presence of a non-admissions clause in an informal settlement agreement has no impact on the *Poole Foundry* analysis. *Id.* at 57.

2. Respondent Violated Sections 8(a)(1) and (5) of the Act when it Questioned the Majority Status of the Union Only Three Days After the Regional Director Approved An Informal Settlement Agreement Requiring Bargaining Between the Parties

Applying *Poole Foundry* and its progeny to the facts of the present case, the ALJ must find Respondent's December 8 poll questioning the Union's majority status violated Section 8(a)(1) and (5) of the Act.

In the present case, the condition precedents for applying *Poole Foundry* are satisfied: the existence of both (1) a settlement agreement, and (2) an obligation to bargain in good faith as a condition of that settlement agreement. See *Valley West Health Care, Inc.* 302 NLRB 586, 587 (1991) (same or similar settlement agreement and notice language regarding respondent's bargaining obligation). On December 5, the Acting Regional Director for the Baltimore Regional office approved an informal settlement agreement in Case 05-CA-182978 concerning Respondent's unilateral wage increases. Respondent admits the settlement agreement required it to bargain in good-faith with the Union. Therefore, according to *Poole Foundry* and its progeny, as of December 5, Respondent was obligated to bargain with the Union for a reasonable period of time before questioning the Union's majority status. On December 8, Respondent questioned the Union's majority status by asking the unit employees, **"Do you want Graphic Communications Conference (IBT), Local 594-S to continue to represent you at Standard Register?"**³⁷ (emphasis in original)

There is no need to apply the above-cited factors for determining whether a reasonable period for bargaining occurred because Respondent questioned the Union's majority status a

³⁷ Most Board cases applying *Poole Foundry* involve methods other than employer polls for questioning an incumbent union's majority status. However, at least on one occasion, the Board has considered the use of an employer poll as the method for questioning the majority status in a *Poole Foundry* analyses. See *Tri-State Culvert Manufacturing, Inc.*, 280 NLRB 743, 751 (1986). While *Tri-State Culvert Manufacturing* has a somewhat lengthy and complicated procedural and legal history with no particular relevance to the present case, the important take away from the case is that the Board acknowledged that employer polling is a method of questioning the majority status of an incumbent union.

mere three days after the Acting Regional Director approved the settlement agreement. See *Poole Foundry & Machine Co.*, supra at 36 (four months passed between approved settlement agreement and question of incumbent union's majority status). There was no bargaining between December 5 and December 8. Thus, a reasonable period of bargaining did not occur before Respondent questioned the Union's majority status.

While the factors identified above for determining a reasonable period of bargaining are generally applicable in cases in which some bargaining ensued between the parties from the date of an approved settlement agreement, the factors also clearly support a finding that a reasonable period of time for bargaining has not elapsed in the present case. In addition to only three days passing from the date of the approved settlement agreement, the parties were bargaining an initial contract, and the parties were not at impasse at the end of their last negotiation session on November 29. The Board has consistently held these two factors weigh heavily in finding that a reasonable period for bargaining has not passed. See *King Soopers, Inc.*, supra at 38; *Valley West Health Care, Inc.* supra at 589; *AT Systems West, Inc.*, supra at 62.

Although by the time of the settlement agreement the parties had 25 negotiation sessions over 18 months, this fact must be balanced against Respondent's conduct during bargaining, including its unilateral implementation of work policies, wage increases, and paid holidays. Additionally, Respondent campaigned against the Union through its memorandums from July through November. The ALJ should take into account that the negotiations occurred in the context of this activity. See *AT Systems West, Inc.*, supra at 62 ("Although, by the time of the settlement agreement, the parties had been in negotiations for approximately 17 months, this fact must be balanced against the Respondent's unfair labor practices in sending the 'Don't Blame Us' letters in March, April, May and June of 1999, and the settled unfair labor practice allegation

that, in July 1999, Respondent unilaterally implemented a wage increase. Taking into account the fact that the negotiations occurred in the context of this activity, we cannot conclude that the parties were at a virtual impasse and unable to reach an agreement.”)

Because Respondent questioned the majority status of the Union before bargaining for a reasonable period of time from the settlement agreement approval date, the ALJ should find Respondent violated the Act by polling unit employees on December 8.

b. Respondent Violated Sections 8(a)(1) and (5) of the Act By Polling the Unit Employees on December 8 In a Coerced Atmosphere.³⁸

1. Coerced Atmosphere Legal Framework

It is well established that an employer may not conduct a poll to assess employee support for a union where the employer has engaged in unfair labor practices, or other activities, that have created a coercive atmosphere. *Struknes Construction Co.*, 165 NLRB 1062, 1063 (1967); see also *Beverly Health & Rehabilitation Services*, 346 NLRB 1319, 1328-1329 (2006) (employee poll showing loss of majority support was tainted by substantial unlawful conduct that occurred 6-8 months before poll). The General Counsel has the burden of proving that unremedied unfair labor practices caused a loss of employee support for the union. *SFO Good-Nite Inn*, 357 NLRB 79 (2011); see also *Unifirst Corporation and Laundry Workers*, 346 NLRB 591 (2006).

In cases involving a general refusal to recognize and bargain with an incumbent union, “the causal relationship between the unlawful act and subsequent loss of majority support may be presumed.” *Lee Lumber*, 322 NLRB 175, 178 (1996), *enfd.* in relevant part and remanded, 117 F.3d 1454 (D.C. Cir. 1997), decision on remand 334 NLRB (2001). In other cases, the Board has identified several factors as relevant to determining whether a causal relationship exists.

³⁸ Paragraphs 7(a), 7(b), 11, and 12 of the Amended Complaint and Notice of Hearing.

These causation factors include the following: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violation, including possibility of detrimental or lasting effect on employees; (3) the tendency of the violation to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union. *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

2. Respondent Violated Section 8(a)(1) and (5) of the Act when it Polled the Unit Employees On December 8 in a Coerced Atmosphere Caused by Its Unilateral Wage Increases.

The ALJ should find Respondent, by holding a poll of its unit employees in a coerced atmosphere caused by its earlier unilateral wage increases, violated Section 8(a)(1) and (5) of the Act.

Because Respondent did not undertake a general refusal to recognize and bargain with the Union, the *Master Slack* factors apply. Applying the *Master Slack* factors to the present case demonstrates a causal nexus between Respondent's February wage increases and the results of the December poll.

As to the first factor, timing, the unilateral wage increases occurred approximately nine months before the December poll. The Board has said nine months between unlawful conduct and withdraw of recognition was "...not insubstantial..." *AT Systems West, Inc.*, supra at 60. However, the Board also held that the coercive effect of unlawful conduct may not dissipate with the passage of time, as respondent's four month period of direct dealings and solicitations to decertify the union were too much to dissipate after nine months. *Id.* Contrast *AT Systems West, Inc.*, with the facts and holding in *Champion Enterprises, Inc.*, 350 NLRB 788, 791 (2007):

Respondent's confiscation of union materials from an employee's workstation occurred in October, the Respondent's failure to bargain involved a 1-day layoff in October, and Plant Superintendent Scott's threat to employee Sahagun that the Union's picketing of the Respondent's

dealer would force the Respondent out of business occurred in November. All of these violations occurred between 5 to 6 months before the petition and withdrawal of recognition. Thus, we find that these incidents were too remote in time to have caused the employees' disaffection with the Union.

The passage of nine months without facts preventing dissipation would appear too remote to cause employee disaffection.

However, in the present case, the unit employees are reminded of Respondent's wage increases every pay period when they receive their pay that includes the merit increases Respondent unilaterally implemented in February. Additionally, Respondent, in several memorandums to the unit employees between September and December, including a memorandum seven days before the poll, reminded the unit employees of Respondent's unilateral benevolence, while portraying the Union as complainers threatening their wage increases. Respondent knew the Union was not seeking rescission of the merit increases at the time it distributed its November 30 memorandum, yet purposefully mischaracterized the Union's stance in order to signal friend and foe. Because of the unit employees' continued receipt of the merit increases each pay period, and Respondent's strategically timed reminders of Respondent's unilateral wage increases, along with the Union's supposed opposition to those increases, the ALJ should find the timing of Respondent's merit increases favors a finding of causal coercion.

The second factor, the nature of the violation, including possibility of detrimental or lasting effect on employees, favors a finding a causal relationship of coercion on the unit employees at the time of the December poll. The unilateral merit increases affected nearly all of the unit employees by directly impacting their compensation. In *M&M Automotive Group, Inc.*, 342 NLRB 1244 (2004), the Board considered the impact of unilateral wage increases and promotions to 11 of 15 bargaining unit employees. In that case, the Board said:

With regard to the second factor, the Respondent's unilateral changes involved the important, bread-and-butter issues of wage increases and promotions for which employees seek and gain union representation. Such changes, particularly where the Union is bargaining for its first contract, can have a lasting effect on employees.

Id. at 1247.

In the present case, over 90% of the unit received unilaterally granted wage increases, a "bread and butter issue," while the parties were negotiating an initial contract. The ALJ should determine the second factor supports a causal connection.

Regarding the third factor, the tendency of the violation to cause employee disaffection, the Board has said:

That it is the objective evidence of the commission of unfair labor practices that has the tendency to undermine the union, and not the subjective state of mind of the employees, that is the relevant inquiry in this regard...In other words, the Board's usual approach is to assess the *tendency* (emphasis in original) of unfair labor practices to cause disaffection, instead of relying on employees' recollection of subjective motives for withdrawing support from the union.

Comau, Inc., 357 NLRB 2294, 2298 (2012).

Objectively, the Employer issued unilateral wage increases to approximately 67 of 72 unit employees. As stated above, the Board considers wages a "bread and butter issue." Therefore, the ALJ should determine this factor favors causal coercion.

Finally, the last factor, the effect of the unlawful conduct on employees' morale, organizational activities, and membership in the union, also favors a finding of a causal connection. The Board has previously found that a respondent, by unilaterally changing mandatory subjects of bargaining, undermined the union's position as the collective-bargaining representative and conveyed a message to employees that it can set important terms and

conditions of employment without the Union's input, thus supporting a causal connection of coercion. See *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155-156 (1998).

While only one unit employee testified during the hearing, Brett Eckert, he described how excited he was by Respondent's unilateral wage increase. Surely, Eckert is not an anomaly in that respect. It is reasonable to expect that many, if not all, of the unit employees were excited and grateful for their wage increases. Moreover, the ALJ should give significant weight to Respondent's attempts to campaign against the Union by referring to the wage increases, and the Union's alleged obstructionism towards those increases. Since Respondent felt references to the wage increases would successfully rally the unit employees to Respondent's cause, the ALJ should thus hold Respondent accountable to that end, and determine that the merit increases impacted the employees' morale and organizational activities.

Because all of the *Master Slack* factors weigh in favor of finding a causal connection between Respondent's February wage increases, and a coercive impact on Respondent's December poll, the ALJ should find Respondent violated Sections 8(a)(1) and (5) of the Act by holding its December poll in the coerced atmosphere it created.

D. ALLEGED DISAFFECTION PRIOR TO DECEMBER POLL

Below, counsel for the General Counsel first presents Respondent's actual reason for holding its December 8 poll: its frustration with bargaining. Then, counsel for the General Counsel addresses Respondent's proffered evidence of objective good-faith uncertainty by chronological category. By presenting Respondent's narrative this way, the ALJ will be able to easily dismiss large portions of Respondent's evidence based on the legal frameworks that later address each category.

I. REASONS FOR THE DECEMBER POLL

a. Respondent's Actual Reason For Holding the December Poll

The most reliable record evidence supports the determination that Respondent's actual reason for holding the December poll was its frustration with, and desire to avoid, continued bargaining with the Union. (2: 282, Jackson) To say it another way, Respondent held its December poll because the unit employees voted down a contract with Respondent's proposals on December 4, and Respondent did not want to continue bargaining with the Union. (1: 142, Potts)(2: 282, Jackson)(GCx12)

In determining Respondent's reason for holding the December poll, the ALJ should focus on the record evidence surrounding Respondent's decision point. As identified in section (C)(I)(o) of this brief, Jackson and Fiorenza first discussed the possibility of holding a poll in mid-November. (2: 276, Jackson) They considered a poll out of frustration with the Union's position that it did not reach a contract on November 3. *Id.* at 274-275. During their mid-November conversation, Fiorenza counseled Jackson to continue negotiations with the Union in the hope that the parties could come to an understanding on a final collective-bargaining agreement prior to the unit employees' December 4 vote. *Id.* When Respondent could not convince the Union on November 29 that an agreement was reached on November 3, Jackson revived his desire to hold a poll. (GCx11)

In his December 1 e-mail to Fiorenza, Jackson explicitly states, "[a]ssuming the vote doesn't happen or the contract is voted down, I want to be ready to move quickly next week." *Id.* Jackson admitted he meant if the unit employees' December vote resulted in any outcome other than a final contract with Respondent's last positions included, he wanted to poll the employees. (2: 281-282, Jackson) Then, in his December 4 e-mail to Crump and Fiorenza,

Jackson states, “*Based on that feedback* [of the December 4 employee vote], we can plan an appropriate course of action [a poll].” (GCx12)(2: 283, Jackson) (emphasis added) Just hours after Potts informed Respondent that the unit employees rejected a contract with Respondent’s last proposals, Respondent retaliated by announcing a poll.³⁹ (Jx28) Jackson’s e-mails, and the timing and sequence of events described above, clearly reveal Respondent’s basis for the December poll was its desire to avoid further bargaining.

Jackson admitted his frustration with bargaining factored into his decision to hold a poll. (2: 279, Jackson) At hearing, Fiorenza denied that bargaining factored into Respondent’s decision to hold the December poll, despite his affidavit stating bargaining did factor into Respondent’s decision.⁴⁰ (2: 578-579, Fiorenza)

At the time Jackson decided to hold the December poll, Fiorenza was the only other person on the call with Jackson. (2: 277, Jackson) Neither Jackson nor Fiorenza are located anywhere near the facility, preventing any personal interactions with unit employees at that time. (1: 92-93, Potts)(2: 271, 283, Jackson) There is no evidence that either Jackson or Fiorenza were reviewing documentation by unit employees or managers regarding unit employee disaffection, or trying to substantiate alleged claims of employee disaffection, at the time of their call. Though both heard about a decertification petition, neither had seen it.⁴¹ (2: 277, Jackson)

³⁹ The ALJ should reject Respondent’s attempt to construe the unit employees December 4 vote as evidence of disaffection providing, in part, its basis for the December poll. Jackson’s December e-mails prove Respondent decided to hold its poll prior to the unit employees’ December 4 vote. (GCx11)(GCx12) Therefore, Respondent’s testimony that unit employees voted against the Union rather than a contract is irrelevant.

⁴⁰ At hearing, Fiorenza walked a tight rope by testifying that despite his affidavit stating that bargaining with the Union factored into Respondent’s decision to hold its December poll, he does not now believe it factored in. Fiorenza’s contradictory statements call into question the credibility of his entire testimony. (2: 578-579, Fiorenza)

⁴¹ Despite having never seen the decertification petition, Jackson admitted he based, in part, his decision to hold the December poll on the rumor of a decertification petition. (2: 277, Jackson)

Jackson admitted he was never presented with objective evidence of good-faith uncertainty of the unit employees' continued support of the Union, and aptly described his supervisory staffs' comments as an echo chamber of "anecdotal noise." (2: 342, Jackson)

The overwhelming record evidence supports the fact that Respondent's frustration with the unit employees December 4 vote, and its desire to avoid continued bargaining with the Union, motivated it to hold its December poll. Based on the evidence regarding Respondent's actual reason for its poll, the ALJ should ignore Respondent's post-hoc narrative of disaffection because Respondent did not actually rely on any of it. However, below, counsel for the General Counsel argues that even if the ALJ were to consider Respondent's narrative of disaffection, the evidence is woefully insufficient to meet its burden, since it is, as aptly put by Jackson, "anecdotal noise." *Id* at 337.

b. Respondent's Disaffection Narrative In Summary

Respondent's narrative starts with its claim that former WorkflowOne ("WF1") employees brought into the facility after SRC's bankruptcy purchase in 2013 uniformly rejected the Union. (4: 694-696, Warner) Added to that assumption, coincidentally, are Respondent's self-serving statements that every "new hire" employed by SRC prior to Taylor Corp.'s acquisition uniformly expressed "dissatisfaction" with the Union. (4: 723-743, Warner) Then, shortly after Jackson gave his July 20, 2015 announcement to the unit members, some unit employees expressed "happiness" that they no longer had to pay union dues. *Id.* at 708. Next, in late August 2015, some unit employees expressed disappointment after learning Respondent was negotiating with the Union. *Id.* at 711. From August 2015 onward, Respondent's evidence of disaffection is primarily second and third-hand hearsay statements bouncing between

Respondent's supervisors until Jackson decided to test the "anecdotal noise." (2: 336-337, Jackson)

c. 2013 - August 5, 2015: Respondent's Pre-Recognition Evidence of Disaffection

Most of Respondent's proffered evidence regarding unit employee disaffection occurred prior to its recognition of the Union on August 5, 2015. Which begs the question, if Respondent knew of this alleged evidence then, why did Respondent recognize the Union?

Sometime in 2013, SRC purchased WF1 out of bankruptcy. (1: 39, Potts)(4: 694, Warner) WF1 was a non-unionized printing facility also located in York. (1: 41, Potts)(4: 605, Bupp) At different points in 2014, SRC transferred a total of 25 to 30 former WF1 employees into the facility. (1: 40, Potts)(4: 694, Warner) As a condition of employment, former WF1 employees had to become Union members and pay dues. (1: 41-42, Potts)

Prior to the former WF1 employees' transfers, Troy Warner, then SRC Plant Manager, spoke with WF1 employees as a group and individually in 2013 and early 2014. (4: 694-695, Warner) Because his meetings with the former WF1 employees were so long ago, Warner cannot remember the details of his conversations. *Id.* at 735. Generally, Warner remembered several former WF1 employees voiced concerns about paying union dues. *Id.* at 696. The former WF1 employees had never experienced the benefits of union representation prior to their employment at SRC. (4: 629, Bupp)

Before testifying with the aid of Respondent counsel's leading questions, Warner could only generalize about the former WF1 employees' alleged statements concerning the Union claiming "all of them basically stated dissatisfaction." (4: 696, Warner) Seeking more detail from Warner, Respondent's counsel placed a list of unit employees in front of Warner and asked

him to pick the employees that expressed “dissatisfaction” with the Union.⁴² (4: 717, Warner) Even with the aid of leading questions, and an employee list, Warner could only generalize regarding the statements made by former WF1 employees as having made a “comment” during their “initial meeting.” *Id.* at 723-743. Warner could rarely recall the “comment,” and when he did, most former WF1 employees merely expressed disappointment with having to pay dues. *Id.*

Respondent attempts to bolster Warner’s testimony regarding former WF1 employees’ opposition to the Union with testimony from James Bupp and Brett Eckert. The ALJ should give no weight to their testimony due to their admitted biases against the Union.

Bupp, a former WF1 employee, started with SRC in September 2014. (4: 604, Bupp) In December 2015, Bupp was made a supervisor by Respondent. *Id.* He testified that approximately 10-15 former WF1 employees expressed disappointment to him at having to become Union members around the time of their transfers to SRC. *Id.* at 609-610. Specifically, Bupp identified George Sollberger, Keith Soders, Gary Spangler, Randy Meadows, Blake Stough, Justin Housseal, Robert Green, Bonnie Rehmeyer, Cindy Albright, Brett Eckert, and Jeff Jones. *Id.* Bupp’s testimony is clearly unreliable because Eckert never worked for WF1. (4: 636, Eckert) Moreover, Bupp proudly testified he never supported the Union while in the bargaining unit, and had never heard a good thing about unions in general. (4: 606, Bupp)

Eckert testified that approximately 90% of the former WF1 employees indicated opposition to the Union around the time they transferred to the facility, but Eckert did not provide specifics for how he reached that estimation. (4: 644-645, Eckert) What Eckert did specify is that many of the former WF1 employees indicated displeasure at paying union dues. *Id.* at 646.

⁴² The ALJ held that Respondent counsel’s use of the unit employee list was for the purposes of attempting to refresh Warner’s recollection. Respondent’s counsel did not take away the list after he refreshed Warner’s recollection as required by the Federal Rules of Evidence. (4: 717, Warner)

Eckert is clearly a biased witness. He admittedly turned against the Union in 2007 because the Union discontinued its practice of distributing holiday gift cards to the unit employees. *Id.* at 640-641. Additionally, Eckert received the highest wage increase from Respondent in February 2016. (Jx9)

In addition to former WF1 employees, Warner identified “new hires” as another category of employee while reading from the employee list. (4: 723-743, Warner) Warner defined a “new hire” as a unit employee hired directly by SRC in 2014. *Id.* at 729. According to Warner, during their orientations, nearly every new hire made a “comment” of “unhappiness” concerning the Union. *Id.* at 723-743. Again, Warner, for the most part, did not provide any detail regarding the alleged comments.

Warner estimated that at the end of 2014, of the 74 unit employees, 20% were against the Union, 20% were for the Union, and 60% “could go either way.” *Id.* at 706.

d. Jackson’s July 20 Speech Excites Some and Concerns Others

As identified in section (C)(I)(d) of this brief, on July 20, 2015, at a time when many unit employees were uncertain about their future employment prospects, Jackson announced unit employees no longer had to be Union members or pay dues. (2: 311, Jackson) While some unit employees were excited by Jackson’s announcement, many were concerned by it. (4: 656, 679, Eckert) Eckert testified that as many as 15 unit employees expressed concern that Respondent would not honor the 2014 agreement. *Id.*

After his July 20, 2015 announcement, several unit employees approached Jackson with questions concerning their working conditions. (2: 311, Jackson) Specifically, several unit employees asked Jackson if they had to pay dues since the Union was no longer their bargaining representative. *Id.* Jackson informed them that a relationship with the Union is their choice. *Id.*

Warner recalled that Brett Eckert, Bryan Wagner, William Attaird, David Humberd, Cody Eck, George Sollberger, and Lucas Goodling, stated they enjoyed not having to pay union dues around the time of Jackson's announcement. (4: 708, Warner)

On August 3, 2015, two days prior to recognizing the Union, Jackson sent Fiorenza an e-mail stating:

...I understood our strategy to be on tonight being any obligation under the former CBA with the Standard Register Company ("Oldco") but agree to enter into negotiations because we hired a majority of the people who had previously been part of the collective bargaining unit. I think this is what you are suggesting in your note.

One other piece of information I want to remind you of is that we have legitimate question whether the union is favored by a majority of the people in the old collective bargaining unit. Two other facilities had been merged into York over the past 12 to 18 months and the employees from those facilities or hired because of moving that work seem to have a strong desire to exit the union.

(Rx6)

Jackson testified his statement that "we have legitimate question whether the union is favored by a majority of the people" was based on his assumption that the employees from the merged facilities did not want union representation, and the few questions he received from unit employees after his July 20, 2015 announcement. (2: 316-317, Jackson)(Rx6)

However, Jackson admitted he did not have "objective evidence" at the time Taylor Corp. began operations at the facility to question the Union's majority status. As a result, he decided to recognize the Union, as demonstrated by Fiorenza's August 5, 2015 letter to Kurt Freeman stating, "...we do not dispute your union's status as collective bargaining representative...". *Id.* at 317.

e. August - October 2015: Some Unit Employees Express Disappointment that Respondent Resumed Negotiations with the Union

Warner identified unit employees that expressed disappointment to him that Respondent was negotiating an initial contract with the Union. Specifically, Warner identified Brett Eckert, William Attaird, Bryan Wagner, David Humberd, Stephen Snyder, Rob Reed, George Sollberger, and Lucas Goodling. (4: 711-712, Warner) Warner claimed Eckert and Humberd used the word “we” when describing their unhappiness. *Id.* at 713-714. However, neither Eckert nor Humberd identified the individuals they were allegedly speaking for when they said “we,” and Warner did not ask Eckert or Humberd for that information.⁴³

There is no clear record evidence of unit employee statements of disaffection made between November 2015 and March 2016.

f. March - December 2016: Crump Hears From The Same Unit Employees About the Union

Warner stopped hearing from unit employees about the Union after Crump replaced him as Plant Manager in March. *Id.* at 759. When Crump became Plant Manager, a few of the same unit employees directly expressed opposition to the Union to him.

⁴³ During the hearing, Fiorenza was extremely evasive in answering counsel for the General Counsel’s questions regarding his description of a meeting he held with Warner in October 2015 regarding the unit employees’ alleged disaffection. (3: 592-593, Fiorenza) On direct examination, Fiorenza testified that during his meeting in October, Warner used the words “the majority” to describe the percentage of employees he alleged did not support the Union. (3: 469, Fiorenza) Confronted by his affidavit, Fiorenza went to great lengths to avoid having to admit that he described this exact meeting with the NLRB Baltimore Regional office’s Board Agent during his affidavit. *Id.* at 592-593. Ultimately, Fiorenza admitted he described his October meeting with Warner to the Board Agent, and when he did, he did not tell the Board Agent that Warner said “a majority,” “or most” unit employees did not support the Union. (3: 553-554, 592-593, Fiorenza) Further, there is no evidence that Fiorenza did anything to investigate Warner’s claims of alleged disaffection.

In March, Crump spoke with Dave Humberd and Cody Eck about the Union on the same day. (2: 389-390, Crump) Crump, being new to the facility, did not know Humberd or Eck at the time of their conversations, or who they could possibly speak for.⁴⁴ *Id.* at 424-425.

First, Crump spoke with Humberd alone in his office. *Id.* at 390. Humberd told Crump he thought Respondent's acquisition of SRC meant the Union was no longer the unit employees' representative. *Id.* Crump explained Respondent's bargaining obligation to Humberd. *Id.* Then, with effective leading questions by Respondent's counsel asking, "were others discussed?" Crump, seeming to remember his cue, responded, "no, well yes, he [Humberd] said a majority or most employees were dissatisfied with the Union." *Id.* at 391. On cross-examination, Crump clarified his testimony saying he assumed Humberd meant a majority of the employees. *Id.* at 423. Crump never asked for the identities of the other employees Humberd referred to, nor did Humberd volunteer their identities.

Later on that day, Crump spoke with Eck alone in his office. *Id.* at 391. Eck said "the employees" were dissatisfied with the Union.⁴⁵ *Id.* at 424. Eck did not identify which employees he was referring to, or how many employees he was referring to. Again, Crump never asked for more information regarding Eck's statement. *Id.*

In October, Eckert told Crump "he would be glad when we get rid of this Union." *Id.* at 393.

Besides these few scattered statements of disaffection from known oppositionists, the only other statement Crump heard directly regarding the Union came from Humberd. *Id.* at 394,

⁴⁴ Both Humberd and Eck had only been employed with Respondent for approximately one year at the time of their conversations with Crump. It is highly unlikely that either employee was able to speak for an actual majority of the unit employees regarding their sentiments towards the Union after only one year at the facility. (2: 424, Crump)(4: 728, Warner)

⁴⁵ Initially, Crump testified that Eck told him that "a majority" of the unit employees were dissatisfied. Then, on cross-examination, he clarified that Eck said "the employees" were dissatisfied. (2: 424, Crump)

427. Only this time, Humberd clearly told Respondent that the unit employees were not as anti-Union as he was. *Id.* at 427.

g. Unit Employees Reject Humberd's Decertification Petition

In August or September, Humberd asked Crump how he could get rid of the Union. *Id.* at 426. Crump referred Humberd to the Right to Work Foundation and the NLRB. *Id.* Humberd drafted and attempted to distribute a decertification petition. *Id.* at 427. Word of the decertification petition spread through the unit employees and Respondent's supervisors. (2: 227, Jackson)(2: 427, Crump)(4: 715, Warner)(Jx15) On August 31, the Union distributed a memorandum to the unit employees regarding the decertification petition stating, "It has come to our attention that one of your co-workers is looking to convince you that you don't need the Union by circulating a petition to decertify the Union via a National Labor Relations Election..." (Jx15)

Respondent was interested in Humberd's decertification petition. (2: 427, Crump) In October, Crump approached Humberd and inquired about the status of his decertification petition. *Id.* Humberd told Crump that he was unable to get unit employees' signatures for the decertification petition. *Id.*

h. Union Dues

Counsel for the General Counsel includes this section in the event Respondent argues the Union's difficulties collecting dues indicates unit employee disaffection. It is true the Union had difficulty collecting dues after August 1, 2015, but only because Respondent suddenly discontinued dues check-off. (1: 53, Potts) Potts had to resort to mailed letters seeking dues at a time when there was no collective-bargaining agreement with Respondent. *Id.* Despite Respondent's sudden dues cut off, approximately 25 unit members continued to regularly pay

dues. *Id.* Since the Union was negotiating an initial contract with Respondent, the Union decided to significantly reduce dues, and later to suspend dues all together. (*Id.* at 53, 96.)(Jx15)

i. Respondent Ignores Unit Employee Support For the Union

Respondent ignored the following facts of unit employee support for the Union at the time it decided to hold the December poll, and up to the December poll: (1) never, in the 50 year history of the Union's representation of the unit employees, has a decertification petition against the Union been filed; (2) assuming Eckert conveyed all of his information to Respondent, 15 unit employees expressed concern regarding Jackson's July 20, 2015 announcements; (3) several unit employees were serving on the Union's negotiating committee throughout negotiations; (4) over 50 unit employees attended the contract vote indicating interest and involvement with the Union; (5) in response to Respondent's poll, several unit employees openly distributed the Union's flyer requesting unit employees to abstain from voting in Respondent's poll; and (6) Respondent witnessed several unit employees wearing Union t-shirts prior to the poll. (1: 96, 136, 177, Potts)(4: 633, Bupp)(4: 706, Warner)(4: 679, Eckert)(Jx30)

j. Jackson's Decision To Hold The December Poll

Besides the few encounters between Crump and known Union oppositionists, Respondent's evidence of disaffection after it began negotiations with the Union in August 2015 is primarily an echo-chamber of its supervisors repeating their opinions to one another that a majority of the unit employees did not want Union representation. (2: 304, 320, 328, Jackson)(4: 621-623, Bupp)(3: 470-515, Fiorenza) Respondent's supervisors regularly held management meetings in which individual supervisors would repeat "comments" they allegedly heard from unit employees regarding the Union. *Id.* However, there is a scarcity of record evidence regarding the details of those alleged unit employee comments, and whether those comments

were accurately communicated up the chain-of-command. There is little evidence that any of the detail of the testimony offered by Warner, Bupp, Eckert, and Crump ever made its way to Jackson since none of the details were testified to by Jackson. As Jackson described, all he was hearing from Respondent's supervisors was "anecdotal noise" lacking objective evidence, which he hoped a poll would provide him. (2: 336, 342, Jackson)

II. ARGUMENT

a. Respondent Violated Sections 8(a)(1) and (5) of the Act by Holding A Poll On December 8 Without Having Objective Evidence of Good-Faith Uncertainty of the Union's Majority Status.⁴⁶

The ALJ must decide what, if any, evidence of Respondent's proffered narrative is relevant to a determination of objective good-faith uncertainty of the Union's majority status. Counsel for the General Counsel argues that only a sliver of Respondent's narrative is relevant and reliable to the ALJ's determination, and ultimately, is insufficient to establish a good faith uncertainty of the Union's majority status.

After presenting the general legal framework necessary for the ALJ's determination, counsel for the General Counsel argues why the different chronological categories of Respondent's evidence are inadmissible, irrelevant, or unreliable.

1. Good-Faith Uncertainty Legal Framework

While the Board in *Levitz Furniture Co.*, 333 NLRB 717 (2001), eased the standard that employers must meet to obtain NLRB elections based on employer-filed (RM) petitions, it did not change the standard for an employer poll of its employees, which requires a showing of objective, good-faith reasonable "uncertainty" as to the union's majority status, the same test as filing for an RM petition. *Id.*

⁴⁶ Paragraphs 7(a), 11, and 12 of the Amended Complaint and Notice of Hearing.

The standards to be applied in assessing Respondent's claim of good-faith doubt are those set forth by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998), and its progeny. Under that standard, absent a contract bar, an employer is obligated to recognize and bargain with its employees' bargaining representative unless the employer establishes that it has a “good faith reasonable doubt” about the union's majority support. *Id.* An employer seeking to defend its refusal to bargain on the basis of good-faith doubt must demonstrate “doubt” in the sense of “uncertainty” rather than “disbelief.” *Id.* at 367. In assessing whether particular evidence proves good-faith doubt, the Board, consistent with *Allentown Mack*, does not exclude classes of evidence—such as an employee's hearsay assertion to the employer regarding the antiunion sentiments of other employees—but rather accords evidence the weight to which it is entitled based on its *reliability*. *Id.* at 368-380. (emphasis added) Accord: *Torch Operating Co.*, 338 NLRB 941 (2003); *Scepter Ingot Castings*, 331 NLRB 1509 (2000), *enfd.* 280 F.3d 1053 (D.C. Cir. 2002). An employer asserting good-faith doubt bears the burden of proof on this issue. *Alcon Industries*, 334 NLRB 604, 605 (2001); *Nicholas County Health Care Center*, 331 NLRB 970, 992-993 (2000).

As noted supra, pursuant to the Supreme Court's holding in *Allentown Mack*, the Board—in assessing an employer's claim of good-faith doubt regarding a union's continued majority support—gives weight to statements by an employee asserting that other employees oppose union representation. However, in determining how much weight to give to such statements, the Board considers “all the circumstances” and is particularly “skeptical” when the declarant employee “has little basis for knowledge, or has some incentive to mislead” regarding the purported anti-union views of the declarant employee's fellow employees. *Allentown Mack Sales & Service v. NLRB*, supra at 379. The Board accordingly gives greater weight to statements

where the declarant employee is a union official who, as such, is likely to be knowledgeable regarding employees' attitudes towards the union and whose statements indicating employees' opposition to union representation are in the nature of statements against the declarant's interest. See *Torch Operating Co.*, supra at 942 (declarant was union steward); *Rodgers & McDonald Graphics*, 336 NLRB 836, 844 (2001), remanded on other grounds 331 F.3d 1002 (D.C. Cir. 2003)(declarant was union steward). Conversely, the Board gives less weight to statements where the declarant is known to oppose union representation or where the statements are vague and fail to identify the other employees who allegedly oppose union representation. See *Sceptor Ingot Castings*, supra at 1509, 1512-1514 (statements failed to identify other employees; declarants were pro-employer witnesses including former union official who had transferred to non-bargaining unit position); *Nova Plumbing, Inc.*, 336 NLRB 633, 636-637 (2001), enf. denied on other grounds 330 F.3d 531 (D.C. Cir. 2003)(statements were vague; declarants were management officials); *Horizon House Developmental Services*, 337 NLRB 22, 25 (2001), enfd. 57 Fed. Appx. 110 (3d Cir. 2003)(declarant was union steward, but statements were vague regarding number of employees opposing union representation).

2. *The ALJ Should Find Respondent Held Its December Poll To Avoid Bargaining, Thus Undermining the Union's Representational Role*

A claim of good-faith uncertainty is neither held in good-faith nor reasonable if timed to undermine the union's representational role, and if raised in a context of illegal antiunion activities, or other conduct by the employer aimed at causing disaffection from the Union. See e.g., *Auciello Iron Works*, 317 NLRB 364, 369 (1995).

By Jackson's own admission, he decided to have the December poll in the event the unit employees voted against a contract. Given the timing of Respondent's poll, one day after the unit employees voted down the contract, the only conclusion can be that Respondent decided to

hold its poll to avoid continued bargaining, and not because of unit employee disaffection. Because Respondent timed its poll to undermine the representational role of the Union, it did not hold a good-faith doubt of the Union's majority status at the time it decided to hold its December poll.

3. *The ALJ Should Discard Respondent's Pre-Recognition Evidence of Good-Faith Uncertainty*

Respondent cannot rely on evidence of good-faith uncertainty it was aware of prior to its recognition of the Union in August 2015 in order to justify its December poll. Respondent admitted it became a successor employer to SRC on August 1, 2015, and recognized the Union on August 5, 2015. Before it recognized the Union, Respondent was aware of all of the alleged unit employee "comments" regarding the Union, but admitted it did not have "objective evidence" in order to contest the Union's status. Now, Respondent seeks to offer the same evidence of alleged unit employee "comments" made around the time SRC purchased WF1 in 2013, and during "new hire" orientations in 2014, and after Jackson's July 20, 2015 announcements, as its proof of objective, reasonable, good-faith uncertainty for its December 8 poll. Extant Board law says the ALJ should dismiss this alleged pre-recognition evidence.

In *MSK Corp.*, 341 NLRB 43 (2004), respondent, a *Burns* successor, ***refused*** an incumbent union's demand for recognition stating that its refusal was based, in part, on evidence of employee disaffection made prior to the maturation of its bargaining obligation.⁴⁷ The Board held that since respondent refused the union's demand for recognition, it was proper to consider evidence of good-faith uncertainty it was aware of prior to respondent's matured bargaining

⁴⁷ As a *Burns* successor that refused to recognize and bargain with the Union, Respondent must demonstrate that it had a good-faith reasonable doubt on the date that its bargaining obligation matured. That obligation matured when two conditions were met: (1) the Respondent had hired a substantial and representative complement of employees, a majority of who had been SRC's unit employees; and (2) the Union had made an effective demand for recognition and bargaining. See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 52 (1987). In the present case, both conditions were met as of August 1, 2015.

obligation, but not evidence obtained after maturation. *Id* at 48-49. A logical corollary to these cases is that once a respondent recognizes an incumbent union, it cannot later (after a successor bar attaches), rely on pre-recognition evidence after a significant passage of time to question the majority status of the incumbent union.

In the present case, Respondent did not exercise its right to refuse recognition based on all of those alleged early “comments” by unit employees. Rather, as Jackson admitted, he did not have the objective evidence at that time, and therefore recognized the Union.

The ALJ should dismiss all of Respondent’s proffered pre-recognition evidence based on its knowledge of this information at the time it recognized the Union in August 2015.

In the event the ALJ considers Respondent’s pre-recognition evidence, he should give no weight to the evidence in considering Respondent’s reasonable good-faith uncertainty of the Union’s majority status at the time it decided to hold its December poll. First, nearly all of the testimony of alleged disaffection comes from Respondent’s supervisors as the declarants of vague hearsay statements allegedly made by unit employees over three years ago. The Board has previously determined that vague testimony from respondent supervisors is less reliable. See *Nova Plumbing, Inc.*, supra at 637. Regarding Eckert, he admittedly favors the Respondent over the Union. Moreover, Eckert’s testimony is arguably tainted by Respondent’s generous wage increase, which benefitted Eckert far more than other unit members. The Board has previously determined testimony like Eckert’s is unreliable. See *Scepter Ingot Castings*, supra at 1512-1514.

Next, Respondent’s pre-recognition evidence is too far in the past to reliably indicate disaffection in late 2016. Warner, by his own admission, cannot remember the details of those early conversations with unit employees. Without specific comments from specific unit

employees, there is no way to place those unit employees as being disaffected with the Union in late 2016. When Respondent's counsel led Warner's testimony by placing a list of unit employees in front of him and asked Warner to pick and choose unit employees that were "disappointed" with the Union, Warner still could not remember details about their alleged comments and blatantly grouped employees based on their start dates or circumstances as all having made the same comment. Between Warner's admitted imperfect memory, and his blatant generalizations, the ALJ should entirely discredit his testimony regarding pre-recognition conversations.

For the reasons identified above, the ALJ should find Respondent's pre-recognition evidence inadmissible and unreliable.

4. The Successor Bar Precludes the ALJ From Considering Respondent's Alleged Evidence of Disaffection that Occurred Between August 1, 2015 and August 1, 2016

In support of its narrative of good-faith uncertainty of the Union's majority status, Respondent alleges several unit employees expressed "disappointment" and "unhappiness" to Respondent's supervisors after discovering Respondent was negotiating with the Union in or around late August 2015. According to the Board's holdings in *UGL-UNICCO Service Co.*, 357 NLRB 801 (2011), and *Chelsea Industries*, 331 NLRB 1648 (2000), *enfd.* 285 F. 3d 1073 (D.C. Cir. 2002), the ALJ cannot consider alleged evidence of unit employee disaffection made between August 1, 2015, and August 1, 2016, because of the successor bar.

In *UGL-UNICCO Service Co.*, the Board reinstated the "successor bar" doctrine. In so doing, the Board replaced the rebuttable presumption of an incumbent union's majority status in favor of an irrebuttable presumption that could last up to a year. *Id.* at 809. The Board held in *UGL-UNICCO* that an incumbent union is entitled to a "reasonable period of bargaining"

during which no question concerning representation that challenged the union's majority status can occur. *Id.*

In reestablishing the successor bar doctrine, the Board in *UGL-UNICCO* noted the following observation by the Supreme Court set forth in *Fall River*:

[A]fter being hired by new company following a layoff from the old, employees initially will be concerned primarily with maintaining their new jobs. In fact, they might be inclined to shun support for their former union, especially if they believe that such support will jeopardize their jobs with the successor or if they are inclined to blame the union for their layoff and problems associated with it. Without the presumptions of majority support and with a wide variety of corporate transformations possible, an employer could use a successor enterprise as a way of getting rid of a labor contract and exploiting the employees' hesitant attitudes toward the union to eliminate its continuing presence.

Id. at 40.

Additionally, Respondent cannot rely on evidence of disaffection that occurred during the successor bar period as its basis for holding a poll outside of the successor bar period.

Remember, Respondent's standard for holding a poll is the same as its standard for filing an RM petition. In *Chelsea Industries*, the Board reaffirmed that an employer cannot withdraw recognition or file an RM petition outside of the certification year based on evidence obtained within the year since there is an irrebuttable presumption of majority status. *Chelsea Industries*, supra at 1649. In that case, respondent withdrew recognition from a union after expiration of the certification year on the basis of an antiunion petition circulated and presented to the employer during the certification year. *Id.* The Board held that respondent's withdrawal of recognition from the incumbent union based on the decertification petition was unlawful because it was created during the time the union was entitled to an irrebuttable presumption of recognition. *Id.* Similarly, in the present case, Respondent attempts to utilize alleged evidence of disaffection obtained during the time of the Union's irrebuttable presumption as its basis for challenging

support for the Union, or withdrawing recognition from the Union, outside the period of the irrebuttable presumption.

According to *UGL-UNICCO Service Co.* and *Chelsea Industries*, Respondent, as of August 1, 2015, was prohibited from questioning the Union's majority status for a reasonable period of time, or relying on any evidence of disaffection that occurred during that reasonable period of time. The ALJ should determine that the reasonable period of time for the Union's irrebuttable presumption in the present case is one year due to fact that the parties were negotiating an initial contract, and Respondent's initial stall tactics in avoiding bargaining, and its many unilateral changes made within the first six months of its bargaining obligation. See *UGL-UNICCO Service Co.*, supra at 809.

Therefore, Respondent is prohibited from relying on evidence of disaffection for its December poll that occurred between August 1, 2015 and August 1, 2016, and any statements made by unit employees regarding their disaffection from the Union between August 1, 2015 and August 1, 2016, cannot be relied on by Respondent to hold its poll of the unit employees on December 8.

The Board's *Falls River* quotation repeated in *UGL-UNICCO Service Co.* is especially relevant to the present case. The unit employees had just experienced a bankruptcy with SRC. Then, Respondent came in as a successor, and several unit employees made statements to it expressing displeasure with the Union. These alleged unit employee statements are unreliable as evidence of actual disaffection from the Union because a reasonable employee would prioritize their continued employment over a relationship with the Union. It is not surprising that some unit employees may have gone out of their way to express their allegiance to their new and current employer.

In addition to the Board's prohibition on Respondent relying on employee statements of disaffection made during the Union's irrebuttable presumption of the Union's majority status, Respondent's evidence is also highly unreliable. Once again, the testimony primarily comes from Respondent's Executive Vice President and its then Plant Manager as the declarants of unit employee hearsay. The ALJ should give no weight to Jackson's and Warner's testimony regarding the unit employees' statements of disappointment with on-going bargaining.

In summary, the ALJ should discard any and all statements of disaffection made by unit employees between August 1, 2015 and August 1, 2016

5. Even if the ALJ Considers Respondent's Alleged Evidence of Disaffection that Occurred after February 1, 2016, that Evidence is Insufficient Under Allentown Mack and Its Progeny

As indicated above, the ALJ must determine how long the successor bar applied. Though counsel for the General Counsel argues the successor bar should apply until August 1, 2016, it is possible the ALJ may determine the bar ceased on February 1, 2016. Therefore, in this section, counsel for the General Counsel analyzes Respondent's proffered evidence of unit employee disaffection from February 1, 2016, onward. The only evidence of disaffection after February is a few hearsay statements from known anti-unionists with Respondent's Plant Manager as the declarant.

Plant Manager Crump started working for Respondent in March. During his first month, Humberd approached Crump and said that a "majority" or "most" employees were "dissatisfied" with the Union. Crump had never met Humberd prior to this encounter, and did not know who Humberd spent his time with or potentially spoke for. Humberd did not identify any of the other employees who allegedly did not support the Union, nor did Crump seek that information. Also,

there is no detail regarding the meaning of Humberd's use of the terms "dissatisfied," "majority," or "most."

By chance, on that same day in March, Cody Eck, another unit employee that Crump had never met, told Crump that "the employees" were "dissatisfied" with the Union. Once again, Eck did not reveal the identities or the number of "the employees" that he spoke for, or what "dissatisfied" meant, nor did Crump ask for those specifics.

Humberd's and Eck's statements are exactly the kind of hearsay statements of mass disaffection, without identifying specific individuals or the number of individuals, that the Board has previously found to be unreliable in finding a good-faith uncertainty. See *Scepter Ingot Castings*, supra at 1512-1514; *Horizon House Developmental Services*, supra at 25 (2001)(declarant was union steward, but statements were vague regarding number of employees opposing union representation). Humberd and Eck's testimony is unreliable and should be accorded little, if any, weight by the ALJ.

The only additional evidence of alleged disaffection is from October, when Eckert allegedly told Crump that he would be glad when he could get rid of the Union. As described above, evidence of Eckert's disaffection is unreliable due to his admitted favoring of the Respondent over the Union, and the taint of Respondent's generous wage increase to Eckert. See §C(II)(a)(3); *Scepter Ingot Castings*, supra at 1512-1514.

6. Unit Employees' Support For the Union

At the time it decided to hold its December poll, Respondent ignored substantial evidence of unit employee support for the Union. In determining whether an employer had a good-faith uncertainty of an incumbent union's majority status, the Board considers evidence known to respondent of employees' support for the union. See *MSK Corp.* supra at 46. Here, Respondent

knew the unit employees did not support Humberd's decertification petition. This information, rightly considered, would have indicated that a majority of the unit employees support the Union. In addition, Respondent knew the Union's December 4 vote had a significant unit employee turnout. This information, rightly considered, indicates mass involvement by the unit employees with the Union.

Though Respondent ignored this information, the ALJ should not when considering if Respondent had objective evidence of a good faith uncertainty when it decided to hold its poll.

7. The ALJ Should Find Respondent's Unilateral Wage Increases Tainted Respondent's Evidence of Good Faith Uncertainty after February 29.

For the reasons identified in section (C)(II)(b) of this brief, the ALJ should assume Respondent's unilateral wage increases tainted Respondent's evidence of disaffection that occurred after February 29.

The Board has held that an employer's good-faith doubt, based on objective considerations, as to the Union's majority status must be free from taint caused by an employer's unfair labor practices. *Kentucky Fried Chicken, Caribbean Holdings, Inc.*, 341 NLRB 69 (2004); *Transpersonnel, Inc.*, 336 NLRB 484 (2001). In *Transpersonnel, Inc.*, the Board rejected several employee statements of disaffection made after the employer unlawfully solicited the employees to reject the union, but counted employees' statements of disaffection that occurred prior to the unfair labor practice. *Id.*

Respondent arguably influenced unit employee sentiment by unilaterally granting wage increases on February 29. Respondent should not be able to profit from those unilateral increases by relying on statements of unit employee disaffection made after February 29.

Therefore, the ALJ should dismiss Respondent's evidence of disaffection that occurred after February 29.

8. *The ALJ Should Find Respondent's Relevant and Reliable Evidence of Disaffection Amounts To an Insignificant Percentage of the Bargaining Unit, Therefore, Respondent was Prohibited From Holding Its Poll on December 8*

Having addressed Respondent's good-faith uncertainty evidence by chronological category, it is evident that an insignificant percentage of the bargaining unit reliably expressed disaffection to Respondent.

If the ALJ applies the successor bar until August 1, 2016, only two unit employees, Humberd and Eckert, reliably expressed disaffection to Respondent. If the ALJ were to be more permissive in interpreting Respondent's evidence of disaffection by crediting Respondent supervisors' hearsay, the ALJ should only include the group of unit employees that were frequently mentioned by multiple supervisors as having made vague comments of disappointment with the Union. Besides Eckert and Humberd, those other unit employees would include Cody Eck, George Sollberger, Lucas Goodling, William Attaird, Rob Reed, and Bryan Wagner.

By including the group identified above, only 8 of 77 unit employees reliably made "comments" of "disappointment" with the Union as of the time Respondent decided to hold its December poll. That means only 10% of the unit employees reliably expressed actual disaffection to Respondent. The Board has consistently held that 10% of a bargaining unit would not meet Respondent's burden of establishing a good-faith uncertainty based on objective evidence. See *Transpersonnel, Inc.*, supra at 485 (where evidence that 40% of the unit employees expressed disaffection, without more, was not enough to meet reasonable uncertainty standard); *Heritage Container*, supra at 455 (where an employer was found to have unlawfully conducted a poll without an objectively based reasonable uncertainty of the union's continued majority support since its evidence consisted of 35% of the unit employees expressing

disaffection); *Wisconsin Porcelain Co, Inc.*, 349 NLRB 151, 152 (2007) (where evidence that approximately 11% of the unit employees expressed reliable disaffection, without reliable statements from employees purporting to speak for a large group of employees, was not enough to meet reasonable uncertainty standard).

To allow Respondent to meet its burden through its supervisors' vague, second and third-hand, hearsay statements allegedly occurring two to three years earlier would have the ultimate effect of eliminating Respondent's burden for contesting an incumbent union's majority status by poll. With such a low-bar, every incumbent union in the country would immediately be threatened with decertification by polling.

For the reasons identified above, the ALJ should find Respondent did not meet its burden of establishing it had a good-faith doubt, based on objective facts, regarding the Union's majority status. Thus, Respondent was never entitled to hold its December 8 poll.

E. MARCH 2017 POLL

I. FACTS

a. December 13: The Union Requests Bargaining

Respondent withheld the December poll results from the Union. (1: 143-144, Potts) Rather than provide the Union with the results, it distributed a memorandum to the unit employees accusing the Union of intimidation stating:

1. ...Since only slightly more than half the eligible employees voted, we believe the threats such as "the union will fire you" were effective in discouraging participation.⁴⁸
2. ...In this case, 38 employees voted "no" – that's more than 88% of the votes. But the law required that there be at least 39 "no" votes in order to withdraw

⁴⁸ Notice, Respondent does not mention that a significant portion of unit employees on leave due to hunting or any other reason.

recognition of the union. Simply one additional “no” vote would have changed the result.

3. Since the company established your pay, benefits and work rules and hired each of you, the union’s statement that “the Company could, at any time and for any reason, reduce your wages and take away or change your benefits” is illogical....

Because of the substantial confusion and intimidation that we heard from employees and the lop-sided vote against union representation, we are consulting with our attorneys about steps we can take to ensure that your free choice rights are fully protected.

(*Id.*)(Jx33)

Respondent provided no evidence regarding its allegations of Union intimidation.

On December 13, Potts sent Fiorenza a letter seeking available bargaining dates stating, “...I have availability the last week in December and would be available to meet anytime in January, 2017.” (1: 147-148, Potts)(Jx34) After exchanging proposed dates, the parties agreed to meet on February 21 and 22, 2017.⁴⁹ (Jx37)(Jx38)

However, prior to its agreement to bargain with the Union, Respondent attempted to file an RM petition with the NLRB Baltimore Regional office. (Jx35)

b. December 20: Respondent Attempts To File An RM Petition With the NLRB, But the NLRB Rejects the Petition

On December 20, Fiorenza sent Potts an e-mail with the subject line: “RM Petition filed.”⁵⁰ (Jx35) Fiorenza, in his e-mail to Potts states:

Based on where things stand, the employer has decided to file an RM petition. Please see attached in this regard. We have also put a hard copy

⁴⁹ Respondent had no availability in December, so it offered to meet for bargaining on January 11 and 12, 2017. (Jx38) Potts was unavailable on January 11 and 12, so he in turn offered January 18, 19, and 20. *Id.* Fiorenza responded that Potts’ dates “don’t work, and Greg [Jackson] is out of the county for the first 2 weeks in February. Can you make Feb 21-22 work?” *Id.* The parties agreed to meet on February 21 and 22. *Id.*

⁵⁰ The ALJ should discredit Fiorenza’s testimony that Respondent sought the Union’s participation in filing an RM petition and that its decision not to proceed with its RM petition was in part because the Union refused to participate in an election. (3: 581, Fiorenza) Respondent already filed, or attempted to file, its RM petition at the time it gave its first notice to the Union. (Jx35) On cross-examination, Fiorenza admitted it was the NLRB Baltimore Regional office that refused to process its RM petition. (3:581, Fiorenza)

in the mail to you and your counsel. From our standpoint, this does not change the bargaining sessions we are setting up for January but we do hope that after consideration you will consent to determining where the unit stands on the issue of representation.

Id.

Fiorenza's e-mail contained the RM petition and a letter addressed to Potts stating in part:

I write to bring you up to date on the Company's assessment of the issue of union support among employees at the York facility...I believe you are already aware that the results of the poll fell just short of ending union representation.⁵¹ Shortly after the poll was completed, however, additional unit employees who were not present during the day of the polling, submitted written notice that they no longer desired to be represented by Local 594-S.⁵² The Company is now faced with a situation where the majority of the 77 person bargaining unit has expressed a desire to end union representation. We do not believe that it is appropriate to ignore the expressed desires of the work force.

As such, we have been considering the significance of this loss of majority support for the union. We believe that under these circumstances the law would permit us to now unilaterally withdraw recognition of the union. However, out of respect for all impacted employees and our overall cooperative working relationship to date, we have instead chosen to file an RM petition with the National Labor Relations Board...

John, as you are aware, the parties' bargaining relationship was premised on our legal obligation to assume employee support for the union following the bankruptcy acquisition process. Since a majority of employees have communicated that this legal assumption is no longer accurate, the employer believes that it is obligated to act.

...Rather than implementing a unilateral withdrawal of recognition, the Company has filed the RM petition in order to request an NLRB election to ensure that all covered employees have the right to participate in a government sanctioned election to determine the employees' wishes in this regard. It is our hope that the union will join us in encouraging employees to vote free from any threat of reprisal.

Id.

⁵¹ Fiorenza confirms Respondent never provided the December poll results to the Union.

⁵² Respondent practically begged unit employees to express disaffection to it in its post-poll memorandum stating "Simply one additional 'no' vote would have changed the result." (Jx33)

However, when Respondent attempted to file its RM petition the NLRB Baltimore Regional office informed Respondent it would not process the petition due to the recently settled charges regarding Respondent's unilateral wage increases. (2: 285-286, Jackson)(3: 581, Fiorenza)

Not wanting to lose an opportunity to coax the unit employees, Respondent distributed another memorandum on December 21 with subject line: "Update on Union Poll Issues," stating:

As you know from our most recent employee memo, our poll results indicated that the Union retained its status as your bargaining representative by one vote...This memo will bring you up-to date as to what will now take place.

Although the poll did not result in the Union losing the majority support of employees, following the poll additional employees independently indicated to us their desire to no longer be represented by the Union. So, while the poll itself did not change the Union's status as your legal representative, we are now faced with a situation where the majority of our employees have expressed a desire to end union representation.

After consideration, we concluded that our best course of action would be to request that the National Labor Relations board itself come into our facility and conduct a government monitored election. In this way, the issue of union representation can be resolved once and for all. This seems especially appropriate since our original recognition of the Union following the bankruptcy acquisition process last year was based on our legal obligation to assume that employees supported the union that was in place prior to our acquisition. Since we now have a strong indication that this is not the case, we believe that we are obligated to take action to ensure that our employees' wishes are respected.

While we have requested that the NLRB-monitored election be conducted as soon as possible, we have been told by the NLRB that we must wait until all steps needed to resolve the Union's complaint over merit wage increases have been taken. This includes the posting of notices for 60 days, as well as continuing to bargain with the Union.

So, in compliance with the NLRB's directions, we will pursue the conduct of a formal election as promptly as we can.

(Jx36) (emphasis added)

c. Post December Poll Disaffection

As indicated in its December 20 letter to Potts, and its December 21 memorandum to the unit employees, Respondent claimed that two unit employees on leave during the December 8 poll indicated they did not wish to be represented by the Union after the poll. (Jx35)(Jx36)

According to Crump, on or about December 13, unit employees Jim Wiley and Greg Brown left notes on Crump's office chair indicating they did not want to be represented by the Union. (2: 414, Crump) Respondent knew Wiley was on leave on December 8 and had personally called him prior to the poll to encourage him to vote. (4: 761, Warner)(GCx19) When Wiley returned to work, he allegedly left a signed note on Crump's chair stating he did not want Union representation. (2: 414, Crump) Crump alleges Brown left a copy of a December poll ballot with the word "no" circled on his office chair. *Id.* at 415.

The ALJ should discredit Crump's testimony regarding the alleged notes left on his chair. Crump did not see either Wiley or Brown leave their notes on his chair. *Id.* There is no evidence Crump confirmed the notes actually came from those unit employees. Moreover, Crump testified he scanned and sent the notes to other managers. *Id.* However, Respondent did not offer the notes as evidence. Therefore, Crump's hearsay testimony regarding the two notes is the only record evidence concerning post-December poll disaffection.

d. January 13, 2017: Respondent Requests to Distribute Wage Increases to the Unit Employees

Prior to bargaining resuming on January 13, 2017, Respondent requested permission to calculate and distribute wage increases for the unit employees. (Jx39) On January 16, 2017, Potts responded stating:

The Union believes that the merit pay issue and review mentioned in your January 13, 2017 email would be best addressed by the parties at our next scheduled bargaining sessions on February 21 and 22 of this year. Since

the bargaining unit overwhelmingly voted to reject the contract, the Union would strongly object to the Company making any announcement and distribution of merit pay prior to our scheduled bargaining meetings next month. Your e-mail of January 13th makes note that the Company is not looking to make a distribution until February, so I see no issue in conducting face to face discussion and review of the merit pay issue in bargaining next month.

Id.

Despite the parties' previous legal dispute regarding Respondent's 2016 unilateral wage increases, Jackson was angered by the Union's refusal to allow Respondent to distribute wage increases without first bargaining. (2: 288-289, Jackson) When Jackson learned the Union would not allow Respondent to calculate and distribute wage increases before bargaining, he wanted to rescind the available pool money and give the unit employees nothing.⁵³ *Id.*

e. February 2017: Negotiations Continue and the Parties Significantly Reduce Their Issues

In February 2017, the parties held their first, and last, negotiation sessions since the approved the settlement agreement in Case 05-CA-182978.

Prior to the parties' February 21, 2017 session, Respondent sent the Union proposals regarding PTO and an ethics hotline. (1: 155, Potts)(Jx40) Respondent's PTO proposal, made after the policy was implemented at Taylor Corp's non-unionized facilities, got closer to the Union's proposals on PTO by providing for payout of accrued PTO upon employee termination. (4: 523-524, Fiorenza)(Jx40) Respondent's ethics hotline proposal was also a working condition existing at Taylor Corp's non-unionized facilities that allowed employees to anonymously report activity without fear of reprisal. (Jx40).

⁵³ Jackson was evasive in answering counsel for the General Counsel's question regarding his initial reaction to learning the Union would not permit Respondent to calculate and distribute the February 2017 wage increases. (2: 287-288, Jackson)

Before meeting with Respondent on February 21, 2017, Potts requested Robert Lacey, Graphic Communications Conference of the International Brotherhood of Teamsters International Vice President, for assistance in negotiations. (1: 155, Potts)(2: 216-217, Lacey) Lacey specialized in concluding contracts for locals like 594-S. (2: 216, Lacey) He agreed to join the parties' February negotiations.⁵⁴ (2: 218, Lacey) In preparation for negotiations, Lacey reviewed the document the unit employees rejected on December 4. *Id.* at 219. After reviewing the document, Lacey believed he could quickly conclude a contract by conceding to Respondent's proposals on all open issues except for PTO and overtime calculation.⁵⁵ *Id.* at 219-220.

The parties resumed negotiations on February 21, 2017.⁵⁶ At the beginning of the session, Fiorenza asked why the unit employees rejected a contract on December 4. (2: 224-225, Lacey) Lacey responded saying he had a proposal that was going to make concluding a contract very easy. *Id.* Lacey said the Union would agree to Respondent's proposals on PTO (with one clarification), ethics hotline, management rights, and all other open issues identified in the December 4 document, except for Respondent's proposal on overtime calculation. (1: 155-156, Potts)(2: 225, Lacey)(3: 524-525, Fiorenza) Fiorenza testified:

"I asked him if those were the only – the items that he had just read across the table, if those were the only open issues for the Union, because there were *many fewer things than were in the disputed document that John had sent me. There were now just very few things on the list, and most of them were just confirming policies that we had suggested. So there was not going to be a dispute over them. And Mr. Lacey said that that was the case and I asked him if I was hearing him correctly; that the*

⁵⁴ Because District 9 had experienced negotiators, Lacey had never before been contacted for assistance by District 9. (2: 217, Lacey)

⁵⁵ Overtime calculation refers to the issue of counting PTO in the accumulation of 40 hours in order to reach overtime hours. (1: 156, Potts)

⁵⁶ Note: In addition to Lacey, the Union added unit employees, Gary Heikes and Terry Croon, to their bargaining committee. (1: 155, Potts) Terry Croon was a former WF1 employee, which contradicts Respondent's witnesses' statements that they were unaware of any support for the Union by former WF1 employees. (4: 611, Bupp)

only issues I saw were how we computed overtime and the clarification on PTO.”

(2: 525-526, Fiorenza) (emphasis added)

Fiorenza’s above quoted testimony directly contradicts his later testimony on cross-examination that the February sessions were unproductive. (2: 591, Fiorenza)

After significantly narrowing the open issues, the parties caucused. (1: 157, Potts)(2: 227, Lacey). While caucusing, Jackson arrived late in the afternoon. (2: 228, Lacey)(2: 290, Jackson). After Jackson arrived, Lacey and Jackson had a side-bar discussion. (2: 229-230, Lacey)(2: 291, Jackson) Lacey told Jackson that if Respondent would concede to the Union’s proposal on overtime calculation, he could sell the contract to the unit employees. (2: 291, Jackson)

When the parties resumed negotiations after caucusing, they briefly discussed merit pay. (2: 230-231, Lacey)(3: 527-529, Fiorenza) The Union agreed to allow Respondent to grant merit pay increases to the unit employees; however, it wanted to review Respondent’s calculations and distribution method. (1: 156, Potts)(3: 527-529, Fiorenza) The parties decided to table the issue until February 22, 2017. (1: 155, Potts)(2: 231, Lacey)(3: 529, Fiorenza)

On February 22, Respondent gave a PowerPoint presentation showing each unit employees’ wage increase using the criteria agreed to by the parties in May and November. (2: 231, Lacey)(2: 293, Jackson) To the surprise of both parties, applying the criteria resulted in approximately 30% of the unit employees receiving no increases. (2: 232, Lacey)(2: 293-294 Jackson) The parties agreed the results were unacceptable, so they caucused to explore ideas for how to improve the results. *Id.*

When the parties returned from caucusing, the Union proposed Respondent give all unit employees not at the top of their wage classification a 1% increase in their wage rate. (*Id.*)(3:

531-532, Fiorenza) Further, the Union proposed that for any money left over after granting certain unit employees the 1% increase, Respondent could use Taylor Corp.'s merit pay criteria, rather than the side-letter agreement, to calculate and allocate the remainder of the merit pay money. (1: 160, Potts)(3: 532, Fiorenza)(2: 253, Lacey) In response to the Union's proposal, Respondent performed a rough calculation and determined that approximately 40% of the overall merit pay money would be used on the employees receiving a 1% increase. (3: 533, Fiorenza) Respondent then offered to calculate the remaining merit pool using Taylor Corp.'s system, and provide the figures to the Union within the week. (1: 160, Potts)(3: 536-537, Fiorenza)

The parties agree that at the end of their February negotiation sessions the only open issues were: (1) a trivial PTO clarification; (2) Respondent's response to the Union's overtime calculation proposal; and (3) merit pay figures using Taylor Corp.'s criteria. (1: 161, Potts)(3: 536-537, Fiorenza)(2: 295-296, Jackson)(2: 232-234, Lacey)

With so few open issues between the parties, and a final contract so close, Respondent's decision to hold another poll of the unit employees is shocking.

f. March 3: Respondent Decides To Hold Another Poll of the Unit Employees

Rather than provide the information it promised during the last bargaining session on the few remaining open items, shortly after the February 22, 2017 bargaining session, Respondent decided to hold another poll. (2: 296, Jackson) Jackson admitted the December 8 poll results factored into his decision to hold its March 2017 poll. *Id.* at 297.⁵⁷

⁵⁷ Fiorenza testified that on or about March 1, Jackson decided to hold the March 2017 poll because Crump told Fiorenza and Jackson that "the employees" were very upset that Respondent resumed negotiations with the Union in February. (3: 540, Fiorenza) Again, there is no evidence that Fiorenza or Jackson sought specifics from Crump regarding his statement, or that Crump provided that detail. Nor did Crump testify to this alleged statement.

As of March 3, 2017, the only unresolved issue between the parties was overtime calculation.⁵⁸ Respondent could have simply made its last, best, final offer in order to conclude negotiations. (3: 583-584, Fiorenza) Rather than reach agreement with the Union, on March 3, 2017, Fiorenza told Potts:

The employer has informed me that it will conduct a poll of unit employees next week to determine whether a majority of the unit desires the representation of the Union. Details are attached. Please let me know if the Union desires to have an observer during the polling times and/or for the tally of ballots.

(Jx43)

Fiorenza attached a memorandum Respondent distributed to the unit employees' on March 3 stating in part:

As I know you are aware, back in December we conducted a poll of our employees to determine whether a majority of our union bargaining unit desired the representation of GCC Local 594S.

A large percentage of employees chose not to vote in that poll which made it difficult to know how a true majority of our production employees felt about this topic.⁵⁹ Based on the results of the poll, the union retained its majority status here by one vote. However, very soon after our poll, two additional employees stepped forward and indicated to us that they did not want the representation of the union. Based on our belief that the Union had, at that point, lost its majority, we took legal steps to give you the opportunity to vote on the union issue in an election conducted by the National Labor Relations Board.

Because the timing of these efforts and due to the fact that we were in the process of resolving the unfair labor practice charges the union had filed over the merit pay issue, the NLRB would not proceed on our petition for a vote. While we were disappointed, we respect the legal process and have now taken all steps necessary to resolve those legal issues and properly provide you with the NLRB notice that was part of the process.⁶⁰

⁵⁸ Respondent provided the PTO clarification to the Union on March 1, 2017. (Jx42) Merit pay was not an unresolved issue because the parties reached agreements in May and November regarding criteria. The parties were merely exploring ways to improve the results of the application of their earlier agreements.

⁵⁹ Again, notice, no mention of hunting having caused the low unit employee vote count for the December poll.

⁶⁰ There is no record evidence that Respondent complied with the settlement agreement or was released from the obligations of the settlement. Even if Respondent had provided evidence that it complied with the settlement

Two and a half months have now gone by since we conducted our poll concerning the union. We have met with the union two additional times but have not reached a contract agreement.

...We continue to have questions about the union's claim that they represent a majority of bargaining unit employees. Because of this, we will be conducting another poll.⁶¹

...We recognize that this process may be frustrating but we want to do everything possible to resolve the issue of union representation in a manner that is fair and transparent and gives us the best chance of addressing the issue without further lengthy legal proceedings. After careful consideration of this issue, and upon consultation with our legal team, we have decided that a timely and fresh poll of our employees most affected by this issue is now the best course of action.

Id.

Potts responded ignoring the poll stating:

...It has been over a week and two days since our last bargaining session with the Company promising a response on the merit pay. We still are awaiting that response and would like to have that response provided to us by Monday morning at the latest. The Company also owes the Union a response on compensated days counting for the accumulation of forty (40) hours for the purpose of overtime.

(Jx44)

The next day, Fiorenza responded to Potts stating:

As I noted at the bargaining table last week, the union's proposal to count compensable but not worked time toward overtime calculation is problematic for the company. I am able to confirm that we continue to reject that proposal.⁶²

agreement, the Board has found that a case's compliance closing does not relieve a respondent of its obligation to bargain with a union as a condition of settlement. See *Valley West Health Care, Inc.*, supra at 587.

⁶¹ Despite Respondent's earlier representation to the unit employees that it "... will pursue the conduct of a formal election as promptly as we can," it did not pursue another RM petition. Jackson testified that Respondent considered filing another RM petition, but decided against it. (2: 297, Jackson) Likely, because Respondent knew the NLRB Baltimore Regional office would not process the petition.

⁶² The Union had to wait approximately two weeks from the last bargaining session to learn that Respondent was continuing to reject the Union's proposal on overtime calculation.

As to merit pay, reallocating the merit poll as per Taylor's traditional process requires some time. I will reach out to the company on Monday morning while I am traveling and check on progress.

Id.

g. Last Minute Campaigning

Similar to the December poll, Respondent again denied the Union a meaningful opportunity to respond by providing short notice of the poll. In an effort to combat Respondent's representation of the parties' February bargaining sessions as fruitless, the Union, in its flyer, stated in part:

...In an effort to make the Company keep negotiating, (they still owe the union answers to the last proposals presented on February 21 and 22) we're asking you to Boycott this travesty of an election!...

...BOYCOTT THE VOTE...

(Jx45)

Not one to cede the final word, Respondent quickly responded to the Union's flyer by distributing a memorandum to the unit employees on March 6, 2017 stating:

We are extremely disappointed that the Union has asked you to refrain from expressing your free choice about whether you desire their representation. ***We will leave it to you to decide what kind of organization would ask you to stay silent over one of the most important issues affecting your work lives.***

(GCx15) (emphasis added)

h. March 7: Respondent Convinces A Majority of the Unit Employees to Vote Out the Union

On March 7, 2017, Respondent polled the unit employees regarding their continued support of the Union. (Jx48) To the delight of Respondent, 47 unit employees voted against continued representation by the Union, an increase of nine votes compared to the December poll.

(*Id.*)(GCx16)

Crump, ecstatic by the results, sent Jackson an e-mail with the subject line: THE EMPLOYEES DID IT!!! (emphasis in original), stating:

Hello all,

It may be cloudy where you are, but it's bright and sunny at Taylor Communications in York, PA...

...Time to turn the page and start writing the next chapter on our journey to becoming "one" Taylor Communications! Obviously none of this would have been possible without the hard work, support and dedication of everyone on this e-mail working toward one cause, creating opportunity and security for our employees. I reflect back on my first bargaining session and was thinking, what in the world are we doing? Why are we so easy on the Union? It hit me after to work for a company who truly cares about the success of their employees. I'm sure the hard work is about to begin but after this, anything is possible. Have a great evening and go celebrate, you all deserve it!

(GCx16)

i. March 8, 2017: Respondent Withdraws Recognition From the Union

The next morning, Fiorenza sent Potts an e-mail stating:

John, the results of the employer's poll indicate that over 60% of the York bargaining unit do not desire the representation of the union. As such the employer has asked me to notify you that it is withdrawing its recognition of GCC 594S.

(Jx50)

Later that same day, Respondent distributed another memorandum to the unit employees stating:

...I know that many of you have questions about what will happen next. Since many Taylor policies were put into place when we were acquired out of bankruptcy, many things will remain the same. But importantly, we will now become fully integrated in Taylor Communications policies, procedures and processes. We will soon have a new handbook covering all aspects of employment. I am very excited about this prospect and the benefits of being a fully integrated facility.

...Taylor is an overwhelmingly non-union company for good reason. The ability of employees to directly impact our performance for our customers is critical to our long term success.

It is our hope that the union will respect the decision that the majority of our employees have made and refrain from mounting a time consuming and costly legal action against your decision. I've learned that they have filed yet another complaint just this week with the NLRB alleging that we have not bargained in good faith...it is our hope that the union will now take the high road and discontinue all activity with respect to our company.

...Regardless of how you voted – or even if you voted – we are all part of one Taylor family. This is the time to be united. I will be in touch again soon.

(Jx51)

On March 15, 2017, Respondent distributed a memorandum to the unit employees informing them that the facility was finally “fully integrating into the Taylor Communications policies, procedures and processes.” (Jx52) As part of its integration process, Respondent identified several immediate changes to the unit employees’ working conditions including changes to holiday pay, funeral leave, PTO payout, and ethics hotline. *Id.*

j. June 5, 2017: Respondent Continues Campaigning Against the Union

If the ALJ is wondering what happened to those merit increases Respondent promised to provide to the Union, Respondent’s June 5, 2017 memorandum to the unit employees answers the question:

As part of our commitment to keep you informed of the important issues affecting our plant, it is with great disappointment that I inform you that the Union has filed new charges with the National Labor Relations Board (NLRB). Through this action the Union is seeking to overturn the results of the employees’ poll and to reverse the changes that have been made here since the majority of employees voted to end union recognition in our poll this past March. As I am sure you recall, the poll conducted this past March resulted in more than 60% of production employees indicating that they no longer wanted to be represented by Local 594-S. In light of these results, we withdrew recognition of the Union and began making changes to bring our York facility in line with other Taylor Communication

facilities. While we had hoped that the Union would accept that our production employees had voluntarily and freely decided to end union involvement here, this is not the case.

This is still a somewhat unsettled situation but from what we know at this point it appears that, absent some sort of settlement, the matter will be heard by an Administrative Law Judge of the NLRB. The timing of when this may occur is also uncertain. More troubling, from our standpoint, is that the Union is requesting that the Labor Board take immediate steps to reverse all of the changes we have made to better align our facility with the other Taylor Communications facilities. ***This includes reversing the pay increases implemented in February, 2017***, the employee incentive program, the PTO payout policy change providing for pay-out upon termination and implementation of the ethics hotline.⁶³

(Jx44) (emphasis added) In the above memorandum, Respondent admitted the February 2017 merit increases were in fact calculated and distributed to the unit employees at the time it claimed it was still working on the calculations. (Jx44)

II. ARGUMENT

a. Respondent Violated Sections 8(a)(1) and (5) of the Act By Polling the Unit Employees On March 7, 2017, and Withdrawing Recognition from the Union on March 8, 2017, According to *Poole Foundry and Its Progeny*.⁶⁴

1. Settlement Agreement Bar Legal Framework

As identified in section (C)(II)(a) of this brief, *Poole Foundry* and its progeny provides the legal framework for applying the settlement agreement bar to Respondent's March 7, 2017 poll, and its March 8, 2017 withdraw of recognition from the Union. The only difference in the analysis for the March 7, 2017 poll compared with the December 8 poll is that the parties had two brief negotiation sessions in the two and a half months since the settlement agreement.

Therefore, the ALJ need only consider the factors identified in *AT Systems West, Inc.*, in order to

⁶³ Respondent again misrepresents the Union's positions to the unit employees by suggesting the Union opposes PTO payout upon termination. The Union has sought PTO payout upon termination throughout bargaining. (Jx17, pg. 6)

⁶⁴ Paragraphs 8(a), 8(c), 9, 10, 11, and 12 of the Amended Complaint and Notice of Hearing.

determine whether Respondent bargained for a reasonable period of time when it questioned the Union's majority status on March 7, 2017. *AT Systems West, Inc.*, supra at 61.

2. The ALJ Should Find Respondent Did Not Bargain For a Reasonable Period of Time Before Questioning the Union's Majority Status on March 7, 2017

Because Respondent only had two productive bargaining sessions in two and a half months since the approved settlement agreement, it did not negotiate for a reasonable period of time before questioning the Union's majority status on March 7, 2017, and therefore violated Sections 8(a)(1) and (5) of the Act.

Applying the factors identified in *AT Systems West, Inc.*, the parties were negotiating an initial contract and were never at impasse. The Board has consistently held these two factors weigh heavily in finding that a reasonable period for bargaining has not passed. See *King Soopers, Inc.*, supra at 38; *Valley West Health Care, Inc.* supra at 589; *AT Systems West, Inc.*, supra at 62.

Focusing on the amount of bargaining, and time for bargaining, from the date of the approved settlement agreement, the parties only had two bargaining sessions in February. The Board has repeatedly found the same or similar amount of bargaining sessions, in the same or similar time period, insufficient for finding a reasonable time for bargaining. See *AT Systems West Inc.*, supra at 61- 62 (three months between settlement agreement and withdraw of recognition, no face-to-face bargaining sessions); *Lexus of Concord, Inc.*, 330 NLRB 1409, 1415-1416 (2000) (one bargaining session in two and a half months between settlement agreement and withdraw of recognition); *Valley West Health Care, Inc.*, supra, at 589 (two bargaining sessions in approximately two and a half months between settlement agreement and question of majority status); *Mid-City Foundry Co.*, 167 NLRB 795, 797 (1967) (two bargaining

sessions in three months since settlement agreement); and *Poole Foundry*, supra at 35 (two bargaining sessions in four months since settlement agreement).

Moreover, the parties made significant progress towards an overall tentative agreement during their February bargaining sessions. During the February sessions the parties reached tentative agreements on all outstanding issues except overtime calculation, which Respondent could have given its last and final position in order to conclude a contract. The fact that the parties made substantial progress towards concluding a contract in their last sessions weighs heavily in finding that more negotiations were necessary. See *Valley West Health Care, Inc.* supra at 589 (parties progress during negotiations factored into determination that a reasonable period for bargaining had not elapsed). Additionally, Respondent promised to give the Union merit pay figures during their last negotiation session. While the Union was waiting and asking for those figures, Respondent pulled the rug out from underneath the Union by announcing a poll. Respondent never gave the Union the promised figures, though it calculated the figures and distributed merit pay shortly after the February sessions. Respondent cannot honestly argue it bargained for a reasonable period of time when its last communication to the Union indicated more proposals were coming.

While it is not a consideration in *Poole Foundry* and its progeny, the ALJ should also consider Respondent's RM petition rejected by the NLRB Baltimore Regional office. The ALJ in *Jackson Sportswear Corp.*, spoke directly to the issue of allowing Respondent to hold a private poll at a time it was prevented from a Board conducted election stating:

The conclusion that respondent did not reasonably have a good-faith doubt, based on objective considerations, of the Union's continued majority support means that at the time Respondent conducted its own private poll, the Board would not have entertained a petition filed by Respondent seeking a Board-conducted election. *United States Gypsum Co.*, 157 NLRB 652, 654-656. While counsel for the General Counsel

does not so contend, I conclude that apart from the deficiencies in the poll itself, this circumstance precludes Respondent from relying on the results of the poll as a defense to its refusal to bargain. ***The fact that Board policy would have precluded Respondent from obtaining a Board election at this time renders this case analogous to a case where the employer party to a contract (or a settlement or recognition agreement) which would bar a representation petition filed by him has withdrawn recognition from the union.*** (emphasis added) The employer could not defend his action on the ground that a poll conducted by him showed that the union had lost its majority; “[o]therwise we should have the anomalous result of an employer being permitted unilaterally to redetermine his employees' bargaining representative at a time when the Board would refuse to make such redetermination because the time is inappropriate for such action.” *Hexton Furniture Co.*, 111 NLRB 342, 343-344. ***Moreover, as is cogently shown by the facts of the instant case, to withhold a Board-conducted election while at the same time permitting the employer to withdraw recognition on the strength of his own “election” would deprive the employees of the safeguards and assurances supplied by Board election procedures.***

211 NLRB, 891, 906- 907 (1977) (emphasis added) .

For the reasons identified above, the ALJ should find Respondent was prohibited from questioning the majority status of the Union on March 7, 2017, because a reasonable period for bargaining had not occurred since the date of the approved settlement agreement. Therefore, Respondent’s March 7, 2017 poll was unlawful.

3. Respondent, By Withdrawing Recognition From the Union Prior to Bargaining For a Reasonable Period of Time, then Unilaterally Changing Unit Employees’ Working Conditions, Violated Section 8(a)(1) and (5) of the Act

Consequently, Respondent’s reliance on its unlawful March 7, 2017 poll to withdraw recognition from the Union, and to subsequently change the unit employees working conditions, violates Sections 8(a)(1) and (5) of the Act. See *AT Systems West, Inc.*, supra at 62.

b. Respondent, By Polling the Unit Employees on March 7, 2017, at a Time with Unremedied Unfair Labor Practices and a Coerced Atmosphere, Violated Section 8(a)(1) and(5) of the Act.⁶⁵

1. Legal Framework

Section (C)(II)(b) of the this brief identifies and interprets the legal framework for determining whether Respondent's unremedied, unlawful, December 8 poll coerced unit employees at the time of Respondent's March 7, 2017 poll. In short, the ALJ must again apply the *Master Slack* factors to the March 7, 2017 poll.⁶⁶

2. The ALJ Should Find Respondent's Unlawful December Poll Coerced the Unit Employees At the Time of Respondent's March 7, 2017 Poll

All of the *Master Slack* factors support a finding of causal coercion between Respondent's December 8 poll and its March 7, 2017 poll. Therefore, the ALJ should find Respondent violated Sections 8(a)(1) and (5) of the Act by polling the unit employees on March 7, 2017.

Regarding the timing factor, Respondent's unlawful December 8 poll occurred only three months prior to its March 7, 2017 poll. The Board has frequently found time periods greater than 3 months to support a finding of causal coercion. See *Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1328-1329 (2006) (employee poll showing loss of majority support was tainted by unlawful conduct that occurred 6-8 months earlier).

Additionally, Respondent prevented dissipation of the effects of its unlawful December poll before holding its March 2017 poll. In December and March 2017, Respondent drafted and distributed multiple memorandums discussing its belief that the Union intimidated unit

⁶⁵ Paragraphs 8(a), 8(b), (9), 10(a), 10(b), 10(c), 11, and 12 of the Amended Complaint and Notice of Hearing.

⁶⁶ Counsel for the General Counsel also repeats its arguments from section (C)(II)(b) of this brief that Respondent's February unilateral wage increases had a nexus of causal coercion on Respondent's March 7, 2017 poll. The only added fact or argument is that Respondent continued to prevent dissipation by referring to its unilateral wage increases in its December and March 2017 memorandums.

employees during the December poll, that additional unit employees indicated disaffection after the December poll, and that it was entitled to withdraw recognition from the Union based on the December poll. Respondent's memorandums were clearly drafted to persuade unit employees to disaffect from the Union. Further, when Respondent held its March 7, 2017 poll, it was a reprisal of its unlawful December 8 conduct, further negating the passage of time. See *Mesker Door Inc.*, 357 NLRB 591, 597 (2011). The ALJ should find that the timing factor weighs heavily in favor of finding a coercive relationship between the two polls.

As to the second factor, the ALJ should find an unlawful poll would have a detrimental and lasting effect on the unit employees. Courts have previously acknowledged problems associated with employer polls, including: its tendency "to cause fear of reprisal in the mind of the employee," *Struksnes Construction Co.*, 165 NLRB 1062, (1967); its "potential for disrupting the bargaining process"; *Thomas Industries v. NLRB*, 687 F.2d 863, 869 (5th Cir.1981); and the possibility that it might "subvert the Board's electoral processes," *NLRB v. A.W. Thompson*, 651 F.2d 1141, 1144 (5th Cir.1981).

The ALJ can safely assume Respondent's December poll disrupted the bargaining process. First, Respondent's December poll affected all of the unit employees because Respondent asked all unit employees to participate in the poll and identify their Union sympathies. Second, Respondent's December poll came immediately after the unit employees' rejection of a contract with Respondent's proposals. When Respondent's reaction to the unit employees' protected activity (the December 4 contract vote) is to hold a poll to rid itself of the Union, there is no doubt Respondent's decision to hold the December poll left a lasting impression on the unit employees.

The final two *Master Slack* factors focus on the effect of the unlawful conduct on protected activities, including the possibility of causing employee disaffection from the Union. *Bunting Bearing Corp.*, 349 NLRB 1070, 1072 (2007); *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001). Respondent's December poll occurred while the Union was bargaining an initial contract with Respondent (a successor employer), and as indicated above, just four days after the unit employees voted down a contract with Respondent's last proposals. A reasonable unit employee would assume Respondent's decision to hold a poll was in retaliation for the unit employees' rejection.

Also, there is clear evidence Respondent's December poll, in fact, caused employee disaffection. In December, 38 unit employees voted against the Union. Then, after Respondent's December poll, and its continued harassment of the unit employees between December 8 and March 7, 2017, nine additional unit employees voted in March 2017 against the Union.⁶⁷ The Board has previously found that an increase in disaffection after unlawful conduct supports a determination that the prior unlawful conduct caused the increased disaffection. See *Mesker Door Inc.*, supra at 598 (17 signatures on petition before unlawful conduct, then another 18 after the conduct. Board found causal connection between unlawful conduct and additional signatures).

Moreover, the ALJ should hold Respondent accountable for its tireless effort to persuade unit employees to vote against the Union. As the Board has stated, "an employer who engages in efforts to have its employees repudiate their union must be held responsible for the foreseeable consequence of its conduct." *Bridgestone/Firestone*, 332 NLRB 575, 577 (2000).

⁶⁷ In its March 3, 2017 memorandum to the unit employees announcing the March 7, 2017 poll, Respondent apologized to the unit employees for the disruption caused by polling stating, "...We recognize that this process may be frustrating but we want to do everything possible to resolve the issue of union representation in a manner that is fair and transparent and gives us the best chance of addressing the issue without further lengthy legal proceedings." (2: 376, Crump)

In sum, applying the *Master Slack* factors to Respondent's unlawful December 8 poll, and its impact on the March 7, 2017 poll, the ALJ should find causal coercion between the polls. Therefore, the ALJ should find Respondent violated Sections 8(a)(1) and (5) of the Act by polling its unit employees on March 7, 2017, at a time with unremedied, coercive, unfair labor practices.

By relying on its unlawful March 7, 2017 poll to withdraw recognition from the Union, and unilaterally change the unit employees' working conditions, Respondent violated Sections 8(a)(1) and (5) of the Act. See *AT Systems West, Inc.*, supra at 61.

c. Respondent Violated Section 8(a)(1) and (5) By Polling Its Unit Employees on March 7, 2017, Without Having Objective Evidence of A Reasonable Good-Faith Uncertainty of the Union's Majority Status, and Subsequently Withdrawing Recognition and Unilaterally Changing Working Conditions.

For Respondent's evidence of disaffection prior to its December poll, counsel for the General Counsel's relies on its arguments in section (D)(II)(a) of this brief. Respondent's only evidence of disaffection since its decision to hold its December poll is the December poll tally and two alleged notes from unit employees received on or about December 13. The poll result and notes are tainted because both are the products of Respondent's unlawful December poll.

Jackson admitted the December poll results factored into his decision to hold the March 7, 2017 poll. (2: 297, Jackson)(Jx43) Since Respondent's December poll was unlawful, its reliance on those tainted results as a basis for the March 2017 poll is unlawful. See *Kentucky Fried Chicken, Caribbean Holdings, Inc.*, supra at 70.

Regarding the two notes, both were made shortly after Respondent's December poll. Wiley's note came after Warner called him and encouraged him to vote in the poll. As to Brown, he indicated his disaffection by circling a sample ballot obtained from Respondent's memorandum regarding the December poll. (2: 415, Crump) Clearly, Respondent's unlawful

December poll directly caused the two unit employees to express disaffection to Respondent. Therefore, Respondent is prohibited from relying on the two tainted notes. See *Transpersonnel, Inc.*, supra at 495.

Moreover, Respondent ignored evidence of unit employee support that occurred after its decision to hold its December poll. First, Respondent ignored the outcome of the December poll which was achieved at the request of the Union by a substantial portion of the unit employees abstaining from the poll. Also, Respondent ignored the fact that unit employees distributed Union flyers and wore Union t-shirts prior to the December poll.

Since Respondent is prohibited from relying on tainted evidence of disaffection that occurred post December poll, and it lacked a reasonable good-faith uncertainty based on objective evidence at the time it decided to hold its December poll, it cannot meet its burden of establishing a good-faith uncertainty of the Union's majority status when it decided to hold its March 7, 2017 poll.

Further, because Respondent lacked the requisite good-faith uncertainty to hold its March 2017 poll, it was therefore unlawful for it to withdraw recognition from the Union on March 8, 2017, and make subsequent unilateral changes to the unit employees working conditions.

F. CONCLUSION

The sum of the record evidence reveals Respondent violated the Act by unlawfully polling its unit employees, subsequently withdrawing recognition from the Union, and unilaterally changing working conditions of the unit employees.

From the moment the parties commenced bargaining in August 2015, Respondent has disregarded its bargaining obligation by engaging in disruptive and unlawful conduct. When the Union filed charges with the NLRB Baltimore Regional office regarding Respondent's conduct,

Respondent embarked on a persistent campaign designed to turn a majority of its unit employees' sentiments away from their union, and towards their new employer.

However, Respondent was never entitled to conduct either poll because it never had objective evidence of a good-faith doubt regarding the Union's continued majority status. Additionally, Respondent was prohibited from holding its polls because it promised to bargain in good faith with the Union as a condition of a settlement agreement finalized days before its first poll. Finally, even if Respondent was not prohibited from holding its polls, the results of the polls were unreliable due to Respondent's preceding coercive conduct.

Counsel for the General Counsel respectfully urges the ALJ find that Respondent has violated the Act as alleged in the complaint and order Respondent to cease its unlawful conduct.

APPENDIX I – PROPOSED ORDER

That Respondent, Standard Register Inc., d/b/a Taylor Communications, its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:
 - (a) Polling employees for purposes of determining union support before a reasonable period of bargaining has elapsed pursuant to a settlement agreement.
 - (b) Polling employees for purposes of determining union support in a coerced atmosphere caused by its own conduct.
 - (c) Polling employees for purposes of determining union support where there are unremedied unfair labor practices.
 - (d) Polling employees for purposes of determining union support without objective evidence of a reasonable good-faith doubt as to the Union's continuing majority support.
 - (e) Withdrawing recognition from the Union based on a poll of employees occurring before a reasonable period of bargaining has elapsed pursuant to a settlement agreement.
 - (f) Withdrawing recognition from the Union based on a poll of employees occurring in a coerced atmosphere caused by its own conduct.
 - (g) Withdrawing recognition from the Union after committing unfair labor practices that are likely to cause loss of union support among employees.
 - (h) Withdrawing recognition from the Union based on a poll of employees held without a reasonable good-faith doubt as to the Union's majority support.

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- (i) Refusing to recognize and bargain with Local 594-S, District Counsel No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of the following bargaining unit:

all production and maintenance employees performing the following work at the Employer's York, Pennsylvania plant – Machine Operator (press and collator), Prepress Production, Bindery Production, Material Handling, Shipping/Receiving, Maintenance Technician (machinist/electrician), and Tool Crib.

- (j) Unilaterally implementing changes in employees' terms and conditions of employment, and refusing to bargain over such changes.

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

Act:

- (a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

all production and maintenance employees performing the following work at the Employer's York, Pennsylvania plant – Machine Operator (press and collator), Prepress Production, Bindery Production, Material Handling, Shipping/Receiving, Maintenance Technician (machinist/electrician), and Tool Crib.

- (b) On the Union's request, rescind any or all of the unilaterally implemented changes made in the terms and conditions of employment of employees since March 7, 2017.

- (c) Within 14 days after service by the Region, post at its York, Pennsylvania, facility, located at 121 Mt. Zion Road, York, Pennsylvania, copies of the

attached Notice to Employees.⁶⁸ Copies of the notice, of forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered with any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the Notice to Employees to all current and former employees employed by Respondent at any time since December 8, 2016.

- (d) Within 14 days after service by the Region, Respondent will post a copy of the notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, on its intranet for its employees at its facility located at 121 Mt. Zion Road, York, Pennsylvania, and keep it continuously posted there for 60 consecutive days from the date it was originally posted.
- (e) Within 14 days after service by the Region, Respondent will e-mail a copy of the signed Notice in English and in additional languages if the Regional Director decides that it is appropriate to do so, to all current and former employees employed by Respondent at its facility located at 121 Mt. Zion Road, York, Pennsylvania since December 8, 2016.

⁶⁸ A proposed Notice to Employees is attached as Appendix II.

APPENDIX II – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the following appropriate unit of employees:

All production and maintenance employees performing the following work at the York, Pennsylvania plant of Standard Register, Inc. d/b/a Taylor Communications: Machine Operator (press and collator), Prepress Production, Bindery Production, Material Handling, Shipping/Receiving, Maintenance Technician (machinist/electrician) and Tool Crib.

WE WILL NOT coercively poll employees in the above bargaining unit about whether they wish to continue being represented by Local 594-S, District Council No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters (“the Union”).

WE WILL NOT poll employees in the above bargaining unit about whether they wish to continue being represented by the Union where there are unremedied unfair labor practices.

WE WILL NOT poll employees in the above bargaining unit about whether they wish to continue being represented by the Union before a reasonable time for bargaining has elapsed pursuant to a settlement agreement.

WE WILL NOT poll employees in the above bargaining unit about whether they wish to continue being represented by the Union without first having objective evidence of a reasonable good-faith doubt concerning the Union’s majority status.

WE WILL NOT unilaterally makes changes to the terms and conditions of employment of employees in the above bargaining unit without first giving notice to the Union, and affording the Union an opportunity to bargain collectively with respect to such changes.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the above bargaining unit, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL identify and, on the Union's request, rescind any changes that we have made unilaterally, since March 8, 2017, to the wages, hours, and working conditions of employees in the above bargaining unit.

WE WILL compensate employees in the above bargaining unit, with interest, for any loss of earnings and other benefits resulting from the unilateral changes we have made to their wages, hours, and working conditions since March 8, 2017.

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

Brief of the Counsel for the General Counsel

CERTIFICATE OF SERVICE

This is to certify that on February 14, 2018, a copy of the Brief of the counsel for the General Counsel was served by e-mail on:

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