

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 5**

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**STANDARD REGISTER, INC., d/b/a  
TAYLOR COMMUNICATIONS,**

**Respondent,**

**and**

**Case No. 05-CA-194336**

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

**Charging Party.**

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**Respondent's Post-Hearing Brief**

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Pursuant to Section 102.42 of the National Labor Relations Board's Rules and Regulations, Standard Register, Inc., d/b/a Taylor Communications ("Respondent", "SRI" or "Employer") submits this Post Hearing Brief as follows:

### **I. STATEMENT OF CASE**

This case involves allegations brought by the General Counsel against Respondent relating to its withdrawal of recognition from Local 594-S, District Council No. 9 of the Graphic Communications Conference of the International Brotherhood of Teamsters ("Union" or "Charging Party") on or about March 8, 2017. These allegations are brought in the context of an uncontroverted hearing record establishing that Employer possessed a good faith uncertainty concerning Charging Party majority status. In fact, evidence presented at the hearing clearly demonstrated that the Union lost majority status even prior to Respondent's acquisition of a predecessor employer and its represented workforce. As such, this case presents a truly unique factual backdrop wherein it is uncontroverted that the Union lacked majority status prior to Respondent becoming a statutory employer and that it lacked majority status up until the time Respondent withdrew recognition.

General Counsel has not disputed that Respondent's employees do not wish to be represented by the Union. Counsel's attorneys instead argue that the fundamental Section 7 right – employee choice as to representation status – should be ignored because of alleged deficiencies in the manner in which Respondent withdrew recognition. In advancing this position, General Counsel thoroughly misapplies the controlling legal principles under which such recognition may be lawfully withdrawn. General Counsel does this in three ways.



***1. Allegations Related to Employer Conduct***

General Counsel alleges that on December 8, 2016 and again on March 7, 2017, Respondent committed unfair labor practices by conducting polls of its unit employees, asking them whether they wished to continue being represented by Charging Party. Amended Complaint ¶¶7, 8 and 11. The Amended Complaint states that the December poll was made unlawful because Respondent committed an unfair labor practice by unilaterally implementing a merit pay increase for unit members in February 2016 which remained unremedied at the time of the poll in December. General Counsel further alleges that the March 2017 poll was unlawful for the same reasons, adding that because the December 2016 poll was itself an unfair labor practice, it tainted the March poll. Amended Complaint ¶8. The General Counsel's "house of cards" argument goes on to allege that since the polls were unlawful, SRI's withdrawal of recognition and subsequent changes to employees' terms and conditions of employment were likewise unlawful. Amended Complaint ¶¶9 and 11.

These allegations fail because the General Counsel has not met its burden of establishing that Respondent had any impact on the Union's loss of majority support. First, General Counsel has failed to meet the threshold burden of establishing, by a preponderance of the evidence, that Respondent's implementation of merit pay increases in February 2016 constituted an unfair labor practice violative of NLRA Section 8(a)(1). *In re JPH Management, Inc.*, 337 NLRB No. 7 (2001), citing *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529 (2000); see also *Nacona Boot Co.*, 116 NLRB No. 273 (1956); *Whiting Milk Corp.*, 145 NLRB No. 137 (1964); *Faro Screen Process, Inc. and Local 591*, 362 NLRB No. 84 (2015). SRI's lead negotiator provided credible testimony that the Union's lead negotiator at the time, John Potts, waived the Union's right to complain about the February incident. (Tr. 486.)

Second, and assuming *arguendo* that this implementation did constitute an unfair labor practice, General Counsel has not established that there was a causal connection between it and employees' disaffection with the Union. *See Master Slack Corp.*, 271 NLRB 78 (1984); *Unifirst Corp. and Laundry Workers*, 346 NLRB 591 (2006). To the contrary, the record herein presents a complete, robust, and detailed account as to the timing for, nature of and reasons underlying the unit's rejection of their bargaining representative. (*See* testimonies of Greg Jackson, Troy Warner, James Bupp, Brett Eckert and Chris Crump.) These reasons pre-date Respondent's involvement with the unit and remained consistent through the relevant timeframe. The General Counsel – who bears the evidentiary burden in this regard – offered no evidence that employee disaffection was in any manner impacted by Respondent. Simply stated, the failure of General Counsel to establish that the implementation of merit pay – or for that matter any other conduct by Respondent – encouraged, caused, strengthened, or in any manner impacted employee disaffection is a fatal flaw in its case. *Master Slack Corp.*, *supra*.

## **2. Allegations Related to the “Settlement Bar Doctrine”**

Faced with overwhelming evidence of employee disaffection and the fact that the Employer played no role in causing it, General Counsel next incorrectly argues that the timing of Respondent's withdrawal of recognition was inappropriate. General Counsel argues that every other consideration in this case impacting the Section 7 rights of employees to choose whether or not to be represented by the Union must be ignored because of a “settlement bar”. Specifically, General Counsel alleges that SRI was “subject to an informal settlement agreement with the Charging Party and the National Labor Relations Board, Region Five, in Case 5-CA-182978, which, among other obligations, required that Respondent bargain in good faith with the Charging Party.” Amended Complaint ¶7. According to General Counsel, the mere existence

of this agreement created an insulated timeframe during which Charging Party's majority status could not be questioned by Respondent. General Counsel argues that one need look no further than this doctrine in resolving this case.

General Counsel, however, thoroughly misapplies the settlement bar doctrine – which is in fact entirely inapplicable to this matter. As will be detailed herein, the doctrine has never served to require continued recognition on the basis of an informal settlement of a matter unrelated to an interruption in bargaining or some other subject matter *actually impacting* employee disaffection. The General Counsel's efforts to extend the settlement bar doctrine to the facts of this case would saddle SRI's employees with a union they do not want and would serve no valid purpose under the Act.

### **3. *Allegations Related to Polling Procedures***

Finally, General Counsel argues that even if the lack of causal connection to employee disaffection and inapplicability of the settlement bar doctrine are established, Respondent failed to follow the requisite procedural safeguards required for conducting its polls. As such, General Counsel argues that the results of the March 8, 2017 poll (i.e., 63.5% voting to discontinue union representation) should be voided. The record herein, however, establishes without question that each and every procedural safeguard was thoroughly followed. *See Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd as modified*, 923 F.2d 398 (C.A.5 1991).

In sum, the General Counsel has not established that the implementation of merit pay was itself an unfair labor practice. In the alternative, it has not shown this conduct to be causally connected to employee disaffection. As such, it cannot be found to have tainted the poll in December 2016. Moreover, the informal settlement agreement, unrelated to an interruption in

bargaining and one in which SRI admitted no wrongdoing, is in no way a bar to questioning the Union's majority status in an otherwise properly conducted poll. *See N.L.R.B. v. Key Motors Corp.*, 579 F.2d 1388 (7<sup>th</sup> Cir. 1978). Likewise, the poll in March 2017 could not be tainted by either the merit pay increase or the poll in December 2016. SRI's withdrawal of recognition based on the uncontroverted wishes of a clear majority of unit members and its subsequent changes to terms and conditions of employment are not only lawful but required under the Act. *See e.g., Oxford Electronics, Inc.*, 2017 WL 2376433 (N.L.R.B. Div. of Judges); *Unifirst Corp.*, *supra*. Accordingly, General Counsel's entire "house of cards" argument must fail.

In short, Respondent conducted a valid poll on March 7, 2017 based on a good faith doubt as to union majority status, and the results of this poll confirmed with objective evidence that unit employees did not wish to be represented. *See Allentown Mack Sales & Service*, 522 U.S. 359 (1998); *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001). This not only justified SRI's withdrawal of recognition, it mandated such action. To do otherwise, would have violated the Act. *See e.g., Oxford Electronics, Inc.*, 2017 WL 2376433 (N.L.R.B. Div. of Judges) (May 31, 2017). Given that the withdrawal of recognition was lawful, SRI's subsequent changes in terms and conditions of employment were also lawful. *See Unifirst Corp.*, *supra*.

## **II. HEARING TESTIMONY AND EVIDENCE**

### ***A. Respondent's Conduct Played No Role in Employee Disaffection with Their Union***

The Respondent purchased the assets of Standard Register Corporation (SRC) out of a bankruptcy proceeding on or about July 31, 2015. (Tr. 260.) Just prior on July 20, it began a process of setting new initial terms and conditions of employment covering the York, Pennsylvania SRC facility (as a *Burns* successor) and making contingent offers of employment to the incumbent workforce of that company. (Tr. 266-70; see also *NLRB v. Burns Security*

*Services*, 406 U.S. 272 (1972).) The Employer began operating the York facility on August 1, 2015. (Tr. 263.)

***1. Employee Disaffection Pre-Dated Respondent's Involvement with the Union and Remained Consistent***

The Respondent's key decision maker (Taylor Corporation's Executive Vice President, Gregory W. Jackson) was made aware of the York production employees' long-standing disaffection with the incumbent Union during a visit to the facility in the days immediately preceding Respondent's acquisition. (Tr. 314-15.) He was made aware of this fact by local York managers, who had been repeatedly told by production employees that they did not want to belong to the Union. (Tr. 323-4, 328; see also testimony of Nicholas J. Fiorenza, Esq., Tr. 455.) Respondent's good faith doubt as to the Union's majority status can hardly be seriously questioned. In addition to uncontroverted hearing testimony, this doubt was documented in an email from Jackson to his labor relations counsel on August 3, 2015, two days after SRI commenced operations in York. Jackson noted:

"One other piece of information I want to remind you of is that we have a 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."  
(Exhibit R-6.)

From August 2015 until March 2017, Mr. Jackson received multiple and consistent reports (at bargaining sessions and teleconferences) from the local York managers that a strong majority of bargaining unit employees did not wish to be represented by the Union. (Tr. 328-9.) This ultimately confirmed his good-faith doubt about the Union's majority status and led to his decision to conduct the polls that are the subject of this proceeding.

Former Plant Manager (now Operations Manager), Troy Warner, testified that he learned about the production employees' disaffection with the Union from conversations he had with each and every unit employee, including Union President Ted Billet, dating back as early as 2014. Warner, like many others, was employed by SRC and later hired by Respondent. Mr. Warner provided uncontradicted testimony that in late 2015 or early 2016:

“...one of the comments he [Ted Billet] made that kind of set me back... [was] that it's very frustrating to put all this time and energy into this [Union] and only five people are -- I said five, but his exact words were a handful of employees are paying union dues. (Tr. 744.)

He also testified that in 2014, a year prior to Respondent's purchase of SRC, SRC had acquired a competitor company, WorkflowOne. WorkflowOne was a non-union employer. As Plant Manager of SRC, Mr. Warner was responsible for meeting “one-on-one” with all former WorkflowOne employees who were eventually integrated into the York facility. (Tr. 694.) Mr. Warner testified without contradiction that each of the 31 former WorkflowOne employees: “...stated dissatisfaction with that [Union membership] because they didn't see a need for it or a desire. They didn't have a desire to be a part of it.” (Tr. 696.)

***2. The Hearing Record Demonstrating Lack of Union Majority Status is Uncontroverted***

At hearing, Mr. Warner was shown a list of bargaining unit employees as of December 31, 2015 (Respondent's Exhibit R-7). The date is significant because it precedes any allegation of improper conduct on the part of Respondent. Warner was asked to identify each employee who had told him *directly* that they did not wish to be represented by the Union. Those he identified were all still employed by SRI at the time of the first poll in December 2016. (Tr. 719, 721.) In fact, the ALJ confirmed with Mr. Warner:

“JUDGE AMCHAN: ... So basically, as I understand it, the bargaining unit, as of March the 8<sup>th</sup>, 2017 is everybody on this list minus the 11 people you’ve just named for me?

THE WITNESS: Yes.” (Tr. 721.)

Specifically, Mr. Warner identified the following employees who were disaffected throughout the relevant timeframe:

1. **Cynthia Albright** – a former WorkflowOne employee who, “...when I [Mr. Warner] had my one-on-one session with her [in 2014], indicate[d] then that she was not pleased with the union dues and having to be a part of that.” (Tr. 723.)
2. **Robert Altland** – a “legacy” employee (i.e., not a former WorkflowOne employee) who told Mr. Warner “multiple times” that he did not want to be represented by the Union. Mr. Warner also noted that Mr. Altland was one of a group of employees who had expressed relief that the Union would no longer be representing them when Respondent took over the York facility in 2015. This group mistakenly believed that by not assuming the pre-existing SRC contract that they would be rid of the Union. (Tr. 723.)
3. **Rodger Altland** – a former WorkflowOne employee who expressed his displeasure upon learning that he had to join the Union when SRC acquired WorkflowOne in 2014 and expressed relief when he mistakenly believed that the Union would no longer be representing unit employees in the summer of 2015. (Tr. 724.)
4. **Keith Barshinger** – a legacy SRC employee who made comments to Mr. Warner “expressing his satisfaction with the fact of learning what Greg's [Jackson] announcement was, that there was no honoring of the [Union’s SRC] contract, and his dissatisfaction of learning that there was going to have to be continued negotiations.” (Tr. 726.)
5. **Michael Boyer** – a former WorkflowOne employee who expressed his displeasure upon learning that he had to join the Union in 2014 and expressed relief when he mistakenly

believed that the Union would no longer be representing unit employees in the summer of 2015. (Tr. 726.)

6. **Greg Brown** – who is no longer employed at the York facility but was at the time of the December poll. Mr. Warner noted that:

“when the initial first poll took place [in December 2016], he was not in the building that day, and he was one of the folks that came forward after learning that the vote was undecided and put in -- I don't know the correct terminology, but indicating that he did not want to be supported by the Union.” (Tr. 726-7.)

7. **Keith Burke** – a former WorkflowOne employee, who Mr. Warner described as follows:

“...very vocal throughout the process. Keith made his statement -- feelings very clear on the meetings because he brought it up a lot. And then after his transfer to the Company, he would bring it up on multiple occasions, probably weekly, his level of frustration, because his contention with that whole process was that when he transferred to the facility, he was not being compensated for his performance as he was when he was in WorkflowOne.” (Tr. 727.)

8. **Terry Crone** – a former WorkflowOne employee, who was “vocal” about his disaffection with the Union. (Tr. 728.)

9. **Jordan Dehoff** – a “new-hire” (i.e., neither a legacy SRC employee nor former WorkflowOne employee) made “it known during the new hire orientation into the plant that he preferred not to be represented by the Union.” (Tr. 728.)

10. **Donald Fake** – a legacy SRC employee who expressed relief to Mr. Warner when he mistakenly believed that the Union would no longer be representing unit employees in the summer of 2015. (Tr. 730-1.)

11. **Heidi Fuller** – a new-hire employee who:

“made it known during the orientation process that she did not wish -- she preferred not to be represented but unfortunately knew that she had to. And throughout the process, kind of very similar to a lot of those listed above, in that she's thankful to hear that [t]his was over. She actually made a comment during a plant-wide meeting that she was letting everyone know in the group



and kind of being thankful to the group that she was ecstatic that they no longer had to be represented ....” (Tr. 731.)

12. **David Fulton** – a former WorkflowOne employee who expressed his desire not to be represented by the Union during his initial meeting with Mr. Warner in 2014. (Tr. 731.)
13. **Jeff Gibbs** – a new hire who stated “during the orientation process that he really didn't want to [join the Union] but unfortunately had to ....” (Tr. 732.)
14. **Todd Glatfelter** – a new-hire who expressed to Mr. Warner that he “preferred not to be represented” by the Union when hired. (Tr. 732.)
15. **Robert Green** – a former WorkflowOne employee who Mr. Warner remembered approaching him “... after a meeting one time, letting me know that he was very, very unhappy with learning of the startup of negotiations” in late Fall 2015, and that he “... was very frustrated in the fact that he felt that sense of, you know, excitement that he thought it was over.” (Tr.732-3.)
16. **James Groscost** – a former WorkflowOne employee who expressed a desire not to be represented during his “initial one-on-one interview” with Mr. Warner. (Tr. 733.)
17. **Jack Heiland** – a new-hire who:

“indicated at the initial orientation he was not interested [in joining the Union, and]... he was vocal throughout it. Kind of the same situation: When the announcement was made by Greg [Jackson], was ecstatic, and the disappointment of learning of the continued negotiations.” (Tr. 734.)
18. **Justin Housseal** – a new-hire who made “a comment during the orientation” that he did not wish to join the Union. He also approached Mr. Warner “... in the hallway as he was departing the meeting room upon the announcement from Greg [Jackson in the Summer of 2015], and was very ecstatic about learning of that news.” (Tr. 734.)

19. **Jeff Jones** - a former WorkflowOne employee who expressed a desire not to be represented during his one-on-one interview with Mr. Warner in 2014. (Tr. 735.)
20. **George Kann** – a former WorkflowOne employee who, like Mr. Jones, expressed a desire not to be represented during his one-on-one interview with Mr. Warner in 2014. (Tr. 736.)
21. **Meade Kauffman** – a new hire who stated during the orientation process that he did not want to join the Union. (Tr. 736.)
22. **Patrick Kennedy** – who is no longer employed by Respondent, but was for both polls conducted, who told Mr. Warner that he did not wish to join the Union at his initial orientation. (Tr. 736-7.)
23. **Edward Kreider** – a new-hire who stated during his orientation process that he did not want to join the Union. (Tr. 737.)
24. **Brian Laird** – a former WorkflowOne employee who expressed to Mr. Warner his desire not to be represented by the Union during his one-on-one interview in 2014. (Tr. 738.)
25. **Robert Martin** – a former WorkflowOne employee who commented to Mr. Warner during his one-on-one interview that he did not wish to join the Union. (Tr. 738.)
26. **Randy Meadows** – a “relatively new hire” who “indicated during the orientation he was not happy with knowing that” he had to join the Union. He also noted that  
“...immediately following that meeting with our team was that he [Mr. Meadows] was pleased to learn that that was no longer going to be a condition of employment there.” (Tr. 738.)
27. **Michael Noel** – a former WorkflowOne employee who commented to Mr. Warner during his one-on-one interview in 2014 that he did not wish to join the Union. (Tr. 738.)
28. **Greg Puchalsky** – a former WorkflowOne employee who Mr. Warner testified:

“...made mention of it during the transfer from WorkflowOne. He also brought it up going through his process of transferring into the plant, that he was [not] very pleased with having to do this and he felt a level of frustration that he was being forced to do this, and whenever there was a level of frustration for him -- in one particular case in mind, we asked him to operate a piece of equipment that was I'll use the word challenging, a harder piece of equipment to run. He said if he'd have known that, that he had to come over here and pay union dues and work harder, he would have never did it. But he actually is still there today.” (Tr. 739.)

29. **Bonnie Rehmeier** – a legacy Standard Register employee, who commented to Mr.

Warner that she was “thankful to hear” that the Union would no longer be representing her when she believed that was what Respondent’s takeover meant. (Tr. 739.)

30. **John Rose** – a new-hire who was “hired on in the 2014 time frame, made indication that he was not happy with having to be a part of [the Union].” (Tr. 740.)

31. **Wesley Shoemaker** – a transfer from TFP ComplyRight, another Taylor Corp.

organization who “indicated during the initial meetings at their previous facility about the opportunity [to transfer to York], he didn't like the idea of having to become part of a union ....” (Tr. 740.)

32. **Palmer Shoff** – a former WorkflowOne employee who indicated at the initial meetings with Mr. Warner in 2014 that he did not want to join the Union. (Tr. 741.)

33. **Keith Soders** – a new hire who indicated at his orientation that he did not wish to be a part of the Union. (Tr. 741.)

34. **Gary Spangler** – also a new hire who indicated at his orientation that he did not wish to be a part of the Union. (Tr. 742.)

35. **Brian Steadman** – a transfer from a different Standard Register facility but a long-term Standard Register employee and while he knew that joining the Union was a condition of transferring to the York facility he told Mr. Warner that “[h]e was not pleased with it....”

He was another employee who also expressed relief to Mr. Warner when he mistakenly believed that the Union would no longer be representing unit employees in the summer of 2015 and disappointment when he learned of negotiations later that same year. (Tr. 742.)

36. **George Stein** – a former WorkflowOne employee who commented to Mr. Warner during his one-on-one interview that he did not wish to join the Union. (Tr. 742.)

37. **Blake Stough** – a new hire who stated during the orientation process that he did not want to join the Union. (Tr. 742.)

38. **Kenneth Warren** – a former WorkflowOne employee who commented to Mr. Warner during his one-on-one interview in 2014 that he did not wish to join the Union. (Tr. 743.)

39. **James Wiley** – a former WorkflowOne employee who commented to Mr. Warner during his one-on-one interview in 2014 that he did not wish to join the Union. (Tr. 743.)

40. **William Wyar** – a new-hire who stated during the orientation process that he did not want to join the Union. (Tr. 743.)

41. **Brad Yost** – a TFP ComplyRight transfer also made comments during the orientation process indicating to Mr. Warner that he did not wish to be represented. (Tr. 743.)

General Counsel offered no rebuttal to Warner's testimony in this regard. The testimony is important because it provides an uncontroverted explanation of one of the ways in which Respondent's good faith doubt was formed. Respondent has no burden to prove that the Union lacked majority status at the time of its polls – only that it had a good faith reason to believe so. *See Allentown Mack*, 522 U.S. at 371. The fact that well over half of the unit told Warner that they were disaffected must be strongly credited in this regard.

There were many other strong indications of the Union's lack of support contributing to Respondent's good faith doubt of majority status. For example, a significant group of production

employees expressed relief to Mr. Warner because they believed that the Union would no longer be representing them when Respondent took over the York facility in August 2015. Mr. Warner identified these employees without referring to Respondent's Exhibit R-7: William Attard, Cody Eck, Brett Eckert, Lucas Goodling, David Humberd, Rob Reed, George Sollberger and Bryan Wagner. (Tr. 708.) Many of these same employees approached Mr. Warner to express their disappointment when they learned that the Union was still representing them in the late fall of 2015, including yet another disaffected employee, i.e., Stephen Snyder. (Tr. 711.)

**3. *Respondent Witness Offered Consistent Testimony as to Employee Disaffection***

Witness James L. Bupp also testified about the disaffection of the WorkflowOne employees, but from a unique perspective. Mr. Bupp was a former WorkflowOne, SRC and SRI bargaining unit employee himself. (Tr. 603-4.) His testimony should be given significant weight since he was for a significant time the co-worker of the very employees who eventually voted to de-unionize. Bupp became SRI's third-shift Production Supervisor in December 2015. (Tr. 604-5.) He testified at hearing that between July and December of 2015, while he was still a Press Operator, he had conversations with 15 other former WorkflowOne employees who expressed their wishes not to belong to the Union when that company was acquired by SRC. (Tr. 619.) Specifically, he named coworkers George Sollberger, Keith Soders, Gary Spangler, Randy Meadows, Blake Stough, Justin Housseal, Robert Green, Bonnie Rehmeyer, Cindy Albright, Jeff Jones, Brett Eckert (Tr. 609.), Dave Humberd, Keith Burke, Brian Laird, and Mike Boyer (Tr. 610.)

Given that all of the witnesses in this case were sequestered, it is important to note that all of these employees were also independently named by Mr. Warner. Mr. Warner's testimony matched Mr. Bupp's with respect to the 15 employees that Mr. Bupp had talked to while he was

a Press Operator. All told, Mr. Warner not only confirmed Mr. Bupp's list of 15 employees, but listed 50 out of a total of 85 employees shown to him on Respondent's Exhibit R-7 who had expressed disaffection with the Union. Moreover, when applied to the lists of employees eligible to vote in both polls, there was clearly a majority of unit members that Mr. Warner legitimately believed to be disaffected with the Union. This is uncontradicted in the hearing record and a strong basis for Respondent's *good faith doubt* of the Union's majority status.

**4. Bargaining Unit Employee Eckert Offered Persuasive Testimony Regarding Employee Disaffection**

Mr. Eckert offered another unique perspective and further independent verification of the employees' disaffection. As a Maintenance Machinist, he worked throughout the York plant and across all of its shifts. (Tr. 636.) Mr. Eckert, like Mr. Warner and Mr. Bupp, was sequestered. Independently, Eckert testified that a majority of unit members "didn't want the Union to be there". (Tr. 659.) He testified that before the Union became a part of the Teamsters (approximately 10 years prior), he had supported the Union. (Tr. 640.) He said that once the Teamsters took over he no longer wished to be represented by them. (Tr. 642.) Specifically, he stated that before the Teamsters took over:

"... our union dues were cheaper, but they would also give us like gift cards around, like, well, Thanksgiving and Christmas time for grocery stores. And matter of fact, before the Teamsters took us over, one of the union representatives actually brought out another gift card and said this shall be the last one that we receive because Teamsters does not allow this.  
...the only communication you got [after the Teamster takeover] is if you went to a union meeting or if you were there to vote on something was the only time you ever heard something. I mean, there was never any direct communication from the Union to the employees....  
It just made me feel like they were only after one thing....  
My monthly contribution." (TR 641-2.)

Mr. Eckert testified that he spoke to approximately 90% of all the employees who were brought in to the York facility from WorkflowOne (Tr. 644) and every one of them expressed

opposition to the Union. (Tr. 645.) This echoed what both Mr. Bupp and Mr. Warner reported at the hearing. Mr. Eckert went on to name numerous specific unit employees who had expressed this opposition throughout the timeframe from 2014 through 2016, including: Terry Crone (Tr. 647), Gary Spangler, Justin Housseal, Jack [Heiland], Heidi Fuller, Randy Meadows (Tr. 648), Jordan Dehoff, Ed [Kreider], Cody Eck (Tr. 649), Greg Brown (Tr. 650), Keith Soders (Tr. 651-3), Bill Attard, Bryan Wagner and John Rose. (Tr. 658.) All of these named employees were included in the lists of disaffected employees identified by Mr. Bupp and/or Mr. Warner.

In the following exchange with Administrative Law Judge Amchan, Mr. Eckert confirmed the approximate total number of employees disaffected with the Union in late 2015:

“JUDGE AMCHAN: Well, the question is, how many people expressed to you a desire to get rid of the Union?

THE WITNESS: All of the ones that I had interaction with.

JUDGE AMCHAN: And that would be how many?

THE WITNESS: I'm going to say at least 50, 50 to 60 employees.” (Tr. 660.)

This independently verified Mr. Warner’s knowledge and testimony that at least 50 employees (i.e., a strong majority of unit membership) in late 2015 wanted to be “rid of the Union”. The consistency of these three uncontradicted testimonies weighs strongly in favor of the Respondent’s good faith doubt as to the majority status of the Union well prior to 2016, when the alleged unfair labor practice regarding merit pay occurred. And, note that once employee disaffection arises, it is assumed to continue unless or until some event occurs or some other evidence comes to light favorably impacting union majority status. Here, none did. *Iroquois Nursing Home, Inc.*, 2012 WL 5494936 (N.L.R.B. Div. of Judges).

And, it is uncontroverted that Eckert communicated his belief that “a majority of the people here do not want the Union” directly to Operations Manager, Troy Warner, strongly contributing to Respondent’s good faith doubt<sup>1</sup> of majority status. (Tr. 661)

**5. *Uncontroverted Testimony Establishes the Reasons for Employee Disaffection***

Not only is it uncontroverted in the record that no Employer conduct was implicated in the employee’s disaffection, it also presents a clear picture of why this unit wanted to be rid of the Union. The reasons they expressed included:

- Union initiation fees and increased dues (Tr. 646-7);
- feeling forced to join the Union or else you would lose your job (Tr. 647);
- inability to be recognized/rewarded individually for superior performance (Tr. 627);
- lack of communication from the Union to unit members (e.g., Tr. 650); and
- Overall lack of any worthwhile representation by the Union. (Tr. 641-2.)

As one employee put it, “why do we need to pay somebody for something that we already have?” (Tr. 653.)

The lack of communication as well as the overall lack of even basic representation was echoed by Plant Manager Christopher Crump’s testimony regarding his and unit members’ interactions with Union President, Ted Billet, in 2016. Mr. Crump recalled that unit member David Humberd, approached him to get information about ongoing negotiations with the Union in August 2016. Mr. Crump testified that:

“... when I was back in the warehouse he [Mr. Humberd] stopped me and he asked me how the bargaining session went. And my response to him was see Ted [Billet] or Wanda [Stough]. Ted is the Union president, and Wanda was an officer of the Union.

....

---

<sup>1</sup> Again, the information received by Warner, Bupp, Crump and other managers was regularly conveyed to Jackson, who ultimately decided to conduct the polls (Tr. 314-15; 328-29).



He [Mr. Humberd] said, I don't get any information from them. And then he said that he'd be glad when we could get rid of this Union.” (Tr. 394.)

Mr. Crump went on to testify that when he became Respondent's Plant Manager in the spring of 2016, he was instructed by his superiors to "... run all of the performance notices, [employee] reprimands through Ted [Billet]. And when I did that, he would basically just shrug it off, said, I'm okay, 'Go ahead and do it'.” (Tr. 395.) The following exchange about these interactions gives a first-hand account about the lack of even basic representation that the Charging Party was actually providing to unit members at the time:

Q. When you say run discipline things through him, what do you mean by that?

A. Whether it be attendance issues or quality issues or whether an employee has a personal issue or what have you.

....

Q. What would you do in those instances when you had those subjects and talked to Ted?

A. I would go to Ted, explain to him what the issue was, and his response was "Go ahead and do it." I had one employee that had an issue with attendance and typically the way the attendance policy works when they're out a Friday, Saturday and a Sunday, it's an occurrence. When they're out Monday, it's another occurrence.

....

And it was told to me by my administrative assistant that Lynn [the employee subject to discipline for the attendance occurrence] has a concern with it, so I went to Ted. I asked him if he heard anything about it. He says yes. I said, so can you tell me what the issue was or is? And then he says, I don't know what it is; go ask her.” (Tr. 395-6.)

A union whose leadership balks at representing unit members in disciplinary matters is failing to provide even basic services that might lead to employee support. It was this kind of apathy that had led the majority of employees to no longer wish to be subject to this Union.

***B. Employer's Administration of Merit Pay Did Not Constitute an Unfair Labor Practice***

The General Counsel's attorneys argue that the employees' disaffection with the Union was caused by Respondent's mistaken merit pay increase, administered at the end of February 2016. As noted above, the Employer began operating the York facility on August 1, 2015. The

topic of merit pay was discussed by the parties extensively during contract negotiations, beginning with the initial negotiating session on August 27, 2015. (See testimony of Secretary-Treasurer for the Union, John Potts, Tr. 63.)

The parties reached tentative agreement on February 11, 2016, allowing the Employer to implement merit pay increases so long as York bargaining unit employees were treated in a manner consistent with those of other facilities operated by Employer's parent company Taylor Corporation. (Tr. 479.) While John Potts, the Secretary-Treasurer for the Union and its lead negotiator, testified that the parties had not reached an agreement he explained that "...we were discussing the criteria [for granting merit pay]." (Tr. 78.) Stated differently, there was an agreement in principle to give bargaining unit members merit pay, but the specific criteria for distributing the increases had yet to be worked out.

A few weeks after this tentative agreement was reached, local York management began the process of administering merit pay increases for its production employees in accordance with what Taylor Corp. was doing at all of its other facilities. According to Mr. Fiorenza's uncontradicted testimony:

"...I explained [to the Union] that my bargaining committee had told me that they believed that they had done the right thing in acting in accordance with that contract provision that was tentatively signed off on. At that time, there was an individual on my committee by the name of Greg Soltis. He was a -- he still is a Taylor executive with responsibility for the Standard Register plan [sic] in York. He works out of Dayton, Ohio. But he was on the committee and he explained that he thought that provision gave him the go-ahead to do it." (Tr. 481-2.)

According to Mr. Fiorenza's and Mr. Potts' testimonies the merit pay increases were given out at the end of February 2016. (Tr. 479, Tr. 76.)

Mr. Potts' testimony about what happened next calls into question the credibility of his entire testimony at the hearing. Mr. Potts initially testified upon direct examination that he

learned about the distribution of merit pay on February 29, 2016. (Tr. 76.) He added that he called Respondent Attorney Fiorenza about it “the first week in March”, implying that the topic had immediate importance to the Union. (Tr. 78.) In fact, as he admitted on cross-examination, Mr. Potts took no action upon learning of the distribution of merit pay. He did not call Mr. Fiorenza as he first testified, did not email him, did not protest or even mention merit pay until four weeks after its distribution. Potts waited until the parties’ next scheduled bargaining session on March 28, 2016, to raise the issue with Respondent for the first time. (Tr. 175-8.) Mr. Potts’ testimony on cross-examination is consistent with the testimony of Mr. Fiorenza, who stated “I found out about the merit pay implementation at a bargaining session that was held in York on March 28, 2016.” (Tr. 479.)

The General Counsel’s contention that the distribution of merit pay was some type of watershed event eroding Union support among the employees is simply not supported by the record. The only evidence attorneys for the General Counsel introduced in this regard was Mr. Potts’ testimony that the action was “devastating to the union”. (Tr. 82.) Mr. Potts later clarified that statement by testifying that the merit pay implementation was not devastating to the employees but that it “doesn’t put the Union in a good light...” (Tr. 176.) While Potts may have assumed that the implementation did not put the Union in a “good light”, his statement of this opinion cannot be accepted as proof of same. Even if one were to accept his statement, it is not evidence that the merit pay implementation actually caused the employees’ disaffection with the Union. In fact, the Union itself took no action when the implementation occurred and the only employee who testified at the hearing indicated that it had no impact on how employees viewed the Union.

During cross-examination, when asked about why, if the impact of the merit increase was so “devastating” to the Union, did Mr. Potts wait nearly a month to address it with the Respondent’s lead negotiator, Mr. Potts’ answer was disingenuous at best.

“Q. Well, why didn't you raise it with ... Nick Fiorenza, the day after you found out about it?

A. Well, there are a couple of reasons: One, my schedule. I mean one of these emails talked to me, my members stick with me, I'm on the road in other negotiations. Number two, I'm seeking the advice of counsel. Number three, one of the issues that's talked to about that email is Wanda Stough going out on an FMLA, on a medical issue, which hindered my being able to communicate to her exactly what happened to be able to get the details on that, on whether or not the Union was going to file an unfair labor practice charge or how we deal with it.

Q. But you found the time to send five other emails to Mr. Fiorenza during that time frame to address other issues as mundane as scheduling of negotiations, where they're going to be held, things of that nature, correct?

A. Yes.” (Tr. 176-7.)

The uncontroverted record demonstrates it was a non-factor among employees. It was best described by former unit member, Brett Eckert, in the following testimony:

“Let's focus on the February/March 2016 time frame. Do you recall receiving a merit pay increase around that time?

A. Yes, I do.

....

Q. Did it have any impact on your feelings towards the Union?

A. No.

Q. Earlier, you testified that the Union lost your support once the Teamsters came on board?

A. Correct.

....

Q. BY MR. LAWLOR: Are you aware of any coworkers whose attitude towards the Union changed after the receipt of merit pay?

JUDGE AMCHAN: ... did any coworkers tell you that their attitude towards the Union changed after you got the merit increase?

THE WITNESS: No.” (Tr. 663 -5.)

The events that transpired once the matter was raised by Mr. Potts on March 28, 2016 demonstrate that the merit pay implementation never constituted an unfair labor practice. Once he learned of the distribution of merit pay, Mr. Fiorenza took immediate affirmative steps to

remedy the error. He sent an email to Mr. Potts. The email included an additional explanation about how the honest mistake was made and also expressed the following:

“I also want to reiterate what Greg Soltis said about the increases at our meeting last week. 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 or 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.

John, let me know if you would like to bargain with respect to the increases detailed on the attached or whether you would like to discuss anything further in terms of correcting the Company’s error.” (See Joint Exhibit 9.)

As noted by Mr. Fiorenza at the hearing, Mr. Potts (and/or the Union) did not respond to the offer to take affirmative steps in conjunction with the Employer to address/correct the merit pay issue. (Tr. 485.) Rather, he stated in a reply email to Mr. Fiorenza, “... depending on the progress made in our next round of negotiations [I will] inform you of our decision on any future legal action.” (Joint Exhibit 10.)

Based on Mr. Fiorenza’s credible testimony, Mr. Potts told Mr. Fiorenza that the Union had given the Employer “a pass” on the merit pay issue. (Tr. 486.)

Q. When you say he said that he would give you a pass, did he use those words?

A. He used those words: "We have given you a pass."

JUDGE AMCHAN: And that's a pass with regard to the prior implementation?

THE WITNESS: It was with the prior implementation. It was given -- the criteria that we have now negotiated, he was giving us a pass. And this was a session that took place late in July 2016.” (Tr. 485-6.)

This “pass” was given in the context of negotiating the only open issue regarding merit pay, i.e., the criteria to be applied to calculating individual employee increases. This testimony rings true given what Mr. Potts had said in his email to Mr. Fiorenza on April 5, 2016, about deciding whether to bring legal action based on the “progress” made on negotiating these terms. (Joint Exhibit 10.) The parties indeed made great “progress” in negotiating this issue. They reached a side letter agreement. Thus, when Mr. Potts told Mr. Fiorenza that the Union had given the Company a “pass” on the issue, Respondent was justified in concluding that Mr. Potts was informing the Company about the Union’s intention not to file legal action.

The fact that the Union did not believe the implementation of merit pay was significant at the time it occurred is not just borne out by hearing testimony. This is obvious from Mr. Potts’ own emails from this time, where for a month after the implementation he repeatedly communicated with Respondent about scheduling meetings but never thought merit pay was important enough to even mention. (Tr. 175-8.) The fact that Respondent offered to fully rehabilitate any negative impact caused by merit pay implementation is not just borne out by the hearing testimony, it is documented in an email sent by Respondent's counsel to Mr. Potts days after Mr. Fiorenza learned of the implementation. The fact that Mr. Potts never responded to Respondent's overture is abundantly clear from the email Mr. Potts sent the next day not responding at all to offers to rehabilitate any issues, but rather simply using the situation as bargaining leverage. (Joint Exhibit 10.) Finally, the fact that Mr. Potts told the Employer, that based on resolving all open issues concerning merit pay, the Union had given the employer a "pass" on the topic is not simply based on Respondent's counsel's testimony, but is obvious from

Mr. Potts reporting to his membership that the issue had been successfully resolved “based on fairness with an opportunity of review by the Union” (Joint Exhibit 13). Despite this acknowledgement that the issue was resolved, the Union filed its unfair labor practice charge regarding merit pay three weeks later (Joint Exhibit 14).

Moreover, the implementation of merit pay was not an unfair labor practice. The Employer offered all appropriate avenues to rescind or rehabilitate the conduct. And the Union affirmatively waived its rights to pursue the matter when it extracted favorable merit pay criteria from Respondent in exchange for giving it a "pass" on the topic. *See American Diamond Tool, Inc. and United Steel Workers*, 306 NLRB No. 108 (1992).

Given the obvious contradictions in Mr. Potts’ testimony, his claim that he never said “at any time around or after ... April 5th that the Union was not going to file charges with the NLRB regarding the merit increases” should be considered critically with a healthy dose of skepticism. (Tr. 86.) Mr. Potts may not have used those specific words. But he did not say that he never told Mr. Fiorenza that the Union was giving the Employer a “pass” on this issue. Moreover, General Counsel did not recall Mr. Potts to rebut Mr. Fiorenza’s testimony in this regard. As noted, he simply challenged the testimony’s credibility – without a legitimate basis for doing so. As such, Mr. Fiorenza’s testimony should be credited and Mr. Potts’ discounted. So the Union, in addition to failing to contest the initial administration of merit pay, failing to avail itself of the opportunity to either rescind, renegotiate or clarify to the bargaining unit, also freely acknowledged to the unit members that the parties had successfully resolved the issue.

As explained in detail below, Respondent’s conduct with respect to merit pay did not constitute an unfair labor practice impacting employee disaffection or giving rise to a settlement bar when the Union’s frivolous unfair labor practice charge was later settled. Despite giving

Respondent a “pass”, the Union later filed a charge against Respondent alleging an unfair labor practice related to the merit pay increases (i.e., Case 05-CA-182978). The parties ultimately resolved the case in early December 2016 by an informal settlement agreement sanctioned by Region 5 of the Board in which the Respondent admitted no violations of the Act. (Joint Exhibit 31.)

It is critical to note at this point that the evidence of employee disaffection detailed above all pre-dated this merit pay issue. General Counsel repeatedly objected to the testimony and other evidence presented about the employees’ long-standing disdain for the Union, claiming that it was either irrelevant or prohibited by this or that bar. Nonetheless, it is uncontradicted -- and in fact undeniable -- that Respondent had reliable knowledge of these employees’ disaffection prior to February 2016 and continued to receive reports of that disaffection thereafter.

***C. The Employer at All Times Bargained in Good Faith Up to a Proper Withdrawal of Recognition***

As required of a *Burns* successor, Respondent continued to bargain with the Union through November 2016, when, according to multiple members of Respondent’s bargaining committee, a tentative collective bargaining agreement was reached. Respondent’s Chief Negotiator Fiorenza, testified as follows:

Q. All right. And during the November 2nd and 3rd negotiation sessions, did the Employer make any concessions with regard to open issues?

A. A lot of these things I'm reviewing were concessions and modifications from our prior bargaining position. The area of PTO was one.

Q. What happened next on November 3rd?

A. On November 3rd, when we confirmed these last items I'm talking about, John Potts made a statement to the effect that I get it, we need a contract. He said, I think we have an agreement but I need to talk to my committee.

...



A. I walked back into the room. It was a very short caucus. I walked back into the room and we sat down for a moment. And as soon as we sat down, John stood up, he extended his hand across the table, and he said, we have an agreement.

Q. Do you recall specifically what he said in that regard?

A. I recall specifically that John said, "We have a tentative agreement."

Q. And what was your understanding as to John's comment that way?

A. I knew what John meant when he said that we have a tentative agreement. Because earlier in negotiations I had sent John an email asking him to describe his local's process for concluding contract negotiations, and I did that because, although I negotiate a lot of similar print-related union contracts, I didn't want to assume I knew his ratification process.

....

I now do not recall if that was an email or if that was a conversation, but I know that I inquired into what the ratification process was. And I was told that in the event we reach a tentative agreement, the members of his bargaining unit would hold a ratification vote via secret ballot. And I was told that in the event we reach a tentative agreement, the members of his bargaining unit would hold a ratification vote via secret ballot. (Tr. 492-7.)

This testimony is consistent with that of other sequestered witnesses, i.e.: Greg Jackson (Tr. 330) and Chris Crump (Tr. 400). It is also consistent with Mr. Potts' testimony about the meeting November 3 (Tr. 181), with one exception: Mr. Potts testified that no tentative agreement was reached that day. (Tr. 112)

There are numerous inconsistencies with Mr. Potts' testimony that a tentative agreement was never reached. First, he testified that during his final caucus with his negotiating team at the November 3 bargaining session, he told them that "I thought it best that we get a contract in place so that we could build a relationship over the next 9 months and hopefully move forward when this plant was in a better position." (Tr. 110-1) Second, he admitted that he had, "... sent in response to Mr. Fiorenza's email. .... [a reply email saying] that the Union[']s bargaining committee would be recommending..." the ratification of the agreement by the unit members at a vote on December 4, 2016. (Tr. 126; Joint Exhibit 24) However, he added in hindsight that it was a "mistake" to say that they would "recommend" it. (Id.) Third, he admitted that the Union did not request any additional bargaining sessions following the November 3 sessions until after

the unit members voted down the contract proposal on December 4. (Tr. 182.) Fourth, the Union scheduled a contract ratification vote for December 4, 2016. (Joint Exhibit 18.)

All of these actions suggest that Mr. Potts was fully aware that the parties had reached a tentative agreement on the entire contract. His admitted statement to the Union's bargaining team about "get[ting] a contract in place" clearly shows that he understood that a joint proposal should be submitted to the unit members for ratification; any "open issues" could be dealt with in subsequent contracts. Just because the Union negotiators did not get everything they wanted in the draft contract that came out of the November 3 session did not mean that there was no tentative agreement.

While it is not entirely clear why the Union chose to back away from the tentative agreement, Mr. Potts informed the Respondent on November 15, 2016, that the Union negotiating committee would present the draft agreement to the unit members as "Tentatively Agreed, Company Final Position and Union proposal". (Joint Exhibit 22.) Given that this was inconsistent with the Respondent's understanding about reaching tentative agreement on November 3, Mr. Fiorenza replied to this information stating: "... I'm not following .. didn't the union withdraw the items noted in italics [representing the so-called "open issues"] when we reached the T/A [tentative agreement]?" (Id.) Mr. Potts responded with:

"while not 'tentatively agreeing' on those open items, ... 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.... **You can call it Semantics[sic], I need to present it in this manner.**" (Id., emphasis added.)

This final sentence implies that Mr. Potts knew the parties reached tentative agreement on November 3, but needed to "present it" in a misleading way to the unit members to enable him to disavow any responsibility for agreeing to its terms. This further suggests that the Union – and

Mr. Potts in particular – recognized how weak its support was among the unit members. Upon learning that the Union was distancing itself from the agreement that had been reached, Greg Jackson testified:

“my first reaction was: (1) we never said final offer to anything, (2) this isn't our tentative agreement, and (3) if they hold a ratification vote, what are they ratified[sic], because it has conflicting provisions in the same document.” (Tr. 333.)

***1. Union Presents Contract Vote as a Vote For or Against Representation***

Brett Eckert testified that when the ratification vote finally took place on December 4, 2016, Mr. Potts began the Union meeting by stating “I guess today you're going to decide whether you want union representation or not.” (Tr. 668.) Later, upon cross-examination, Mr. Eckert expanded on this incident by testifying that:

“After he said his first statement, I actually looked at the guy beside me and said, did he say what I just thought he said?

Q. So you weren't sure what he said?

A. I just wanted to make sure that someone else heard the same thing that I did.

Q. And so you turned towards another employee and said, did I just hear him say what I thought he said?

A. Yes, I did.

Q. And that employee said, yes, you just heard that?

A. He actually said the same words back to me as what Mr. Potts said.” (Tr. 683.)

It is important to note that General Counsel did not offer any testimony or other evidence to refute Mr. Eckert's testimony.

Furthermore, Mr. Eckert was not the only employee who believed that voting down the proposed agreement would be a vote to get rid of the Union. Chris Crump testified that employee David Humberd also inquired “if they [unit members] voted no for the contract, would that mean that there would be no union?” (Tr. 402.)

Not surprisingly, on December 4, 2016, the bargaining unit members voted down the proposed agreement that they believed was either: 1) a vote against Union representation; or 2) a

vote against an agreement that had been falsely characterized as the “Company’s final position” which the Union’s negotiating team was not recommending.

In his December 5, 2016 email to Nicholas Fiorenza, Mr. Potts reported that “the bargaining unit voted overwhelmingly to reject the Company[sic] final position.” (Joint Exhibit 27.) It is telling that Mr. Potts chose this way of presenting the news to the Employer despite knowing full well that the Employer had never characterized the tentative agreement or any of its proposals as the “Company’s final position.” (See Tr. 112-3.) We can only speculate that this mischaracterization was intended to create an evidentiary record that would support a false narrative of the parties’ negotiations and the presentation of the agreement to the unit members.

## ***2. December Poll Conducted When Contract Vote Further Demonstrated Disaffection***

When the contract was ultimately voted down, this information was relayed back to Greg Jackson by the York facility managers. (Tr. 334-5.) In addition, the managers:

“voiced to me their personal frustration that employees were complaining about us negotiating with the Union because they didn't think the Union represented them. Or they thought that when they -- when we took over and didn't assume the contract that the Union was gone. And that, you know, ultimately those continuing messages that happened every time we had negotiations, there was this kind of continuous murmuring, complaining that, I'll leave, I'll quit if I have to join the Union, things like that that were going to be disruptive to our operations. That was obviously a concern to me that I was going to have an even further ineffective operation.” (Tr. 328.)

As a result, Mr. Jackson directed that an employee poll be conducted because he “... was uncomfortable bringing the employees a contract when they did not want to be represented.” (Tr. 580.) Jackson testified that, in part, his frustration with the Union’s conduct contributed to his decision to conduct the December poll. This statement, however, must be understood in the full context of the Union’s disingenuous conduct concerning the tentative agreement, including misleading the employees into believing that they could end union representation by voting

down the contract. When the Union did not follow through on its statement that voting down the contract would end Union involvement, Mr. Jackson rightfully sought to give employees a direct voice by conducting a poll. Certainly, he possessed the requisite good faith doubt of Union majority status to do so.

In the afternoon of December 5, 2016, the Employer advised the Union that it would conduct a poll of all production employees at the York facility on December 8, 2016 to determine whether a majority desired Union representation. (Joint Exhibit 28 at 4.) The next day, the Union requested information concerning the nature of the poll. The Employer responded and provided the Union with detailed information with respect to same. (Id. at 1-2.)

On December 6, 2016, Plant Manager Chris Crump issued a memorandum to all York Production Employees communicating to them that: “[t]he sole purpose of the poll is to establish whether more than 50% of our production employees, currently represented by [the Union] actually desire such representation.” (Joint Exhibit 29.) Assurances against reprisal were given in that same memo. (Id.)

The Union distributed its own memorandum (on December 6 or 7) to the same employees encouraging them to “refuse to vote in Taylor’s poll”. (Joint Exhibit 30; Tr. 517.) The employees were subsequently polled on December 8, 2016 by secret ballot. Chris Crump described the procedures as follows:

“Q. Tell us what arrangements were made for the poll – the actual conducting of the physical poll.

A. Okay. We actually had a small little corner and we actually took a cubicle and made a single entrance to go inside a polling area where we had a table and a chair. So as -- and then we also had a table where two of our company observers sat and as the employees entered the polling area, they signed off on the paperwork. They were given a ballot. They walked into the booth. They made their selection. They folded it. On the outside we had a table with a box that was taped with a small slit cut in the top to where the employees could put their vote in the box when they finished casting their vote.

Q. Okay. In the cubicle that you had set up, if you were outside the cubicle could you see inside as to what other people were doing?

A. No. No.

Q. Were there arrangements made for observers?

A. Yes.

Q. Tell us about that.

A. We had two observers from the Company: Kendra Knobb (ph.), who's our administrative assistant, and at the time we had an HR contractor named Greg Siebert. They were sitting at the table.

Q. What table?

A. The table that we had about 30 feet away from the polling booth.

Q. And what role, if any, did they play in the actual carrying out of the poll?

A. They were the ones that actually had the employees sign off on a sheet and they were the ones that were giving them the ballot. And they were watching just to make sure that everything was flowing the way it was supposed to flow.

Q. And what do you mean by that?

A. That we didn't have two people, three people going in a polling booth together and that there was no intimidation or such.

Q. Were any union observers at the poll?

A. No.

Q. Do you know if the Union had been invited to send observers?

A. Yes. They were.

Q. How do you know that?

A. I know Nick [Fiorenza] sent John Potts an email notifying him of it and asked him if they wanted to be present.

Q. Did anybody from the Union show up for the polling?

A. No." (Tr. 406-7; see also Tr. 407-13.)

In short, "[t]he poll was conducted as best as we could to mirror what a [Board] certification election would look like." (Tr. 517.)

The tally of the December 8 poll indicated that 38 unit members voted against the Union and 5 voted for it. (Joint Exhibit 32.) Given that there were 77 employees in the bargaining unit, the poll was one vote shy of a majority. However, the following week, two production employees (Jim Wiley and Greg Brown) who had not been present for the vote on December 8, gave signed statements to Plant Manager Chris Crump indicating that they did not wish to be represented by the Union. (Tr. 414.) Since these were signed statements, they were not a part of

the secret ballot vote. Accordingly, Respondent did not “count” these notes as “no” votes.

However, this further called into question the majority status of the Union.

With the results being muddled, the Respondent asked that the Union agree to a formal RM petition vote to determine the Union’s majority status. (Joint Exhibit 35.) The Union declined and as the Board balked at processing the petition without Union consent, Respondent withdrew it.

### **3. *Parties Continue to Bargain and Union Continues to Backtrack***

Following the December 2016 poll, the Respondent continued to bargain with the Union. (Tr. 519-20.) When the parties met for a bargaining session on February 21, 2017, the Union added new members to its negotiating team: Robert Lacey, an International Representative out of the Teamsters’ Washington office (Tr. 224-5; 523) and two additional production employees. (Tr. 528.) These new Union bargaining team members began rehashing contract items that had been agreed to by the parties months prior. (Tr. 529.) In other words, negotiations were moving backward instead of progressing.

### **4. *March Poll Reveals Production Employees’ Wish to Rid Themselves of Union***

Based on the information from the first poll and additional notes from Mr. Wiley and Mr. Brown, as well as ongoing and consistent information received from managers at the York facility regarding the employees’ continuing disaffection with the Union, Mr. Jackson decided to conduct a second poll in March 2017. (Tr. 343.) Mr. Jackson described the decision as follows:

So the buildup of all the information that had been provided to me from the beginning, personal observation or personal interaction with employees, and then continuing buildup. Then we got to March and the noise after our February sessions got louder and louder again, and I guess I was in a, I'll say, an ethical quandary of I can't force these people to be part of a union if they don't want to be, but I don't know because I don't have the objective evidence in hand. And so holding a secret ballot poll seemed, to me, to be the only viable alternative I had to get information to make a meaningful decision.

....

I had the poll that gave me the count from that poll and then I had these individual slips turned in separately from people who were on vacation, and then I have other people continue to clamor saying other people didn't vote because they thought it was going to -- the vote was going to go against Union representation, so they didn't vote because they didn't want to be in trouble. (Tr. 342-3.)

Clearly possessing the requisite good faith doubt of majority status, Respondent notified the Union on March 3, 2017 that the poll would be held the following week on March 7, 2017. (Joint Exhibit 43.) Once again, the Union campaigned against the poll by distributing a memorandum to production employees dated March 6, 2017, encouraging them to “BOYCOTT THE VOTE!”. (Joint Exhibit 45.) This memorandum also reveals that the Union was fully aware that its members were disaffected. In it, the Union noted: “If you’re not happy with the direction of the Union, Then[sic] join in and fix it!” (Id.)

The same measures taken to safeguard a secret ballot vote in December were taken by Respondent in March. (Tr. 417-8; Joint Exhibit 43.) This time 52 of 74 unit members voted. Of that number, 47 (or 63.5% of the total number of unit members) voted against Union representation and only 5 voted for it. (Joint Exhibit 48.) The next day, Mr. Fiorenza notified Mr. Potts by email that the Employer was “withdrawing its recognition of GCC 594S.” (Joint Exhibit 49.) Following this withdrawal, the Respondent modified the policies and procedures at the York facility to bring them into line with the parent company Taylor’s policies/procedures. (Tr. 299.)

### **III. ARGUMENT**

#### ***A. General Counsel’s Position Ignores the Cornerstone Principles of Employees’ Right To Determine Representation Status***

It is well-settled that the Board’s general obligation under the NLRA is to promote two equally important goals: 1) employees’ freedom of choice in deciding whether they want to



engage in collective bargaining and whom they wish to represent them; and 2) the maintenance of established, stable bargaining relationships. *See St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999); *Stanley Spencer v. NLRB*, 712 F.2d 539, 566 (D.C. Cir. 1984); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338–39 (1944). The Board has consistently found that an employer violates Section 8(a)(1), (2), and (3) of the NLRA by recognizing and entering into a collective-bargaining agreement with a union that does not represent a majority of the employer’s employees (in an appropriate unit). *See Oxford Electronics, Inc.*, 2017 WL 2376433 (N.L.R.B. Div. of Judges) (May 31, 2017); *The American Bottling Company, Inc. D/B/A Dr. Pepper Snapple Group*, 2012 WL 1419602 (N.L.R.B.); *Regency Grande Nursing & Rehab. Ctr. & SEIU*, 347 NLRB 1143 (2006). Respondent was therefore bound by the Act to withdraw recognition from the Union when it received the March 7, 2017 poll results.

The attorneys for the General Counsel argue that the York employees’ free choice must be ignored and SRI must continue to bargain with a Union that clearly does not enjoy majority status because:

1. a “reasonable period of time” (Tr. 25) had not passed since SRI entered into an informal settlement agreement to end NLRB case 05-CA-182978 (i.e., a “settlement bar”), citing *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), *AT Systems West*, 341 NLRB 57 (2004) and *CTS Construction Inc.*, 2017 WL 2402772 (N.L.R.B.), or in the alternative;
2. SRI officials did not have a “good faith uncertainty” (Tr. 27) to conduct polls on December 8, 2016 and on March 7, 2017, citing *Levitz, supra*, *Allentown Mack Sales & Service, supra*; and/or
3. SRI failed to adhere to safeguards of *Struksnes Constr. Co.*, 165 NLRB 1062 (1967) in conducting said polls (Tr. 28).

These arguments not only fail as a matter of law but advocate for a result fundamentally contrary to the core purposes and protections of the Act.

***1. The “Settlement Bar Doctrine” Is Inapplicable To This Case***

The attorneys for the General Counsel argue that Respondent’s agreement to “bargain” in its informal settlement agreement created an insulated timeframe during which SRI was required to continue to bargain with the Union regardless of its lack of majority support. They rely principally on *Poole, supra*, in which the Board ordered an employer to bargain for a “reasonable time” after entering into a settlement agreement. This argument fails because the facts and circumstances on which *Poole* and its progeny turn are not present in the instant case.

Specifically, in those cases, the employer was alleged -- or proven -- to have “broken” or interrupted the bargaining relationship with the incumbent union (i.e., the employer either refused to recognize or refused to bargain with the union). Board and case law clearly indicate that when an employer is responsible for cutting off negotiations with an incumbent union, there is a rebuttable presumption that by doing so the employer caused employees to become dissatisfied with the union. *See Lee Lumber and Bldg. Material Corp.*, 334 NLRB 399 (2001), *enf’d*. 310 F.3d 209 (D.C. Cir 2002). That presumption can only be rebutted after a “reasonable period of time” has passed to remedy the interruption. These are the only circumstances in which the “settlement bar doctrine” is applicable. Put another way, the “settlement bar doctrine” has never been applied absent allegations of an employer’s improper interruption of the bargaining process.

Here, Respondent never improperly interrupted the bargaining process prior to the informal settlement. Neither the Union in the underlying charge (05-CA-182978) nor the General Counsel’s Complaint allege a refusal to bargain or even any delaying tactics by

Respondent. Instead, the settlement agreement in this case, ended a dispute over a unilateral change allegation involving merit pay. This dispute was fully resolved by the parties before the underlying charge was even filed.

It is for this reason that *Poole* and its progeny are distinguishable. As the 7<sup>th</sup> Circuit Court of Appeals explained in *N.L.R.B. v. Key Motors Corp.*, 579 F.2d 1388 (1978):

The rationale of this remedial scheme is that when a bargaining relationship is interrupted by an employer's wrongful refusal to bargain and then restored by the Board's bargaining order, that bargaining relationship "must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." [citing *Franks Bros. Co. v. N. L. R. B.*, 321 U.S. 702, 705-06 (1944)] *Id.* at 1390.

In *Poole*, *supra*, this same rationale was applied to a Board-approved settlement agreement in which the employer had agreed to bargain in exchange for the dismissal of refusal-to-bargain charges. In its in-depth analysis of *Poole*, the 7<sup>th</sup> Circuit noted:

The Board has implicitly made the determination that employee free choice may be temporarily sacrificed (in that an employer may be forced to bargain with a union that no longer has the support of a majority of the employees) for a "reasonable time" so as to give the bargaining relationship an opportunity to succeed and thereby promote industrial stability. We have no difficulty with this determination. It appears to us, however, that the primary justification for this infringement on employee free choice is to restore with some force a bargaining relationship that was interrupted as a result of the employer's refusal to bargain. **That justification is absent here.** *N.L.R.B. v. Key Motors Corp.*, 579 F.2d at 1390-91 (emphasis added).

In the present case, unlike in any other case in which the Board has ordered the employer to bargain for a reasonable time on the basis of a settlement agreement (including *AT Systems West*, 341 NLRB 57 (2004) and *CTS Construction Inc.*, 2017 WL 2402772 (N.L.R.B.) cited by General Counsel), it was never alleged that Employer refused to bargain prior to the settlement. The bargaining relationship was, therefore, never interrupted by the Employer. Accordingly, there is no justification for sacrificing employee free choice under these circumstances.

Further demonstrating that the settlement bar doctrine does not apply in this case is the General Counsel's misunderstanding of the five-factor "reasonable period of time" standard that originated in *Lee Lumber and Bldg. Material Corp.*, 334 NLRB 399 (2001), *enf'd*, 310 F.3d 209 (D.C. Cir 2002) and later applied in *Town and Country Plumbing & Heating, Inc.*, 352 NLRB 1212 (2008). Their advocacy for use of this standard is mistaken in two ways.

First, as discussed above, the "reasonable time standard" is only applicable when an employer has unlawfully refused to recognize or bargain with an incumbent union. Those facts are absent from this case. Second, the Board has clearly stated that the five-factor *Lee Lumber* test is only to be used to determine whether the reasonable waiting period should be extended from six months to one-year. Thus, not only is the reasonable time standard inapplicable to the current case, Counsel has completely misconstrued the standard.

Similar to *Poole*, the employer in *Lee Lumber* refused to bargain with an incumbent union when it received a decertification petition from its employees in March 1990. In May 1990, after the Union filed a refusal-to-bargain charge with the Board, the employer acquiesced and began to once again bargain with the Union. Then, in July 1990, the employer received a second decertification petition from employees and subsequently withdrew recognition from the Union. (*For a concise recitation of the facts, see Lee Lumber and Bldg. Material Corp.*, 334 NLRB 399 (2001).) Faced with these facts, the Board concluded that:

...when an employer has unlawfully failed or refused to recognize or bargain with an incumbent union, employee disaffection from the union that arises during the course of that unlawful conduct will be presumed to be the result of that conduct. Absent unusual circumstances, the Board held, this presumption of taint is rebuttable only by a showing that the employee disaffection arose after the employer resumed recognizing and bargaining with the union for a reasonable period of time without committing any more unfair labor practices that would have an adverse effect on the bargaining. As the Board observed,

[W]hen a bargaining relationship has been initially established, or has been restored after being broken, it must be given a reasonable time to

work and a fair chance to succeed before an employer may question the union's representative status. *Id.* at 400 (citations omitted).

Again, in the instant case, there was no “break” in bargaining that could have caused employee disaffection with the Union. Prior to March 8, 2017, SRI never refused to bargain with Charging Party nor did it engage in any delaying tactics. Not only is this uncontradicted by any evidence produced at the hearing, neither the Union nor the Board attorneys made any such allegations. Therefore, even applying *Lee Lumber*, the factors that might warrant the imposition of an insulated waiting period to permit a bargaining relationship a “fair chance to succeed” were never present.

When the employer in *Lee Lumber* appealed the Board's decision to the D.C. Circuit Court of Appeals, the Court remanded the case to the Board to define the phrase “reasonable period of time.” The Board responded by establishing a “reasonable time standard”, stating:

... we believe that when an employer has unlawfully failed or refused to recognize or bargain with an incumbent union, there should be an insulated period of a defined length during which the union's majority status cannot be questioned. We have decided that the defined period should be at least 6 months. *Id.* at 402.

The Board went on to note that the 6-month insulated period was only “a minimum period, and may be extended up to an additional 6 months, depending on an analysis of other case-specific factors.” *Id.* It is only then that the Board introduces the five-factor test which Counsel misapplies in the instant case. In other words, the five-factor test relied upon by Counsel is not used to determine if a “reasonable period of time” should be observed. Rather, the test is only used to determine whether the timeframe should be expanded once it had been concluded that it is applicable at all. Accordingly, Counsel's application to the analysis of this case is inapposite.

**2.     *The General Counsel Advocacy for an Unconditional Application of the Settlement Bar is at Odds with Current Law and the Purpose of the Act***

Ignoring both the facts and the law presented in the “settlement bar doctrine” cases (cited by General Counsel), he portrays this matter as a “quick work” case. (Tr. 26.) This portrayal is not only false but disguises an argument that would dramatically expand the doctrine. General Counsel is attempting to make the “settlement bar doctrine” a blanket requirement in all cases where any settlement agreement exists regardless of whether the factors underlying the *Poole* doctrine are present. The D.C. Circuit Court has already ruled against such an expansion of this doctrine in *BPH & Co., Inc. v. N.L.R.B.*, 333 F.3d 213 (2003).

In *BPH*, approximately six weeks after an employer recognized the union, the employees filed a petition to decertify the union as their bargaining representative. The union then filed charges against the employer, alleging that it had unlawfully coerced the employees to sign the decertification petition and engaged in dilatory, bad-faith bargaining. Three months later, the union withdrew its bad-faith bargaining charges and entered an informal settlement agreement with the employer, wherein the employer admitted no wrongdoing. (*For a comprehensive facts statement, see Wyndham Palmas del Mar Resort*, 334 N.L.R.B. 514 (2001).) The parties recommenced bargaining for three months. Then, the employees filed a second decertification petition. Given that the petition contained a majority of the employees’ signatures, the employer formally withdrew recognition. This spurred the union to refile charges and the NLRB Regional Director issued a complaint, charging that the employer had violated section 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition of the union.

Without finding that any unfair labor practice occurred or in any way tainted the decertification petition, the Board held that the employer had violated the settlement agreement

by withdrawing recognition and therefore violated the Act. The Court disagreed and described the flawed reasoning in *BPH* as follows:

Although the Board does not dispute that in adjudicated cases it may not find that an employer unlawfully withdrew recognition based on a decertification petition without also finding—based on substantial evidence—that the employer’s ULP(s) caused disaffection with the union,... **it nonetheless asserts that it may find that the employer violated section 8(a)(1) and (5) because “regardless whether [the Company] admitted or denied engaging in unlawful conduct, [it] agreed to a remedy.”** *Id.* at 220 (emphasis added).

The D.C. Circuit Court vacated the Board’s order stating that such reasoning:

... contravenes the [National Labor Relations] Act because it allows the Board to routinely find a violation of the Act in the absence of substantial evidence. The only evidence on which the Board based its finding that the Company’s ULPs caused the loss of support for the Union is the Agreement—an Agreement that specifically provides that the Company admitted no wrongdoing. This falls far short of satisfying the substantial evidence standard [necessary for the Court to uphold a Board rule]. *Id.* at 222.

Counsel for the General Counsel applies the same flawed reasoning in an attempt to prevent SRI from withdrawing recognition from a Union that has clearly lost majority support. There is no finding based on substantial evidence that the merit pay implementation was an unfair labor practice. As detailed elsewhere herein, no unfair labor practice occurred. In fact, the only evidence on which General Counsel can base its argument that the merit pay increase caused the loss of support for the Union is the agreement – the agreement that settled a frivolous charge without admission. This falls far short of satisfying the substantial evidence standard and “contravenes the Act.” *Id.* Under these circumstances, when a settlement agreement states that the employer will bargain in good faith, the proper rule is an employer need only bargain with the union “...until such time as it has a reasonably based good faith doubt of the union’s majority status.” *N.L.R.B. v. Key Motors Corp.*, 579 F.2d at 1391.

**B.     *Employer Had Good Faith Uncertainty of Union’s Majority Status for both Polls***

SRI (and Gregory Jackson in particular) decided to conduct a poll on December 8, 2016 based on its long time good faith doubt of the Union’s majority status. The poll was lawful, and conducted in a manner which faithfully applied all required safeguards.

**1.     *December 2016 Poll***

It has long been established that an employer may lawfully poll employees concerning their union support if the employer has a good faith reasonable doubt of the union’s majority status based on objective considerations. Certainty or absolute proof of lack of majority status is not required. *See Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359 (1998). In *Allentown Mack*, the Supreme Court credited the following facts with creating this good faith reasonable uncertainty:

- “...6 of Allentown’s 32 employees had made ‘statements which could be used as objective considerations supporting a good-faith reasonable doubt as to continued majority status by the Union’.” *Id.* at 368.
- “... a seventh employee (to the effect that he ‘did not feel comfortable with the Union and thought it was a waste of \$35 a month,’ *ibid.*) supported good-faith reasonable doubt of his support for the union-as in our view it unquestionably does.” *Id.*
- “... the statement of an eighth employee...who said that ‘he was not being represented for the \$35 he was paying’.” *Id.*
- “the statements of two employees regarding not merely their own support of the union, but support among the work force in general.” *Id.*

In assessing these statements, the Court pointed out that:

“It must be borne in mind that the issue here is not whether [a] statement clearly establishes a majority in opposition to the union, but whether it contributes to a reasonable uncertainty whether a majority in favor of the union existed. We think it surely does.” *Allentown Mack*, 522 U.S. at 371.

SRI officials had and maintained a similar reasonable uncertainty when it polled unit employees concerning their union sympathies on December 8, 2016. This uncertainty was based



on the facts detailed above. To review:

- Third Shift Press Maintenance Machinist Brett Eckert testified that a majority of unit members “didn’t want the Union to be there”. (Tr. 659.) He testified that once the Teamsters took over the Union (approximately 10 years prior) he no longer wished to be represented by them and his disaffection remained to the present. (Tr. 640, 642.)
- Mr. Eckert testified that he had spoken with approximately 90% of all the 31 employees who were brought in to the York facility from WorkflowOne (Tr. 644) and every one of them expressed opposition to the Union. (Tr. 645.) Mr. Eckert went on to name 14 specific unit employees who had expressed this opposition to him.
- In the following exchange with Administrative Law Judge Amchan, Mr. Eckert confirmed the approximate number of employees disaffected with the Union in late 2015:

“JUDGE AMCHAN: Well, the question is, how many people expressed to you a desire to get rid of the Union?

THE WITNESS: All of the ones that I had interaction with.

JUDGE AMCHAN: And that would be how many?

THE WITNESS: I'm going to say at least 50, 50 to 60 employees.” (Tr. 660.)

- Mr. Eckert testified that he shared this information with Operations Manager, Troy Warner, (Tr. 661) who, in turn, reported Eckert’s comments to the Employer’s primary decision maker, Greg Jackson. (Tr. 323-4, 328; see also testimony of Nicholas J. Fiorenza, Esq., Tr. 455.)
- James L. Bupp, who was made the third-shift Production Supervisor in December 2015 (Tr. 604-5) and had been a unit member (third-shift Press Operator) from the time when SRC had acquired his former employer, WorkflowOne, in September 2014 testified that between July and December of 2015, while he was still a Press Operator, he had conversations with 15

other former WorkflowOne employees who expressed their wishes not to join the Union when that Company was acquired by SRC. (Tr. 619.)

- Troy Warner, the former Plant Manager, also testified that when SRC acquired WorkflowOne in 2014, he was responsible for meeting “one-on-one” with all 31 former WorkflowOne employees who were integrated into the York facility. (Tr. 694.) Mr. Warner testified without contradiction that each of the 31 employees at the time of the acquisition: “...stated dissatisfaction with that because they didn't see a need for it or a desire. They didn't have a desire to be a part of it.” (Tr. 696.) To leave no doubt as to the number of employees that had expressed their disaffection with the Union to Mr. Warner, Mr. Warner was shown a list of production employees from December 31, 2015 (Respondent’s Exhibit R-7) to refresh his memory. He went on to name 29 more employees who had expressed their disaffection with the Union. All told, Mr. Warner specifically identified 50 employees who were still employed on December 8, 2016, who had made such statements.
- In late 2015 or early 2016, Union President, Ted Billet told Troy Warner, that “it's very frustrating to put all this time and energy into this and only ... a handful of employees are paying union dues.” (Tr. 744.) As the Circuit Court for the District of Columbia noted in 2003:

“ ‘[t]he natural inference is that the decline reflected a loss of union support,’ and that ‘[i]n some circumstances, and this is certainly one of them, membership and dues checkoff data ‘can unquestionably be probative to some degree’ of [the employer’s] doubt’.” *McDonald Partners, Inc. v. NLRB*, 331 F.3d 1002, 1007 (D.C.Cir. 2003) (*quoting Allentown Mack*, 522 U.S. at 380).
- Employees reported their understanding that voting against the draft tentative agreement on December 4, 2016 was a vote against the Union (Tr. 402), based on John Potts’ characterization of same. (Tr. 668, 683.) When the contract was ultimately voted down, this

information was relayed back to Greg Jackson by the York facility managers. (Tr. 334-5.) In addition, the managers:

“voiced to me their personal frustration that employees were complaining about us negotiating with the Union because they didn't think the Union represented them. Or they thought that when they -- when we took over and didn't assume the contract that the Union was gone. And that, you know, ultimately those continuing messages that happened every time we had negotiations, there was this kind of continuous murmuring, complaining that, I'll leave, I'll quit if I have to join the Union, things like that that were going to be disruptive to our operations. That was obviously a concern to me that I was going to have an even further ineffective operation.” (Tr. 328.)

....

So based on the report -- based on my personal observations when I was there, based on the reports I'd heard over the last whatever it had been then, 18 months, and based on the report that the votes against the contract had been, in fact, votes against the Union or that the employees had understood that they were voting against the Union, I said, I have to know the facts. I've got all this anecdotal continuing noise and I want to know what the real truth is. (Tr. 336-7.)

Applying *Allentown Mack* to the instant situation, Greg Jackson, the Employer's decision maker had a good faith reasonable uncertainty as to the Union's majority status based on these objective considerations as of the date that the unit members voted down the tentative agreement, i.e., December 4, 2016. The poll based on that uncertainty was held four days later.

General Counsel argued throughout the hearing that testimony regarding employee disaffection that was learned by Respondent before SRI took over the York facility through August 2016 (when they argue the one-year successor bar ended), must be deemed irrelevant. Specifically, the attorneys stated their argument as follows:

Under the Board's decision in *MSK Corp.* [341 NLRB 43 (2004)], where a successor employer refuses to recognize the employees' bargaining representative, they must demonstrate it had good faith reasonable doubt before the bargaining obligation occurred. But here, the Respondent recognized the Union. So once it did so, any evidence of disaffection that it had up to the point of recognizing it can't be used to establish a good faith uncertainty of the majority status. So, therefore, there's no relevance to this testimony because it can't be relied on. (Tr.

608-9.)

....

To the extent that this [evidence] is being offered as a reason for questioning majority status, once the Respondent recognized the Union, the Board's successor doctrine barred Respondent questioning the majority status of employees for a minimum of 6 months to a maximum of 1 year from the date of the first bargaining meeting, so from August 2015 to February 2016. So conversations that Mr. Bupp had with regards to union support during that time are irrelevant, and Respondent was prohibited from considering those conversations in its later decision to conduct a poll to withdraw majority support. (Tr. 616-7.)

This is a complete misreading and misapplication of the case. The *MSK* case involved a successor employer that refused to recognize an incumbent union once it had hired a substantial and representative complement of employees, i.e., when its bargaining obligation attached. The employer in that case attempted to justify its refusal by introducing evidence of employee disaffection that it received after the bargaining obligation arose. In the only paragraph in *MSK* that is even remotely related to General Counsel's argument of irrelevance in this context, Administrative Law Judge Edelman stated that:

Under the Board's holding in *St. Elizabeth Manor* [329 NLRB 341 (1999)], any evidence of disaffection with the Union from [when the bargaining obligation arose], on is not relevant. The bargaining obligation had attached, and the Union's majority status could not be challenged. Statements of disaffection made January 21, 2001 [when bargaining obligation had attached], and thereafter, including the decertification petition circulation on March 23, 2001, are irrelevant. Thus, even if Respondent establishes it had a good-faith doubt of majority status under *Allentown Mack*, the "successor bar" doctrine requires that Respondent recognize and bargain with the Union for a reasonable period of time. *MSK, supra* at 55.

*St. Elizabeth Manor, Inc.* does not stand for the proposition that information gained by an employer during a successor bar is irrelevant for purposes of determining whether an employer has a good faith doubt of a union's majority status once that bar has ended. Rather, that case simply established the existence of a successor bar for a "reasonable period of time" following the acquisition of a unionized facility. (*St. Elizabeth Manor, Inc., supra* at 341.) The Respondent clearly complied with that requirement.

The meaning of the *MSK* case is that when a *Burns* successor refuses to recognize an incumbent union it cannot justify that refusal on evidence provided to the employer after the fact. In other words, the reason why the evidence was irrelevant in *MSK* was because the employer had already violated the Act when the bargaining obligation attached and it was attempting to justify that action by what it learned thereafter.

In the instant case, there is no allegation that SRI refused to recognize the Union and then tried to justify it by evidence it gathered after the fact. The successor bar (be it six months or a year) ended well before SRI took any action to question or challenge the Union's majority status. The bargaining obligation attached in August 2015 and SRI recognized the Union at that time. Even if you accept that the successor bar was one year, it would have ended in August 2016. The first poll was not held until December 2016.

*MSK* does not require, as General Counsel argues, that Respondent's managers (e.g., Greg Jackson, James Bupp, Chris Crump and Troy Warner) clear their minds of all information that was freely given to them by employees disaffected with the Union before or during that one-year timeframe.

Similarly, it should also be noted that General Counsel argued that Respondent could not "question" the Union's majority status during that time, as if the Employer and its managers were not permitted to form that thought in their heads. This is also a misreading of the standard. The appropriate standard is set forth by the Board in *UGL-UNICCO Service Company*, is:

... the union is entitled to a reasonable period of bargaining, during which no question concerning representation that challenges its majority status may be raised **through a petition** for an election filed by employees, by the employer, or by a rival union; nor, during this period, may the employer **unilaterally withdraw recognition** from the union based on a claimed loss of majority support, whether arising before or during the period. *UGL-UNICCO Service Company*, *supra* at 808 (emphasis added).

In other words, it is not that the employer must clear its managers' minds of all questions of majority status during this timeframe. Rather, the union's majority status cannot be questioned through the actions of decertification, RM petitions or withdrawals of recognition during the successor bar. It is also worth noting that the Board in the above quotation states that “**during this period**...[the employer may not] unilaterally withdraw recognition from the union based on a claimed loss of majority support, whether arising before or during the period.” (Id. emphasis added.) The corollary of this statement is that an employer **may** withdraw recognition **after this period** based on evidence of disaffection “arising before or during the period.”

## **2. March 2017 Poll**

As noted above, if an employer has a good faith reasonable uncertainty of a union's majority status based on objective considerations (required by *Allentown Mack, supra*) and the procedural safeguards of *Struksnes* and *Texas Petrochemicals* were satisfied, its poll is lawful. The lawful December 8, 2016 poll resulted in 38 of the 77 employees in the unit voting to discontinue the Union's representation, one shy of the number needed to demonstrate that lack of majority support. However, the following week, two unit members, who were absent on the day of the poll, i.e., Greg Brown and James Wiley, submitted signed statements to Plant Manager Chris Crump indicating that they too no longer wished to be represented by the Union. (Tr. 414.) When added to the votes cast during the poll against continued Union representation, 40 of the 77 employees expressed their desire to remove the Union from the York facility.

Based on this information, the Employer informed the Union on Friday, March 3, 2017, that it would be conducting a second poll on Tuesday, March 7, 2017. The results of this poll clearly demonstrated that 47 of 74 total unit employees (or 63.5%) voted to discontinue the Union's representation. (Joint Exhibit 48.) As with the December 2016 poll, this poll was

lawfully conducted under *Allentown Mack*, *supra*. And, as the next section explains, the procedural safeguards of *Struksnes* and *Texas Petrochemicals* were also satisfied.

**C. *The Employer Strictly Complied with the Procedural Safeguards Set Forth in Struksnes Constr. Co. and Texas Petrochemicals Corp. when it Conducted its Polls***

The Employer complied with the procedural safeguards set forth by the Board in its landmark decisions, *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967) and *Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enfd as modified*, 923 F.2d 398 (C.A.5 1991). Under *Struksnes*, an employer may lawfully poll its employees to determine the extent of their support for the union provided that the following safeguards are observed:

“(1) the purpose of the poll is to determine the truth of a union’s claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.” *Id.* at 1063.

The Board thereafter imposed an additional requirement of providing the union advance notice of the time and place of the poll. *See Texas Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enfd as modified*, 923 F.2d 398 (C.A.5 1991). The Fifth Circuit Court of Appeals in *Texas Petrochemicals* explained why advance notice was added to the *Struksnes* procedural requirements, as follows:

When the NLRB holds an election, be it certification or decertification, there is a period of time in which both the union and the employer are **able to present their side of the issues**; advance notice would provide similar benefits when the NLRB is not involved. *Texas Petrochemicals Corp.*, 923 F.2d at 403 (emphasis added).

As the Supreme Court noted in *Allentown Mack*, “[t]hese substantial safeguards make coercion or restraint of employees highly unlikely.” *Allentown Mack*, 522 U.S. at 383.

**1. *December 2016 Poll***

The Employer complied with each of these procedural safeguards, as described below.

*a. The Employer Clearly Explained the Poll's Purpose, Communicated that Purpose to Union/Employees and Provided Advance Notice to the Union of the Time and Place of the Poll*

The purpose of the poll was stated in an email to the Union three days in advance of the poll on December 5, 2016. Specifically, Respondent's attorney, Nicholas Fiorenza, sent an email to John Potts, the Secretary-Treasurer for the Union stating:

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 594S**. 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 .... See Exhibit 17, p. 4 [emphasis added]. (Joint Exhibit 28.)

On December 6, 2016, Union Representative John Potts emailed the undersigned with a number of questions about the poll. (Id.) He was provided the information requested on the same day. (Id.) The Union immediately began campaigning against the poll by telling employees that the poll was "illegal". (Tr. 410.) Then, on either December 6 or 7, 2016, the Union distributed a memorandum to the production employees which states, in part:

Taylor has informed us that it plans to conduct a "poll" on Thursday, December 8, 2016, to ask workers if they want the Union to continue to represent them at the Standard Register Facility.

....

**On Thursday, December 8<sup>th</sup>  
TAKE A STAND WEAR YOUR TEAMSTERS T-SHIRT  
REFUSE TO VOTE IN TAYLOR'S "POLL"  
IF YOU DO VOTE, VOTE THAT YOU WANT LOCAL 594-S TO  
CONTINUE TO REPRESENT YOU AT STANDARD REGISTER  
(Joint Exhibit 30.)**

These communications provide uncontradicted proof that the Employer clearly explained the purpose of the poll to the Union and that the Union had the time to present its position to the employees. This satisfies both the spirit and the specific letter of the law as prescribed in *Texas*



*Petrochemicals Corp.* See also *Boaz Carpet Yarns*, 280 NLRB 40 (1986) [a single day's notice held to be reasonable]; *Unifirst Corp.*, 346 NLRB 591 (2006) [three days' advance notice deemed reasonable]. Moreover, on December 6, 2016, the Employer distributed a memorandum to unit members stating, in pertinent part:

“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.” (Joint Exhibit 29.)

This communication satisfies the first and second procedural safeguards of *Struksnes*, i.e., evidence of the purpose of the poll and that the purpose was clearly communicated to employees.

***b. Assurances against Reprisal were Given***

At the end of the same memorandum, employees were told that:

“[w]hatever choice you make, there will be absolutely no reprisals because of your participation in this process or otherwise. This is your free choice.” (Joint Exhibit 29.)

Thus, assurances against reprisal required by *Struksnes* were given.

***c. Employees were Polled by Secret Ballot***

In *Texas Petrochemicals Corp.*, *supra*, the Board indicated that:

“While we require, then, that employer polls be predicated on the same evidentiary basis as Board conducted RM elections, we do not go so far as to require that such polls be conducted with the same extensive procedural formalities as those that accompany Board elections. To impose such procedural requirements on in-house employer polls would, in all likelihood, effectively do away with such polls—a result which we do not seek. While we favor reliance on a Board-conducted RM election rather than an employer's own in-house poll, we nevertheless acknowledge an employer's right to conduct such a poll on the basis of a reasonable doubt about an incumbent union's majority status.” *Texas Petrochemicals Corp.*, 296 NLRB at 1064.

In other words, the Employer was under no obligation to observe the “same extensive procedural formalities as those that accompany Board elections.” Nevertheless, SRI did its best

to emulate those formalities in conducting its poll. Specifically, the poll was conducted by secret ballot in the Employer's temporary break room. As can be seen by the photos of the polling site (Joint Exhibit 47), employees who chose to vote were permitted to do so in a private area in the corner of the break room, shielded by dividers with no windows or other means of viewing the voting area. Similar to a Board-conducted election, a ballot with a single question was used, asking employees:

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

**Yes                      No**

**(Please CAREFULLY circle only one answer.)** (Joint Exhibit 29.)

The Employer had two monitors present throughout the poll. As noted above, the Employer gave the Union an opportunity to have a representative observe the poll as well. However, the Union did not choose to do so.

Neither of the Employer's polling monitors were direct supervisors of any of the production employees. Moreover, they were not high-ranking managers of the Employer. *Cf. Grenada Stamping and Assembly, Inc.*, 351 NLRB No. 74 (2007); *Helnick Corp.*, 301 NLRB No. 18 (1991); *Eagle Comtronics, Inc.*, 263 NLRB No. 70 (1982). Rather, they were Greg Siefert, who worked in the Employer's Human Resources department, and Kendra Knaub, a clerical employee.

As Plant Manager Chris Crump testified, the polling location was set up as follows:

1. A table for the Company's polling monitors to sit (and any authorized union observers);
2. A sign-in sheet for employees who choose to participate (to avoid the possibility of anyone voting more than once);
3. A divider or screen in a corner of the room without windows, where the employees can

complete their ballots;

4. A cardboard ballot box completely sealed with packing or duct tape with a slit cut in the top which will permit votes to be slid in but which will not permit anyone to see the ballots inside;
5. The ballot box placed just outside the private area, so that the polling monitors (and any authorized observers) can witness each ballot being placed in the box. (See Tr. 406-7; Tr. 407-13.)

At the end of the polling, the monitors opened the ballot box and retrieved all of the ballots cast. After tallying the votes, the polling monitors then completed and signed the “Tally of Ballots” affidavit. (Joint Exhibit 32.) As can be seen from Joint Exhibit 32, the tally revealed that of the 43 employees who participated in the poll, 38 voted to end union representation. The unit at the time, however, was comprised of 77 employees. Thus, by a margin of one vote, it appeared that the Union maintained majority support.

However, as noted above, two employees who were absent the day of the vote came forward the next week to express their wishes to no longer be represented by the Union. So, very shortly after the poll, a majority of the unit expressed their disaffection with the Union.

But for purposes of the *Struksnes* safeguards, the December 8 poll was conducted by secret ballot, with even greater procedural formalities than those required by law.

*d. The Employer had not Engaged in Unfair Labor Practices or otherwise Created a Coercive Atmosphere*

The Board has held that, “[t]his last criterion [of the *Struksnes* safeguards] is limited to unfair labor practices **that can be shown to have caused the loss of employee support for the union.**” *Unifirst Corp.*, 346 NLRB 591, 607 (2006) (emphasis added). In this case, the Employer committed no unfair labor practices **that could have caused a loss of employee**

**support for the Union.**

General Counsel has argued that the February 2016 merit pay increase constituted an unresolved unfair labor practice that tainted the December 8, 2016 poll under this last safeguard set forth in *Struksnes*. As repeatedly presented at the hearing and discussed above, the employees' disaffection with the Union and the Employer's knowledge of same was ongoing throughout its relationship with the Union. Brett Eckert, James Bupp, Chris Crump and Troy Warner were able to name 50 employees, a large majority of unit members, who by the end of 2015 were already disaffected with the Union and remained so throughout the relevant timeframe of this case.

Thus, there is no basis to conclude that any Employer conduct in February 2016 created or otherwise impacted this disaffection. Throughout this time and until March of 2017, the Employer remained ready, willing and able to come to an agreement with the Union and move forward with its operations in York. In other words, if the disaffection pre-dated the alleged unfair labor practice, such practice could not be the cause of that disaffection.

Moreover, given the Union's and the Employer's actions following the merit pay incident, it is respectfully submitted that the Employer committed no unfair labor practice. It must be remembered that two Union officers (including its Local President) who were also on the Union's bargaining committee, participated in merit pay discussions at the bargaining table, accepted their merit increases, and did so without protest of any kind.

When Mr. Potts, almost a month later, first raised an issue concerning merit pay – the Employer immediately offered to fully rehabilitate any possible issue with respect to same. This included: a) responding in full to Union information requests concerning merit pay; b) offering to negotiate over the merit pay increases given in 2016; c) offering to negotiate over merit pay

criteria for future administration (thus restricting language already tentatively agreed to); d) offering to rescind the merit pay increases; e) offering to communicate with bargaining unit employees, jointly with the Union, to inform them that the increases “should have been undertaken only with prior bargaining and Union involvement”; f) offering to “consider other things” the Union might suggest as well; g) concluding negotiations with respect to future merit pay increase criteria and applicable production goals. (Joint Exhibit 9.) The Union had no interest in taking any steps to address the granting of merit pay which had already taken place.

There is an unbroken line of NLRB case law from 1956 to the present in which the Board has dismissed allegations of unfair labor practices in situations where: 1) the employer has notified and bargained with the union over how to correct an erroneous unilateral change in a term or condition of employment; and 2) certain other mitigating factors are present. With respect to correcting an errant unilateral change, the employer must “first notify[] the Union and bargain[] over how the matter [will] be straightened out.” *In re JPH Management, Inc.*, 337 NLRB No. 7 (2001), citing *Charles S. Wilson Memorial Hospital*, 331 NLRB 1529 (2000); see also *Nacona Boot Co.*, 116 NLRB No. 273 (1956); *Whiting Milk Corp.*, 145 NLRB No. 137 (1964); *Faro Screen Process, Inc. and Local 591*, 362 NLRB No. 84 (2015).

As the Board noted in *Nacona Boot Co.*, 116 NLRB No. 273 (1956):

As a general rule, to be sure, “good faith is not open to an employer as a defense to an unfair labor charge merely because it entertained an erroneous view of the law.” ... Bearing in mind, however, the additional considerations present in this case--that the **Respondent has not been found to have engaged in any other unfair labor practices; that the record as a whole demonstrates the Respondent’s acceptance of the collective-bargaining principle; that the unilateral action complained of stands alone and does not appear to have been engaged in with any purpose of discredit the Union or undermine its authority or prestige; that the Union itself never took exception to the action nor requested bargaining concerning it; that the Respondent of its own volition, and immediately upon learning from the filing of an individual charge that its action was being questioned, cured its error by rescinding its**

**unilateral action, thereby rendering unnecessary an affirmative order requiring it to do so; and that the record provides no substantial basis for inferring any disposition on the Respondent's part to engage in like conduct in the future, even though not ordered to cease and desist therefrom, but does reflect a willingness on its part to continue harmonious bargaining relations with the Union--**I do not believe that the isolated incident here involved is enough to justify a finding of refusal to bargain upon which a remedial order should be supported. ... Consequently, I shall recommend that the allegation in question be dismissed. [Citations omitted. Emphasis added.]

The instant matter, without reasonable question, calls for application of the *Nacona* standard. The record as a whole demonstrates that this Employer fully embraced the collective-bargaining principle. The erroneous granting of merit increases on February 29, 2016 stands alone, as what it was: a singular mistake without any improper motive. There is no indication that it was done with the purpose of discrediting the Union or undermining its authority or prestige. There is no indication that it had any impact whatsoever on employee disaffection with the Union. (See Brett Eckert's testimony, Tr. 663 -5.) The fact that the Employer was willing to communicate to employees (via a joint communication with the Union) that it had made a mistake, clearly indicates a respect for the collective bargaining process. As noted above, the Union did not initially take exception to the action or request bargaining concerning it. Once it learned of the mistake, the Employer of its own volition offered to cure its error by rescinding its unilateral action.

Applying *Nacona*, the Employer followed the law with respect to correcting its erroneous action. Accordingly, there was no unfair labor practice to possibly taint the December 8, 2016 poll.

In the alternative, Mr. Potts' words and actions served as a waiver of the Union's statutory bargaining rights with respect to the mistaken merit wage increase. To be effective, a waiver of statutory bargaining rights must be "clear and unmistakable." *Metropolitan Edison Co.*

*v. NLRB*, 460 U.S. 693, 708 (1983). “Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two.”

*Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). “[W]here the parties had not yet concluded their first collective-bargaining agreement, [the Board] must decide the waiver issue based solely on evidence of the parties’ conduct.” *American Diamond Tool, Inc. and United Steel Workers*, 306 NLRB No. 108, \*\*2 (1992).

Here, the conduct and statements of the Union through Mr. Potts were clear and unmistakable during negotiations of the parties’ first collective bargaining agreement. During bargaining, the Union fully acknowledged to Respondent (Tr. 485-6.) and its own membership that the merit pay issue had been successfully resolved. (Joint Exhibit 13). So the Union, in addition to failing to contest the initial administration of merit pay, failed to avail itself of the opportunity to rescind, renegotiate or clarify the matter with the bargaining unit.

Thus, the Union’s words and actions constituted a clear and unmistakable waiver of its statutory bargaining rights with respect to the mistaken administration of a merit wage increase that took place on or about February 29, 2016. Accordingly, there can be no unfair labor practice with respect to that action as a unilateral change in a term or condition of employment.

***e. No Causal Connection Between Alleged ULP and Disaffection***

The General Counsel bears the burden of proving a causal connection between unfair labor practices and the loss of majority support. *Master Slack*, 271 NLRB 78, 84 (1984). *See also Enterprise Leasing Company of Florida, LLC*, 2012 WL 1229601 (N.L.R.B. Div. of Judges). Even accepting that the Employer’s granting of merit pay on February 29, 2016 is an “unremedied” unfair labor practice, there is still no causal connection between that incident and

the lack of Union support.

The attorneys for the General Counsel introduced no evidence proving this causal connection. Mr. Potts' testimony was insufficient in this regard. His testimony was limited to his opinion that the action was "devastating to the union." (Tr. 82.) But the Union itself took no action when it occurred. Mr. Potts waited nearly a month to address it with the Respondent. (Tr. 176-7.) When he was asked about the so-called "devastating" impact, he responded:

I didn't say it was a devastating effect on the bargaining unit employees....What I said it was devastating to the Union at the bargaining table and it doesn't put the Union in a good light with the bargaining unit. (Tr. 176.)

But with respect to the actual impact on employees, General Counsel offered no evidence. Even Mr. Potts' testimony about merit pay putting the Union in something other than a "good light" is merely a statement of his opinion, without any factual support in the record.

The only evidence in the record about the actual impact of merit pay on the employees' view of the Union was given by Respondent's witness, and unit member, Brett Eckert. Mr. Eckert's testimony was that the incident was a non-factor for him and his fellow unit members.

Q. Did it have any impact on your feelings towards the Union?

A. No.

Q. Earlier, you testified that the Union lost your support once the Teamsters came on board?

A. Correct.

....

Q. BY MR. LAWLOR: Are you aware of any coworkers whose attitude towards the Union changed after the receipt of merit pay?

JUDGE AMCHAN: ... did any coworkers tell you that their attitude towards the Union changed after you got the merit increase?

THE WITNESS: No." (Tr. 663 -5.)

Not only is this there no causal connection due to the General Counsel's failure to meet its evidentiary burden in this regard, there is also no causal connection as a matter of law. The Board has held that in order to determine whether such a causal connection exists, the Board



must consider the so-called “*Master Slack*” factors, i.e.: (1) the length of time between the unfair labor practices and the employees’ disaffection with the union; (2) the nature of the violations, including the possibility of a lasting and detrimental effect on employees; (3) the tendency of the violations to cause employee disaffection with the union; and (4) the effect of the unlawful conduct on employees’ morale, organizational activities, and union membership. *Unifirst Corp.*, *supra*; *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 fn. 16 (1996); *RTP Co.*, 334 NLRB 466, 469 (2001). *See also Master Slack Corp.*, 271 NLRB 78 (1984).

Analyzing these factors, it is clear that there is no causal relationship between any alleged improper Employer conduct involving polling, the merit pay issue or otherwise and the employees disaffection with the Union.

### *1. Proximity in Time*

The length of time between the unfair labor practices and the employees’ disaffection with the Union is the first of the four *Master Slack* factors, 271 NLRB at 84, and “it is obviously an important consideration.” *Tenneco Automotive, Inc. v. N.L.R.B.*, 716 F.3d 640, 649 (D.C. Cir. 2013). As the District of Columbia Circuit Court noted:

“This temporal factor typically is counted as weighty only when it involves a matter of days or weeks. *See, e.g., Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007) (eight to fifteen days was “close temporal proximity”); *Miller Waste Mills, Inc.*, 334 NLRB 466, 468 (2001) (“close temporal proximity” when unfair labor practices occurred two to six weeks before petition for withdrawal). **However, a lapse of months fails to support, and typically weighs against, a finding of close temporal proximity.** *See, e.g., Garden Ridge Mgmt., Inc.*, 347 NLRB 131, 134 (2006) (five-month delay weighed against finding that unfair labor practices caused employee sentiment against Union); *Lexus of Concord, Inc.*, 343 NLRB at 852 (no temporal proximity when lapse was three months).” *Id.* [emphasis added].

The lapse of time between the merit pay increase and the December 8 poll was more than nine months. At a minimum, this fails to support (and likely weighs against) a finding of close

temporal proximity.

More importantly, the vast majority of employee statements regarding their disaffection with the Union began well prior to the February 29, 2016 incident. In other words, there is no way that something that occurred on February 29, 2016 could have had a causal effect on something that occurred prior to that date. This fact alone should render any further consideration of the *Master Slack* factors moot.

## **2. Nature of Alleged Violation**

The Board has held that the types of violations that have detrimental and lasting effects are those involving coercive conduct such as discharge, withholding benefits, and threats to shutdown the company operation. *See, Goya Foods of Fla.*, 347 NLRB 1118, 1121–22 (2006) (discharging three union adherents and suspending another were “hallmark violations”); *JLL Rest., Inc.*, 347 NLRB 192, 193 (2006) (threatening employees with closure and job loss); *Beverly Health and Rehab. Serv., Inc.*, 346 NLRB 1319, 1328–29 (2006) (discharging active union supporter and unilaterally changing hours and vacation). Generally speaking, for a unilateral wage increase to have detrimental or long-lasting effect on employee support for a union, the incident must “show[] employees that their union is irrelevant in preserving or increasing their wages....” *In re Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001), *citing Alachua Nursing Center*, 318 NLRB 1020, 1030-1031 (1995). *See also M & M Auto. Grp., Inc.*, 342 NLRB 1244, 1247 (2004).

The February 29, 2016 incident did not show York employees that the Union was irrelevant. Employer negotiated the structure of merit pay increases with the Union. The parties had reached tentative agreement on the topic. While the administration of the increases was premature, Employer negotiated with the Union over how to address that mistake, as dictated by

well-settled Board law. Among other things, Employer offered to: rescind the merit pay increases; communicate with bargaining unit employees, jointly with the Union, to inform them that the increases “should have been undertaken only with prior bargaining and Union involvement”; and “consider other things” the Union might suggest as well. The Union suggested nothing.

In short, Employer’s action did nothing to make it appear that the Union was irrelevant in this process other than making a single mistake in the timing of distributing merit pay increases that the Union negotiated. Thus, the incident is not the type that would tend to have a detrimental or lasting effect on employees or cause disaffection with the Union.

### **3. *Effect of Alleged Violation on Employees’ Morale***

As noted above, the Employer maintains that it engaged in no unlawful conduct. Moreover, there is no evidence that the merit pay increase had any negative effect on employee morale or membership in the Union. Based on information provided by Union President, Ted Billet, in early 2016, there were only a “handful of employees” still paying dues to the Union. (Tr. 744.)

Accordingly, this factor does not support a causal connection between the incident and the employees’ disaffection with the Union. Thus, the analysis of *Master Slack* factors demonstrates that there is no causal connection between the incident that occurred on February 29, 2016 and the employees’ disaffection with the Union expressed in December 2016.

### **2. *March 2017 Poll***

The Employer also complied with the procedural safeguards required by *Struksnes* and *Texas Petrochemicals* in its March 2017 poll as was done in association with the December 2016 poll. (Tr. 417-8.) Specifically, on March 3, 2017, Respondent’s attorney Nicholas Fiorenza

notified John Potts by email that:

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. (Joint Exhibit 44.)

The details attached to the email provided the purpose, date, time and place of the poll. As they did with the December poll, the Union distributed a memorandum to the production employees, encouraging them to “BOYCOTT THE VOTE”. (Joint Exhibit 45.) Thus, the notice requirement of *Texas Petrochemicals* was clearly satisfied.

The Employer also provided a memorandum to employees on March 3, 2017, which clearly explained the purpose of the poll, as well as its time and place. (Joint Exhibit 43.) Thus, both the first and second procedural safeguards of *Struksnes* were satisfied, i.e., evidence of the purpose of the poll and that the purpose was communicated to employees.

At the end of the employee memorandum, the Employer reiterated that:

“the poll is your chance to voluntarily express your free choice on the issue of union representation. There can absolutely be no retaliation from either the company or the union based on how you vote.” (Joint Exhibit 43.)

Thus, the third *Struksnes* requirement of assurances against reprisal was also satisfied.

The poll was conducted by secret ballot, using the same procedures described above for the December 8 poll. (Tr. 417-8.) The only difference involved the Employer’s lead monitor. Since the December 8 poll, employee Greg Siefert left the Employer. In his place, the Employer had Mike McGinnis, a non-management, non-unit-member employee, serve in that lead monitor role. (Joint Exhibit 48.) In sum, like the December 8 poll, the March 7, 2017 poll was conducted by secret ballot with even greater procedural formalities than those required by law, thereby satisfying the fourth *Struksnes* requirement.

With respect to the final element of the *Struksnes* procedural safeguards, there were no unresolved unfair labor practices. As noted above, the December 8, 2016 poll was lawful as conducted, the employees' disaffection with the Union pre-dated the merit pay increase and even the compliance period associated with the Union's charge related to the February merit pay increase (Case 05-CA-182978) had been completed and officially closed by the Region.

In addition, there were no high-ranking managers at or near the polling location to create any atmosphere of coercion. As noted by the U.S. Supreme Court in *Allentown Mack*, the "substantial safeguards [like those observed by Employer in conducting its poll] make coercion or restraint of employees highly unlikely." *Allentown Mack*, *supra*, at 383.

Given that the Employer had a good faith reasonable uncertainty of the Union's majority status based on objective considerations (required by *Allentown Mack*, *supra*) and the procedural safeguards of *Struksnes* and *Texas Petrochemicals* were satisfied in conducting the March 7, 2017 poll, it is respectfully submitted that the poll was lawful.

Upon obtaining the polling results, the undersigned notified the Union that based on the fact that 47 of 74 total unit employees (63.5%) voted to discontinue the Union's representation, the Employer would be withdrawing recognition, effective immediately. (Joint Exhibit 49.)

#### **IV. Conclusion**

The General Counsel's argument must be dismissed because: 1) the settlement bar or *Poole* doctrine is inapplicable in this case, *see N.L.R.B. v. Key Motors Corp.*, 579 F.2d 1388 (1978) ; *BPH & Co., Inc. v. N.L.R.B.*, 333 F.3d 213 (2003); 2) SRI's decision maker Greg Jackson had a "good faith uncertainty" to conduct polls on December 8, 2016 and on March 7, 2017 based on *Allentown Mack Sales & Service*, 522 U.S. 359 (1998); and 3) SRI adhered to the procedural safeguards set forth in *Struksnes Constr. Co.*, 165 NLRB 1062 (1967) and *Texas*

*Petrochemicals Corp.*, 296 N.L.R.B. 1057 (1989), *enf'd as modified*, 923 F.2d 398 (C.A.5 1991) in conducting said polls. The results of the March 7, 2017 poll gave employer the necessary objective evidence to withdraw recognition from the Union (*Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB 717 (2001)) and any subsequent changes to the employees' terms and conditions of employment were lawful. *See Unifirst Corp. and Laundry Workers*, 346 NLRB 591 (2006). In light of the foregoing, sacrificing the employees' Section 7 right to choose their representation status is wholly unwarranted and in no way effectuates the purposes of the Act.

For all the foregoing reasons, Respondent requests that the Amended Complaint be dismissed in its entirety.

Dated: February 14, 2017  
East Syracuse, NY

Ferrara Fiorenza PC

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of February, 2018, a copy of the foregoing was electronically filed and served via electronic mail upon the following:

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