

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WESTROCK SERVICES, INC.

and

Case 10-CA-195617

GRAPHIC COMMUNICATIONS CONFERENCE OF
THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 197-M

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Robert Ringler, Administrative Law Judge

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I. INTRODUCTION

The preponderance of the record evidence proves that WestRock Services, Inc. (herein “Respondent”), violated Section 8(a)(1) of the National Labor Relations Act by disparately enforcing its non-solicitation rule against employees engaged in business on behalf of the Graphic Communications Conference of the International Brotherhood of Teamsters Local 197-M (herein “Union”); by promising improved benefits and wages if the Union were decertified; and by interrogating employees regarding their Union sympathies. Respondent further violated Section 8(a)(1) of the act by unlawfully assisting in the initiation and filing of an employee petition to decertify the Union.

This brief will begin by setting forth relevant background facts. It will proceed to a discussion of threshold issues and applicable case law. The brief will then be divided into sections devoted to individual complaint allegations.

Counsel for the General Counsel argues that the Administrative Law Judge should credit the record evidence showing that Respondent violated Section 8(a)(1) of the Act, find the violations alleged in the complaint, and order Respondent to remedy its unlawful conduct.

II. BACKGROUND FACTS

A. Respondent’s Business Operations

Respondent operates a printing company in Chattanooga, Tennessee. (Tr. 28; 499).¹ Respondent maintains a workforce of approximately 110 hourly production employees in addition to its salary exempt supervisors and managers at its facility located at 2453 Amnicola Highway (herein “Chattanooga facility”). (Tr. 599). The employees work three different shifts:

¹ All citation to the transcripts will be referred to as “Tr.” followed by the page number. Exhibits will be referred to in the following manner, followed by the exhibit number: General Counsel exhibits as “GC Exh.”; Respondent exhibits as “R Exh.”; and Administrative Law Judge exhibits as “ALJ Exh.”

first shift from 7:00 a.m. until 3:00 p.m.; second shift from 3:00 p.m. until 11:00 p.m.; and third shift from 11:00 p.m. until 7:00 a.m. (Tr. 29; 36; 49). The work is divided between the Litho department and the Finishing department, which are housed in two buildings separated by a parking lot. (Tr. 27).

A description of Respondent's management hierarchy will be limited to those supervisors and or agents relevant to this case. Randy Reed is the Regional General Manager at the Respondent's facility. (Tr. 598). Reed has held this position for approximately 14 years. (Tr. 598). Scott Pulice is Respondent's Human Resources Director. (GC Exh. 6). Shelia Smith is a first-shift supervisor. (Tr. 498). Smith has held this position for approximately 27 years. (Tr. 502). Respondent stipulated on the record that the above individuals, as well as Tamika Cheeks, David Gravitt, Walter "Charlie" White, and Adam Cartwright, are supervisors as defined by Section 2(11) of the Act. (Tr. 11).

B. Decertification Petition

The Union and Respondent have had a collective bargaining relationship for many years. (Tr. 429; 498).² The last collective-bargaining agreement expired in about October 2016, and the parties are negotiating a new contract. (Tr. 31).

Beginning about February 2017,³ Respondent's employee Joe Pike began soliciting support for a petition to decertify the Union. (Tr. 541). At all relevant times, Pike worked as a pressman assigned to the Komori press on second shift in the Litho department. (Tr. 526-527). At the beginning of the 2017 calendar year, employee Josh Tucker was Pike's assistant.⁴ Pike

² Shelia Smith testified that she had worked for Respondent for approximately 31 years. (Tr. 501). Smith testified that the Union had been representing employees for the entire time she has been employed by Respondent. (Tr. 505).

³ All dates herein refer to the calendar year 2017 unless otherwise indicated.

⁴ Tucker quit in approximately April 2017 (Tr. 578).

testified that he was bothered by “slackers” who caused him “more work and caused problems in the company” being protected by the Union, so he began a campaign to decertify the Union. (Tr. 531-532). Pike stated that his assistant, Tucker, assisted him with his campaign and did internet research to find out how to get rid of the Union. (Tr. 532). Tucker printed decertification cards and some material related to decertifying unions from the internet. (R Exh. 60 and 61). Pike testified that he did not know how Tucker knew to list Respondent as “WestRock Services, Inc. d/b/a/ WestRock Visual” and that he did not know what “d/b/a” means. (Tr. 539).

Pike testified that Tucker found Tuscaloosa, Alabama, lawyer Tom Scroggins to represent Pike. (Tr. 568). Pike claimed that Tucker came up with Scroggins’ name because Scroggins had been involved with the Volkswagen plant in Chattanooga. (Tr. 568). Pike did not meet with Scroggins regarding his representation and did not sign a representation agreement or a fee agreement from Scroggins. (Tr. 569). Pike stated that it is “very possible” that he will receive a bill from Scroggins at some point. (Tr. 570). Pike did not know Scroggins’ billing rate and never discussed the rate with Scroggins. (Tr. 571).

Employees, supervisors and managers throughout the facility widely held knowledge of Pike’s decertification efforts. (Tr. 35; 166; 235; 508; 529-530; 601). Pike solicited support for the decertification petition whenever people walked past his press. (Tr. 543). He asked General Manager Reed if he would bring someone who had been through the decertification process to the facility to speak with employees about the process. (Tr. 555). Pike testified that he made the request before he filed his decertification petition with the National Labor Relations Board. (Tr. 559).

On about March 24, Pike filed a petition to decertify the Union with the National Labor Relations Board. Shortly before Pike filed the petition and on several occasions after he filed the

petition, Respondent held meetings to discuss the decertification efforts and Respondent's position on continued Union representation of the employees.

The unfair labor practices in this case took place in the context of Pike's solicitation for the decertification petition and Respondent's response to the solicitation activity and filing of the petition.

III. THRESHOLD LEGAL ISSUES AND APPLICABLE LAW

A. Credibility

To the extent that credibility determinations are necessary in this case, those determinations should weigh in favor of the non-supervisory employee witnesses called during the General Counsel's case in chief. Witnesses William Bearden, Steve Brown, Jamie Ford, Ken Frost, Leah Johnson, and Taylor Walker were employees of Respondent at the time of their testimony. The Board has consistently held that testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). The Board has also held that the testimony of current employees is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). The credibility of Counsel for the General Counsel's witnesses should be enhanced in the case at hand because the witnesses all gave testimony while Respondent's General Manager Randy Reed sat in the hearing room as a representative of Respondent. (Tr. 636). Many of the witnesses

testified directly about actions that Reed had taken or things that Reed had said, thus creating an enhanced risk of reprisal.

The majority of the witnesses Respondent called to testify were supervisors or agents of Respondent. When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This is particularly true where the witness is Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Furthermore, much of the testimony of these witnesses was elicited with leading questions during direct examination. Thus, the testimony of Respondent's witnesses should be afforded less weight than the testimony of Counsel for the General Counsel's witnesses and discredited where appropriate. *T.M.I.*, 306 NLRB 499 (1992); *H.C. Thomson*, 230 NLRB 808 (1977). In addition, to the extent that Respondent's witnesses failed to deny or contradict the testimony of Counsel for the General Counsel's witnesses, the testimony of Counsel for the General Counsel's witnesses should be credited as uncontradicted. See *Mark Lines, Inc.*, 255 NLRB 1435 (1981) (finding a violation of Section 8(a)(1) where General Counsel's evidence offered through witness of 'less than impressive credibility' was not rebutted and therefore confirmed by uncontradicted proof).

Finally, although not addressed in FRE 611, a judge may draw an adverse inference when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. *International Automated Machines*, 285 NLRB 1122, 1123 (1987) (adverse inference was warranted for respondent's failure to call its production manager to testify about significant disputed matters), *enfd. mem.* 861 F.2d 720 (6th Cir. 1988); *Parksite Group*, 354 NLRB 801, 805 (2009) (failure of respondent to call its manager who evaluated the alleged discriminatees

for rehire was subject to an adverse inference; the General Counsel was not required to subpoena the manager); and *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999), enfd. mem. 205 F.3d 1324 (2d Cir. 1999).

B. Agency Status of David Brooks and Earl Johnson

Counsel for the General Counsel alleges that David Brooks and Earl Johnson were agents of Respondent within the meaning of Section 2(13) of the Act. Counsel for the General Counsel further alleges that Brooks and Johnson unlawfully promised employees improved wages and other benefits if the employees decertified the Union. Respondent denies these allegations. The specific facts and arguments regarding the statements that Brooks and Johnson made will be discussed later in this brief.

When considering the allegations regarding Brooks and Johnson, the Administrative Law Judge must determine whether or not they were agents of Respondent within the meaning of Section 2(13) of the Act. Employers are responsible for the actions of their agents according to common law agency principles. *D&F Industries*, 339 NLRB 618, 619 (2003). “If the employee acted with the apparent authority of the employer with respect to the alleged unlawful conduct, the employer is responsible for the conduct.” *Id.* Apparent authority is found when an employer manifests a reasonable basis for a third party to believe that the employer has authorized the alleged agent to perform the acts in question. *Id.*, citing *Cooper Industries*, 328 NLRB 145 (1999). The test for determining whether an employee is an agent is “whether, under all the circumstances, the employees would reasonably believe that the alleged agent ‘was reflecting company policy and speaking and acting for management.’” *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). The Board will consider the position of the employees in addition to the context in which the behavior occurred when evaluating whether the alleged agent had the apparent

authority to perform the act in questions. *Id.* Phrased differently, the inquiry is whether the employer has placed the employee in the position of a conduit where employees reasonably believe that he or she speaks for management. *Three Sisters Sportswear Co.*, 312 NLRB 853, 865 (1993). Counsel for the General Counsel will argue below that both Brooks and Johnson were agents of Respondent within the meaning of Section 2(13) of the Act based on the apparent authority Respondent vested in both men.

IV. STATEMENT OF FACTS AND ARGUMENT

A. Disparate Enforcement of Respondent’s Non-Solicitation Rule [Complaint ¶ 7]

i. Facts

At all relevant times, Respondent has maintained a work place rule prohibiting employees from soliciting “other employees, customers, contractors, or vendors ... during the working time of any of the employees involved.” (Tr. 31; 601-602; GC Exh. 2). The rule defines working time as “the period when an employee is expected to be performing job duties but excludes approved meal and break times.” (GC Exh. 2). Employees are generally allowed to speak to one another during working times about any topic except Union related business. (Tr. 32; 111; 165; 602-603).

Beginning in February, Respondent allowed petitioner Joe Pike and his assistant Josh Tucker to leave their work area during working hours to solicit support for Pike’s decertification petition. (Tr. 35; 167; 235; 529-530). At all relevant times, Pike and Tucker were second shift employees and worked in the Litho department. (Tr. 36; 527). Pike and Tucker handed out pieces of paper titled “PETITION TO REMOVE UNION AS REPRESENTATIVE” (herein “decertification cards”) to Respondent’s employees. (R Exh. 61). Pike and Tucker used the

decertification cards to collect employee signatures supporting the decertification petition. (Tr. 540).

On about February 17, when they arrived at work prior to 11:00 p.m., several third shift employees, including Leah Johnson, Steve Brown, and Jamie Ford, observed Pike and Tucker in the Finishing department building soliciting support for Pike's decertification petition. (Tr. 36; 167; 235). Ford testified that Pike asked if she were a full-time or temporary employee and then handed Ford a decertification card. (Tr. 235). Leah Johnson informed her supervisor Walter "Charlie" White that Pike and Tucker were in the Finishing department building soliciting employees to sign the decertification cards during their scheduled work time. (Tr. 37). Johnson requested that White email Respondent's general manager, Randy Reed, to inform Reed of the solicitation occurring during working time. (Tr. 37-38). White sent the email per Johnson's request. (GC Exh. 3).

Pike and Tucker also solicited support for the decertification petition by speaking to employees in their work areas during working times. (Tr. 576). Pike testified that he solicited support for his petition during his working times. (Tr. 576). Pike also testified that employees approached him at his work station while he was working to discuss his petition. (Tr. 576). Pike solicited second-shift employee William Bearden by asking Bearden to sign a decertification card while Bearden was performing quality checks on Pike's press. (Tr. 277). Tucker solicited first-shift employee Taylor Walker by asking Walker to sign a decertification card during working time as Walker was finishing his shift. (Tr. 114). No member of management ever told Pike that he was not permitted to hand out decertification cards while on work time or in work areas. (Tr. 590).

When Respondent's supervisors observed employees engaging in discussions related to the Union, the supervisors instructed employees to discuss Union business during breaks or after the end of their shifts. (Tr. 32-34; 111; 165). Leah Johnson testified that supervisor Charlie White told her and her co-workers that they had to wait until break or lunch to engage in any discussions regarding the Union. (Tr. 32-33). White told her not to talk about Union affairs during her shift two or three times and as recently as nine months ago. (Tr. 34). As a result, Johnson refrained from discussing the Union. (Tr. 33). Taylor Walker also testified that White told him that he was not allowed to discuss the Union unless employees were on break. (Tr. 111). These claims regarding White's statements are unrebutted as Respondent failed to call White as a witness.

Steve Brown testified that supervisor Adam Cartwright prohibited him from discussing the Union three times within the last year. (Tr. 165; 192). These claims regarding Cartwright's statements are unrebutted as Respondent failed to call Cartwright as a witness.

ii. Argument

The record evidence demonstrates that Respondent violated Section 8(a)(1) of the Act by selectively and discriminatorily enforcing its non-solicitation rule to prohibit its employees from discussing Union business in work areas and during work time while allowing Pike to solicit support for his decertification petition and allowing employees to discuss other non-work related topics. Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7. It is well established that an employer violates Section 8(a)(1) when it forbids employees to discuss the union while working, but allows employees to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' activities regarding the union

organizational campaign. See *In re Teledyne Advanced Materials*, 332 NLRB 539 (2000)(citations omitted); *Jensen Enter., Inc.*, 339 NLRB 877, 878 (2003)(citing *Willamette Ind.*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986)).

In the instant case, it is undisputed that employees may talk about various non-work related topics while working so long as the conversation does not interfere with their work. However, employees Leah Johnson, Taylor Walker, and Steve Brown all testified that supervisors Cartwright, Smith, and White prohibited employees from discussing Union-related business, telling employees that Union business must wait until break time or the end of their shifts. Respondent failed to call Cartwright or White as witnesses to rebut or deny these claims. Smith failed to rebut or deny these claims despite the fact that the Respondent called her as a witness during the hearing. As such, all claims regarding supervisors prohibiting employees from discussing the Union stand unrebutted and uncontradicted. See *Mark Lines, Inc.*, 255 NLRB 1435 (1981) (finding a violation of Section 8(a)(1) where General Counsel's evidence was not rebutted and therefore confirmed by uncontradicted proof).

The record establishes that Respondent disparately enforced its non-solicitation rule by selectively and discriminatorily prohibiting its employees from discussing Union business while allowing all other topics of conversation and allowing Pike to solicit for the decertification petition. Based on the foregoing, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

B. Sheila Smith's Solicitation of Taylor Walker [Complaint ¶ 8]

i. Facts

At all relevant times, employee Taylor Walker worked as a press assistant on first shift. (Tr. 109-110). As a press assistant, Walker worked in the Litho department and reported to

supervisor David Gravitt. (Tr. 110). Walker set up presses for the pressmen, delivered supplies and equipment, and inventoried the paper every morning. (Tr. 110; 121). Walker was a friend of Tucker and Pike. (Tr. 128; 129; 132). At Tucker's request, Walker signed a decertification card in support of Pike's petition. (Tr. 114).

At all relevant times, supervisor Sheila Smith worked on first shift and supervised the first shift employees in the Finishing department. (Tr. 498). As part of her job duties, Smith walked through the Litho department and was generally familiar with the people in that building (Tr. 519).

Walker testified that on about March 6, Smith approached him while he was working in the Litho department. (Tr. 115; 125). Walker testified that he had signed a decertification card at some point prior to March 6. (Tr. 115). Smith instructed Walker to get decertification cards and take them to first-shift Finishing department employees Ryan Murray and Jeremy Lawrence. (Tr. 115). Walker was casually acquainted with both Murray and Lawrence. (Tr. 133). Smith told Walker that she would "do her best to convince" Murray and Lawrence to sign the decertification cards. (Tr. 116). Walker stated "okay" and then returned to work. He later reported Smith's statements to the Union stewards. (Tr. 116-117).

During her testimony at hearing, Smith denied that she asked Walker to give decertification cards to any employees. (Tr. 514). Respondent also called employee Jeremiah Lawrence to testify that Walker had not given Lawrence a decertification card. (Tr. 487). Lawrence is Smith's nephew. (Tr. 479).

ii. Argument

An employer violates Section 8(a)(1) by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to

decertify a union. *Mickey Linen & Towel Supply*, 349 NLRB 790, 791 (2007). The record evidence demonstrates that Respondent's supervisor Smith violated Section 8(a)(1) of the Act when she instructed employee Taylor Walker to obtain decertification cards and take the cards to employees Ryan Murray and Jeremy Lawrence for signature. Smith further violated Section 8(a)(1) of the Act by promising to "do her best" to convince Murray and Lawrence to sign the decertification cards.

The conversation between Walker and Smith was a one-on-one conversation that Smith denies took place. Thus, the Administrative Law Judge must decide which witness to credit. The Administrative Law Judge should credit Taylor Walker.

Walker credibly testified about his interaction with Smith. Walker, a current employee of Respondent, testified about this conversation in the presence of General Manager Randy Reed. Thus, Walker's testimony is particularly reliable because it went against his pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). As a current employee, Walker's testimony is also entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully).

Smith's testimony should be afforded less credibility because she is a supervisor and agent of the Respondent and gave testimony while General Manager Reed sat in the hearing room. When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861

F.2d (6th Cir. 1988). This is particularly true where the witness is Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). On this basis, the Administrative Law Judge should credit Walker's version of events over Smith's.

Respondent may argue that it is unlikely that Smith would have made such a request of Walker because they did not have a strong personal relationship. Also, Respondent may argue that Smith would not need Walker to solicit a card from her own nephew. However, Walker testified that he was a friend of Josh Tucker and worked in the same area as Pike and Tucker. At the time of the conversation with Smith, Walker had signed a decertification card. Furthermore, Walker was acquainted with both Murray and Lawrence. Given these facts, Smith may have incorrectly assumed that Walker was working with Pike and Tucker to solicit decertification cards. As a supervisor, Smith could not have lawfully collected decertification cards from Lawrence and Murray herself. Thus, it is more likely that she would have instructed Walker to solicit the cards from Lawrence and Murray.

Respondent called employee Jeremiah Lawrence to testify that Walker had not given Lawrence a decertification card. However, that Walker did not follow through with Smith's directive is irrelevant because it is Smith's directive itself that violated Section 8(a)(1). Respondent also attempted to establish that Lawrence could have gone to Pike directly if he were interested in signing a decertification card and that Lawrence had not discussed the Union or the decertification with Smith. However, Lawrence's testimony does not contradict Walker's testimony about Smith's statements.

The record establishes that Respondent, by its supervisor Smith, actively solicited in the initiation, signing, or filing of an employee petition seeking to decertify a union when Smith instructed Walker to take decertification cards to Murray and Lawrence. Smith further assisted in

the initiation of the petition when she stated that she would encourage Lawrence and Murray to sign the decertification cards. As such, Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

C. Randy Reed's Promise to Jamie Ford [Complaint ¶ 11(a)]

i. Facts

At all relevant times, employee Jamie Ford worked as a finishing helper on third shift. (Tr. 233). As a finishing helper, Ford worked in the Finishing department and reported to supervisor Walter "Charlie" White. (Tr. 234). Ford worked as a lead person to ensure that items were packaged correctly and shipments went out correctly. (Tr. 234).

Every Wednesday morning, at the end of third shift around 6:00 a.m., Respondent's general manager Reed and other members of management perform what is called a "Board Walk-Through." (Tr. 236 -237). The purpose of the walk-through was to review issues throughout the facility, including safety concerns, production goals, and quality issues. (Tr. 237). On about Wednesday, March 1, following the Board Walk-Through, supervisor White, general manager Reed, and Ford had a brief conversation about the good night of work. (Tr. 238-239; 608). During the conversation, White asked Reed, "When are we going to get this girl paid?" (Tr. 238-239; 608). It is undisputed that Reed replied that he could not give Ford a raise until the "contract goes through or the Union is out." (Tr. 239; 608).

ii. Argument

The record evidence demonstrates that Respondent's General Manager Reed violated Section 8(a)(1) of the Act when he implied that employee Jamie Ford would receive a wage increase if the Union were decertified. Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether employees would

reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out. *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983). It is undisputed that Pike's decertification campaign was well underway by March 1 and that employees, supervisors and managers were all aware of the campaign. It is also undisputed that Respondent knowingly allowed Pike to solicit support for the decertification petition during work time and in work areas. In this context, Reed told Ford that he could not give her a raise until the contract went through or the Union was out.

The Board has found an implied promise of benefits where employers inform its employees that it could give an employee a wage increase if the union was not present. *Bridgestone/Firestone, Inc.*, 335 NLRB 941, 947 (2001). See also *Feldkamp Enterprises, Inc.*, 323 NLRB 1193, 1198 (1997) (The employer made an implied promise of a wage increase, but stating that it could not do anything until after the union election was over, for the purpose of persuading the employee to withdraw his support for the union). In *Bridgestone*, the employer promised an employee a wage increase if the union were voted out, and implied that the wage increase may not be possible while the union was seeking a contract. 335 NLRB at 947. The Board found the employer made an implied promise of benefits if the union was voted out where the communication was made in the context of a meeting where the employer had also questioned its employee regarding his position on the union. *Id.* While Reed did not interrogate Ford regarding her Union support, his statements, taken in context of the decertification campaign, implied that Respondent would increase Ford's wages if the Union were voted out.

The record evidence demonstrates that Respondent's General Manager Reed violated Section 8(a)(1) of the Act when he implied promises of improved wages if the Union was

decertified. As such, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

D. Randy Reed's Promises at Employee Meetings [Complaint ¶ 12(a)]

i. Facts

On about March 22 and March 27, Respondent held a number of employee meetings to discuss Pike's decertification petition and provide Respondent's position on decertification. (Tr. 41; 610; 612; GC Exhs. 4 & 5).

On about March 22, Respondent held mandatory employee meetings during each work shift to discuss Pike's decertification efforts. (Tr. 41). General Manager Reed led the meetings. (Tr. 42). Reed read a prepared statement and projected images of the statement for employees to follow along. (Tr. 42; 169; 240; 610; GC Exh. 4). The text of the statement is memorialized in General Counsel's Exhibit 4.

Reed answered questions after he finished reading the prepared statement (Tr. 43). Third-shift employee Leah Johnson testified that during the meeting Reed informed employees that after the decertification was filed he would be allowed to tell employees what Respondent could offer. (Tr. 75). Johnson and employee Steve Brown testified that employee Christian Gonzales asked whether employees were being asked to "take a shot in the dark" if Respondent could not tell employees what it would offer if the Union is decertified. (Tr. 44; 171). Reed replied to Gonzales, "No, it's not a shot in the dark." (Tr. 44). Johnson asked Reed why Respondent allowed Pike to solicit for support during work time when the employer was not allowed to be involved with the decertification efforts. (Tr. 47; 171; 240). Reed responded, "Leah, we're not talking about a twenty-minute conversation here, we're talking about a five minute conversation." (Tr. 47). Reed did not deny making any of these statements.

On about March 27, Respondent held mandatory employee meetings on each work shift to announce that the decertification petition had been filed and an election would be scheduled. (GC Exh. 5). General Manager Reed led the meetings. Reed read a prepared statement and did not allow questions. (Tr. 49; 612-613; GC Exh. 5). Reed told employees that they would be much better off without a union contract that prevents Respondent from rewarding employees for their work. (GC Exh. 5). Reed told employees that Respondent's non-union plants are typically paid better than union plants such as this one. (GC Exh. 5). Reed did not provide employees any examples or facts to support this claim. Reed told employees that it bothered him to see employees at other plants, with poorer production rates, make more money than the employees at the Chattanooga facility. (GC Exh. 5). Reed asked employees to give Respondent "one year to show you that things can be better here union-free." (GC Exh. 5). Finally, Reed told employees that they could vote "to keep things just the way they are, or you can vote to give us all a chance to make things much better." (GC Exh. 5).

ii. Argument

An employer may lawfully inform employees of its opinions of a union and of the wages and benefits its non-union employees receive. However, the Board has long held that comparisons between union and non-union facilities, and related statements of fact, may, depending on their precise contents and context, imply promises of benefits. *Grede Plastics*, 219 NLRB 592, 593 (1975); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975), *enfd. mem.* 566 F.2d 1186 (9th Cir. 1977). Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether employees would reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out. *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983). "It is

immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted.” *Michigan Products*, 236 NLRB 1143, 1146 (1978). See also *DynCorp*, 343 NLRB 1197, 1198 (2004) (“The use of ‘cautious language or even a refusal to commit . . . to specific corrective action, does not cancel the employees’ anticipation of improved conditions if the employees oppose or vote against the unions.”) (quoting *Reliance Electric Co.*, 191 NLRB 44, 46 (1971)), *enfd.* 233 Fed.Appx. 419 (6th Cir. 2007).

During the March 22 meeting, Reed told employees that once the petition was filed, the Respondent would be allowed to tell employees what the company could offer. Reed did not deny making this statement. Reed then began the March 27 meeting by informing employees that the decertification petition had been filed. Reed went on to tell employees that he was bothered that employees at the non-union facilities get better pay and that he wants to see employees get out from the Union contract that is holding them back. Reed also told employees that it bothered him to see employees at other plants, with poorer production rates, make more money than the employees at the Chattanooga facility and asked employees to give Respondent “one year to show you that things can be better here union-free.”

An employer violates the Act when it promises to reward employees in order to curtail unionization. See *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003), *enfd.* in relevant part 397 F.3d 548 (7th Cir. 2005). The Board has found that an employer’s request for chance to “deliver” is an implied promise to grant benefits. *Libertyville Toyota*, 360 NLRB 1298, 1299 (2014), citing *Reno Hilton*, 319 NLRB 1154, 1156 (1995).

In *Libertyville Toyota*,⁵ the Board found an implied promise of increased wages and remedying of grievances where the employer held an employee meeting; discussed competitive wages; stated that a wage increase was “absolutely possible;” and then stated that the employer wanted the opportunity to address issues before employees “pay someone else to address them.” *Id.* at 1299. The Board noted that while the employer did not expressly promise to increase wages or remedy grievances, the request for a chance to address issues directly links the remedying of grievances to the rejection of the union. *Id.* See also *Reno Hilton*, 319 NLRB 1154, 1156 (1995) (when taken in context of earlier statements, employees could reasonably interpret the employer’s request for a “chance to deliver” as an implied promise to remedy grievances, to grant benefits, or both). Similarly in the case at hand, Reed repeatedly stated that employees at Respondent’s non-union facilities made more money than employees at the Chattanooga facility and requested one year to show employees “things can be better here union-free.” Taken in context, employees could reasonably interpret Reed request for one year to show employees that things could be better as an implied promise of increased wages.

Employees would reasonably interpret Reed’s statements as offers and implied promises that the employees at the Chattanooga facility would receive the same “better” wages that non-union facilities receive if they decertified the Union. This interpretation is reasonable where Reed made this statement less than one week after telling employees that the Employer would be able to tell employees what it could offer after the decertification petition was filed and Reed began the March 27 meeting by informing the employees that the decertification had been filed.

⁵ The conduct at issue in *Libertyville Toyota* was the subject of employer conduct during a union organizing campaign. However, the analysis of the alleged implied promise of benefits is applicable to the alleged violations of Section 8(a)(1) in the case at hand.

Reed's statements constitute an implied promise of benefits in violation of Section 8(a)(1) of the Act. Therefore, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

E. Randy Reed's Promise to William Bearden [Complaint ¶ 11(b)]

i. Facts

At all relevant times, employee William "Bill" Bearden has worked in quality control on second shift. (Tr. 276–277). As a quality control associate, Bearden works primarily in the Litho department. (Tr. 277). Bearden moves between press machines and checks print jobs before they go to press, while jobs are on the press, and after the press is laid. (Tr. 276).

On or about March 27, General Manager Reed held a meeting to inform employees that a decertification petition had been filed and that the union contract prevented Respondent from rewarding employees. Sometime after that meeting, Bearden was performing quality checks on the 78 press operated by employee Ken Frost. Reed and Frost were engaged in conversation when Bearden arrived at the press and joined the conversation. (Tr. 283-284; 614). After Bearden arrived, Reed turned the conversation towards Respondent's 401(k) program at Respondent's Kimble, Tennessee, plant, where Reed's son worked. (Tr. 142; 285; 637-638). The Kimble plant is a non-union plant. (Tr. 285; 638). Reed stated that his son had amassed approximately \$19,000 in his 401(k) account because the non-union plants received a higher percentage of matching funds than the Chattanooga facility. (Tr. 142; 285).

Reed admitted giving Bearden an example of his son's 401(k) plan at the non-union facility, though Reed claimed that Bearden first asked about the 401(k) plan. (Tr. 614).

ii. Argument

The record evidence demonstrates that General Manager Reed violated Section 8(a)(1) of the Act when he implied to William Bearden that Respondent's 401(k) matching program would increase if the Union were decertified.

Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether employees would reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out. *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983). "It is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." *Michigan Products*, 236 NLRB 1143, 1146 (1978).

Reed's conversation with Bearden occurred within a couple of hours of a mandatory employee meeting in which Reed expressed his opinion that the employees would be better off without the Union and asked for one year to show employees how they could be better off without the Union. Reed then proceeded to give Bearden a very specific example of the wealth his son accumulated with the benefits he received at one of Respondent's non-union facilities. Under these circumstances, it is reasonable for Bearden to conclude that Reed's statement implied that if the Union were decertified, Respondent would provide the same 401(k) matching funds to the Chattanooga facility employees that it provides to the non-union Kimble facility employees.

The record evidence demonstrates that Respondent's General Manager Reed violated Section 8(a)(1) of the Act when he implied promises of improved benefits and wages if the Union were decertified. As such, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

F. Randy Reed Collected a Decertification Card [Complaint ¶ 9]

i. Facts

Employee Ken Frost first learned of employee Joe Pike's efforts to decertify the Union in February when Pike gave Frost a decertification card to sign as Frost walked into work. (Tr. 138). Frost put the decertification card in his tool box near his work area. (Tr. 139). Frost testified that he discussed whether or not he should sign the card with Reed. (Tr. 154-155). Frost signed the decertification card around the end of March and returned it to his tool box. (Tr. 144).

On or about March 27, General Manager Reed held a meeting to discuss the decertification petition, as described in further detail above. Shortly after the meeting, Frost was at his press when Reed spoke to quality control employee William Bearden. This conversation is described in further detail above. During the conversation, Reed described the money that his son had saved up in his 401(k) in the year or so since he had been employed at Respondent's non-union Kimble facility. (Tr. 142). Bearden finished the quality checks on Frost's press, and Bearden and Reed walked away. (Tr. 143).

A few minutes later, Reed came back to the press, and Frost handed Reed his signed decertification card. (Tr. 143; 616). Reed testified that Frost handed him a folded piece of paper and requested that Reed give the paper to Pike. (Tr. 616). Reed took the decertification card and walked away without any further conversation. (Tr. 145). Reed then gave the card to Joe Pike. (Tr. 562-563). Pike testified that he received Ken Frost's decertification card from Reed.⁶ Reed handed Pike a folded sheet of paper and stated, "This is from Ken." (Tr. 562-563).

⁶ The transcript recorded the employee's name as Ken Cross on pages 562-563. The correct name is Ken Frost.

ii. Argument

The record evidence demonstrates that Respondent's General Manager Reed violated Section 8(a)(1) of the Act when he collected a decertification card from employee Ken Frost and delivered the card to the decertification petitioner Joe Pike. An employer violates Section 8(a)(1) by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify a union. *Mickey Linen & Towel Supply*, 349 NLRB 790, 791 (2007).

At some point prior to giving his card to Reed, Frost had discussed with Reed whether or not he should sign the card. Frost then gave Reed his signed decertification card after Reed held a meeting discussing the decertification petition and after Reed described the benefits his son enjoyed at the non-union Kimball facility. Frost asked Reed to take the card to Joe Pike. Reed admitted that he knew, and it was well known throughout the facility, that Joe Pike was collecting decertification cards. Reed complied with Frost's request and gave Pike the signed card. Pike admitted that Reed gave him the signed card. Under these circumstances, Reed certainly would have known that he was delivering Frost's decertification card to Joe Pike.

The record establishes that Respondent, by general manager Reed, actively solicited, encouraged, promoted, and provided assistance in the initiation, signing, or filing of an employee petition seeking to decertify a union when Reed collected Frost's signed decertification card and delivered the card to Pike. As such, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

G. David Brooks and Earl Johnson Promise Benefits [Complaint ¶ 12(b)]

i. Facts

During the decertification campaign, General Manager Reed sent a request to Respondent's human resources department to bring someone from a decertified plant to speak to employees. (Tr. 624). On about April 2 through April 6, Respondent brought Earl Johnson and David Brooks, two employees from Respondent's Conway, Arkansas facility, to the Chattanooga facility to speak with employees about the decertification process. (Tr. 323; 384).

Brooks and Johnson were involved in a successful decertification campaign at the Conway facility around 2009. (Tr. 322–323; 380). Since that time, Brooks and Johnson have occasionally travelled to other WestRock facilities engaged in decertification efforts to speak with employees at Respondent's invitation. Respondent pays all travel expenses and normal wages for their time. (Tr. 325; 349-350; 384).

The Conway facility plant manager and human resources representative asked Brooks and Johnson if they would be willing to travel to the Chattanooga facility to speak about decertification. (Tr. 323; 383). Brooks paid for all travel expenses for both men, and, Respondent reimbursed Brooks for all expenses. (Tr. 335; 355; 385–386; GC Exh. 9). Respondent paid both men their normal wages, including overtime if applicable, for the time they spent in Chattanooga and travelling. (Tr. 336-338; GC Exh. 9).

Upon arrival, Reed walked Brooks and Johnson through the plant, introduced them to employees, and informed employees that Brooks and Johnson were there to answer questions about the decertification petition. (Tr. 408). Reed informed employees that Brooks and Johnson would be available in the break room if the employees had questions. (Tr. 410). Brooks and Johnson wore their work uniforms -- black button-up shirts with the WestRock logo and their

names -- while in the Chattanooga facility. (Tr. 379). Brooks testified that he did not see anyone at the Chattanooga facility wearing a similar uniform. (Tr. 414). Employees at the Chattanooga facility do not wear uniforms. (Tr. 624-625).

Brooks and Johnson met privately with Reed prior to the small group employee meetings. (Tr. 339; 389). Reed gave them an itinerary and told them to make sure they did not make any promises to employees. (Tr. 339; 389; 629). Brooks and Johnson also met with Respondent's legal counsel prior to the small group employee meetings to go over what they should and should not say during the meetings. (Tr. 339; 387). Brooks and Johnson also met with the petitioner, Joe Pike. (Tr. 581). In between the meetings with employees, Brooks and Johnson spent time either in the break room or in one of the offices. (Tr. 630).

Brooks testified that he and Johnson conducted about eight to ten employee meetings at the Chattanooga facility. (Tr. 390). Employees attended meetings with Brooks and Johnson in small groups, with two or three meetings per shift. (Tr. 51). Reed started the meetings and introduced the two men from Arkansas. (Tr. 51; 631). Reed claims he told employees that Brooks and Johnson could not promise employees anything and that Brooks and Johnson were not present for that purpose. (Tr. 631). After completing the introductions, Reed left the room. (Tr. 52). Brooks and Johnson told employees their job titles at the Conway facility. (Tr. 348). Brooks was a corrugated coordinator. (Tr. 374). Johnson was a maintenance technician and lubrication management in a pillar team. (Tr. 320).

Employees Leah Johnson and Jamie Ford attended one of the meetings. (Tr. 50-51; 242-243; R. Exh. 62). During the meeting, Brooks informed employees that the Arkansas facility had received a pay raise and an increase in their 401(k) match after the union was decertified. (Tr. 56; R. Exh. 62). Johnson told employees that it was obvious that Respondent cared about its

employees; otherwise it would not have brought Brooks and Johnson to the facility to speak with the employees. (Tr. 56). Both Brooks and Johnson said that Respondent could not make promises to employees. (Tr. 57; R. Exh. 62). However, Johnson told employees that Norcross -- the short-hand term employees use to refer to Respondent's corporate office -- would be coming to talk to employees. (Tr. 57-58; 246; R. Exh. 62). Brooks and Johnson told employees to pay attention to what the Norcross representatives had to say. (Tr. 57; 246). Johnson told employees that Respondent could not promise anything but if employees listen closely and "read between the lines they are telling you what they are going to be able to offer, but legally they cannot just flat out tell you what they can offer." (Tr. 57). Brooks and Johnson told employees to be open-minded and wait to see the benefits packages offered to non-union plants. (Tr. 247). Brooks and Johnson also told employees that turmoil between their union and facility left them with less work and the threat of plant closure. (R. Exh. 62). Johnson explained that "corporate" said their plant is doing well so they would probably stay open. (R. Exh. 62).

Employee Steve Brown also attended a meeting with Brooks and Johnson. (Tr. 171). During Brown's meeting, Reed introduced Brooks and Johnson by informing employees that they were there to discuss what Respondent may have to offer if employees decertify the Union. (Tr. 172). Brooks and Johnson both spoke about issues with the union at the Conway facility. (Tr. 173-174). Johnson stated that Respondent's corporate offices in Norcross had taken notice of the Chattanooga facility because of all the Union problems. (Tr. 174-175). Johnson stated that the Norcross corporate office was watching the Chattanooga facility as a "flagship." (Tr. 174-175).

Johnson admitted that during the meetings he and Brooks discussed pay raises and the increased 401(k) match they received after decertification at their facility. (Tr. 352-353). Johnson

did not deny that he told employees that Respondent brought them to the facility. He did not deny that he told employees that people from Norcross would be coming to speak to them. He did not deny that he told employees to listen carefully to the people from Norcross. In response to leading questions from Respondent's counsel, Johnson denied making any promises to employees and denied using the words "read between the lines" during the meetings. (Tr. 326-327). However, Johnson did not deny telling employees that corporate had taken notice of the Chattanooga facility because of the Union problems or that corporate said their plant was doing well and would probably stay open.

In response to a leading question, Brooks claimed he did not remember using the term "flagship." (Tr. 393). In response to leading questions, Brooks also denied suggesting someone would come from Norcross to promise better benefits, denied saying the Chattanooga facility was getting more attention from Norcross, and denied that he told employees to "read between the lines." (Tr. 393-394).

Respondent called Project Coordinator Patricia Steinaway to testify about the decertification petition and the employee meetings. In response to a leading question from Respondent's counsel, Steinaway denied that Brooks or Johnson said anything about reading between the lines during the meeting she attended. (Tr. 450-451). She did not deny that Brooks and Johnson made any of the other statements attributed to them.

ii. Argument

The Administrative Law Judge must first decide whether Brooks and Johnson were agents of Respondent within the meaning of Section 2(13) of the Act. As described earlier in this brief, the test for determining whether an employee is an agent is "whether, under all the circumstances, the employees would reasonably believe that the alleged agent was 'was

reflecting company policy and speaking and acting for management.” *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). The Board will consider the position of the employees in addition to the context in which the behavior occurred when evaluating whether the alleged agent had the apparent authority to perform the act in questions. *Id.*

When considering the context in which the behavior occurred, Counsel for the General Counsel argues that employees would have reasonably believed that Brooks and Johnson were reflecting company policy and speaking and acting for management during their visit to the Chattanooga facility. General Manager Reed walked Brooks and Johnson throughout the facility prior to the employee meetings, introduced them to employees, and told employees they would be speaking about union decertification. He told employees that Brooks and Johnson would be available in the facility to answer any questions the employees had outside of the scheduled meetings. Brooks and Johnson wore black button-up shirts that displayed their names and Respondent’s logo. Under these circumstances, employees would reasonably believe that Respondent brought Brooks and Johnson to the facility to speak to employees on behalf of Respondent in order to further communicate Respondent’s anti-Union message during the decertification process.

During the employee meetings, Reed introduced both Brooks and Johnson. He told employees that Brooks and Johnson were not allowed to make any promises. This statement alone would reasonably lead employees to believe that Brooks and Johnson spoke for Respondent because Reed informed employees that Respondent had control over what Brooks and Johnson were and were not allowed to say to employees.

Brooks and Johnson made statements during the meetings that would further reinforce the reasonable belief that they spoke for Respondent. They told employees that Respondent brought

them to the facility to speak to employees. They provided information about what Respondent's corporate office would do in the future regarding to the decertification process. They claimed they had information about Respondent's corporate office's position on the Union at the Chattanooga facility.

Considering all of the circumstances, employees would reasonably believe that Brooks and Johnson were reflecting company policy and speaking and acting for management. Thus, the record evidence establishes that Brooks and Johnson were agents of Respondent when they met with employees at Respondent's Chattanooga facility. According to common law agency principles, Respondent is responsible for any express or implied promises of improved benefits and wages made by Brooks and Johnson as its agents. . *D&F Industries*, 339 NLRB 618, 619, (2003).

As agents of Respondent, during the small group meetings Brooks and Johnson unlawfully promised employees benefits if they decertified the Union. An employer may lawfully inform employees of its opinions of a union and of the wages and benefits its non-union employees receive. However, the Board has long held that comparisons between union and non-union facilities and related statements of fact, may, depending on their precise contents and context, imply promises of benefits. *Grede Plastics*, 219 NLRB 592, 593 (1975); *Westminster Community Hospital, Inc.*, 221 NLRB 185, 185 (1975), *enfd. mem.* 566 F.2d 1186 (9th Cir. 1977). Determining whether a statement is an implied promise of benefits involves consideration of the surrounding circumstances and whether employees would reasonably interpret the statement as a promise that benefits would be adjusted if the union were voted out. *Viacom Cablevision*, 267 NLRB 1141, 1141 (1983). "It is immaterial that an employer professes that he

cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted.” *Michigan Products*, 236 NLRB 1143, 1146 (1978).

Counsel for the General Counsel's witnesses credibly testified that Brooks and Johnson told employees that representatives from Respondent's corporate headquarters in Norcross would be meeting with employees at the Chattanooga facility and that employees should pay attention to what the Norcross representatives had to say and to listen closely. Brooks and Johnson denied telling employees to read between the lines, but did not deny many of the other statements attributed to them. Additionally, Brooks and Johnson primarily testified in response to leading questions, whereas Counsel for the General Counsel's witnesses testified in response to non-leading questions. Additionally, Brooks and Johnson were agents of Respondent and gave testimony while Respondent's General Manager sat in the hearing room. When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This is particularly true where the witness is Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006).

Based on the foregoing, the Administrative Law Judge should credit the recollections of Counsel for the General Counsel's witnesses concerning the meetings with Brooks and Johnson. When they told employees to listen carefully to what Norcross had to say and to read between the lines, Brooks and Johnson unlawfully impliedly promised the employees benefits if they decertified the Union. Employees would have interpreted those statements to be implied promises especially after hearing that both Brooks and Johnson received pay raises and 401(k) matching increases from Respondent after they decertified the union at their own facility. Under

these circumstances, employees would have interpreted the statements from Respondent's agents Brooks and Johnson to be an implied promise that benefits would be adjusted if the Union were decertified.

Therefore, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act by making implied promises of improved wages and benefits during the April 4 meetings as alleged in the complaint.

H. Scott Pulice Promises Benefits [Complaint ¶ 12(c)]

i. Facts

On about April 18, Respondent's Human Resources Director Scott Pulice, who works at the Norcross corporate office, held mandatory employee meetings on each work shift. (Tr. 58; 249). Pulice spoke to employees about the wages and benefits that Respondent offers its non-union facilities compared to wages and benefits at the unionized Chattanooga facility. (GC Exh. 6). Pulice spoke from a prepared slide presentation but did not read the slides word for word. (Tr. 61).

Some slides informed employees that Respondent could not make any promises. (GC Exh. 6). However, Pulice told employees "I'm going to blow your mind." (Tr. 62). Pulice stated that his presentation was a "game changer," a statement repeated in the third slide in his presentation. (Tr. 62; GC Exh. 6). One of Pulice's slides claimed that employees asked, "What about other benefits if we were union-free?" (GC Exh. 6). Several slides contained information about wages at some of Respondent's non-union facilities and compared wage increases at union versus non-union facilities. (GC Exh. 6). One slide, entitled "Game Changer #1 Annual Wage Increases," compared percent increases of "union - 1.5-2.5% (approx.)" versus "non-union - up to 5% or 7% (depending on personal performance)" facilities. (GC Exh. 6).

Another slide, entitled “Game Changer #2 Retirement Benefits – 401(k),” informed employees that they currently received a \$1 for \$1 match up to 1%, but non-union employees have a \$1 for \$1 match up to 5% and a 2.5% additional contribution. (GC Exh. 6). In some of the meetings Pulice used a whiteboard in the conference room to further demonstrate the benefits to Respondent’s 401(k) program in its non-union facilities. (Tr. 62; 250; 454). Pulice asked at least one employee what their hourly pay rate was. He then used that example as an average salary of approximately \$40,000 per year at the Chattanooga facility to illustrate how much money the Chattanooga employees could earn under Respondent’s non-union 401(k) matching program. (Tr. 62; 633). Pulice made calculations on the whiteboard using the average salary and Respondent’s 410(k) contribution matching percentage in its non-union facilities. (Tr. 62; 251). At the conclusion of his calculations, Pulice concluded on the whiteboard and orally that employees could be millionaires when they retire under Respondent’s non-union 401(k) matching plan with their current wages. (Tr. 63; 250). The slide presentation ended with a slide telling employees that if they voted to decertify the Union, Respondent would have one year to show employees “how things can change for the better” at Respondent’s facility. (GC Exh. 6).

Respondent did not call Pulice as a witness during the hearing.

ii. Argument

An employer violates the Act when it promises to reward employees in order to curtail unionization. See *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003), *enfd.* in relevant part 397 F.3d 548 (7th Cir. 2005). Similarly, an employer violates Section 8(a)(1) when it promises, explicitly or implicitly, to grant a benefit contingent on employees relinquishing support for a union. *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994). The danger inherent in a well-timed promise to bestow a benefit is the implication that employees must disavow their

union support in order to obtain the benefit. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

The record evidence establishes that Human Resource Director Pulice made implied promises of improved benefits and wages during the April 18 small group meetings if employees decertified the Union. Respondent emphasizes that Pulice informed the employees that Respondent could not make any promises regarding what it would do for employees if the Union was decertified. However, the Board has held that such disclaimers are immaterial if an employer makes express or implied promises that benefits will be granted. *Michigan Products*, 236 NLRB 1143, 1146 (1978).

It is important to consider the context in which this meeting took place. Before Pike filed the decertification petition, Randy Reed told employees that he could not tell them what Respondent could offer until after the filing of the petition. After Pike filed the petition, Reed held meetings wherein he made implied promises of improved wages and benefits if employees decertified the Union. Thereafter, Respondent held meetings led by Brooks and Johnson wherein they told employees that the people from Norcross would come talk to them and that employees should listen closely and read between the lines because Respondent could not make explicit promises.

With that background, Respondent held meetings where it is undisputed that Pulice compared the wages and benefits that Respondent offers its non-union employees compared to wages and benefits that the Union-represented employees at the Chattanooga facility receive. Pulice told employees that he was going to blow their minds and called his presentation a game changer. By these statements, Pulice sent the implicit message that the employees at the Chattanooga facility would receive the same benefits that Respondent's non-union plants receive

if they decertified the Union. Pulice used a whiteboard in the conference room to demonstrate the amount of money that an employee at the Chattanooga facility would accrue if the employee received Respondent's 401(k) matching program offered at its non-union facilities. At the conclusion of his calculations, Pulice told employees that they could be millionaires when they retire. This was an explicit example of the benefits the Chattanooga employees could receive in the future if they voted to decertify the Union. These facts are unrebutted on the record.

In *Etna Equipment & Supply Co.*, 243 NLRB 596 (1979),⁷ the Board found an implied promise of benefits where an employer not only informed employees about pension benefits at a non-union facility but provided each employee a chart, specifically tailored to his age, length of service, and wage rate, showing the exact difference in pension benefits he would receive under the non-union and union pension plans. The Board noted that it seemed difficult to believe that the employer would go to such effort unless it intended employees to believe the pension benefits presented were more than a mere possibility. *Id.* at 596-597. Similarly in the case at hand, Pulice used an employee's salary to write out an example to show employees exactly how much money they would accumulate under the 401(k) plan Respondent offered to its non-union represented employees. Thus, Pulice's conduct constituted an implied promise of benefits in violation of Section 8(a)(1) of the Act.

In *Viacom Cablevision*, 267 NLRB 1141 (1983), however, the Board distinguished *Etna* and found no implicit promise where the employer presented to its employees a general (*i.e.*, not individualized) comparison that showed that its employees who had decertified their union had historically received higher wages than some of the employer's represented employees. The

⁷ The conduct at issue in *Etna Equipment*, as well as the conduct in the *Viacom* and *Grede* cases discussed below, was the subject of objections to an election. However, the analysis of the alleged implied promise of benefits is equally applicable to the alleged violation of Section 8(a)(1) in the case at hand.

Board noted that a comparison of wages is not *per se* objectionable; the question is, was there a promise, either express or implied from the surrounding circumstances, that wages would be adjusted if the union were voted out. The Board found no such promises in *Viacom* because: (1) the comparisons were offered to the employees in response to their requests for information, (2) the employer did no more than truthfully inform the employees of wages that had been enjoyed by its unrepresented employees, (3) the employer “repeatedly” made verbal disclaimers of promises in its meetings with employees, and (4) the wage comparison was only one of many topics covered in the employer’s letters to employees and meetings and conversations with them.

The case at hand is distinguishable from *Viacom*, specifically on the second and fourth points. In this meeting, Respondent went beyond merely informing employees of the wages enjoyed by its unrepresented employees. Pulice demonstrated the calculations on the whiteboard of what Respondent’s employees would earn if they received the same 401(k) matching percentages as the unrepresented employees. Additionally, wage and benefit comparisons, including 401(k) plans, were the only purpose of this meeting, rather than just one of many topics that Respondent discussed. Regarding the repeated verbal disclaimers of promises, these disclaimers should be afforded less weight when Respondent’s agents previously told employees that they should listen carefully and read between the lines because Respondent could not explicitly make any promises.

In *Grede Plastics, A Division of Grede Foundries*, 219 NLRB 592 (1975), the Board held that a factually accurate letter to employees about wages and benefits at non-union facilities was nevertheless an implied promise of benefits because it was a clear invitation for employees to reject the union and receive benefits for doing so. In the letter, the employer described better wages and benefits at non-union facilities and invited the employees to be part of the successful

team and to vote against the union in the election. *Id.* The Board noted that the letter sent the message that if employees declined to join the team by voting against decertification, then the employer would take a tough stand during negotiations and would not agree to terms and conditions of employment enjoyed by non-union employees. *Id.* at 593. Similarly in this case, Respondent sent the same message through Pulice's presentation and 401(k) whiteboard example. Pulice sent the message to employees that Respondent would not agree to increased 401(k) matching, wages or benefits through negotiations with the Union and that the only way employees could enjoy those benefits would be to decertify the Union.

The facts of this case are similar to the facts in *Etna* and *Grede*, where the Board found implied promises of benefits. In this case, Respondent's employees would reasonably interpret Pulice's 401(k) demonstration as a promise of improved benefits if the employees decertified the Union. Therefore, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act by making implied promises of improved wages and benefits during the April 18 meeting as alleged in the complaint.

I. Randy Reed Interrogates Steve Brown [Complaint ¶ 13]

i. Facts

At all relevant times, employee Steve Brown has worked as a journeyman lead pressman in the Litho department on third shift. Brown runs the printing press and is responsible for completing whatever print jobs are left for him from earlier shifts. (Tr. 163). Brown is a shop steward for the Union on third shift. Brown first learned of employee Joe Pike's efforts to decertify the Union from the second-shift shop steward, Ron Edgeman. (Tr. 166).

Brown attended a meeting on about April 5 led by David Brooks and Earl Johnson from Respondent's Conway facility to discuss decertification of the Union, as described above.

Sometime after the meeting, Brown created a Facebook post about the meeting. Brown stated in part that “there is something Randy Reed is not trying to tell everyone....” (Tr. 177; GC Exh. 7). Brown’s Facebook post further stated that Reed was working hard to get rid of the Union and encouraged others to share their comments. (GC Exh. 7). Brown made the post on his personal Facebook page, but intended to make the post on the Union’s Facebook page. (Tr. 219). A couple of hours after making the post, someone at work told Brown that he had posted on his personal Facebook page. (Tr. 219). Brown then deleted the post. (Tr. 219).

A few days after Brown created and then deleted the Facebook post, Reed asked to meet with him in private at the end of Brown’s shift. (Tr. 178; 617-618). Brown and Reed met in supervisor Adam Cartwright’s office in the Litho department. (Tr. 178). When Brown entered the office, Reed asked him to have a seat at the desk. (Tr. 179). Reed’s cell phone was visible on the desk. Its screen was illuminated and showing an image of Brown’s Facebook post. (Tr. 179; GC Exh. 7). Reed told Brown that he had received a photograph of the Facebook post from someone, but he did not specify who provided the photo. (Tr. 180). Reed asked Brown whether he had a problem with the facility or a problem with Reed. (Tr. 179). Brown stated that he had a problem with the things he had heard in the meeting with Brooks and Johnson and described some of the things Brooks and Johnson said. (Tr. 180-181). Reed said, “I told them guys when they got here, all we’re to discuss is the decertification of the Union and what it has done, what the Company has to offer without the Union.” (Tr. 181). Reed and Brown then discussed how well the plant was doing, and the meeting ended. (Tr. 181).

Reed did not deny that Brown’s recollection of the meeting was accurate.

ii. Argument

The facts of Brown and Reed's meeting about the Facebook post are not in dispute, as Reed did not deny or dispute Brown's recollection of the exchange. Thus, the only question is whether, in light of all of the circumstances, Reed's meeting with Brown violated Section 8(a)(1) of the Act.

An employer's interrogation of employees about their sentiments regarding a particular union is not a per se violation of the Act. However, the Board has determined that where the interrogation is found to be coercive in light of all surrounding circumstances, it will be deemed to be in violation of the Act. *Rossmore House*, 269 NLRB 1176 (1984) enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board applies the test set forth in *Rossmore House*, to determine whether the circumstances surrounding the interrogation warrant a finding of violation of the Act. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1182-83 (2011). The test involves a case-by-case analysis of various factors, including: (1) the history of the employer's attitude and/or hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity and company rank of the interrogator; (4) the place and manner of the interrogation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether the purpose was communicated to the employee; and (8) whether the employer assures that no reprisals will be taken if the employee supports the union. See *Id.*; see also *Fiber Glass Sys.*, 298 NLRB 504 (1990). The Board has determined that one need not apply the factors mechanically, but rather that the factors are useful indicia in evaluating the legality of an interrogation. *Camaco Lorain Mfg.*, 356 NLRB 1182. Additionally, the standard is an

objective one, considering whether the questioning would reasonably tend to coerce the employee and thus restrain the exercise of Section 7 rights. *ManorCare Health Services*, 356 NLRB 202, 218 (2013); *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). The determination does not turn on whether the questioned employee felt intimidated. *Id*

Applying the *Rossmore House* factors in this case, it is evident that Reed's interrogation of Brown was coercive in violation of Section 8(a)(1). First, Respondent had been actively campaigning against the Union, unlawfully promising benefits to employees if they decertified the Union and unlawfully prohibiting Brown and other employees from discussing the Union. Second, General Manager Reed sought out Brown because of a pro-Union Facebook post regarding Respondent's anti-Union meetings. Third, Randy Reed is the General Manager of the facility. Fourth, Reed pulled Brown off the work floor and into a supervisor's office to interrogate Brown about the Facebook post. Reed did not explain who gave him the Facebook post. Fifth, Reed asked if Brown had a problem with him, and Brown said no. While Brown's response was not necessarily false, it is evident that he would be uncomfortable being fully honest about any issues he had with his General Manager. Sixth, Reed did not have any legitimate reason for interrogating Brown about his Facebook post. Reed's dislike for Brown's stated opinions is not a valid reason to call Brown into a supervisor's office to confront him with the Facebook post that Brown had previously deleted. Seventh, Reed did communicate to Brown that he called him into the office to discuss the Facebook post and find out if Brown had a problem with Reed or the facility. Eighth and finally, Reed did not make any assurances that there would be no reprisals against Brown for his support of the Union or his protected activity on Facebook. Indeed, Reed solicited grievances from Brown regarding himself and the facility.

When viewed in the totality of the circumstances, General Manager Reed's interrogation of Brown regarding his Facebook post and support for the Union, in the midst of a decertification campaign, is objectively coercive. Therefore, the Administrative Law Judge should find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

J. Respondent Provided More than Mere Ministerial Aid to the Union Decertification Efforts [Complaint ¶ 10]

An employer violates Section 8(a)(1) by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify a union. *Mickey Linen & Towel Supply*, 349 NLRB 790, 791 (2007). The test is whether the specific conduct at issue had "the tendency...to interfere with the free exercise of the rights guaranteed to employees under the Act." *Washington Street Foundry*, 268 NLRB 338, 339 (1983)(quoting from *Red Rock Co.*, 84 NLRB at 525).

In the instant case, the credible evidence establishes that Respondent knowingly permitted petitioner Pike to solicit support for his decertification petition in work areas and during work time. The evidence further establishes that Respondent prohibited its employees from discussing Union business during work time and in work areas. The Board has found unlawful assistance with a decertification petition by an employer "knowingly permitting its circulation on worktime." See *Silver Spur Casino*, 270 NLRB 1067, 1071 (1984); *Weiser Optical Co.*, 274 NLRB 961 (1985); *Central Washington Hospital*, 279 NLRB 60, 64 (1986).

Respondent further engaged in active solicitation when Smith instructed Walker to obtain decertification cards and give them to employees Murray and Lawrence. Smith encouraged, promoted, or provided assistance in the signing of an employee petition by promising to "do her best" to convince Murray and Lawrence to sign the decertification cards.

The Board has repeatedly held that promises of improved terms or conditions of employment if the employees decertify a union constitute unlawful direct assistance to a decertification petition. See *Royal Himmel Distilling Co.*, 203 NLRB 370, 375 (1973); *Hi-Tech Cable*, 318 NLRB 280, 283 (1995), *enfd. in pertinent part*, 128 F.3d 271 (5th Cir. 1997); *Hearst Corp.*, 281 NLRB 764 (1986), *enfd. mem.* 837 F.3d 1088 (5th Cir. 1988), *reh'g denied mem.* 840 F.2d 15 (5th Cir. 1988)). Respondent provided unlawful direct assistance to the decertification petition by making an implied promise that employee Jamie Ford would receive a raise if the Union were decertified and making an implied promise to employee William Bearden that Respondent's 401(k) matching program would increase if the Union was decertified. Finally, Reed provided assistance in the initiation, signing, or filing of Pike's petition seeking to decertify the Union by informing employees that Respondent could inform the employees what benefits Respondent could offer after the decertification petition was filed.

Reed also aided, or provided assistance to the filing of Joe Pike's decertification petition by collecting a decertification card from employee Ken Frost and delivering the card to Pike.

By engaging in the activities described above, Respondent provided unlawful assistance to Pike's decertification effort by providing more than ministerial assistance to the decertification efforts. As such, the Administrative Law Judge should find that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

V. CONCLUSION

Counsel for General Counsel respectfully urges that the Administrative Law Judge credit the testimony of the Counsel for the General Counsel's witnesses and find that Respondent violated the Act as alleged in the complaint. Counsel for the General Counsel seeks an order

requiring Respondent to cease its unlawful conduct and remedy the harm that it has caused to its employees.

Respectfully submitted,

/s/ Matthew Turner
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/s/ Kami Kimber
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Counsel for the General Counsel
National Labor Relations Board, Region 10

Dated this 23rd day of March 2018.

APPENDIX I – PROPOSED CONCLUSIONS OF LAW

1. Respondent, WestRock Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. At all material times, Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M has been a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the following individuals have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Adam Cartwright, Tameka Cheeks, David Gravitt, Scott Pulice, Randy Reed, Shelia Smith, and Walter White.
4. At all material times, Earl Johnson and David Brooks have been agents of Respondent within the meaning of Section 2(13) of the Act.
5. Respondent violated Section 8(a)(1) of the Act by:
 - a. Selectively and disparately enforcing its non-solicitation rule against employees engaged in Union business.
 - b. Supervisor Sheila Smith's solicitation and direction to employee Taylor Walker to solicit signatures supporting the decertification efforts from Jeremy Lawrence and Ryan Murray.
 - c. Supervisor Sheila Smith's promise to encourage Jeremy Lawrence and Ryan Murray to sign decertification cards.
 - d. General Manager Randy Reed's promise to increase Jamie Ford's wages if the Union was decertified.
 - e. General Manager Randy Reed's promise to William Bearden of improved benefits through increased employer matching contributions to the 401(k) program if the Union was decertified.
 - f. General Manager Randy Reed's collection of decertification cards for the decertification petitioner.
 - g. Providing more than mere ministerial aid to the Union decertification petition.
 - h. General Manager Randy Reed's promises of improved wages and benefits if the Union was decertified at the March 22, 2017 employee meeting.
 - i. General Manager Randy Reed's promises of improved wages and benefits if the Union was decertified at the March 27, 2017 employee meeting.

- j. Earl Johnson and David Brooks making promises of improved wages and benefits if the Union was decertified at the April 4, 2017 employee meetings.
- k. Human Resources Director Scott Pulice's promises of improved wages and benefits if the Union was decertified at the April 18, 2017 employee meetings.
- l. General Manager Randy Reed's interrogation of Scott Brown regarding Brown's Union sympathies.

The aforementioned unlawful conduct engaged in by the Respondent constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

APPENDIX II – PROPOSED ORDER

Respondent, WestRock Services, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:
 - (a) Selectively and disparately enforcing its non-solicitation rule against employees engaged in Union business.
 - (b) Directing employees to solicit support from co-workers for the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition.
 - (c) Encouraging employees to support the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition.
 - (d) Providing unlawful aid to the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition.
 - (e) Making promises of improved wages and benefits if Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M is decertified.
 - (f) Interrogating employees regarding their union sympathies.
 - (g) In any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Within 14 days after service by the Region, post at its Chattanooga, Tennessee facility copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2017.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

- (b) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX III – (Proposed) NOTICE TO EMPLOYEES

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT encourage, promote, solicit, assist, or participate in employees' Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition efforts.

WE WILL NOT promise you wage increases in order to encourage you to sign a Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition.

WE WILL NOT promise you improved benefits in order to encourage you to sign a Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M decertification petition.

WE WILL NOT stop you from discussing union matters during working time while permitting other employees to solicit support for a union decertification petition during working time.

WE WILL NOT ask you to solicit other employees to sign any document or otherwise solicit fellow employees to get rid of the Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M.

WE WILL NOT ask you about the union support of other employees.

WE WILL NOT interrogate you about your support for Graphic Communications Conference of the International Brotherhood of Teamsters, Local 197-M.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

CERTIFICATE OF SERVICE

This is to certify that on March 23, 2018, copies of the Brief of Counsel for the General Counsel were served by email on:

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