

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 6**

VT HACKNEY, INC.

and

UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO,
CLC

Case Nos. 06-CA-199799
06-CA-200380 and
06-RC-198567

**VT HACKNEY INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

James H. Fowles, III, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
First Base Building
2142 Boyce Street, Suite 401
Columbia, South Carolina 29201
Tel: 803.252.1300
Fax: 803.254.6517
Email: james.fowles@ogletreedeakins.com

ATTORNEYS FOR VT HACKNEY, INC.

Dated: May 17, 2018

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, VT Hackney Inc. ("VT Hackney" or the "Company"), respectfully submits this brief in support of its contemporaneously filed Exceptions to the Decision of Administrative Law Judge ("ALJ") Robert A. Ringler, dated April 19, 2018.¹ The ALJ erred in concluding that VT Hackney engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act ("NLRA" or the "Act") by: (1) a supervisor, Judy Ross ("Ross"), making an innocuous comment that could not conceivably be regarded as unlawful interrogation under applicable Board law; (2) a labor consultant, Charlie Stephenson ("Stephenson"), accurately stating the law and asking employees if they had any questions, which could not conceivably be regarded as an unlawful solicitation of grievances; and (3) enforcing its distribution policy by removing loose union flyers and paraphernalia from Company-owned toolboxes in a working area. The ALJ further erred by finding that the Company engaged in objectionable conduct when: (1) Stephenson held a meeting with employees in the Finals/Finish Department to educate such employees of their Section 7 rights; and (2) a former supervisor removed Union literature and a "USW" pin from in and around Company owned toolboxes in a working area.

As shown below, the ALJ's findings should be overturned and the NLRB should rule that VT Hackney did not violate the Act or engage in objectionable conduct as alleged.

¹References to the ALJ's Decision are designated as "(ALJD page:line)." References to the transcript of proceedings are designated as "(Tr. page:line)." VT Hackney also incorporates by reference its Post-Hearing Brief, filed on April 13, 2018, which contains significant detail about Respondent, its operations, various relevant background facts, and many arguments that the ALJ failed to review or consider.

II. STATEMENT OF THE CASE

On or about May 11, 2017, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (the “Union”), filed a representation petition in Case No. 06-RC-198567. The election occurred on June 1, 2017, at which time the employees voted against the Union.² After the election, the Union filed eight objections and two unfair labor practice charges, Charge Nos. 06-CA-199799 and 06-CA-200380 (collectively the “Charges”). On October 30, 2017, the Regional Director for Region Six issued a Consolidated Complaint for the alleged unfair labor practices (“Consolidated Complaint”), and an Order Directing Hearing on Objections, Consolidating Cases and Notice of Hearing (“Objections to the Election”).

A hearing was held before ALJ Robert A. Ringler in Williamsport, Pennsylvania on February 21, 2018. At the hearing, David Shepley (“Shepley”), Counsel for the General Counsel, alleged that: (1) on May 22, 2017, Stephenson unlawfully solicited grievances at a meeting with employees; (2) on or about May 20, 2017, Ross interrogated former employee David Wise (“Wise”); and (3) former supervisor, David Bohannon (“Bohannon”), removed Union literature and a single “USW” button from toolboxes while allowing employees to keep other paraphernalia in their toolboxes. The Objections to the Election reflect the same allegations made in the Consolidated Complaint, and no additional evidence was presented on the Objections to the Election. (*See* Tr. pp. 187-89; ALJD fn. 1.)

On April 19, 2018 – less than one week after the parties filed their post-hearing briefs – the ALJ issued a decision finding that VT Hackney violated Section 8(a)(1) of the Act and engaged in

²One hundred thirteen (113) employees voted against the Union, eighty three (83) voted for the Union, and there were fourteen (14) challenged ballots.

objectionable conduct, as alleged by both the Union and the Counsel for the General Counsel. Specifically, the ALJ concluded that the Company violated Section 8(a)(1) when Ross allegedly interrogated a “neophyte” about his union sympathies; and violated Section 8(a)(1) and engaged in objectionable conduct when: (1) Stephenson allegedly held a meeting with employees and solicited grievances; and (2) a former supervisor allegedly removed union literature in Company owned toolboxes while allowing Company literature to remain. (*See generally* ALJD pp. 5-8.)

As discussed in detail below, the Board should reject and reverse the ALJ’s decision for multiple reasons. First and foremost, the ALJ’s findings and conclusions are not supported by a preponderance of the record evidence. The ALJ’s decision is not based on applicable Board precedent or on the facts in the record. The ALJ’s decision on its face gave no weight to the arguments set forth in the parties’ post-hearing briefs. The ALJ’s findings that the Company committed three 8(a)(1) violations and committed objectionable conduct is unsupported by the record, contrary to the law, and should be reversed. Therefore, VT Hackney now files Exceptions and this Brief in Support of its Exceptions, seeking to overturn the ALJ’s Decision and Recommended Order and instruction to the Regional Director to overturn and order a rerun election.

III. QUESTIONS INVOLVED

1. Did the ALJ err in finding that VT Hackney violated Section 8(a)(1) of the Act when Judy Ross, Human Resource Manager, had a conversation with an employee in which she asked how he was handling the craziness of the campaign and ended the conversation by stating that the Company was counting on him to vote? (Exception I.)
2. Did the ALJ err in finding that VT Hackney violated 8(a)(1) of the Act and engaged in objectionable conduct when Stephenson had a meeting with ten (10) to fifteen (15)

employees in which he explained that, under Section 7 of the Act, employees could go to management now with their complaints? (Exception II.)

3. Did the ALJ err in finding that VT Hackney violated 8(a)(1) of the Act and engaged in objectionable conduct when a former supervisor took Union flyers and a single USW pin out of and around from Company owned toolboxes, while later allowing the employees to have Company posters in the same vicinity? (Exception III.)
4. Did the ALJ's Decision properly address the party's arguments as set forth in the parties' post hearing briefs? (Exceptions I through III.)
5. Did the ALJ's decision, conclusions, and proposed remedies improperly disregard record evidence and legal precedent? (Exceptions I through III.)

IV. ARGUMENT

A. Request for Oral Argument

VT Hackney requests oral argument on its Exceptions. Oral argument will assist the Board's understanding of the case in several respects:

First, due to the voluminous nature of the record, oral argument will aid the Board's understanding of the case.

Second, the ALJ issued his decision only four business days after all parties filed their post-hearing briefs, and it will become evident that the ALJ failed to consider the arguments of the parties, the factual evidence presented at the hearing, or applicable legal precedent.

Third, the Board's complete and careful consideration of this case, including its allowance of oral argument, is imperative to the fair administration and enforcement of the Act and to the future operations of the Company. Allowing oral argument will assist the Board with understanding the broader context in which the evidence should be viewed.

B. General Exceptions

1. The ALJ Erred In Relying On Inferences To Support Predetermined Legal Conclusions

“Inference piled on inference is not a substitute for evidence.” *Interlake Iron Corp. v. NLRB*, 131 F.2d 129, 131 (7th Cir. 1942). To constitute a preponderance of evidence, the record “must do more than create a suspicion of the existence of the fact to be established.” *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). Here, for example, the ALJ relieved the Union and General Counsel from their burdens of proof by inferring through speculative findings that Stephenson unlawfully solicited grievances, promised benefits and unlawfully applied legal policies. (ALJD 5: 28-31; 8:14-16.) This is precisely the type of inference that is prohibited under applicable law.

2. The ALJ’s Credibility Determinations Evidence Clear Bias And Are Not Supported By The Record

VT Hackney recognizes that the Board will not overrule an ALJ’s credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that such credibility resolutions are incorrect. *Standard Dry Wall Prods., Inc.*, 91 NLRB 544 (1950), *enf’d* 188 F.2d 362 (3d Cir. 1951). However, an ALJ’s factual findings as a whole must show that the ALJ “implicitly resolve[d]” conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982). Critically, while an ALJ may resolve credibility disputes implicitly rather than explicitly, he only may do so if his “treatment of the evidence is supported by the record *as a whole*.” *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 765 (2d Cir. 1996) (emphasis added). Indeed, as the Supreme Court has instructed, the Board may not make its determination “merely on the basis of evidence which in and of itself justify[s]

it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn.” See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

Rather, the Board must “take into account whatever in the record fairly detracts from [the] weight” of the ALJ’s decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp.*, 340 U.S. at 487. It is not enough that the record contain some evidence that could conceivably have supported an ALJ’s finding. The *Universal Camera* standard is met only if the ALJ discusses, and provides citations to, that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003) (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that “the ALJ must minimally articulate his reasons for crediting or rejecting” evidence)); *PPG Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part); *Fortuna Enters., L.P.*, 354 NLRB 202, 203 (2009) (failure to make detailed factual findings and credibility resolutions resulted in remand of finding of Section 8(a)(1) violation).

Here, the ALJ largely made no effort to articulate his reasons for crediting or discrediting testimony other than to state generally that he determined credibility and to label testimony as either credible or not credible in a conclusory fashion. (ALJD 3:40-44; 4:1-2, 21--30; 5:18-31.) The ALJ provided no support for his determinations and failed to explain why he resolved almost all of the credibility issues in favor of the General Counsel’s witnesses.³ Rather, the ALJ discredited Respondent’s witnesses based largely on his own speculation. In discrediting Stephenson’s testimony that he did not unlawfully solicit grievances in one of the many meetings he held, the ALJ made the conclusory assertion, without any evidentiary support, that Stephenson was a “slick and, unfortunately, deceitful witness” who’s “neutral educator defense was

³ The Union did not have separate witnesses.

unavailing, and eviscerated his credibility.” (ALJD 5:19-21.) There is simply no basis in the record whatsoever to support this conclusion. Similarly, the ALJ discredited Moser’s testimony regarding the same alleged grievances because his “comparable claims [were] equally unappealing” but failed to provide a single fact to support this conclusion (ALJD 5:24-25.) Notably, the ALJ did not make any findings regarding any witness’ demeanor as contemplated by *Standard Dry Wall Prod., Inc.*, 91 NLRB at 545. (“[I]t is our policy to attach great weight to a Trial Examiner’s credibility findings insofar as they are based on demeanor.”).

In similar cases, the Board has routinely remanded cases for an ALJ’s failure to make critical credibility determinations. *See In Re Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (the failure to address an allegation, make an express credibility finding regarding certain testimony, or address contrary testimony warranted a remand to the ALJ to make the necessary credibility resolutions and determine whether an 8(a)(1) violation was established); *Saigon Gourmet Rest., Inc.*, 353 NLRB 1063, 1064 (2009) (“Because the judge made no credibility findings resolving the testimonial conflict, we will remand this allegation to the judge.”); *PPG Aerospace Indus., Inc.*, 353 NLRB at 224; *Fortuna Enters.*, 354 NLRB at 203; *see also Edgewood Nursing Ctr. v. NLRB*, 581 F.2d 363, 365 (3d Cir. 1978); *Sears, Roebuck & Co.*, 349 F.3d at 514 (*citing Scivally*, 966 F.2d at 1076 (“ALJ must minimally articulate his reasons for crediting or rejecting” evidence)). Accordingly the Board should overturn the ALJ’s decision in this case.

C. The ALJ’s Conclusion That VT Hackney Violated Section 8(a)(1) When Judy Ross Unlawfully Interrogated A “Neophyte” Prior To The Election Is Erroneous Because The ALJ Disregarded Board Law And Because The Conclusion Is Not Supported By A Preponderance Of The Evidence

1. Pertinent Background Facts

David Wise (“Wise”), a former Finals/Finish Assembler for VT Hackney, was employed from December 2016 until August of 2017. (Tr. 12:14, 18.) Wise was terminated months after

the campaign and election due to his poor attendance. (Tr. 158:6-7.) Wise met with Ross on several occasions before the Union campaign and subsequent election. (Tr. 160:5.) Wise spoke to Ross only one time during the campaign.⁴ (Tr. 14:1-3; 158:14-16.) The conversation occurred in the Final/Finish Department, by former coordinator, Angi Burris,' desk. (Tr. 14:8; 159:25.) The conversation began when Ross asked him, as she did with every other employee “How are you handing it, how [are] you doing with the craziness with the union campaign?” (Tr. 160:11-15.) Wise initially alleged that Ross asked him how he felt about the Union. (Tr. 22:4.) However, Wise also acknowledged that Ross may have asked something along the lines of the above quoted question. (Tr. 22:9-12.) All parties agree that during that conversation, Ross told Wise that his current supervisor thought he was doing good work. (Tr. 14:21-22.) Ross stated she told him this because it was important to her to tell employees what people thought of their work. (Tr. 171:4-13.) At the end of the conversation, Ross ended the discussion as she did with every other employee, but stating that the Company was counting on the employee to vote. (Tr. 162:20-22.) Wise acknowledged that Ross said the Company was “counting on him,” but denies that Ross said “to vote.” (Tr. 15:9; 21:7-10.)

2. The ALJ Erred in Crediting Wise Over Ross

In finding that the evidence established that Ross asked Wise what he thought of the Union (rather than “how he was doing with the craziness of the Union campaign”) and said “we are

⁴ As explained at the hearing, Wise claims he spoke with Ross on or about Saturday, May 20, 2017. (Tr. 14:4-5.) However, Ross does not and did not work Saturdays. (Tr. 162:8-9.) Thus, from the onset, the ALJ’s credibility determination as to Ross’ credibility was erroneous, as Ross cannot testify to a discussion she had on a day she did not work, and Wise was not clear as to when the conversation actually occurred. (See ALJD 4:23-28.) The ALJ’s decision to discredit Ross for having a “poor recollection of the exchange,” while seemingly ignoring that Wise could not even articulate the day of the week he actually worked and had a conversation with Ross, was erroneous. (ALJD 4:25-26.)

counting on you” (rather than “we are counting on you to vote”) the ALJ credited Wise’s vague and equivocal testimony over the specific testimony put forth by Ross. (ALJD 4:23-30.) This was error. *See Conley Trucking*, 349 NLRB 308, 319 fn. 26 (2007) (citing *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), *enf’d* 309 F.3d 452 (7th Cir. 2002) (“it is settled that general or blanket denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides’ witnesses”)).

Despite the fact that Ross provided a clear and detailed testimony as to how she began her discussion, what she said to Wise about during the discussion, and how she ended the discussion, the ALJ held that Ross was not as credible of a witness because she acknowledged to have had numerous conversations with employees during the campaign and ruled that the question regarding the “craziness of a campaign” could be interpreted or viewed as being overly broad. (ALJD 4:25-28.) It is critical to note that Wise affirmatively denied that Ross referenced the “craziness of the campaign.” It is internally inconsistent for the ALJ to credit the testimony of Wise, who denied that Ross ever referenced the “craziness of the campaign,” while simultaneously finding that Ross made that comment.⁵

For the foregoing reasons, the ALJ erred in finding that Wise was a more credible witness than Ross because Ross was able to articulate in detail her conversation with Wise and was able to explain what she said, at which each point of the conversation, without wavering or contradicting herself. Wise’s testimony, on the other hand, was vague and he recognized that the

⁵ Ross denied that she thought her question of “How are things going with the craziness of the campaign” was a broad question that would lead to all sorts of answers. (Tr. 165-66:21-25, 1-3.) Further, Ross acknowledged that the question was an open ended question, but that it was to let employees know that she cared about them. (Tr. 167:1-4.)

statements, as alleged by Counsel for General Counsel were not full and accurate quotations of what was actually said during their conversation.

3. The ALJ Did Not Properly Address The Relevant Factors In Finding An Unlawful Interrogation As Outlined In Board Law

The ALJ erroneously concluded that the evidence established that Ross interrogated Wise when she had a single conversation with him during the campaign. (ALJD 6:34, 39-40.) In arriving at that highly flawed conclusion, the ALJ relied primarily on the facts that: (1) Ross was a high-ranking plant official; (2) Wise was a “neophyte;” (3) the Company concurrently committed two other ULPs before the election;⁶ and (4) the conversation between Wise and Ross occurred less than two weeks before the election. (ALJD 6:34-38.) In basing the alleged violation on these facts, the ALJ first listed factors as set out in *Westwood Healthcare Center*, 330 NLRB 935 (2000). However, the factors, as listed in *Westwood Healthcare*, were not appropriately applied in this matter. In *Westwood Healthcare*, the Board provided a list of factors that should be used when determining whether an interrogation was unlawful:

- (1) The background, *i.e.*, is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner; *i.e.*, how high was [s]he in the company hierarchy?
- (4) Place and method of the questioner, *e.g.*, was the employee called from work to the boss’ office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness in the reply.

⁶ The two other alleged acts were also isolated and did not involve Wise.

330 NLRB at 939. Further, the Board held in *Westwood Healthcare* that it must determine whether, based on all of the circumstances, the interrogation would “reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Id.* at 940.

Although the ALJ cited *Westwood Healthcare*, he failed to fully review the factors as laid out in that case. Instead, the ALJ only looked at the third prong and “other facts” that he deemed were pertinent to make his determination. This, in and of itself, is a clear showing that the ALJ erred in his decision. A full application of the *Westwood Healthcare* factors to the evidence in this case reveals that VT Hackney did not, as a matter of law, engage in unlawful interrogation. First, VT Hackney has not shown a history of hostility and/or discrimination against employees who favor a union. In fact, there have been over four elections at this facility in the past six years, and this was the first election in which an 8(a)(1) violation has been alleged. There is no evidence in the record that supports the ALJ’s notion that the Company had a history of hostility and discrimination toward employees who may support a union.

Second, even if Wise’s testimony is credited, Ross did not ask Wise any question that she could later use against him, contrary to the ALJ’s assertion that Wise may have been afraid that his “ongoing tenure might be conditioned upon this ultimatum.” (ALJD 6:40.) Ross, as a member of the human resources team, genuinely cared about the well-being of her employees, and as she explained, she “cared about them and [...] wanted [them to know] that [if] they wanted to ask questions, or concerns, they could have asked.” (Tr. 167:2-4.) The ALJ did not find that Ross’ character was in question and neither the Union nor the Counsel for General Counsel called her character and integrity into question. There are no grounds for the ALJ to find that questions about an employee’s welfare during a campaign were in any way an interrogation.

Third, the conversation was in no way coercive. First, as shown by the record evidence, Ross spent several hours a day out on the production floor speaking with employees even prior to the campaign. Even though Ross was on the production floor more during the campaign, there was no evidence that her presence created a sense of stricter scrutiny. In addition, the conversation between Ross and Wise occurred in an open area, he was not called “down” to her office, and the conversation occurred solely between the two individuals and not a large group.

Fourth, even if it appears that Wise was truthful in his comments, the questions and/or statements posed by Ross were not ones that would provoke a reasonable employee to lie.

Therefore, based on the factors set forth in *Westwood Healthcare*, the ALJ’s decision that Ross interrogated Wise or threatened his ongoing tenure at VT Hackney was clearly erroneous.

D. The ALJ’s Conclusion That VT Hackney Violated Section 8(a)(1) And Committed Objectionable Conduct Warranting An Rerun of the June 2017 Election When Charlie Stephenson Held A Meeting With Employees And Solicited Grievances Is Erroneous Because It Is Not Supported By A Preponderance Of The Evidence

1. Pertinent Background Facts

It is undisputed that Charlie Stephenson (“Stephenson”) was hired by VT Hackney as a labor consultant. (Tr. 132:1-8; 179:6-8.) As stated by the Company through Jim Moser (“Moser”), Production Manager, and Stephenson himself, Stephenson was hired by the Company to educate the employees about unionization. (Tr. 133:8-10; 150:16-21; 179:6-8.) As part of his job as a labor consultant, Stephenson met with employees in small group meetings and in one-on-one settings. (Tr. 133:14-16.)

It is also undisputed that on or about May 22, 2018, Stephenson had a meeting with ten (10) to fifteen (15) employees, in the presence of Moser. (Tr. 26:24; 27:3-4, 13-14; 136:19-23; *see generally* 174-75.) During that meeting, Moser introduced Stephenson and Stephenson spoke to the employees using a PowerPoint presentation and the Basic Guide to the NLRA (“Basic

Guide”). (Tr. 40: 6-7; 46:9-11; 133:8-10; 140:8-14; 176:-8.) Further it was undisputed evidence that, during the presentation, Stephenson showed a slide titled the “Heart of the Act” that set forth the rights that employees have under the Act. Following that, but before he turned the slide, Stephenson again read from the Basic Guide and told employees that they currently had the right to go to management with their issues and complaints, but if a union was voted in, would have to go through the union – the then sole bargaining representative. (Tr. 47:16-25; 48:1-19; 79:11-25; 80:1-8; 141-144.) Finally, all employees agree that Stephenson, at the end of the presentation, put up a sign that read “Questions,” and at that point employees began asking questions and/or making statements. (Tr. 44:11-15; 49:1-25; 50:1-6; 77:13-16; 147:3-18.) Stephenson, formerly a local and international organizer for the Teamsters, stated that he did not ask employees to state their concerns or promise to bring their problems to management for resolution. (ALJD 5:8-9; Tr. 148:11-16.)

2. The ALJ Erred In Crediting Schutt and Trojan Over Stephenson and Moser

In finding that the evidence established that Stephenson unlawfully solicited grievances and thus engaged in objectionable conduct, the ALJ credited two untrustworthy witnesses, Schutt and Trojan. (ALJD 5:19-31.) The ALJ’s reason for discrediting Stephenson is irrational, as he claims, without evidence, that “Stephenson was a slick, and unfortunately, deceitful witness,” simply because Stephenson stated that his goal as a paid labor consultant was to educate workers. (ALJD 5:19-21.)

In addition, Stephenson, at no point during the hearing, whether on direct or cross examination, stumbled over the facts, and never got “caught” telling a lie. On the other hand, both Trojan and Schutt got caught – multiple times – in lies that were clearly made to bolster the Union’s defense. For example:

- Initially, Schutt claimed that Stephenson “asked what our concerns were, and why we felt we needed a union.” (Tr. 28:4-5.) However, he later made statements that completely contradicted his initial positions:
 - Q: “And at this point, Mr. Stephenson said ‘well, basically, I’m done, does anybody have questions,’ correct?” A: “yes.” Q: “And that’s all he said, correct?” A: “no, he asked – at that time, yes. That would have been a yes.” (Tr. 49:8-13.)
 - A: [Questions were] “pretty much spontaneously asked.” Q: “You testified that Mr. Stephenson stated to employees, “are there any questions?” Is that accurate that he said that at some point?” A: “Yeah, he basically asked if there was any concerns, which would relate to a question, yes.” Q: “Well, did he ask, separate from asking are there any concerns, are there any questions, or was it all just one statement?” A: “Pretty much one full statement.” Q: “And, that statement, to the best of your recollection, was what; what did he say?” A: “What are your concerns and then we can ask questions.” [...] Q: And, when was that said in relation to when he asked the other question about concerns.” A: “At the end as well.” Q: “Pardon me?” A: “At the end as well.” (Tr: 57:2-17, 21-25.)
- Similarly, Trojan was caught several times in lies, and became defensive with the attorneys when questioned:
 - A: “... He told us that the employees really didn’t need a union.” (Tr. 63:4-5.)
 - Q: “And, did he also, during that, discuss with you some reasons that employees might not want to join a union?” A: “Not so much reasons why. He just like, I feel that – ‘your voice’ – yeah, I guess there is a reason, ‘Your voice is more than anything, you don’t need a union.’” (Tr. 78:4-8.)
 - A: “No, he didn’t ask why we want a union. He said that we don’t need a union.” (Tr. 88:3-4.)

Despite these glaring “hiccups,” the ALJ simply states that he “credit(s) Schutt and Trojan” because they were “persuasive and believable witnesses with strong demeanors.”

In finding that Stephenson was “slick and deceitful,” the ALJ took several statements made by Stephenson out of context and applied them in ways that were helpful to his decision. First, on

direct, Stephenson stated that he utilized his PowerPoint presentation in conjunction with the Basic Guide to conduct his group meetings. (Tr. 133:14-16.) Rather than providing his “opinion” of what rights employees have under the NLRA, Stephenson, while reading from the Basic Guide, stated:

“Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of Employment authorized under 8(a)(3).”

(Tr. 142:20-25; 143:1-4.) Subsequently, Stephenson, again reading from the Basic Guide, stated:

Dues of bargaining representatives and employer. Once an employer representative has been designated by a majority of the employees in an appropriate unit, the Act makes that representative the exclusive bargaining agent for all employees in the unit. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to their union or membership. Once a collective bargaining agreement has been designated or selected by its employees, it is illegal for an employer to bargain with individual employees, with a group of employees, or another employee representative.

(Tr. 143:15-25; 144:1.) Simply restating what the Board has stated is a clear understanding of employee’s Section 7 rights is not in any way “deceitful” or “slick.” Under any objective reading of this testimony, Stephenson was simply educating employees of their rights under Section 7, just as he alleged in the hearing.

Moreover, nothing about these statements supports the ALJ’s conclusory contention that Stephenson was a “slick,” “deceitful,” and therefore a non-credible witness. In addition, while the ALJ decided, without any evidence that Stephenson was a “slick and unfortunately, deceitful

witness,” there is absolutely no evidence to support such allegations and conclusions. Instead, everything Stephenson stated in his testimony was confirmed by both Schutt and Trojan. Further, Stephenson provided more than general and/or blanket denials of the solicitations, and was able to refute the broad and unsupported allegations of solicitation as alleged by Schutt and Trojan.

3. A Preponderance Of The Evidence Does Not Support The ALJ’s Finding That Stephenson Solicited Grievances

The ALJ erroneously concluded that Stephenson violated Section 8(a)(1) when he told employees during a meeting that they did not need a union, asked what their concerns were, and said that he would bring those concerns back to management. (ALJD 7:3-5).

For a solicitation of a grievance to be unlawful, an employer must also promise employees increased benefits and/or improved terms and conditions of employment in an effort to discourage union support during a representation campaign. *Station Casinos, LLC*, 358 NLRB 1556, 1574 (2012); *Southern Monterey Cnty. Hospital*, 348 NLRB 327 (2006) (“A solicitation of grievances by an employer during an organizational campaign is not unlawful.”); *Ryder Transportation Services*, 341 NLRB 761, 769 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005). However, a violation of the Act does not occur if employees, on their own accord, approach management to discuss their problems or if “the employer maintained a prior open door policy and there is no evidence that any promises were made to employees.” *EFCO Corp.*, 327 NLRB 372 (1998). Moreover the Board has held that an employer does not violate the Act when the employer merely asks for questions or comments during a meeting. *See, e.g., Wal-Mart Stores, Inc.*, 348 NLRB 274, 281 (2006) (“if employees initiate the contact with management [...] then the employer is not soliciting grievances, it is merely answering questions, which is totally lawful, so long as the answers do not convey a promise of benefits linked to union activities.”).

Here, the ALJ concluded, based on the testimony of Schutt and Trojan, that Stephenson's comments could be interpreted as a solicitation of a grievance, with an implied promise to remedy the issues that prompted the organizing drive. In arriving at that highly-flawed conclusion, the ALJ appears to have primarily relied on two statements made by Stephenson, which – according to the ALJ – are not plausible and are therefore the sole reasons as to why Stephenson must not be a credible witness: (1) Stephenson stated that he did not really have a “dog in the fight” when asked what his “goal” was – other than education – at the facility; and (2) when Stephenson said “I’m hired to explain the Act, that is how I do my contract, that is how I present myself; that’s what [I] do. There is other consultants that do it differently, they offer guarantees. I come in specifically to help educate the workers about the NLRA, that’s what I do.” (Tr. 150:1,16-21.) The ALJ’s reasoning is well off the mark for multiple reasons. Indeed, the preponderance of the evidence does not establish that Stephenson did anything more than ask, at the end of a PowerPoint presentation, whether employees had questions and concerns, or told employees that under Section 7 of the NLRA, employees were currently allowed to deal directly with their employer about issues involving their terms and conditions of employment, but that if a union is voted in, such issues must go through the union. In short, considering all of the record evidence, the General Counsel has fallen short of satisfying its burden of affirmatively establishing that Stephenson asked employees why they wanted a union or told employees they could tell him what their issues were and that he would report those back to the Company. Finally, even if these statements could be construed as true, there was never an implied or explicit promise that arose from such statements. Therefore, the ALJ’s findings must be reversed.

4. The ALJ Erred In Finding That Stephenson’s Actions In A Group Meeting Constituted Objectionable Conduct

The ALJ found that Stephenson’s alleged solicitation of grievances was objectionable conduct that should overturn the election. (ALJD 7:36-41.) However, the ALJ did not provide a single reason for making this conclusion. Instead, the ALJ simply copied a paragraph out of *Intertape Polymer Corp.*, 363 NLRB No. 187, slip op. at 2 (2016), and then concluded “Hackney’s unlawful conduct interfered with employees’ free choice in what was an already close election.” (ALJD 8:1-15.) This is incorrect because, as established in the record, the Union lost the election by thirty (30) votes. Further, the ALJ apparently disregarded the post-hearing briefs’ extensive discussion of the case law on *de minimis* principles and VT Hackney’s argument that even if Stephenson’s comments swayed every employee in the meeting to vote for the Company instead of the Union, it would not be enough votes to overturn the election. Instead of addressing the *de minimis* argument in any way, he simply concluded that there was objectionable conduct and such conduct must invalidate the election.

E. The ALJ Erred In His Finding That The Company Violated Section 8(a)(1) And Engaged in Objectionable Conduct When A Former Supervisor Took Union Flyers And A Single Union Pin Out Of Company Owned Toolboxes

1. Pertinent Facts

At some point during the campaign, Dave Bohannon (“Bohannon”), former Supervisor of the Finals/Finish Department, noticed union flyers lying around the Finals/Finish Department.⁷

⁷ It is unclear as to when the alleged action occurred. Schutt believes that this incident occurred on May 11, 2017, which was the same day that the Union filed the representation petition. (Tr. 30:16-18.) Sees believes the action occurred on May 15, 2017. (Tr. 93:3.) And Trojan believes it occurred “sometime” in May, but possibly a week after the petition. (Tr. 65:8.) However, it appears that the event, as alleged, was a single event that occurred in the Finals/Finish Department, specifically in the trailer bays. (Tr. 65:3-4; 92:18-19.)

The evidence, as presented, shows that five employees, including Schutt and Sees, had placed loose union flyers inside, on top of, underneath and around Company owned toolboxes. (Tr. 30:11-12; 31:9-10; 65:11-14; 92:25; 93:15-17.) The evidence further showed that the Company maintained a Solicitation – Distribution policy that prohibited the distribution of non-work literature in work areas. (Employer Exhibit 3; Tr. 119:10-17.) Employees received the policy during their new hire training/on boarding, in monthly meetings and during morning meetings with their supervisors. (Tr. 53:13; 124:16-18.)

Evidence shows that Bohannon noticed the union flyers, and one USW pin and collected them. (Tr. 32:1-11, 93:12-21.) After collecting the flyers and single pin, Bohannon approached some of the Final/Finish employees and told them that the union flyers could not be in the work area. (Tr. 32:8-12; 69:6-8.) Bohannon also told the employees that pins must be worn on their person, instead in the Company-owned toolboxes. (Tr. 32:14-15; 69:9-10.)⁸

At some point during the campaign, but before Bohannon was terminated on May 22, 2017,⁹ Bohannon passed out Company flyers and allowed employees to place them in their toolboxes. (Tr. 95:6-9.) However, there was no evidence to show that such flyers were going to be distributed by anyone other than an agent of the Company. *See e.g., Intermet Stevensville*, 350 NLRB 1349 (2007) (supervisors' distribution of campaign literature to employees is not a violation of the Act); *Beverly Enterprises – Haw. Inc., d/b/a Hale Nani Rehab. & Nursing Ctr.*, 326 NLRB

⁸ Not surprisingly, the ALJ disregarded that Trojan – an employee who did not have a tool box, and thus did not have union flyers or a pin in a tool box - alleged that Bohannon specifically sought him out to tell him what could and could not be put into a toolbox. (Tr. 69 4-22.) This makes absolutely no sense and it is illogical to find that Trojan was in any way a credible witness regarding a matter that would not have included him.

⁹ Critically, if the conduct by Bohannon occurred on Monday, May 15, 2017, Bohannon was only the supervisor of the employees for four business days before he was terminated.

335, 336 (1998) (finding that the employer did not engage in objectionable conduct by allowing supervisors to distribute flyers in the time clock areas, and in the dietary, housekeeping and laundry departments).

The Company also maintained a no distribution/solicitation policy, and was in the process of implementing the 5S initiative when the representation petition was filed. (Tr. 115:12-23; 119-7-17.) During the hearing, there was undisputed testimony that (1) employees in the Finals/Finish Department had meetings about the solicitation/distribution policy; (2) there were fans in the department and bay doors were frequently opened, which would lead to papers being blown away, and thus affecting the cleanliness of the area; (3) Company's loose paper all went into their respective binders; and (4) loose papers were thrown away. (Tr. 124:16-23; 125:25; 126:1-4; 128:5-21; 129:13-25; 130:1-16; 185:12-14.)

2. The ALJ Erred In Finding That That The Company Disparately Applied a Presumptively Valid Rule

The ALJ erroneously found that the Company disparately applied its valid No Solicitation/Distribution policy. (ALJ 5:41-42.) The ALJ did not identify any instance where a non-supervisory employee was permitted to distribute literature in working areas. Moreover, and significant for overruling his decision, the ALJ did not explain why the rule was violated, or why the Company could not distribute literature without allowing widespread distribution. *See Beverly Enterprises, supra; In re K-Mart Corp.*, 336 NLRB 455 (2001) (“The Board and courts have held that the enforcement of a valid no-solicitation rule by an employer who is at the same time engaging in anti-union solicitation during work time and in working areas does not automatically constitute an unfair labor practice. Rather, the question must be answered in the circumstances of the individual case with attention to whether the ‘no-solicitation rules ‘truly diminish the ability of the labor organizations involved to carry their messages to the employees’ – a consideration

that would be ‘highly relevant’ in determining whether an otherwise valid rule has been fairly applied.”); *NLRB v. NuTone, Inc.*, 357 U.S. 357 (1958); *Summitville Tiles, Inc.*, 300 NLRB 64, 66 (1990). Instead, the ALJ simply said “Bohannon’s actions were, as a result, unlawful.” (ALJD 6:3.)

As shown above, the Board has consistently held that a Company is permitted to distribute materials without it constituting evidence of disparate enforcement of a solicitation/distribution policy. Thus, if the Company wished to distribute anti-union flyers to its employees during work time in working areas, it had every right, under the law, to do so.

3. The ALJ Erred in Finding That VT Hackney Participated In Objectionable Conduct

The ALJ found that the removal of pro-union material from Company-owned tool boxes in working areas was objectionable conduct that should overturn the election. (ALJD 7:36-41.) Much like the ALJ’s decision in finding the solicitation of grievances to be objectionable conduct, the ALJ failed to provide an adequate explanation this conclusion. The ALJ did not address why such conduct would be objectionable, how many people were allegedly affected by Bohannon’s actions, or whether the conduct was, as VT Hackney argued, a *de minimis* violation at most. Therefore, the ALJ failed to support his conclusion that the Company engaged in objectionable conduct when it enforced a company policy, an action which would affect such a small portion of the voting group that it could not conceivably have changed the outcome of the election.

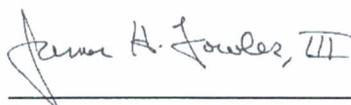
V. CONCLUSION

For all the foregoing reasons, the decision and recommended Order of ALJ Robert A. Ringler should be reversed by the Board and the allegations and objections brought before the ALJ should be dismissed in their entirety.

DATED this 17th day of May, 2018.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



James H. Fowles, III

Counsel for VT Hackney, Inc.

First Base Building
2142 Boyce Street, Suite 401
Columbia, South Carolina 29201
803.252.1300 (telephone)
803.254.6517 (facsimile)
james.fowles@ogletreedeakins.com

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

VT HACKNEY, INC.

and

**UNITED STEEL, PAPER AND
FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

**Case Nos. 06-CA-199799
06-CA-200380 and
06-RC-198567**

CERTIFICATE OF SERVICE

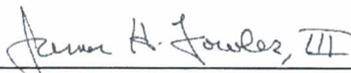
I hereby certify that a true and correct copy of the foregoing VT Hackney Inc.'s Brief in Support of its Exceptions to the Decision of the Administrative Law Judge and VT Hackney's Exceptions to the Decision of the Administrative Law Judge has been served on the following on the date below by VT Hackney, Inc.:

Gary Schiners, Executive Secretary
Office of the Executive Secretary
1015 Half Street SE
Washington, DC 20570
gary.schiners@nlrb.gov

David L. Shepley, Esq.
National Labor Relations Board, Region 6
1000 Liberty Avenue, Room 904
Pittsburgh, PA 15222-411
david.shepley@nlrb.gov

Brad Manzolino, Organizing Counsel
United Steel, Paper and Forestry, Rubber,
Manufacturing, Energy, Allied Industrial and
Service Workers International Union,
AFL-CIO, CLC
60 Blvd. of the Allies
Five Gateway Center, Room 913
Pittsburgh, PA 15222
bmanzolino@usw.org

Dated this 17th day of May 2018.



James H. Fowles, III