UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX

VT HACKNEY, INC.

and

Cases 06-CA-199799,
06-CA-200380 and
06-RC-198567

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

ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Dated at Pittsburgh, Pennsylvania,

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Table of Contents

TABLE OF AUTHORITIES

Cases **Pages**

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I. PRELIMINARY STATEMENT

Upon charges duly filed with Region Six of the National Labor Relations Board (herein called the "Board") by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (herein called "the Union"), in Cases 06-CA-199799 and 06-CA-200380 against VT Hackney, Inc. (herein called "Hackney" or "Respondent"), and Objections to Election filed by the Union on June 8, 2017, in Case 06-RC-198567 [GC-1(v)][1], an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called "the Consolidated Complaint") issued on October 30, 2017. [GC-1(k)] An Order Directing Hearing on Objections, Consolidating Cases and Notice of hearing issued on October 30, 2017, in Case 06-RC-198567, that consolidated that case for purposes of objections with the aforesaid Cases 06-CA-199799 and 06-CA-200380. [GC-1(m)]

The Consolidated Complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (herein called "the Act") by interrogating its employee about his

[1] "GC" designates Counsel for the General Counsel's hearing exhibits; "R" designates Hackney's hearing exhibits. Numbers in brackets (in small font) designate page and line numbers in the official transcript and the exhibits. "ALJD" designates the ALJ's Decision followed by a page and line reference. "RB" designates Respondent's Brief in Support of Exceptions followed by a page number.

union sympathies, impliedly promising employees improved terms and conditions of employment by soliciting employee grievances and unlawfully removing union literature and union buttons from tool boxes while permitting other paraphernalia to remain in the tool boxes.

The hearing in this matter was held before Administrative Law Judge Robert Ringler (herein called "the ALJ") in Williamsport, Pennsylvania on February 21, 2018. The ALJ issued his Decision on April 19, 2018 (herein called the "ALJ's Decision"). In his decision the ALJ found that Hackney had violated Section 8(a)(1) of the Act in all respects as alleged in the Consolidated Complaint.

Respondent timely filed Exceptions to the ALJ's Decision along with a brief in support thereof on May 17, 2018. This Answering Brief is being filed after an extension of time was granted to June 7, 2018.

I. STATEMENT OF FACTS

A. Background facts

Hackney manufactures insulated tractor-trailer vans and bodies at a plant in Montgomery, Pennsylvania (herein called "the plant"). [152/10;GC-1(t)] There are at least 215 production and maintenance employees at the plant. [GC-1(t);GC-1(u)] Jim Moser ("Moser") is Respondent's Production Manager. [173/11] Judy Ross ("Ross") is Respondent's Human Resources Manager. David Bohannon ("Bohannon") was a supervisor in the Final Finishing Department (herein called "Final Finishing") until, as noted above, his employment with Hackney was terminated on May 22, 2017.[2] [162/1]

On May 11, in Case 06-RC-198567, the Union filed a representation petition for a unit of production and maintenance employees at the plant. [GC-1(o)] The Union's efforts to organize the

[2] Hereinafter all dates at for 2017, unless otherwise stated.

employees that led to the filing of the petition continued throughout May. The organizing included the distribution at the plant of pro-union literature (herein called "Union flyers") and small pin buttons that displayed only the Union's name ("herein called "Union buttons"). [92/4-10]

Hackney opposed the Union's organizing efforts, including the holding of captive audience meetings where a management labor consultant, Charles Stephenson ("Stephenson"), made presentations to the employees. During at least one meeting, held on May 22, Stephenson solicited employee concerns and promised to "fix" them. [132/3-5]

An NLRB election was held on June 1. The Union lost the election by a count of 113 to 83, with 14 non-determinative challenged ballots. [GC-1(u)] The Union filed eight objections to the election on June 8. [GC-1(v)] After the Union ultimately withdrew six of those objections, two remained for adjudication by the ALJ.

B. Facts relevant to the allegation that Human Resource Manager Judy Ross interrogated David Wise about his Union sympathies

David Wise ("Wise") was employed by Hackney from December 2016 through August 2017 working as an assembler in Final Finishing under Bohannon's supervision. [12/14-18;15/1] Wise did not hold any position with the Union related to the organizing. [13/5] He did not display anything during the organizing to show whether he supported or opposed the Union. [13/13] Prior to about May 20, when Ross initiated a conversation, Wise had never spoken to any supervisor about how he felt about the Union representing the employees at the plant. [13/17]

About May 20, Ross, Hackney's Human Resources Manager, stopped Wise on his return to his work area from visiting the restroom. Wise had spoken on occasion with Ross in the Human Resources Office, presumably concerning employment matters. [17/3-7] Ross spoke to Wise about 10 feet from the desk of a coordinator in Final Finishing. No one overheard the exchange that followed. [14/6-18;18/13]

Ross started the conversation by complimenting Wise on his work, stating that Wise's supervisor, Bohannon, had told her that Wise was a good worker. Ross then asked Wise what

he thought about the Union. Wise answered that he was still gathering information and he was not sure what he thought. Ross followed up on Wise's non-committal answer by telling him, "Well, we are counting on you." Wise then returned to his work area. [14/21-15/13]

C. Facts relevant to the allegation that Agent Charles Stephenson impliedly promised improved terms and conditions of employment to employees by soliciting their grievances at a captive attendance meeting

Stephenson operates a business called Labor Relations Solutions in which he functions as a labor consultant. He works for employers such as Hackney in this capacity. [132/3-5] Hackney hired Stephenson as its agent to primarily address employees at captive audience meetings attended by groups of 10 to 15 employees during the weeks leading up to the election. [133/14] One such meeting was held in the conference/training room at the plant during the late morning or early afternoon on May 22. [136/21;139/11] The meeting lasted between 60 and 90 minutes. [27/16;61/18] Brian Schutt ("Schutt"), CoreyTrojan ("Trojan"), Jeff Bixler ("Bixler) and several other employees from Final Finishing were present at this meeting. [26/16;61/16;176/20]

Moser, the only Hackney supervisor present, introduced Stephenson. [174/24] Stephenson used a power point document and a "Basic Guide to the National Labor Relations Act" (herein called the "Basic NLRB Guide") to address the employees at the meeting. [R-1 and R-4, respectively] The power point document included information about employee rights under the Act and the rights of employers and unions. Several pages of the power point stated limitations on a union's ability to represent employees in the collective-bargaining process and to exert pressure on an employer.[3] In this regard, one page addressed union security clauses. [R-1, p. 8] Another page stated that in negotiations a union has only the leverage of calling a strike and asked employees if they were willing to risk their paychecks, their benefits and being permanently replaced in the event of a strike. [R-1, p. 27]

[3] See pages 10, 11, 25, 26, 29 and 30 of the power point. (Unfortunately, the pages to the power point, R-1, are not numbered.) Counsel for the General Counsel does not contend that the power point contained any false statements, but does contend that its selective content is relevant to the issue of Stephenson's purported neutrality toward unionization, as was concluded by the ALJ. [ALJD 5/22-23]

Stephenson highlighted only certain sections of the Basic NLRB Guide and he emphasized those sections in his presentation. These highlighted sections included the following: (1) union security – p. 3; (2) an employer's right to legally discharge employees – p. 13; (3) legal lockouts – p. 13; (4) the provisions of Section 8(b(1)(A) of the Act – p. 20; and (5) the provisions of Section 8(b)(3) of the Act – p. 22.[4]

At some point during his power point presentation, Stephenson stated that he would take any concerns the employees had to Hackney management and he would fix any issues. [24/8;63/9-11;80/22;81/12;82/21-25] In response to Stephenson's question about employee concerns, various employees stated their concerns, but only one particular response is described in the record. [28/8;82/18]

D. Facts relevant to the allegation that Supervisor Bohannon removed union literature and union buttons from tool boxes while permitting paraphernalia and anti-union literature to remain in the tool boxes

Most of the employees working in Final Finishing, including Schutt and Jason Sees ("Sees"), had a company owned tool box assigned to them for use in performing their work. [29/19-21;92/19] The tool boxes were located on metal tables in several numbered bays in Final Finishing. Bohannon was the supervisor assigned to Final Finishing and he walked through these bays several times each work day. [97/11;35/18]

In addition to holding the tools used for performing work, employees would place a multitude of personal items in their respective tool boxes. They included keys, personal cell phones, wallets, personal calendars, sodas, food from home or the cafeteria, family photos, cigarettes, pens, knives and personally owned tools. [34/18-24;41/11;70/16;96/19] These various personal items were positioned in the tool boxes where they were clearly

[4] Counsel for the General Counsel does not dispute an employer's lawful right to apprise its employees of any provision of the Act. However, Counsel for the General Counsel contends, as is the case with the content of the power point, that Stephenson's selective highlighting of the Basic NLRB Guide reveals that he was not impartially educating the employees, but rather he was advocating against unionization.

visible. [35/8;35/23] The employees who openly kept personal items in their tool boxes before about May 11, continued to do so at least until the day of the election. No supervisor ever told any employee to remove personal items from his or her tool box. [36/7-18;71/17;97/6;98/5]

During the organizing activities that occurred after the filing of the petition, the Union distributed flyers that encouraged employee support in the upcoming election. [29/4-8] The Union also passed out Union buttons. [29/14] Some employees, including Schutt and Sees, placed the Union flyers and Union buttons in or on their tool boxes. [30/4-24;31/9;52/1-17] Schutt affixed a Union button to the lid of his open tool box using a magnet. [31/9]

Prior to about May 11 and at times thereafter, Hackney had no written rule stating what items an employee could have in their tool box or display on their tool box. [33/17;69/22;96/25] Also, prior to about May 11, employees were never orally told by Bohannon or any other supervisor specifically what items could or could not be kept in their tool boxes. [33/18-34/4;70/4;97/3]

About May 11, Schutt saw Bohannon remove a Union flyer and Union button from his tool box in bay #3. [32/11;29/23] Bohannon proceeded to tell Schutt that he could only wear the Union button on his person and he handed the Union button to Schutt. [32/14] Bohannon then threw Schutt's Union flyer into the trash can. [33/8]

On the same day that Schutt saw Bohannon remove the Union flyers and Union buttons from the tool boxes, Bohannon passed out anti-union flyers to employees Schutt, Jason Koch, Joe Paul Hemus, Willie Wingo and Mike Mitchtree. [36/19-3715] He told these employees they should read the anti-union flyer in order to educate themselves. [37/8] Jason Koch, Joe Paul Hemus, Willie Wingo and Mike Mitchtree all took the flyers and, as Bohannon watched, they went to their nearby tool boxes and placed them in a visible position in their respective tool boxes. [37/16-39/1] Bohannon did not tell the employees to

not place the anti-union flyers in their tool boxes, tell them they must remove them once placed there or subsequently remove the anti-union flyers from the tool boxes. [39/2-8;39/13]

About May 15, Sees left one or two Union flyers tucked under the corner of his tool box while he went to the restroom. [92/19-93/3] When he returned to the area, he saw Bohannon taking Union flyers from the tool boxes and the metal table. [93/12-17] Sees then entered the bay and walked toward his tool box. As Sees passed Bohannon, he saw that Bohannon had several papers rolled up in his hand. [93/18-21] When Sees got to his tool box, he found that the Union flyer or flyers that he had been tucked under a corner were missing and the ones that he had seen lying on the metal table were also gone. [94/12; 98/20] Sees saw that various personal items in the tool boxes were undisturbed. [99/5]

About May 18, Bohannon spoke to Sees and gave him some anti-union literature. Sees asked Bohannon why he could give out anti-union literature when the employees could not distribute pro-union literature. Bohannon told Sees that if the employees did the distributing, it amounted to solicitation, but the company could pass out its anti-union literature because Hackney, not the Union, paid the employees. [94/17-95/24] He confirmed this statement to Bixler, who joined the conversation. [95/25-96/11]

About a week after the petition was filed on May 11, Trojan observed that some Union flyers were on the metal tables and in the tool boxes. [76/13] A short while later, he saw Bohannon walking into bay #3 and aggressively grabbing the Union flyers from the tool boxes. [67/21] He then went to bay #2 and aggressively snatching up the Union flyers in the tool boxes located there. [68/13]

About 3-5 minutes after Bohannon removed the Union flyers from bay #2, he initiated a conversation with Trojan wherein he told Trojan that the flyers were not to be displayed. Just as Bohannon had previously told Schutt, he told Trojan that a Union button could not be on a tool box. Bohannon then deposited the Union flyers he had confiscated from bays #2 and #3 in the trash can. [694-13]

Employees received anti-union flyers at various captive audience meetings. They brought these flyers back to their work area and placed the flyers in or near their tool boxes. The supervisor in Final Finishing after May 22, Ryan Baker ("Baker"), did not remove these flyers from the tool boxes.[5] [55/2-22]

II. ARGUMENT AND AUTHORITIES

A. Overview of Respondent's Exceptions

Counsel for the General Counsel does not concede or agree to the validity or applicability of any of the statements or arguments made by Respondent in its Exceptions and brief in support thereof, including those which are not specifically referred to herein. In the instant case, the clear preponderance of the evidence rests with the findings made by the ALJ in his Decision and not with any findings to the contrary proposed by Respondent in its Exceptions. In further response to Respondent's Exceptions, Counsel for the General Counsel submits that Respondent's arguments are erroneous and misplaced. It is submitted that the well-reasoned Decision of the ALJ fully supports all of his conclusions of law which are adverse to Respondent. Turning to the actual exceptions, Respondent has filed an exception to the ALJ's finding that each of the three 8(a)(1) allegations in the Consolidated Complaint were proven by the evidence. Each of these exceptions will be refuted seriatim below.

B. Respondent's attacks on the ALJ's credibility findings

1. The Board's treatment of credibility issues

Respondent acknowledges that the Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that the credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) In an attempt to take the ALJ's Decision out of the purview of this longstanding practice, Respondent cites several cases where the Board or an

[5] As previously noted, Bohannon's employment had been terminated on May 22. [162/1]

appeals court determined that a judge had failed to adequately address credibility issues. Respondent relies upon two Board cases in particular to attack the ALJ's credibility findings. None of the cases cited by Respondent, however, weaken the ALJ's credibility findings.

In *PPG Aerospace Industries*, 353 NLRB 223, 224 (2008), cited by Respondent, the Board remanded the case to the judge to reconsider and explain his credibility findings with respect to conflicting testimony from a supervisor and an employee. The Board decided to remand the case because there was extrinsic evidence that undercut the credibility of the employee witness and because the judge did not consider witness demeanor in drawing his credibility conclusions. In regard to the latter, the judge had merely stated, "[the employee's] testimony is likely to be true."

In *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 202, 203 (2009),[6] also cited by Respondent, the Board remanded the issue in the case to the judge because he had made no express findings as to the credibility of two witnesses in light of several highly pertinent issues. The judge's credibility findings were obviously deficient in that case.

In contrast to the cases relied upon by Respondent, the ALJ more than adequately analyzed the credibility issues with respect to key opposition witnesses. This will be shown by the facts presented below.

2. The ALJ's findings with respect to the credibility of Ross and Wise

Regarding the allegation that Ross interrogated employee David Wise ("Wise"), the sole evidence comes from the testimony of those two witnesses.[7] Therefore, the ALJ by necessity had to credit either Ross or Wise with respect to what Ross said to Wise where their testimony

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[6] Cited by Respondent as "*Fortuna Enters., L. P.*"

[7] Ross, while confirming the conversation with Wise in May, established that it could not have occurred on May 20. [162/9] It is certain that the conversation occurred on some weekday in May after the filing of the petition when both Ross and Wise were at work. [155/17] Regarding Respondent pointing out that the date of the conversation could not have been May 20 [RB p. 8, fn.4], Counsel for the General Counsel points out that the Consolidated Complaint alleges that the violation occurred "*about* May 20, 2017" Furthermore, Wise's testimony concerning what Ross said to him was in response to a question

differed. Unlike the facts in the cases cited by Respondent, the ALJ gave several reasons for crediting the testimony of Wise. These reasons are as follows: (1) Wise testified in a straightforward manner; (2) he was consistent in his responses; (3) he had strong recollection; (4) he had good overall demeanor; and (5) was consistently cooperative. [ALJD 4/23-25] With respect to Ross' credibility, while not finding her to be disingenuous, he explained the reasons for not crediting her version of the conversation over that of Wise. In this regard, the ALJ correctly stated that Ross had a "poor recollection of the exchange [with Wise]." Moreover, he found that Ross admitted she had had conversed with many employees about the upcoming election and had "inartfully" made the alleged statements that amounted to unlawful interrogation. [ALJD 4/25-28] Thus the ALJ stated sound reasons for discrediting Ross' testimony in favor of that of Wise.

Contrary to Respondent's exceptions, the Board should not find that the ALJ failed to adequately analyze the credibility issue or that a clear preponderance of the evidence brings the ALJ's conclusions into question. Thus, the Board's standard for handling exceptions to credibility findings, as set forth in *Standard Dry Wall Products*, supra, should be applied in the instant cases.

Looking more closely at Ross' credibility, the ALJ did not state that Ross was deceitful. However, Counsel for the General Counsel contends that Ross' testimony regarding her conversation with Wise should be discredited because she testified regarding overarching matters in a manner that defies belief. In this regard, Ross testified as to *why* she spoke to Wise and her mindset regarding a union at Hackney.

Ross testified that she wanted to encourage Wise to vote in the NLRB election and that she gave the same encouragement to many other employees. [157/15;165/7] Ross testified that she did so because she was supposedly committed to a solitary goal— *that she might learn*

concerning "May 20th of 2017, or *about* that date" [13/22-23] Thus, the exact date of the conversation between Ross and Wise is irrelevant to the ALJ's credibility determination.

whether the employees wanted to have the Union represent them. The relevant testimony in this regard is as follows:

Q: (General Counsel) – "And is it your testimony that you did that [asked many employees to vote] simply because you personally wanted to know if the employees wanted a union, or whether they didn't want a union, and that's all you – was your goal, is that right?

A: (Ross) – "Yes"

Q: (General Counsel) – "So, that was your sole goal, is just to find out if the employees wanted a union or not?"

A: (Ross) – That is correct, because I think it is a privilege to be able to vote, whether it is for an election for union or non-union, or for politicians, it is important to vote." [165/11-20]

The aforesaid testimony of Ross warrants the conclusion that she was not a credible witness. Thus, she should be discredited on any point where her testimony conflicts with that of Wise. As noted, Ross testified that she simply wanted to see democracy at work in her work place, trying to portray herself as someone who supported the employees' freedom to choose, whatever their choice might be. Ross attempted to come across as the rarest of human resources managers—one who has absolutely no preference whether her employer is legally required to deal with a union. Obviously, if she could score this point it might follow that she would never even think to coerce and manipulate any employee to vote against the Union. In contrast to Ross' spurious claims, Production Manager Moser candidly testified to the obvious--that Hackney wanted to be "union free" [179/20]

3. <u>The ALJ's credibility findings with respect to Stephenson and the employee witnesses</u>

The ALJ concluded that Stephenson was "slick" and "deceitful" in giving testimony. Although the ALJ did not use the word demeanor, his conclusion that Stephenson was "slick" obviously implies a finding as to his demeanor. More importantly, the ALJ discredited Stephenson with respect to what he told the employees gathered for a captive audience meeting because Stephenson's testimony on a fundamental and relevant matter was "preposterous" and contradicted by the evidence. In this regard, the ALJ concluded that Stephenson's credibility had been "eviscerated" [ALJD 5/19-24]

Respondent disputes the ALJ's conclusions, but they are firmly based on the record and the ALJ more than adequately addressed Stephenson's credibility. To overrule the ALJ's credibility findings with respect to the testimony of Stephenson seems entirely unjustified and to remand these cases to the ALJ to make more detailed findings regarding Stephenson's credibility would serve no purpose inasmuch as he has already amply stated his reasons in the strongest terms.

Regarding the reasons why Stephenson was not a credible witness, the ALJ succinctly summarized his reasoning in six lines in his decision. [ALJD 5/19-24] However, much more can be said regarding this matter.

Stephenson professed that it was not his goal that Hackney would prevail in the election [149/21-24], and that he "really [didn't] have a dog in the fight" [150/1]. He also testified that he was "pretty indifferent" to unions. [134/8] He repeatedly claimed, as the ALJ noted [ALJD 5/20], that his sole purpose in speaking to Hackney's employees was to simply educate them regarding the provision of the Act. [134/4;149/24;150/20] Counsel for the General Counsel respectfully asserts that Stephenson's testimony concerning his professed neutrality regarding unionization is astounding and it fully merits the ALJ describing it as "preposterous"

It is impossible to understand how Stephenson could remain in business working for employers for eight years if he conducted his work in a manner that did not favor employers with respect to NLRB elections. [135/19] Because Stephenson cannot be credited regarding the basic facts of why and how he conducted his business of speaking to employees on behalf of employers, the ALJ rightfully rejected Respondent's "neutral educator defense" [ALJD 5/23] The ALJ properly credited the testimony of Schutt and Trojan where it conflicts with that of Stephenson.

In contrast to Stephenson's credibility, the ALJ stated that the employee witnesses, Schutt and Trojan, had "strong demeanors" and were "persuasive and believable" The ALJ found further reason to credit the employees' version of what Stephenson said to the captive

audience in the fact that the employee witnesses "courageously and diplomatically" testified adverse to their employer's interests in the presence of "high level company officials."[8] Once again, it must be concluded that the ALJ adequately explained his credibility resolutions and grounded them on clear evidence. Nonetheless, Respondent attacks the credibility of Schutt and Trojan asserting that the ALJ was unjustified in crediting their testimony. [RB p. 13-14]

Respondent makes the wildly unwarranted claim that both Schutt and Trojan were caught lying on multiple occasions. The testimony relied upon by Respondent in making these claims does not show that either employee lied on the stand. The testimony of Schutt merely reveals a truthful witness trying to recall exactly when Stephenson solicited the concerns of the gathered employees. Nevertheless, Schutt clearly testified that Stephenson asked the employees to state any concerns. [28/4]

Regarding portions of Trojan's testimony used by Respondent to attack Trojan's credibility, that testimony in no way undercuts his credibility regarding the key matter of Stephenson having asked the employees to state any "concerns" The portions of Trojan's testimony quoted in Respondent's brief covers a different matter from the solicitation of concerns. Nonetheless, Trojan was consistent in his responses on this irrelevant matter of whether Stephenson asked why the employees wanted a union or stated that they did not need a union.[9] Regarding whether Stephenson solicited concerns—the basis for which the ALJ found a violation-- Trojan testified four times, three on cross examination, that Stephenson asked the employees to state their concerns and they would get fixed. [63/9-11;80/21-22;81/12-13;83/2-4]

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[8] Respondent has attempted to call Trojan's credibility into question in the context of the alleged unlawful removal of union literature and union buttons from employee tool boxes. [RB 19, fn. 8] It does so on the basis that supervisor Bohannon would not have initiated a discussion with Trojan, as Trojan testified he did, about the union items being in the tool boxes. This argument carries no weight because there is no reason to assume Bohannon (who did not testify as to the matter) could not have initiated a conversation with Trojan, who worked in the bays where the tool boxes were located and was under his direct supervision. Accordingly, the ALJ did not discredit the testimony of Trojan regarding what Stephenson said at the captive audience meeting based on this bogus argument on an unrelated matter.

[9] Respondent makes the totally unsubstantiated claim that Trojan "became defensive with the attorneys." A fair reading of the record in no way supports this claim.

For the aforesaid reasons, Respondent has failed to show that the ALJ was unjustified in finding Schutt and Trojan to be credible witnesses.

C. Exception (#I) to the ALJ's finding that Hackney, through Judy Ross, its Human Resource Manager, violated Section 8(a)(1) of the Act by unlawfully interrogating an employee (ALJD 6/33)

Respondent excepts to the manner in which the ALJ applied the factors the Board set forth in *Westwood Healthcare Center*, 330 NLRB 935 (2000) to determine that Ross' statements to Wise amounted to unlawful interrogation. Respondent gives four reasons to support its position, all of which are unpersuasive.[10] [RB p. 10-12]

Contrary to Respondent's claims, the ALJ appropriately applied the factors set forth in *Westwood Healthcare Center*. However, the ALJ could have just as easily based his analysis on many other cases that analyze what constitutes coercive and unlawful interrogation. The lead Board case in this regard is *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *NLRB v. Hotel Employees Local 11,* 760 F.2d 1006 (9th Cir. 1985). The Board has over the years consistently applied the factors set forth in *Rossmore House* in numerous cases where unlawful interrogation is alleged.

As the law has developed in this area, the Board has noted that in addition to the specific factors set forth in *Rossmore House*, other factors may be considered. In this regard, in one case the ALJ could have cited in addition to *Westwood Healthcare Center*, the Board summarized the law as follows: "The Board considers the following factors, among others, in determining whether questioning is unlawful: 1. Whether there is a history of employer hostility to or discrimination against protected activity; 2. The nature of the information sought; 3. The identity of the questioner; 4. The place and method of interrogation; 5. The truthfulness of the employee's reply. The Board also considers, when relevant, the nature of the

[10] The first reason Respondent relies upon mentions certain assertions that are absent from the record. These are claims involving prior elections at Hackney and prior ULP allegations. Because there is nothing set forth in the record to support these assertions, they should be ignored.

relationship between the supervisor and the employee." *Intertape Polymer Corp.*, 360 NLRB 957, 957 (2014) [11] (citations omitted)

The Board has also given great weight in other decisions to "whether or not the employee being questioned is an open and active union supporter" in determining whether the interrogation is coercive and, therefore, unlawful.[12] The Board considers the potential for coercion to be less when an open union supporter is being questioned than when the employee's union sympathies are unknown.

The ALJ correctly found that Ross' statements to Wise in May constituted unlawful interrogation when analyzed pursuant to the factors used by the Board in *Westwood Healthcare Center*, *Intertape Polymer Corp* and a host of other Board decisions. An analysis of why that is so is set forth as follows.

Looking first at the evidence regarding the oft cited key factor of whether Wise at the time of the questioning was an open and active supporter of the Union, Wise said nothing during the organizing drive to reveal his thoughts about the Union to management. He had not spoken to any supervisor about how he felt about Union representation prior to Ross' questioning. [13/13-17] Thus, this critical factor weighs in favor or finding Ross' questioning to be coercive. The ALJ specifically took this factor into account. [ALJD 6/7-8]

The history of employer discrimination also weighs in favor of finding the questioning to be unlawful. As the ALJ found, Hackney blatantly tried to keep the Union's message from being disseminated when Bohannon, discarded Union flyers in the trash and restricted the display of Union buttons while permitting anti-union literature to be placed in the tool boxes. Hackney also brought in a labor consultant who, in the presence of the Production Manager, promised

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[11] Supplemental decision on remand at *Intertape Polymer Corp.*, 363 NLRB No. 187 (May 10, 2016)

[12] *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 7 (August 4, 2016), enfd. in relevant part 871 F.3d 811 (8th Cir. 2017); *Charter Communications, LLC*, 366 NLRB No. 46 (March 27, 2018); *Bozzuto's, Inc.*, 365 NLRB No. 146, slip op. at 2 (December 12, 2017).

employees improved terms and conditions of employment by soliciting their grievances. The ALJ relied upon the existence of these other violations in making his finding. [ALJD 6/35-36]

Regarding the nature of information that Ross sought from Wise, the Board has found when questioning is aimed at finding out the employee's personally held views on a union such questioning is much more coercive than if the focus is elsewhere. In *Intertape Polymer Corp.*, the Board stated, "Williams [a supervisor] asked Thames [an employee] to reveal *his* view of the Union. " Id. at 957 (emphasis in original)[13] Ross asked Wise what *he* thought about the Union. Thus, this factor weighs in favor of finding Ross' questioning to be coercive. Although the ALJ made no mention of this factor, he could have additionally relied upon it in finding a violation.

Regarding the factor of the identity of the questioner, this weighs in favor of finding coercion. Ross is Hackney's Human Resources Manager and Wise was well aware of her position having spoken to her a few times previously in the Human Resources Office. [17/3-7] The Board has noted that the head of an employer's human resources department carries with it the clear implication that the manager is responsible for personnel decisions.[14] Thus, the potential for coercion is greater when a human resources manager does the questioning than when the questioning is done by a manager with lesser authority. The ALJ took this factor into consideration in making his findings. [ALJD 6/34]

Regarding the place and method of interrogation, although Ross did not call Wise into her office for questioning, it is important to recognize that she not only waylaid Wise in his return to his work station, but spoke to him when no one else was present. The fact that Ross questioned Wise in an open area, as Respondent points out, is, of course, irrelevant when no one knows what she is up to. The Board deems questioning to be particularly coercive when it

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[13] See also *Phillips 66 (Sweeny Refinery),* 360 NLRB 124, 128 (2014), cited by the Board in *Intertape Polymer Corp.*, regarding this factor.

[14] *Southern Bakeries*, LLC, supra.

is done one-on-one.[15] Therefore, the circumstances under which Ross questioned Wise weigh in favor of finding there was coercion. The ALJ could have relied upon this additional factor.

As shown above and contrary to Respondent's assertions, almost all of the factors the Board looks at in determining whether questioning is coercive favor the finding of a violation. However, as useful as a point by point analysis of the aforesaid factors in any given case may be, the Board has made clear that there should be no attempt to "mechanically" apply any of the relevant factors. Instead, the Board views the various factors are a useful starting point for assessing the "totality of the circumstances." *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000) In *Medcare Associates*, the Board stated the following: "In the final analysis, our task is to determine whether under all the circumstances the questioning at issue 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[16] Thus, the Board emphasizes that the totality of the circumstances is the ultimate consideration and the ALJ noted this in his Decision. [ALJD 6/26-31]

It is through this totality of the circumstances test that the coerciveness of Ross' statements to Wise is starkly revealed. Wise testified that Ross' question of how he felt about the Union was sandwiched between two statements obviously designed to manipulate him. Ross' initial statement that Wise's supervisor had told her that Wise was a good worker was designed to curry favor with Wise. This compliment prepped Wise for Ross' direct question of what Wise thought about the Union. That question could have not only elicited information about how Wise felt about the Union, but also his possible activities on behalf of the Union or other pertinent information about the Union's organizing. The ALJ noted that Ross admitted that her version of what she said to Wise could have coaxed him to reveal Union activities.

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[15] *Kellwood Co.*, 299 NLRB 1026, 1026-1027 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991)

[16] Regarding the importance of analyzing the totality of the circumstances, see also *Bozzuto's, Inc.*, supra.

[ALJD 4/16-18, noting (167/10)] In response to Ross' question, Wise gave a completely non-committal answer. Ross then told Wise, "well, we are counting on you." This last statement showed Wise that management had him on its radar with expectations regarding his actions. Ross' statement cannot be construed as a mere hope that Wise would show up to vote because Wise credibly testified that Ross made no mention whatsoever about him voting. [21/10-13] The series of statements Ross made to Wise seem cunningly designed to potentially discover what Wise thought about the Union and to coerce him into throwing his support to his employer.

In response to the aforesaid evidence, Respondent advances what Counsel for the General Counsel would label as its "mother hen" argument. Respondent asserts that in stopping Wise she was showing she "genuinely cared about the well-being of her employees." [RB p. 11] The record evidence belies any such argument. Regarding the manner of interrogation, a factor closely related to the mindset of the questioner, the Board has stated, "[A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case."[17]

Based on both the factors the Board relies upon to evaluate whether coercion exists and on the totality of the circumstances, the ALJ correctly found that Ross' questioning of Wise would objectively tend to coerce and restrain him from engaging in the rights which he was guaranteed by Section 7 of the Act. Accordingly, Respondent's exception to the finding that Hackney violated Section 8(a)(1) through Ross' interrogation of Wise should be denied.

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[17] *Medcare Associates, Inc.*, supra at 942, citing *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 fn. 7 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980), quoting from *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979).

D. Exception (#II) to the ALJ's finding that Hackney, through agent Charles Stephenson, violated Section 8(a)(1) of the Act by engaging in objectionable conduct by soliciting grievances (ALJD 7/25)

Respondent contends that all that Stephenson spoke to the employees at the May 22 meeting did not violate Section 8(a)(1) of the Act. Of course, this contention runs aground on the clear and credible testimony of attendees Schutt and Trojan concerning just what Stephenson said. The ALJ made the correct finding based on Board law concerning the solicitation of employee grievances leading up to an election. However, it may be instructive for the Board to consider the following brief review of Board law on this issue.

The solicitation of employee grievances may, under certain circumstances, be a violation of Section 8(a)(1).[18] The Board summarized the law in this respect as follows: "The Board has long held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizing campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. This inference is particularly compelling when, during an organizing campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice."[19] These principles have often been applied in the context of captive audience meetings for small groups of employees.[20]

Employee Trojan testified that after Stephenson asked employees to state their concerns at the May 22 captive audience meeting, he said "he would then take those concerns back to management, and management would fix any issue addressing our concerns." [63/9-11]

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[18] *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972)

[19] *Amtech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006). The Board cited *Amtech* with approval for these principles in a more recent case, *Garda GL Great Lakes, Inc.*, 359 NLRB 1334, 1335 (2013)

[20] *Manor Care of Easton, PA*, 356 NLRB 202 (2010), enfd. 661 F.3d 1139 (D.C.Cir. 2016)

Through this statement Stephenson blatantly promised to remedy any concerns/grievances the Final Finishing employees might voice.

It is telling that Stephenson did not attempt to rebut Trojan's testimony with any specificity. Stephenson simply denied that he asked employees about their "problems" or "concerns", failing to address his promise to fix things. [148/13-16] Even if his testimony is somehow deemed to encompass a denial of having promised to fix concerns, the ALJ properly credited Trojan's testimony because of Stephenson's overall lack of credibility.

As noted, Trojan testified that Stephenson not only asked for the employees to state any concerns, but that he would see that the concerns got "fixed" Admittedly, Schutt recalled only the first part of Stephenson's statement. [28/4] However, even if Schutt's testimony is given more weight than that of Trojan—and Counsel for the General Counsel asserts that both employees testified truthfully as to what each recalled—the ALJ was on a firm foundation when he found unlawful solicitation. This is because the Board has repeatedly stated that the solicitation of grievances from employees, especially in the context of an organizing campaign, *implies* that the employer is thereby promising to take action to remedy grievances that might be elicited. Thus, the evidence supports the ALJ's conclusion of law that Respondent impliedly promised to remedy employee grievances in order to discourage their Union support.

The Board has recognized that during an organizing campaign an employer may lawfully solicit employees' grievances where it is merely continuing a past practice because there is thus no inference to be drawn that the grievances will be remedied. *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003) However, the record is devoid of any evidence of a past practice. The ALJ noted this important fact in his Decision. [ALJD 7/27-33]

For all the foregoing reasons, Respondent's exception in this regard should be denied.

E. Exception (#III) to the ALJ's finding that Hackney violated Section 8(a)(1) of the Act by engaging in objectionable conduct when union literature and a union pin were removed from Hackney-owned tool boxes in working areas (ALJD 5/39-41)

The ALJ's analysis of why Bohannon's actions violated Section 8(a)(1) of the Act by confiscating Union materials from employee tool boxes is brief, but accurate. [ALJD 5/39-6/3] The application of Board law to the undisputed facts in Case 06-CA-199799 shows why Respondent's exception to the ALJ's finding should be denied.

An employer can, of course, have a policy covering the distribution of materials at its facility. However, any such rules cannot be disparately enforced such that pro-union literature is treated less favorably than anti-union literature. If the Board finds that there has been disparate treatment, the employer has violated Section 8(a)(1) of the Act. *Seton Co.*, 332 NLRB 979, 979 (2000)

In addition to the issues involving lawful rules and their enforcement, the Act guarantees employees the right to possess pro-union literature and to not have that literature confiscated by management. The Board affirmed a judge's decision where the judge stated, "The confiscation of prounion literature from employees interferes with their protected rights and violates the Act." *Hanson Aggregates Central, Inc.*, 337 NLRB 870, 875 (2002), citing *Romar Refuse Removal*, 314 NLRB 658, 665 (1994) In *Hanson Aggregates Central,* the judge rejected a defense that the employer was preventing littering and found that the employer's confiscation of pro-union literature violated the Act. In another case where the Board affirmed a judge's decision, the judge found a violation where a supervisor tore up union leaflets.[21]

As noted above, there is no question that Bohannon removed Union flyers and Union buttons from the tool boxes, threw the Union flyers in the trash can and told employees that they were prohibited from keeping those items in their tool boxes. Therefore, based on the testimony

[21] *Southland Knitwear, Inc.*, 260 NLRB 642, 655 (1982)

of Schutt, Trojan and Sees it must be concluded that Bohannon engaged in the following litany of conduct: (1) about May 11, he confiscated a Union flyer from Schutt's tool box and threw it in the trash in Schutt's presence; (2) also about May 11, Bohannon took a Union button from Schutt's tool box and handed it to Schutt; (3) about May 15, Sees observed Bohannon removing Union flyers from the tool boxes and the metal table in bay #2; and (4) about May 18, Trojan observed Bohannon grabbing Union flyers from tool boxes in bay #2 and bay #3 and depositing them in the trash can.[22]

Respondent elicited much testimony at the hearing regarding a solicitation and distribution rule in Hackney's employee handbook. [118/13-124/23] Respondent emphasizes the purported relevance of this rule in its brief in support of exceptions. [RB p. 18-21] The rule at issue, in pertinent part, is set forth on page 30 of the employee handbook as follows: "Distribution of non-work related literature by employees on company property in working areas is prohibited." [R-3, page 2] Although this rule is lawful on its face, it has absolutely nothing to do with Hackney's employees placing Union flyers in their tool boxes. In this regard, there is no evidence that the manner in which employees came to possess of Union flyers and place them in their tool boxes violated the aforesaid distribution rule. Moreover, there is no evidence that Schutt, Trojan, Sees or any other employee did anything to violate the rule. Thus, Respondent's argument based on the distribution rule is misplaced.

If any rule were somehow applicable to the situation it had to be a rule covering what items employees could keep in their tool boxes, not a solicitation or distribution rule. In this regard, it is of critical importance to recognize that no such written rule existed in May. [33/17;69/22;96/25] Also, no supervisor ever orally promulgated any rule as to what items could or

[22] With no justification in the record, Respondent contends that there "was a single event that occurred in the Finals/Finish Department, specifically in the trailer bays." [RB p. 18, fn. 7] The testimony cited for this contention, "Tr. 65:3-4; 92:18-19", in no way shows there was a single event. The three employee witnesses described the conduct of Bohannon on three separate occasions. Bohannon did not testify and, therefore, the employees' accounts of separate incidents involving Bohannon are undisputed.

could not be kept in the tool boxes. [33/18-34/4;70/4;97/3] Because there was no rule covering what items could be kept in the tool boxes, employees routinely kept keys, personal cell phones, wallets, personal calendars, sodas, food from home or the cafeteria, family photos, cigarettes, pens, knives and personally owned tools. [34/18-24;41/11;70/16;96/19] Employees had every right to believe that Union flyers or Union buttons were also permitted to be openly kept in their tool boxes and, therefore, many employees did so. With no established rule, Bohannon created his own ad hoc "rule" prohibiting Union flyers and buttons from being kept in their tool boxes—while he permitted anti-union literature.

Bohannon enforced his unlawful ad hoc "rule" in a manner that revealed his anti-union animus and that he was clearly attempting to restrain employees from exercising their Section 7 rights. In this regard, Bohannon did not simply tell the employees that they must remove the Union flyers and Union buttons from their tool boxes. Nor, did he personally remove the items and politely hand them to their owners providing an explanation. Instead, Bohannon grabbed the Union flyers and tossed them in the trash!

In contrast to his treatment of Union flyers and buttons, Bohannon distributed anti-union union literature to employees on more than once.[23] On one such occasion, about May 11, Bohannon passed out anti-union flyers to a group of employees consisting of Schutt, Jason Koch, Joe Paul Hemus, Willie Wingo and Mike Mitchtree. [36/19-3715] What happened next is extremely probative. After the employees took the Union flyers, Bohannon watched as they walked to their nearby tool boxes and put the anti-union flyers in visible positions in their respective tool boxes. [37/16-38/20] Bohannon did not stop the employees from placing the anti-union flyers in their tool boxes, order them to remove the flyers or take any subsequent action to have them removed. [39/2-13] He found it

[23] Counsel for the General Counsel recognizes that the Board finds that an employer "may lawfully campaign during employees' nonbreaktime and in working areas even though it prohibits employees from doing so." *Fairfax Hospital*, 310 NLRB 299, 299 n. 3 (1993) Thus, Counsel for the General Counsel takes no issue with Bohannon passing out anti-union literature during work time.

acceptable that the anti-union flyers remained visible, yet he prevented Union flyers from being similarly positioned. The ALJ properly noted these facts in his Decision. [ALJD 3/3-5]

Respondent unsuccessfully attempted to defend Bohannon's actions by calling Baker to the stand. Baker was Bohannon's replacement as production supervisor in Final Finishing after Bohannon's termination. Respondent's misplaced argument, derived from Baker's testimony, can be summarized as follows: (1) as of May, Hackney was implementing a policy in Final Finishing known as "5S"; (2) 5S standards required the work place to be kept orderly; (3) Union flyers in tool boxes and on tables would run afoul of 5S standards regarding orderliness in the facility; (4) moreover, Union flyers might blow around the plant due to some open doors; (5) *if* Baker would have found Union flyers in tool boxes or on tables (which, of course, Baker never did due to Bohannon's prophylactic measures) he *would have* removed them; and (6) therefore, Bohannon had the right as a supervisor to confiscate the Union flyers.

Respondent's argument fails for several reasons. First, what *Baker* would have *hypothetically* done does not exonerate Respondent for Bohannon's conduct. Therefore, Baker's testimony is worthless. Because Bohannon did not testify to explain his actions and purported motivation, the testimony of the employees defines Bohannon's actions.

Second, and of critical importance, Trojan testified that employees after May 22 would return from captive audience meetings with anti-union literature in hand and place that literature in their tool boxes. Baker was aware of this and yet he took no action to have the anti-union literature removed from the tool boxes where it was allowed to remain. [55/2-22] Thus, Baker's actions confirmed that Respondent, through Bohannon, was acting disparately with respect to Union flyers and Hackney's anti-union literature.

Third, the argument that wind might blow Union flyers around the plant and, therefore, necessitate their removal from tool boxes, is frivolous and utterly unpersuasive for the following reasons: (1) anti-union literature, which would have been equally subject

to being blown around, was permitted by Bohannon and Baker to remain in the tool boxes; (2) Bohannon threw the Union flyers in the trash rather than handing them to the employees and instructing them to keep the flyers where the wind could not blow them around; and (3) Bohannon failed to take the logical step of explaining to either Schutt or Trojan that enforcement of 5S standards was the reason why Union flyers could not be kept in employee tool boxes.

Although the ALJ did not note the following, Counsel for the General Counsel wishes to emphasize that the "wind made us do" argument is shown to be fallacious by an additional critical fact-- Bohannon also required the employees to remove the Union buttons from their tool boxes where they were held on by magnets![24] If flyers blowing around the plant was a genuine concern, why were the Union buttons also prohibited when they were attached to the tool boxes such that the wind would have no effect on them? That *both* Union buttons and Union flyers were removed from the tool boxes by Bohannon clearly proves that he was motivated by anti-union animus.[25]

As can be seen from the facts presented above, the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by disparately enforced an ad hoc rule that restrained employees from exercising their Section 7 rights. The Complaint allegation also involves the unlawful confiscation of those items. Whether the conduct is viewed as disparate treatment, confiscation, or both, the ALJ correctly found a violation based on the conduct of Bohannon on the three occasions described in the record. Respondent's exception does not affect the validity of the ALJ's legal findings and, therefore, should be denied.

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[24] As Respondent points out in its brief, there is testimony regarding Bohannon's handling of just one union button, but his ad hoc rule obviously applied to more than just Schutt's union button.

[25] The fact that Bohannon told the employees they could wear the buttons on their person does not excuse his prohibiting their placement on the tool boxes. In this regard, Respondent cannot successfully argue that an employer is excused from unlawful conduct if it acts lawfully in another, albeit related, respect.

F. Exception (#IV), Respondent's request for oral argument

Respondent's request for oral argument in these three consolidated cases should not be granted because oral argument is unnecessary and completely unwarranted. Respondent attempts to justify its request based on the misplaced contentions that the record is voluminous and that oral argument will assist the Board to understand the broader context of these cases. Furthermore, Respondent asserts, in effect, that the ALJ utterly failed to responsibly carry out his duties by not considering Respondent's arguments, the evidence in the record or applicable legal precedent. None of the aforesaid contentions individually or taken as a whole should persuade the Board to grant the request for oral argument.

Regarding the claim that the record is voluminous, it is patently clear that a transcript of only 190 pages and a total of five exhibits, other than the formal papers, do not amount to a voluminous record. As to the need to demonstrate some context to the allegations, the context in these cases consists of a representational election following an organizing drive, Hackney's not uncommon response to the Union's efforts and the commission of three alleged 8(a)(1) violations. The context is one the Board has dealt with thousands of times over the 83 years of its existence and, therefore, does not justify oral argument.

Regarding Respondent's concern that the ALJ issued his decision too quickly and, therefore, oral argument will cover for the ALJ's purported haste, examination of the ALJ's detailed and well-reasoned Decision proves this contention to be utterly unfounded. The ALJ should not be faulted for efficient and prompt attention to his duty to issue a decision when his Decision explicitly addresses Respondent's arguments and the evidence was carefully considered.

For all the foregoing reasons, Respondent's request for oral argument before the Board should be denied.

IV. CONCLUSION

Based on the above and record as a whole, Counsel for the General Counsel submits that the record herein, as set forth and argued above, fully supports the findings and conclusions and recommended remedy of the ALJ that Respondent has violated Section 8 (a)(1) of the Act, as alleged in the Consolidated Complaint.

It is submitted that the findings of fact and conclusions of law of the ALJ are amply supported by the record evidence. Respondent's arguments in its Exceptions in no way justify a failure to affirm any of the ALJ's rulings, findings and conclusions as set forth in his Decision and Recommended Order inasmuch as the ALJ has carefully analyzed, and applied appropriate precedent to, the facts of these cases. Accordingly, Counsel for the General Counsel respectfully requests that the Board deny all of Respondent's Exceptions, including its request for oral argument, and adopt the ALJ's Decision in its entirety.

Dated at Pittsburgh, Pennsylvania, this 6th day of June 2018.

Respectfully submitted,

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