

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

MTIL, INC.

and

Case 13-CA-189867

UNITED ELECTRICAL, RADIO AND
MACHINE WORKERS OF AMERICA,
LOCAL 1103

**RESPONDENT, MTIL, INC. EXCEPTION TO
ALJ MELISSA M. OLIVERO'S DECISION OF JULY 16, 2018**

On July 16, 2018, Administrative Law Judge Melissa M. Olivero issued her Decision in the above captioned matter. The Respondent, MTIL, Inc., takes exception to a certain portion of Administrative Law Judge Olivero's Decision (Discharge of Bobby Frierson) and requests that the National Labor Relations Board give consideration to this exception in their review.

Before proceeding to setting forth the exception to Administrative Law Judge Olivero's Decision, the Respondent, MTIL, Inc., must advise the Board that this matter proceeded on two (2) parallel, but separate and distinct, Legal fronts/forums. Obviously, the Decision of Administrative Law Judge Olivero was predicated on an Unfair Labor Practice Trial, which occurred on May 8 through May 11, 2017 at the Offices of Region 13 of the National Labor Relations Board. Companion to that proceeding, Region 13 of the National Labor Relations Board also initiated in the United States District Court for the Northern District of Illinois a Preliminary Injunction Action subject to Section 10(j) of the National Labor Relations Act (Peter Sung Ohr, Regional Director of Region 13 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board v. MTIL, Inc., Case No. 17 CV 2656) on April 7, 2017, a copy of which is attached and marked as Exhibit A. These two (2) companion Legal

proceedings proceeded on a parallel basis with the Decision of Magistrate Judge Jeffrey Cole being issued on November 14, 2017, a copy of which is attached as Exhibit B.

In his Decision, Magistrate Judge Cole found:

“The Petition of the Regional Director of Region 13 of the National Labor Relations Board for Preliminary Injunction under Section 10(j) of the National Labor Relations Act is granted in part and denied in part consistent with the holdings above.” (Page 27 of Magistrate Judge Cole’s Memorandum Opinion and Order).

Specifically, Judge Cole found in favor of the National Labor Relations Board with regard to requiring the Respondent, MTIL, Inc., to recognize the Union as the Exclusive Bargaining Agent of the Employee Complement in the defined Unit and for MTIL, Inc. to commence bargaining (i.e. a Gissel type Order). It is also interesting to note that Magistrate Judge Cole found that the termination of Bobby Frierson was valid and not based on anti-Union animus and that Mr. Frierson was not entitled to reinstatement and/or back pay (see Exhibits B and C).

Since the Employer has conformed in every particular to the Decision of Magistrate Judge Cole in recognizing the Union as the Exclusive Bargaining Representative for the Employee Complement; has posted Magistrate Judge Cole’s Court Order in both English and Spanish at the Facility (see Exhibit C, letter to Peter Sung Ohr, Regional Director, Region 13, and supporting data), and has had ten (10) Bargaining Sessions with the Union regarding Collective Bargaining Negotiations, the Respondent, MTIL, Inc., has in point of fact complied with a very good portion of Administrative Law Judge Olivero’s Decision even prior to its issuance. The only point on which the Respondent, MTIL, Inc., takes issue with Administrative Law Judge Olivero’s Decision is predicated on the basis of Bobby Frierson’s termination.

Termination of Bobby Frierson

On December 13, 2016, Cornelius Chandler (the Assistant General Manager at the time) called Frierson and two (2) other associates over to him on the floor because they were standing around on the floor and not working (Tr. 163, 482, 552-53). The two (2) associates returned to work after a short discussion with Chandler but Frierson lingered around (Tr. 553). As addressed in Magistrate Judge Cole's Decision, Frierson, in his conversation with Chandler, was taunting and insulting in his remarks/comments to Chandler (see Exhibit B, pages 10-11). Chandler stated he was giving Frierson a verbal warning and Frierson then returned to his work on the line (Tr. 165, 482). Shortly thereafter, during a pre second shift meeting in which Chandler was meeting with second shift leads and associates, Frierson banged loudly on the door and repeatedly shouted "Where's my verbal" along with obscenities, and was generally aggressive (Tr. 483-84, 554). This confrontation upset Chandler but he attempted to continue the meeting (Tr. 484). When Chandler exited the meeting and entered the office space, Frierson was there and was "irate" or "very angry" (*Id.*, Tr. 670). Frierson confronted Chandler about whether it was a verbal or written warning and Chandler told him it was a verbal warning and asked Frierson to leave the office because he was too irate and aggressive (Tr. 484, 554, 669-70). Frierson did not leave the premises and instead walked towards Chandler with a clenched fist and "reared up" at him (Tr. 484, 554). The confrontation was "very, very intense, very extreme" (Tr. 554). This caused Chandler to feel threatened (Tr. 484). Others then separated Chandler and Frierson (Tr. 426, 485, 554-555, 670). Frierson also yelled something at forklift lead employee Gerald Bradley who was present (Tr. 554). Everyone was trying to get Frierson to calm down and to get him out of the office (Tr. 554). Bradley learned that Frierson also threatened another employee and relative of Bradley's, Darnel Robinson, earlier in the day (Tr. 555-56). Bradley then

approached Frierson in the parking lot of the plant trying to understand why he was being so threatening and hostile, as the two were friends (Tr. 556). Frierson then threatened Bradley by repeatedly saying “I don’t want to talk. I want to fight” (Tr. 556-57). Chandler conveyed a written report of the incident as part of the investigation conducted by Hudson (Tr. 485-86, Rsp. Exh. 19). Bradley also prepared a written statement of the incident for the investigation (Tr. 557, Rsp. Exh. 16).

There was conflicting and inconsistent testimony elicited at the hearing regarding the history of MTIL employees fighting and the corresponding discipline handed out by the company. GC witness, MTIL employee, and purported Union organizer, Oscar Bendezu, testified that he observed “like two” fights among MTIL employees, and one of the persons involved was fired and another was suspended (Tr. 313, 318). GC witness and MTIL employee, Matthew Wilmot, testified that he observed three (3) fights at MTIL and knows that one employee returned to work and he does not know about the other employees involved (Tr. 329). GC witness and MTIL employee, Crishonna Collins, testified that she saw about three fights at MTIL (Tr. 349). None of the fights observed by these witnesses were between an employee and management. Zekas and Frierson testified that they each saw physical fights occur once a week during their employment (Tr. 43, 183).

It should be noted that while there is no dispute as to Respondent’s, MTIL, Inc.’s, knowledge of Mr. Frierson’s Union involvement, that in and of itself is not a valid basis to conclude that the discipline/termination of Mr. Frierson is a violation of the Act. There must be some nexus, i.e. connection, between the “Union involvement” and the actions taken by the Employer. In the case at hand, there is none – Union activity is not related in any way to the incidents of December 13, 2016.

Frierson, of his own volition, was insulting and taunting in his initial communication with Chandler; Frierson, of his own volition, escalated the situation by confronting Chandler during the second shift meeting and again in the office, demanding his written warning. Frierson's exceedingly insubordinate, aggressive, insulting behavior was the basis of his termination and this has nothing whatsoever to do with his Union activity!

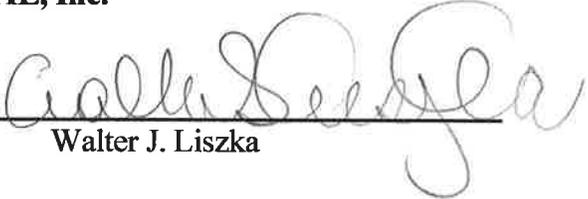
In NLRB v. Electro-Voice 83 F. 3d 1559 (7th Circuit 1996), the Court held that a termination must be shown to be motivated by anti-Union animus. Clearly, by his own actions, Frierson has clearly established that his termination was motivated by his own behavior on December 13, 2016 – insubordinate, aggressive, taunting and truly unnecessary behavior, and not by anti-Union animus!

It is also quite interesting to note, as set forth in the initial presentation of this matter, and as can clearly be gleaned through Magistrate Judge Cole's Memorandum Opinion and Order (Exhibit B), Magistrate Judge Cole found that there was no basis to conclude that the termination of Bobby Frierson was in any way, shape, or form related to Union activity. Furthermore, Magistrate Judge Cole found that even if the Respondent, MTIL, Inc., had been lax in its enforcement of other penalties of termination for fighting, the Frierson/Chandler confrontation was the first instance testified to that involved an Employee's confrontation with a member of Management which, in and of itself, would be a valid basis for the termination of Mr. Frierson.

It is respectfully requested that the Board find that the termination of Bobby Frierson on December 14, 2016 was valid and not premised on anti-Union animus or sentiment and that Respondent, MTIL, Inc., not be required to reinstate him and/or provide him back pay.

Respectfully Submitted,

MTIL, Inc.

By: 

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

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UNITED ELECTRICAL, RADIO
AND MACHINE WORKERS OF
AMERICA, LOCAL 1103

CERTIFICATE OF SERVICE

Walter J. Liszka, first being duly sworn, attests that the **Respondent MTIL, Inc. Exception to ALJ Melissa M. Olivero's Decision of July 16, 2018** was uploaded and filed with the National Labor Relations Board via the E-filing System on August 6, 2018; and that one (1) copy of **Respondent MTIL, Inc. Exception to ALJ Melissa M. Olivero's Decision of July 16, 2018** was sent via E-mail or FedEx Priority Overnight Delivery, to the following persons on August 6, 2018:

**SENT VIA FEDEX
OVERNIGHT DELIVERY**

Judge Melissa M. Olivero
Administrative Law Judge
Division of Judges
1015 Half Street SE
Washington, DC 20570-0001

**SENT VIA FEDEX
OVERNIGHT DELIVERY**

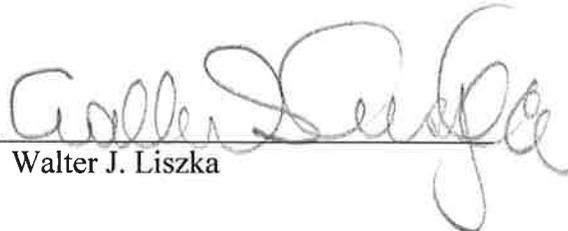
Peter Sung Ohr
Regional Director
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**SENT VIA E-MAIL
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Walter J. Liszka

1. Petitioner is the Regional Director for Region 13 of the Board, an agency of the United States government, for and on behalf of the Board.

2. Jurisdiction of this proceeding is conferred upon this Court by Section 10(j) [29 U.S.C. Sec. 160(j)] of the Act.

3. At all times material herein, Respondent, a corporation, has maintained an office and place of business in Bolingbrook, Illinois, where it is now and has been engaged in the business of sanitizing reusable plastic crates.

4. On December 15, 2016, United Electrical, Radio and Machine Workers of America, Local 1103 (hereinafter "the Charging Party" or "the Union"), pursuant to the provisions of the Act, filed a charge with the Board against Respondent in Case 13-CA-189867 alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. A copy of the charge is attached as Exhibit A.

5. On February 23, 2017, following a field investigation during which all parties had an opportunity to submit evidence upon the said charge in Case 13-CA-189867, the General Counsel by Regional Director, Peter Sung Ohr, on behalf of the Board, issued a Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act [29 U.S.C. Sec. 160(b)], alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. A copy of the Complaint and Notice of Hearing is attached as Exhibit B.

6. On April 5, 2017, the General Counsel by Regional Director, Peter Sung Ohr, on behalf of the Board, issued a First Amended Complaint and Notice of Hearing pursuant to Section 10(b) of the Act [29 U.S.C. Sec. 160(b)], alleging that the Respondent has engaged in,

and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. A copy of the First Amended Complaint and Notice of Hearing is attached as Exhibit C.

7. Petitioner asserts that there is a likelihood of success that the Regional Director will, in the underlying administrative proceeding in Case 13-CA-189867 establish the following:

(a) At all material times, Respondent, a California corporation, has been engaged in the business of sanitizing reusable plastic crates.

(b) During the preceding twelve months, a representative period, Respondent in conducting its operations described above in paragraph 7 (a), purchased and received goods, products, and materials valued in excess of \$50,000 directly from points located outside of the State of Illinois.

(c) At all material times, the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [29 U.S.C. 152(2), (6) and (7)].

(d) At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. [29 U.S.C. 152(5)].

(e) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)], and agents of Respondent within the meaning of Section 2(13) of the Act [29 U.S.C. Sec. 152(13)]:

Cornelius Chandler	Assistant Manager
Ramon Haya Trueba	Operations Manager North America

(f) At all material times, Edgardo Villanueva held the position of Respondent's Management Consultant and has been an agent of Respondent within the meaning of Section 2(13) of the Act [29 U.S.C. Sec. 152(13)].

(g) About December 1, 2016, Respondent, by Cornelius Chandler, in the employees work area, interrogated employees and threatened employees with plant closure, job loss and or termination of employment.

(h) About December 2, 2016, Respondent, by Ramon Haya Trueba, in and near his office:

- (1) granted benefits to employees, and;
- (2) made an implied promise of benefits to employees.

(i) About December 7, 2016, Respondent, by Edgardo Villanueva and Ramon Haya Trueba, in the employee break room:

- (1) made an implied promise of benefit to employees, and;
- (2) threatened employees with plant closure or relocation.

(j) Since December 9, 2016, Respondent, by Cornelius Chandler and Ramon Haya Trueba, has granted employee bonuses to discourage union support and/or membership.

(k) About December 9, 2016, Respondent, by Ramon Haya Trueba, in or near the employee break room, interrogated employees about employee support for the Union.

(l) About December 12, 2016, Respondent, by Cornelius Chandler, in the employee break room, made an implied promise of benefits to employees.

(m) About December 14, 2016, Respondent, by Cornelius Chandler, in the office, interrogated employees about their activities on behalf of the Union.

(n) About December 14, 2016, Respondent, by Edgardo Villanueva and Ramon Haya Trueba, in the employee break room:

- (1) threatened employees with job loss and random drug testing,
- (2) solicited grievances from employees, and;
- (3) promised holiday pay and bonus benefits to employees.

(o) About December 14, 2016, Respondent, by Cornelius Chandler, in the employee break room, threatened employees with termination if they supported the union.

(p) About December 14, 2016, Respondent terminated employee Bobby Frierson

(q) Respondent engaged in the conduct described above in paragraph 7 (p) because the named employee of Respondent assisted the Union and engaged in protected concerted and union activities, and to discourage employees from engaging in these activities.

(r) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production and maintenance employees including quality control, sort stackers, tickers, wrappers, stackers, forklift operators, throwers, mechanics, pallet jackers, loaders, lead persons and janitors employed by the Respondent at its facility currently located at 400 West Crossroads Parkway, Bolingbrook, Illinois 60440; excluding all office clerical employees, employees of temporary agencies and guards, professionals and supervisors as defined by the Act.

(s) From about October 26, 2016, to about November 29, 2016, a majority of the Unit designated the Union as their exclusive collective-bargaining representative.

(t) Based on the Respondent's conduct alleged in this complaint and based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(u) About November 30, 2016, the Union, by telephone, requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(v) The serious and substantial unfair labor practice conduct described above in paragraphs 7(g)-(q) is such that there is only a slight possibility of traditional remedies erasing their effects and conducting a fair election. Therefore, on balance, the employees' sentiments regarding representation, having been expressed through authorization cards, would be protected better by issuance of a bargaining order.

(w) The allegations described above in paragraphs 7(g) – (q) necessitating the issuance of a bargaining order described above in paragraph 7(v) are supported by, among other things:

- (1) Ramon Haya Trueba and Cornelius Chandler are high ranking managers responsible for the discriminatory conduct described above in paragraphs 7(g)-(q);
- (2) the conduct described above in paragraphs 7(g)-(q) has not been retracted;
- (3) there are approximately 95 employees in the Unit described above in paragraph 7 (r);
- (4) the conduct described above in paragraphs 7 (i), (j) and (n) was immediately directed at approximately 95 employees;
- (5) approximately 95 employees learned or were likely to learn of the conduct described above in paragraphs 7(g)-(q);

(6) the conduct described above in paragraphs 7(g)-(q) followed immediately on the heels of the Respondent's knowledge of the Union's campaign, and;

(7) the employee described above in paragraph 7(p) was a leading organizer for the Union.

(x) Since about November 30, 2016, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

(y) By the conduct described above paragraphs 7(g)-(o), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. [29 U.S.C. Sec. 158(a)(1)].

(z) By the conduct described above in paragraphs 7(p)-(q), Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. [29 U.S.C. Sec. 158(a)(1) and (3)].

(aa) By the conduct described above in paragraphs 7(u)-(x), Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act. [29 U.S.C. Sec. 158(a)(1) and (5)].

(bb) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act. [29 U.S.C. Sec. 152(6) and (7)].

8. Respondent's unfair labor practices, as described above in paragraphs 7(g)-(bb), have irreparably harmed, and are continuing to irreparably harm Respondent's employees in the exercise of their rights Section 7 of the Act guaranteed them and the public's interest in deterring

continued violations. More particularly, Respondent's unfair labor practices have caused and will continue to cause the following harm:

(a) Respondent's egregious and unlawful conduct has resulted in the abrupt discharge of lead union organizer Bobby Frierson and has irreparably chilled, if not obliterated, the employees' support for the Union at a critical time when it was trying to obtain a Board certification as the employees' collective bargaining representative; and, if left unchecked, will have irreparably harmed the collective-bargaining process and made a final Board order meaningless.

(b) Respondent's unlawful termination of the a lead union organizer, coupled with its other equally unlawful conduct aimed at weakening union support, such as threats to close the facility and discharge employees for supporting the Union, interrogations of Union supporters, solicited employee grievances, threatening to institute random drug testing, and promising and granting employees' benefits to discourage union activity, has severely undermined the employees' right to freely exercise the rights guaranteed them by Section 7 of the Act and has effectively stalled the Union's organizing campaign which had achieved initial success.

(c) With the passage of time inherent in Board administrative litigation, even if the Board ultimately certifies the Union as the employees' collective-bargaining representative, the Union will be unable to approach Respondent with the requisite employee support necessary to engage in meaningful collective bargaining due to the chilling effect these blatant violations of the Act have had and will continue to have on employees. Thus, Respondent's unlawful conduct has clearly destroyed its employees' efforts to exercise their

Section 7 rights to select a bargaining representative of their choice and has deprived them of the benefits of good faith collective bargaining.

9. There is no adequate remedy at law for the irreparable harm being caused by Respondent Employers' unfair labor practices, as described above in paragraphs 7(g)-(bb). Absent interim relief, the delay in obtaining a remedy through traditional Board administrative proceedings will negatively impact the Board's ability to ensure industrial peace and protect employees' Section 7 rights to join or assist labor organizations and to bargain collective through their own representatives. Moreover, unless interim reinstatement is promptly obtained, Respondent's discharge of the lead employee Union organizer will stand as a clear and forceful message. The remaining employees will learn that showing support for the Union, or engaging in other protected activity, will likely result in their abrupt termination or other serious adverse employment actions, and that neither the Union nor the Board can effectively protect them.

10. In balancing the hardships in this matter, if injunctive relief is not granted the harm to the employees, to the public interest, and to the purposes and policies of the Act, outweighs any harm that the grant of injunctive relief will have on Respondent. Specifically, should the interim order be granted, the imposition of cease and desist remedies requires nothing more than that Respondent obey the law, and affirmatively the Respondent will simply be required to reinstate the unlawfully terminated employee during the pendency of this proceeding, effectively re-establishing the pre-violation employment state.

Further, with respect to an interim bargaining order, such an order would not compel Respondent to agree to any specific term or condition of employment advanced by the Union in negotiations. Rather, such order only requires that Respondent bargain in good faith to an agreement or bona fide impasse. Moreover, any agreement reached between the parties under

Section 10(j) decree may be conditioned on the Board ultimately granting a bargaining remedy. Additionally, the costs in terms of time and money spent on collective bargaining and grievance adjustment is a burden that falls on both parties and thus does not defeat a request for an interim bargaining order.

Absent injunctive relief, Respondent will reap the benefit of its own misconduct, *i.e.*, it will erode the support of the employees for the Union and strip them of the benefits of good faith collective bargaining. There is the distinct danger that without an interim reinstatement order the lead Union organizer will be forever lost from this bargaining unit and Respondent will effectively accomplish its unlawful goals of permanently undermining collective bargaining and ridding its workplace of Union supporters. This is due to the fact that with the passage of time, this leading Union supporter will be less likely to accept reinstatement and will be less enthusiastic about resuming support for the Union. Where the discrimination has taken place during an organizing campaign, interim reinstatement of the Union supporters is particularly important to protect the employees' Section 7 right to select a bargaining representative free from Respondent's coercion so that, if the Board ultimately certifies the Union, it will be able to approach Respondent with the requisite employee support in order to engage in meaningful collective-bargaining.

11. In balancing the equities, the immediate and substantial threat to the employee's Section 7 rights, to the public interest and to the policies of the Act, clearly outweigh the minimal burden on Respondent. There is no evidence that the reinstatement of the lead union organizer would pose a significant hardship upon Respondent. To the contrary, Respondent will receive the benefit of this experienced employee's labor during the interim period. Similarly, resumption of the organizing campaign by the discharged employee and the Union would restore

the lawful status quo and would serve the public interest in protecting employees' right to freely choose whether or not to engage in union organizing activities.

In sum, given these circumstances, injunctive relief is imperative since the passage of time necessary to adjudicate the unfair labor practice charges on the merits will dissipate the effectiveness of the ultimate remedial power of the Board, and will further ravage employee support for the Union allowing Respondent to achieve its goal through the commission of unfair labor practices.

12. Upon information and belief, to avoid the serious consequences set forth above, it is essential, just, and proper to effectuate the policies of the Act and avoid substantial, irreparable and immediate injury to such policies, to the public interest, and to the employees that, pending final disposition of the matters pending before the Board, Respondent be enjoined and restrained in accordance with the purposes of Section 10(j) of the Act.

WHEREFORE, PETITIONER PRAYS:

1. That the Court issue an Order directing Respondent, pending final Board adjudication of the instant charges, to cease and desist from:
 - (1) coercively interrogating employees;
 - (2) soliciting employee grievances to discourage them from engaging in union activities;
 - (3) promising benefits to employees to discourage them from engaging in union activities;
 - (4) granting benefits if employees refrain from engaging in union activities;

- (5) threatening employees with plant closure or relocation, job loss and or termination of employment in retaliation for their union and protected, concerted activities;
- (6) threatening employees with random drug testing in retaliation for their union and protected, concerted activities;
- (7) terminating or otherwise discriminating against employees in retaliation for their union and protected, concerted activities;
- (8) failing or refusing to recognize and bargain in good faith with the Union for Unit employees; and
- (9) in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

B. That the Court direct Respondent to take the following affirmative action:

(1) within five (5) days of the Court's order, offer interim reinstatement, in writing, to Bobby Frierson to his former position of employment at his previous wages and other terms and conditions of employment, displacing if necessary, any workers contracted for, hired, or reassigned to replace him; and if his former job no longer exist, offer interim reinstatement to a substantially equivalent positions;

(2) temporarily expunge any references to the discharge of Bobby Frierson from his personnel files and not rely on such discharge in any future discipline imposed prior to a final Board order;

(3) recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of Respondent's employees in the Unit petitioned for by the Union;

(4) post a copy of the District Court's order, in both English and Spanish, (the Spanish translation to be approved by the Regional Director of Region 13 of the Board prior to posting), at Respondent's office where notices to employees are customarily posted, said posting to be maintained during the Board's administrative proceedings, free from all obstructions and defacements, and agents of the Board to be granted reasonable access to Respondent's facility to monitor compliance with the posting requirement;

(5) within ten 10 days of the Court's Order, to: (a) hold a mandatory employee meeting or meetings on working time, at times when the Respondent customarily holds employee meetings, and scheduled to ensure the widest possible employee attendance, at which the District Court's Order will be read to employees in English and in Spanish in a translation to be approved by the Regional Director of Region 13 of the Board, by a responsible management representative of the Respondent in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a responsible management representative ; (b) announce the meeting(s) for the Order reading in the same manner it would customarily announce a meeting of employees; (c) require that all employees at the facility involved in this proceeding attend the meeting(s); and (d) have the Regional Director's prior approval of the time and date of the meeting or meetings for the reading of the Court's Order and the Regional Director's approval of the content and method of the announcement to employees of the meeting(s) for the reading of the Court's Order; and

(6) within twenty days of the issuance of the District Court's Order, file with the District Court, with a copy to be submitted to the Regional Director of the Board for Region 13, a sworn affidavit from a responsible Respondent official setting forth, with specificity, the

manner in which Respondent has complied with the terms of the Court's decree, including how the documents have been posted as required by the Court's order.

DATED at Chicago, Illinois, this 7th day of April, 2017.

/s/ Peter Sung Ohr

Peter Sung Ohr, Regional Director
National Labor Relations Board
Region 13
219 South Dearborn, Suite 808
Chicago, IL 60604

action. The Petitioner's brief in support of its petition for preliminary injunction seeks to portray the case in rather grim and absolute terms, almost as though a provocative presentation can resolve the case against MTIL, Inc. Thus, we are told, among other things, that the present case presents no less than an employer's "crusade" against its employees and its commission of "egregious" violations of the NLRA that "cannot be eradicated by the mere passage of time or the Board's usual remedies." [Dkt. #20 at 1-4, 10-11]. Of course, "saying so doesn't make it so...." *United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504, 510 (7th Cir.2010). While "[a] siren turns more heads than a birdsong does," Charles Kuralt, *American Moments*, 11 (1998), claims of catastrophe are often needlessly exaggerated, and sometimes they are not true. *Cf.*, *Kelcey v. Takers Co.*, 217 F.2d 541, 546 (2d Cir. 1954)(Frank, J.). *Compare Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1422 (Fed. Cir. 1988)("the habit of charging inequitable conduct in almost every major patent case has become an absolute plague."). And so we turn to the facts of this case, sensitive to the realization that hyperbolic statements in briefs do not resolve concrete cases. *Belleau v. Wall*, 811 F.3d 929, 938 (7th Cir. 2016). *See Upjohn Company v. United States*, 449 U.S. 383, 390 (1981); *Sandra T.E. v. South Berwyn School Dist.* 100, 600 F.3d 612, 619 (7th Cir.2010).

B.

Under Section 10(j) of the National Labor Relations Act, a district court is authorized to enter "just and proper" injunctive relief pending the final disposition of an unfair labor practices claim by the N.L.R.B. 29 U.S.C. § 160(j). The reason there must be two proceedings moving along parallel tracks in the federal court and before the N.L.R.B. is because Congress has decided that the N.L.R.B. often cannot accomplish its responsibilities in time to make a difference. The N.L.R.B.'s often languorous pace has caused the Seventh Circuit to call it "extraordinarily slow," *Lineback v. Spurlino*

Materials, LLC, 546 F.3d 491, 500 (7th Cir. 2008), and “notoriously glacial.” *Lineback v. Irving Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011). Yet, “[t]he longer that an employer is able to chill union participation or avoid bargaining with a union, the less likely it is that the union will be able to organize and to represent employees effectively once the N.L.R.B. issues its final order.” *Spurlino Materials*, 546 F.3d at 500. Thus, the need for prompt judicial review of the Petitioner’s request ordering MTIL to bargain in good faith with United Electrical, Radio and Machine Workers of America, Local 1103 over the terms of its employment of its production and maintenance workers and for an injunction ordering MTIL to reinstate an employee it has fired, Bobby Frierson, a union organizer.¹

Under 10(j) and the applicable case law, relief is “just and proper” when four factors are present: (1) the N.L.R.B. has no adequate remedy at law; (2) the union will be irreparably harmed without interim relief, and that potential harm to the union outweighs potential harm to the employer; (3) public harm would occur without the relief; and (4) the N.L.R.B. has a reasonable likelihood of prevailing. *Harrell ex rel. N.L.R.B. v. Am. Red Cross, Heart of Am. Blood Servs. Region*, 714 F.3d 553, 556 (7th Cir. 2013); *Irving Ready-Mix, Inc.*, 653 F.3d at 570; *Spurlino Materials*, 546 F.3d at 500; *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir. 2001). The Petitioner bears the burden of establishing the first, third and fourth of these circumstances by a preponderance of the

¹ The Act states in relevant part that:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

evidence. *Spurlino Materials*, 546 F.3d at 500; *Francisco Foods*, 276 F.3d at 286. The second prong is evaluated on a sliding scale: the better the Petitioner's case on the merits, the less its burden to prove that the harm in delay would be irreparable, and *vice versa*. *Spurlino Materials*, 546 F.3d at 500; (7th Cir. 2008); *Francisco Foods*, 276 F.3d at 286-87.

While “[a]n injunction granted under section 10(j) is an ‘extraordinary remedy’ and should be granted only in those situations in which effective enforcement of the Act is threatened by delay in the Board's dispute resolution process, in order to demonstrate a reasonable likelihood of success on the merits, *Irving Ready-Mix*, 653 F.3d at 570, the Petitioner need only show the “evidence [i]s sufficient to establish a better than negligible chance of success on the merits.” *Spurlino Materials*, 546 F.3d at 503; *N.L.R.B. v. Electro-Voice*, 83 F.3d 1559, 1570 (7th Cir. 1996). Things are made more difficult by the Petitioner asking the court to rule based on the hearing transcript and exhibits taken at the administrative hearing, when not even the ALJ has not yet ruled. In that context, a court is prohibited from making credibility findings, even though the outcome of most cases depends upon a resolution of competing versions of events given by interested witnesses, often willing to dissemble when it is to their advantage. *Schmude v. Tricam Industries, Inc.* 556 F.3d 624, 628 (7th Cir. 2009). Under the Act, credibility determinations are the exclusive province of the N.L.R.B., acting through the ALJ, who heard the testimony and observed the witnesses. *Spurlino Materials*, 546 F.3d at 491; *Francisco Foods*, 276 F.3d at 287. The law recognizes that “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985). *See also, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. N. L. R. B.*, 547 F.2d 575, 592 (D.C. Cir. 1976). Or as Justice Jackson succinctly put it, “a few minutes’ observation in the courtroom is more

informing than reams of cold record.” *Ashcraft v. State of Tenn.* 322 U.S. 143 (1944)(Jackson, J., dissenting).

Yet, even though the court cannot consider credibility, it is charged with predicting what the N.L.R.B.’s ultimate conclusion likely will be. *Spurlino Materials*, 546 F.3d at 503 (describing the court’s task as making “a predictive judgment about how the N.L.R.B. is likely to rule.”); *N.L.R.B. v. Q-1 Motor Exp., Inc.*, 25 F.3d 473, 477 n.3 (7th Cir. 1994)(“The court therefore must attempt to predict what the eventual outcome of the N.L.R.B.’s proceedings will be and to act accordingly. If the eventual outcome turns out to be different from what was predicted, however, it is obviously the prediction, not the outcome, that must be rejected.”). In a case dominated by conflicting versions of events from various witnesses, the ALJ’s decision will involve multiple credibility findings. Not surprisingly, at least based on the cases to which the Petitioner has called the court’s attention, these predictions don’t have a track record of being especially accurate or consistent, especially when made prior to the ALJ’s decision. *See, e.g., Electro-Voice*, 83 F.3d at 166 (ALJ’s conclusion directly contradicted conclusion court made, based on the transcript of the administrative hearing, one month earlier); *Francisco Foods, Inc.*, 276 F.3d at 284(two months after the district court denied the Director’s petition for interim relief on dry record, the ALJ ruled the other way); *Q-1 Motor Exp., Inc.*, 25 F.3d at 477 n.3 (district court’s ruling different than eventual ALJ determination). When there is an ALJ’s decision already in hand, the matter becomes simpler, as the court is obligated to “give some measure of deference to the view of the ALJ in determining the likelihood of success.” *Francisco Foods*, 276 F.3d at 288. After all “[t]he ALJ is the Board’s first-level decisionmaker. Having presided over the merits hearing, the ALJ’s factual and legal determinations supply a useful benchmark against which the Director’s prospects of success may be weighed.” *See also Spurlino*

Materials, 546 F.3d at 502–503.

Along those lines, the Petitioner tells us that in proceedings like this one, the court “should give the [petitioner’s] version of the disputed facts the ‘benefit of the doubt’ and should accept the reasonable inferences he draws from the facts if they are ‘within the range of rationality,’” quoting from the 41 year-old *Squillacote v. Graphic Arts Int’l Union, AFL-CIO*, 540 F.2d 853, 858–59 (7th Cir. 1976). [Dkt. #15, at 3]. But that is to ignore the importance of the role credibility plays and to effectively demand almost all cases be decided in favor of the N.L.R.B. Also, *Graphic Arts* was about a Section 10(l) injunction, not a 10(j) injunction. 540 F.2d at 858. In the context of a 10(j) case, which is what we are concerned with here, the most recent Seventh Circuit comment on whether the Petitioner should be entitled to “the benefit of the doubt” appears to be in *Electro-Voice*, 83 F.3d at 1567, where the court refused to determine whether the Petitioner’s view of the facts was entitled to such deference and explained that the concept came from 10(l), not 10(j), cases. 83 F.3d at 1567 n.16. The only deference the Seventh Circuit has said was applicable to a view of the facts is “some measure of deference” to the ALJ’s view, *Am. Red Cross, Heart of Am. Blood Servs. Region*, 714 F.3d at 556, and, as already stated, the Petitioner doesn’t yet have the ALJ’s decision. As a result, we wade into the often diametrically opposed stories about working and union organizing at MTIL’s facility at a bit of a disadvantage, and we attempt to predict what might happen before the N.L.R.B.

C.

Petitioner tells us that a union organizing campaign among MTIL’s production and maintenance employees began in mid-October 2016, and resulted in the union filing a petition to represent MTIL’s employees on November 20th. Petitioner claims that immediately after the election

petition was filed, MTIL engaged in a continuous and pervasive campaign to quash the union activity of its employees. For example, the Petitioner claims that in early December after employee, Willie Stevens, began wearing a union button, he was “unlawfully interrogated” by plant manager, Cornelius Chandler. [Dkt. #20, at 3]. But Petitioner cites to no evidence² of this “interrogation” in the record, and *ipse dixit*s of counsel don’t count. See *IFC Credit Corp. v. Aliano Brothers General Contractors, Inc.*, 437 F.3d 606, 610-611 (7th Cir.2006); *United States ex rel. Feingold v. AdminaStar Federal, Inc.*, 324 F.3d 492, 494, 497 (7th Cir. 2003); *Car Carriers Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984). In fact, when asked what Chandler told him would happen if a union came in, Stevens testified that he “[couldn’t] recall.” (R. 206). Then N.L.R.B. counsel asked him if Chandler “mention[ed] the company relocating if the union came in,” Stevens answered, “[s]omething like that, he was saying. It’s a possibility –.” (R. 206).³

²This is a tack that Petitioner, unfortunately, takes throughout. The transcript is over 700 pages long. Documentary evidence puts the record at well over 1000 pages. While an attorney who has lived a case may know with precision where in a record certain points are made, a judge, with no similar familiarity with the materials, cannot. That is why, time and again, the Seventh Circuit has that warned attorneys that arguments unsupported by citations to the record need not be considered. *Rahn v. Bd. of Trustees of N. Illinois Univ.*, 803 F.3d 285, 294 (7th Cir. 2015)(“As we have oft-stated, ‘we will not root through the hundreds of documents and thousands of pages that make up the record here to make [plaintiff’s] case for him.’”); *Spitz v. Proven Winners N. Am., LLC*, 759 F.3d 724, 731 (7th Cir. 2014)(“...[a] brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record.”); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)(“Judges are not like pigs, hunting for truffles buried in the briefs.”).

³ A leading question, even though proper where a witness claims a lack of recall, often provokes an unreliable or at least suspect response. *United States v. Campbell*, 659 F.3d 607, 612 (7th Cir. 2011), *rev’d on other grounds*, 568 U.S. 802 (2012). Of course, this involves a determination of credibility, *Stine v. Marathon Oil Co.*, 976 F.2d 254, 266 (5th Cir. 1992), which is beyond our charge here.

“Employers . . . violate § 8(a)(1) when they interrogate employees about their union activities in circumstances that tend to interfere with organizational efforts.” *Electro-Voice*, 83 F.3d at 1570. Petitioner does not develop this point or explain what was asked of Stevens or how it was asked. [Dkt. #20, at 3].

A former MTIL employee, Tonia Zekas, testified that she overheard plant manager, Ramon Haya-Trueba, ask one of the employees, Labrie Ousley, to get his line to vote against unionizing. Zekas said that Ousley told Haya-Trueba “he would be working on that.” Haya-Trueba told Ousley he would give him \$500 if his line voted against the union, and gave him three t-shirts. (R. 37). Zekas explained that the t-shirts, which were green, meant a pay increase for Ousley of \$1.25 per hour. (R. 38). While Zekas testified that Haya-Trueba writes in Spanish and prefers to speak Spanish over English, she said this exchange, which she claims she overheard through a two-inch gap in the wall between offices, was in English. (R. 35, 36, 78). Haya-Trueba, the plant manager, who testified through an interpreter at the hearing said that he spoke very little English – “loose words” like “hello” or “good morning,” that he never had this interaction with Ousley and that one could not hear, or at least not understand, conversations through the wall. (R. 632, 626).

Temporary employee, Tasha Lee, testified that in early December she saw plant manager, Chandler, in the break room. She said he picked up a union flyer and “[h]e was like, if the union wins, there's going to be a lot of people getting fired.” (R. 336). There may have been one other person in the break room, but Lee could not recall. (R. 335). An MTIL employee, Matthew Wilmot, testified that plant manager, Haya-Trueba, asked him if he had signed a union flyer. (R. 324).

On December 7, 2016, MTIL held an employee meeting. Edgardo Villanueva, a consultant MTIL engaged for labor relations, testified that the idea was to educate the employees about the “nuances” of union membership. (R. 675, 686). While the union flyers told them they would get more money if they voted union, Villanueva explained this wasn’t always the case. (R. 686). Oscar Bendezu, who started working for MTIL in March 2016 and attended the first-shift meeting, called Villanueva “the guy from union buster.” (R. 309). Bendezu was pro-union; he wanted a union

because “[t]he way they talk to us. They force us to do what we doing. It was real harassment at that time” (R. 262). Bendezu, who understood both Spanish and English, testified that Haya-Trueba told the employees in Spanish “[t]hat he probably would move if the union win.” (R. 310). Bendezu didn’t know if he meant himself or the company. (R. 310). Villanueva translated this into English and, again, Bendezu didn’t know if they meant him or the company would move. (R. 310).

Bobby Frierson, a union organizer and employee, who was fired and who is the centerpiece of this case, testified that on December 9, 2016, “Mr. Ramon” – Frierson didn’t know Haya-Trueba’s last name – asked him what he could do to get the union not to come in. (R. 152). Frierson said he told him it was too late. (R. 153). Frierson testified that a couple of days later, on December 12, Haya-Trueba told him that the picture of him on a pro-union flyer was “nice.” (R. 160). Frierson said Chandler told him, that “[e]verybody is not going to make it. The important people, yeah, we can take care of them, but we can’t take care of everyone. Maybe on the next go around we can, but I can take care of you.” (Tr. 162). Chandler told Frierson he was one of his favorites. (R. 162). When counsel asked whether Chandler wanted anything in exchange, Frierson answered: “he didn’t say it, but he was saying – it was pretty much to vote no for the union.” (R. 162). Frierson testified that he then told Chandler, “instead of offering me a \$3 raise, there’s six people in line. You could give everybody 50 cents.” (R. 162-63). When counsel asked when Chandler had offered the \$3 raise, Frierson explained: “. . . . He didn’t actually say, here is a \$3 raise. He said we can give you a raise.” (R. 163). Frierson then said there was no exact number, and he wouldn’t have believed him anyway. (R. 163).

Plant Manager, Chandler, testified that, later that day, MTIL distributed bonuses, and for the first time six employees received payments of \$100. (R. 511). Haya-Trueba testified that he didn’t

grant any bonuses at that time. (R. 624). Villanueva testified that, at the meeting, Haya-Trueba told the employees the company “would be looking at the possibility of pay . . . for the up[coming] holiday, which was Christmas . . .” (R. 696). Plant Manager, Haya-Trueba “absolutely [did] not” tie this to the upcoming election. (R. 696). Haya-Trueba, testified that they began paying for all holidays when, at Thanksgiving, they received many complaints about it. (R. 623).

On December 14, just two days prior to the scheduled election, MTIL held another meeting at which, according to Bendezu, Haya-Trueba told employees that “he’s [going] to do drug tests and stuff like that [and] if [you] don’t pass the test everybody is going to be out” and “he’s going to start paying for holiday[s].” (R. 312). Villanueva said the subject of drug tests “absolutely [did] not” come up. (R. 695-96). Stevens testified that Villanueva translated Plant Manager, Haya-Trueba, as saying testing “may be a possibility if people use drugs – .” (R. 208). Crishonna Collins, who began with MTIL in August 2016, said Villanueva translated Haya-Trueba as telling the employees that “[t]he voting for the union was cancelled,” and “if the union would have come in everybody would have been drug tested and also if the union came in the whole place would shut down.” (R. 347).

The main focus of this case, however, is the termination of union organizer Frierson on December 14, 2016, shortly before the vote. The reasons given for his termination on his “Employee Exit Form” were “[t]hreatening to conduct an act of violence against another employee. [He] displayed insubordinate behavior when he failed to exit the facility after direction. The employee also made verbal threats to associates.” (G.C. 70). The testimony regarding Frierson’s conduct are these: Frierson testified that, on December 13, 2016, he was standing around by the time clock with two other employees when Chandler asked him if he got paid to stand around. (R. 164-65). Obviously, this was not a question, but an expression of sarcasm and displeasure. Frierson, who

according to his picture was an African American, sarcastically responded, “no sir, *boss*.” (R. 165)(Emphasis supplied). Chandler thought Mr. Frierson was being patronizing and asked if he thought he was funny, and, again, Frierson responded, “no sir, *boss*.” (R. 145)(Emphasis supplied). Frierson wasn’t sure whether Chandler then said he would write him up or that he was merely giving him a verbal warning. (R. 145). But it was one or the other. Nonetheless, according to Frierson, he continued along the same lines:

I said, is there anything else you need me to do, *boss*? I said, no sir, *boss*. Is it okay if I go back and do the job you say you pay me for, *boss*?

(R. 145)(Emphasis supplied).⁴

Despite Mr. Frierson’s obvious taunting and his intentionally insulting and provocative remarks, Chandler testified that he gave Frierson only a verbal warning because, he needed him to be in his work area during the shift. (R. 482). The story of this exchange, much of it admittedly coming from Frierson, himself, is likely to be credited by the ALJ. And Frierson did not challenge what Chandler said. Chandler then testified that he had a second shift meeting. While the meeting was in progress, he heard loud knocking on the door; it was Frierson. (R. 483-84). According to Chandler, Frierson said, “[w]here’s my verbal. Fuck that. I want my verbal.” (R. 484)(Emphasis supplied). Frierson admitted that he interrupted the meeting so he could get his “write-up because

⁴ One is reminded of Justice Jackson’s famous observation in *Kunz v. People of State of New York*, 340 U.S. 290, 299 (1951)(dissenting opinion): “These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low. They are not in that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none.”

[Chandler] said he wrote [him] up” (R. 167). Again, Chandler had just given him a verbal warning, as he explained in his testimony. (R. 484). He testified that he left his meeting and told Frierson, who was then in the office, that he had said it was a verbal warning and he wasn’t going to write him up. (R. 484). During his testimony, Frierson agreed that Chandler had told him he wasn’t writing him up. (R. 148). The Petitioner concedes there was no write-up, only a verbal warning. [Dkt. #20, at 6].

Mr. Frierson was angry because Chandler, he testified had “made a scene out there,” and he demanded a write-up instead of a verbal warning. (R. 168). Mr. Chandler testified that he and Lionel Hudson—the human resources administrator – asked Frierson to leave the office because Frierson was so irate. (R. 484). Chandler testified Frierson stood in the corner of the office and then came toward him with a clenched fist; Chandler said he felt threatened. (R. 484). As Hudson described it, Frierson was upset, the two were close together, and body language led him to believe things could escalate. (R. 426). Body language, of course, can be meaningful. *See, e.g., Skilling v. United States*, 561 U.S. 358, 386 (2010); *United States v. Olano*, 507 U.S. 725, 739 (1993); *United States v. Wing*, 104 F.3d 986, 988 (7th Cir. 1997). Hudson got between them. (R. 426). Chandler testified that he told Frierson to leave, but he would not. (R. 484). Someone grabbed Frierson and someone grabbed Chandler. (R. 484). According to Frierson, Chandler told him to leave the building, and he simply left without any further confrontation. (R. 168). Stevens testified that, from what he saw, Chandler and Frierson were arguing about whether Chandler had said Frierson would be written up or whether it had just been a verbal warning; Chandler told him to leave, and Frierson left. (R. 216).

Gerald Bradley, a forklift lead with MTIL, essentially corroborated Chandler's version of the exchange. He said Frierson interrupted the meeting and was very disruptive. (R. 553). He further testified that Chandler avoided Frierson and went on with the meeting. (R. 554). Then, out in the office after the meeting, he said:

Bobby [Frierson] came in. He was loud. You know, aggressive, and him [sic] and [Chandler] started arguing again. You know, it got very, very intense, very extreme, you know, to the point Bobby was so upset and angry you couldn't even say nothing to him. You know, he got very close, in close proximity to [Chandler], you know, rearing up at him to the point where I just was like, man, what you doing? I told him, you tripping. He wasn't trying to hear anything. He waved me off. Said something to me. You know, yelled something to me.

From that point [Hudson], I think, came out of his office. You know, everyone just basically tried to, you know, get Bobby to calm down to get him up out the office, separate him and [Chandler].

(R. 554).

Bradley testified that, right after that, Frierson made hostile gestures toward another employee, who happened to be Bradley's nephew. (R. 555). Hostile gestures have meaning. *Bott v. U.S. Airways, Inc.*, 2009 WL 1686801, at *3 (W.D.N.C. 2009).

Frierson testified that when he left the building he went to the parking lot where he met Sean Fulkerson from the Union. (R. 169). It seems he had arranged to meet with Fulkerson at this time, but it's not entirely clear. (R. 169). Frierson testified that he wanted to have a conversation with him about the incident that had just happened. (R. 169). According to Frierson, he had punched out at his usual time, 2:15 p.m. (R. 170). Apparently while he was meeting with Fulkerson – it's unclear – a number of employees surrounded him and threatened to kick his ass. (R. 172). One of them was Bradley. Frierson testified that he told Bradley his issue wasn't with him "because [Chandler] is his henchman." (R. 2). Fulkerson then told Frierson, "that's not how you beat them," and Frierson

testified he then calmed down. (R. 173). Frierson testified that a security guard then approached him and after being told to leave the parking lot, he did. (R. 174).

Frierson testified that he reported to work the next day and was called into the office. (R. 174). There, he met Chandler, Hudson, and the security guard. Hudson told him he was suspended pending an investigation. (R. 175). The “Disciplinary Action Report,” which he signed, said that he was insubordinate when told to stop talking to other employees and return to work, approached his supervisor in a threatening manner, and threatened another co-worker. The report also said that Frierson had engaged in a “[t]hreat of violence” when he approached his supervisor in a threatening manner and also threatened other co-workers verbally. (G.C. 71). Hudson called him later that evening and told him he was terminated. (R. 180). The Employee Exit Form, which was not signed by Frierson, stated that he threatened to commit an act of violence against another employee, and that he displayed insubordinate behavior when he failed to exit the Facility and also made verbal threats to associates. (G.C. 70).

D.

Likelihood of Success on the Merits

The Petitioner makes several charges of anti-union animus that he says are “clearly demonstrated” by the record and show he has a “strong likelihood of success” on the merits. But Petitioner’s characterization of the evidence as “clear” is not supported by the record. The evidence, which consists of the testimony of various employees and managers provides, for the most part, opposing versions of the facts. In cases presenting conflicting versions of events, the outcome “depends greatly upon nuanced credibility determinations....” *JH ex rel. JD v. Henrico Cty. Sch. Bd.*, 395 F.3d 185, 197 (4th Cir. 2005). Indeed, without the ability to make credibility judgments, in most

cases it would be exceedingly difficult if not be impossible to say that one side or the other had shown that the version of events sponsored by one party had been shown to be “clearly” true or “clearly” false. Fortunately for the Petitioner, he doesn’t have to establish anything “clearly.” All he need show in this case is that he has a “better than negligible” chance of succeeding on the merits before the N.L.R.B. *Spurlino Materials*, 546 F.3d at 503 (7th Cir. 2008); *Electro-Voice*, 83 F.3d at 1570.

“Better than negligible” is not much of a hurdle to negotiate. *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046 (7th Cir. 2017). In *Electro-Voice*, for example, the district court denied the Petitioner an injunction, because it concluded “the evidence of unfair labor practices [wa]s ‘equivocal’ or ‘unclear.’” 83 F.3d at 1568. Although the employer presented “a plausible explanation” for its actions and “compelling evidence in support of its case,” 83 F.3d at 1570, the Court of Appeals reversed, noting that the timing of discharges and the manner in which the terminations were carried out, viewed in the light of the evidence suggesting that the company engaged in other anti-union practices and acted with anti-union animus, establish that the Director has “a better than negligible chance of prevailing on the merits.” But, the Court emphasized, its decision should not be deemed as an expression of opinion on the merits of the case, itself. Indeed, it stressed that its “holding should not be taken as a finding in favor of the Director on the merits.” It noted that the defendant had offered a “plausible explanation for the terminations, and presented compelling evidence in support of its case.” It emphasized that there were credibility questions regarding witnesses and that its inquiry is limited to whether the Director has a better than negligible chance of success. *Electro-Voice, Inc.*, 83 F.3d at 1570. As in *Electro-Voice*, there are obvious credibility questions affecting both sides, and it’s up to the ALJ to assess credibility in this

case. Could the ALJ believe enough of the Petitioner's witnesses and enough of their testimony to find for the Petitioner? The answer is "yes." But so much hinges on the credibility of the witnesses.

First, Petitioner argues that the record "clearly demonstrates" [Dkt. #20, at 3] threats that if the union won the company would shut down or relocate. Threatening plant closure or other reprisals for union activity violates §8(a)(1), because "these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce." *Electro-Voice*, 83 F.3d at 1570. But, the testimony that the Petitioner relies on doesn't "clearly demonstrate" any such thing. When asked what Chandler told him would happen if the union came in, Stevens said he didn't remember. It was only when prompted by N.L.R.B. counsel that Stevens said, "something like that." (R. 206). When Bendezu testified about relocation threats, he said that Haya-Trueba had told employees at a meeting that he "probably would move" if the union won. But, Bendezu said he didn't know whether Haya-Trueba meant he would move personally or the company would relocate. (R. 310). So, he didn't consider it a threat. Collins testified that Haya-Trueba said three things: the union election was cancelled, if the union won everyone would be drug-tested, and if the union won, the plant would close. (R. 347).

It's improbable that Haya-Trueba told the employees the election was cancelled; no other witness testified he said anything remotely like that.⁵ If the plant closed, the employees certainly weren't going to be drug-tested by MTIL. None of this "clearly establishes" the Petitioner's view of the facts. But, that's not the question. The question is whether the Petitioner has a better than negligible chance of success before the ALJ and the N.L.R.B. The testimony of the Petitioner's

⁵ Actually, Haya-Trueba cancelled nothing; the Union and the N.L.R.B. cancelled the election the day after this meeting, December 15, because charges had been filed before the N.L.R.B. (G.C. 65).

witnesses was not “inherently incredible” and thus, cannot be rejected on that basis. *See Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)(“the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it.”); *Schandelmeier-Bartels v. Chicago Park District*, 634 F.3d 376 (7th Cir. 2011)(a district court can disregard testimony if reasonable persons could not believe it because it contradicts indisputable physical facts). *See also Latino*, 58 F.3d at 315; *Electro-Voice, supra*, 83 F.3d at 1571; *Geighy Chemical Corp. v. Allen*, 224 F.2d 110, 114, n.5 (5th Cir. 1955). In the instant case, there is a more than negligible chance that the ALJ will believe the Petitioner’s witnesses. It would be an error to deny the Petitioner relief simply because of conflicting testimony and credibility issues – issues that exist in every case that goes to trial. *Compare Whitehead v. Bond*, 634 F.3d 919 (7th Cir. 2012).

Maybe Zekas – a disgruntled former employee⁶ – did hear Plant Manager, Haya-Trueba, through a gap in the wall between their offices, and he was speaking English to Ousley. Maybe he did give Ousley t-shirts and a raise. Zekas said she sent the paperwork through to payroll; Petitioner hasn’t pointed to any documentary evidence of that. [Dkt. #20, at 4]. While the ALJ might well not credit some or all of this testimony, there’s at least some chance – a better than negligible chance – that the ALJ will believe what the witness said she overheard, and “granting benefits with an eye toward curbing union organization violates § 8(a)(1).” *Electro-Voice*, 83 F.3d at 1570.

⁶ Zekas testified that she was fired for being late for work too often but claimed she wasn’t aware that she had been. (R. 41). Zekas is also the only witness from the administrative hearing to testify that Haya-Trueba spit on or shoved employees every week, and that Chandler physically assaulted 15 different employees. (R. 48-49). Exaggeration is not an indicia of truthfulness. *Mei Zhen Huang v. Mukasey*, 256 Fed.Appx. 406 (2nd Cir. 2007); *United States v. Lopez*, 2016 WL 7337548, at *3 (S.D. Tex. 2016); *Gray v. Michael*, 2016 WL 6403509, at *9 (D. Md. 2016). Nor is implausibility. *Electro-Voice, Inc.*, 83 F.3d at 1569.

Most of the petitioner's focus is on the altercation between Frierson and Chandler and the subsequent termination of Frierson. The *pas-de-deux* is described differently by the two men, but not entirely. Of course, there is no certainty whom the ALJ will believe, and the difficult task of assessing credibility of witnesses, as already explained, is not a part of the present exercise. We did not see or hear the testimony, which is all important. But, overall, the testimony of the two men indicates agreement that Frierson was milling around and Chandler told him to get back to work. Rather than simply complying, Frierson delayed and began goading Chandler by playing the obsequious underling, using language that all would interpret as racially charged and inflammatory and provocative: "yes sir, boss . . . no sir, boss . . . anything else, boss."⁷ Frierson, himself, basically admitted his behavior. Chandler asked if Frierson thought he was funny, and issued a verbal warning. Clearly, and contrary to the Petitioner's assertions, discipline – especially the minor discipline involved – was not "unwarranted." [Dkt. # 22, at 11]. Frierson admitted conduct that was intended to be provocative and insulting.

Although Frierson and the Petitioner concede that Chandler gave only a verbal warning, Frierson decided to escalate things and demand a write-up. So he interrupted a meeting, and then confronted Chandler in the office. By all accounts, the encounter was aggressive and confrontational, with Chandler telling Frierson there had only been a verbal warning and Frierson demanding a write-up in any event. Plant Manager, Chandler, who explained the circumstances under which the encounter with Frierson occurred, understandably felt threatened. The Petitioner never explains why,

⁷ Petitioner claims that this demonstrates that "at no point did Frierson refuse to follow a directive of his supervisor or engage in insubordinate conduct." [Dkt. #22, at 3]. But Frierson's own testimony shows that, when told to get back to work, rather than return to his work station, he went into his "yes sir, boss," "no sir, boss," "anything else, boss" routine before finally complying.

if, as is now conceded, the warning was merely verbal, Frierson, was so adamant and made a scene about and demanded a write-up. Frierson's behavior could not responsibly have been ignored, and it is his behavior and the language he chose showed quite clearly he did not want it to be.

It seems more than a happy coincidence that the organizer from the union, Fulkerson, was waiting for Frierson in the parking lot after this fateful shift. Of course, it may not been preplanned. But the timing seems more then fortuitous, and a confrontation and a *write-up* of a union organizer over nothing more than dawdling, for that is how it began, would serve a beneficial purpose in the union campaign. Of course, all this is for the ALJ. But one thing is not open to serious question: Frierson chose to exacerbate the situation and escalate the controversy at every opportunity. At any point, it would seem, he could have not only have staved off being fired, but receiving any discipline at all. When told to get back to his work station, he did not, choosing to mock Chandler in racially charged and insulting and demeaning language. When given a verbal warning, he chose to confront Chandler, and he demanded a higher degree of discipline: a write up. This was all Frierson's doing as all the witnesses in essence testified.

E.

Section 8(a)(3) of the National Labor Relations Act prohibits employers from terminating employees "*solely on the basis of their union activities or sympathies.*" *Electro-Voice*, 83 F.3d at 1568 (citing 29 U.S.C. § 158(a)(3))(Emphasis supplied). Thus, the employer's motivation for terminating an employee is critical to the determination whether the termination violates the NLRA. *Electro-Voice*, 83 F.3d at 1568; *N.L.R.B. v. So-White Freight Lines, Inc.*, 969 F.2d 401, 406 (7th Cir.1992). The Petitioner has the burden of proving by a preponderance of the evidence that the terminations were motivated by a desire to thwart protected activity. *Chicago Tribune Co. v.*

N.L.R.B., 962 F.2d 712, 716 (7th Cir.1992). If the Petitioner carries that burden, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have terminated the employees irrespective of the protected activity. *Id.* at 718. *See also, Electro-Voice*, 83 F.3d at 1568; *Northern Wire Corp. v. N.L.R.B.*, 887 F.2d 1313, 1318 (7th Cir.1989).

There is no dispute that Chandler and management knew of Frierson's involvement in the union. At the same time, it was Frierson, not Chandler, who escalated the altercation to the point of no return. That's a problem for the Petitioner since the termination has to be motivated *solely* by anti-union animus, as the Seventh Circuit held in *Electro-Voice*. The evidence supports the conclusion that MTIL did have a more than sufficient, non-union reason to fire Frierson – namely, his exceedingly insubordinate, aggressive and threatening behavior toward another worker and toward one of MTIL's managers. In *Electro-Voice*, the Seventh Circuit emphasized that the circumstances surrounding Shaffer's termination were sufficiently distinct to warrant separate consideration from other firings. *Electro-Voice* presented evidence that Shaffer “destroyed several thousand dollars worth of equipment, and would have been terminated regardless of his union activity.” 83 F.3d 1570 at n. 17. The Seventh Circuit “concur[ed] with the district court that the Director ... failed to establish a better than negligible chance that an anti-union animus motivated Shaffer's termination.” So too here.

But the Petitioner ignores all of this and insists that the firing of Frierson was illicit because an individual who had had a physical altercation over a cellphone with a co-worker, who happened to be his pregnant girlfriend, only received a 3-day suspension. Significantly, the girlfriend, who apparently started the whole thing, received the same suspension as the boyfriend. (R. 51-53, 56).

The boyfriend was not fired because the Company needed him on the line. (R. 58).⁸ Also ignored is the fact that both suspensions were recommended by Ms. Zakis, the Petitioner's witness at the hearing. It should be parenthetically noted that three other employees had previously been discharged for fighting, while some others were merely disciplined. (R. 45). Chandler said that, in his opinion, Frierson's behavior was worse than the altercation over the cell phone. (R. 530). Of course, the issue is not what Chandler believed, but whether an employer like MTIL is bound by an earlier episodic disciplinary decision so that it could not issue any greater punishment to an employee who had conducted himself as Frierson had without being subject to the kind of claim the Petitioner is now making. While evidence of the earlier 3-day suspension may be relevant to the motive underlying the discipline meted out to Frierson, it is not conclusive or limiting by any means. Nor should it be.

Apart from the fact that comparisons are necessarily inexact, punishment in one setting does not demand that it be repeated in a different setting, lest there be a finding of illicit motivation. Infractions affecting multiple people and involving different and multiple forms of misconduct can be treated differently than misconduct of a different nature. After all, to be an appropriate comparator requires that the comparator be similarly situated to the person to whom the comparison is being made, *Hanners v. Trent*, 674 F.3d 683, 692 (7th Cir. 2012), which, in this case, means they have a "comparable set of failings...." *Monroe v. Indiana Dep't of Transportation*, 871 F.3d 495, 509 (7th Cir. 2017). Here, MTIL could reasonably believe that the comparators were not similarly situated for the reasons previously discussed. And finally, that MTIL may have seen the situations differently

⁸ We cannot make credibility judgments; but it maybe noted that the witness claimed that the father had threatened to kill the baby over the cellphone. It was she who recommended the suspension. (R. 51-56).

than does the Petitioner does not mean the Petitioner has shown a better than negligible chance of success on its claim that the firing had a prohibited motivation. *Cf., Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 564 (7th Cir. 2016). Employers, it must be remembered, even have the prerogative to be “shortsighted and narrowminded.”

Under the circumstances that exist in this case, where Frierson was intentionally insubordinate and threatening to multiple people over a somewhat extended period of time and his misbehavior was directed to management and workers alike, MTIL had ample reason for firing Frierson unrelated to a desire to thwart or curtail union activity. As in *Electro-Voice, Inc.*, “the Director has failed to establish a better than negligible chance that an anti-union animus motivated [the Frierson] termination.” 83 F.3d at n. 17.

F.

While the Petitioner has enough to show he has a “better than negligible” chance of succeeding on the merits before the N.L.R.B., *Spurlino Materials*, 546 F.3d at 503 (7th Cir. 2008), *Electro-Voice*, 83 F.3d at 1570 – it’s a particularly onerous burden – *Whitaker By Whitaker*, 858 F.3d at 1046 – his case is not especially strong. The testimony was equivocal or contradictory or, some might find, in some instances, arguably implausible. Even if that were not the case, witnesses for one side adequately disputed witnesses for the other. If this were Petitioner’s motion for summary judgment, the motion would be denied. *See Bloedorn*, 276 F.3d at 287 (comparing process to summary judgment proceeding). That’s because all, or nearly all of this case hinges on the credibility of the various witnesses, *see Orton Bell v. Indiana*, 759 F.3d 768, 773 (7th Cir. 2014), a matter beyond our statutory authority to resolve.

While the present case is not a motion for summary judgment, the nature of Petitioner's case means that he must make a stronger showing of irreparable harm if he is not granted the relief he requests. *Spurlino Materials, LLC*, 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286-87. First, we shall apply that calculus to the Frierson termination. The Petitioner seeks an order requiring MTIL to reinstate Frierson and submits that if relief is not granted, unionization will suffer irreparable harm. Petitioner calls him "the primary Union leader [at] the facility." [Dkt. #20]. Notably, in the 30-year-old case Petitioner relies upon to support Frierson's reinstatement, *Gottfried v. Frankel*, 818 F.2d 485, 496 (6th Cir. 1987), the Petitioner presented *evidence* of the important role the fired employee played in developing union support, as well as evidence of a drop in union membership. *Id.* at 496. In *Electro-Voice*, one-third of the workforce in the Indiana plant was fired, which had a substantial chilling effect on union activity in the Indiana plant. 83 F.3d at 1572. Here, nothing of the kind occurred, and Petitioner directs the court to no evidence or testimony to suggest Frierson is the *key* union organizer. Petitioner claims that, since his discharge, "[e]mployee attendance at organizing meetings has significantly dwindled." [Dkt. #20, at 11]. Petitioner points to some sign-in sheets from October, November, and December of 2016, and one from March of 2017. Attendance at the meetings prior to Frierson's discharge was 8, 15, 8, 10, 17, 17, and 14. Afterward, it was 7 and 9. (G.C. 74, 75). Arguably, a drop in attendance from an average of about 12 to an average of 8 is "significant[]." But, as we point out in note 9 below, the evidence suggests an actual increase in attendance following the termination of Frierson's employment.⁹ In any event, one must be careful

⁹ Petitioner says union support has eroded "since [the alleged anti-union campaign in November . . .]" [Dkt. # 20, at 11]. Attendance at meetings on October 25, 26, and November 2, 16 was 8, 15, 8, 15, and 10; attendance on November 30, and December 7 and 14, was 17, 17, and 14. (G.C. 74). Contrary to the Petitioner's characterization, after November, support, or at least interest, actually rose.

continue...

of *post hoc ergo propter hoc*, which, as Judge Easterbrook reminds us, “is the name of a logical fallacy, not a means to prove causation.” *Loudermilk v. Best Palate Co., LLC*, 636 F.3d 312, 314 (7th Cir. 2011).

The only evidence as to union leaders at MTIL – evidence that petitioner does not cite [Dkt. #20 at 12-14] – is a flyer listing Frierson, not as the primary union leader, but merely one of four. (G.C. 73). Petitioner’s Reply Brief indicates, again without citation to the record, that Bendezu is also a leader, making Frierson just one of five at a facility of 86 workers. [Dkt. #22, at 12, 14]. So, the Petitioner provides the court with nothing that shows that the termination of Frierson is the “disappearance of the ‘spark to unionize.’” *Pye ex rel. N.L.R.B. v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001). Based on the evidence, Frierson continues to attend organizational meetings. (G.C. 75). Petitioner has simply not made a sufficient showing, let alone a strong enough showing, to balance the weaknesses of its case regarding Frierson, that the absence of Frierson on the plant floor will do irreparable harm to efforts at unionization.

Petitioner contends what Frierson did is protected under a 40-year-old N.L.R.B. case, *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979), because he is a union activist. But that’s more than a stretch, and taken to the limits of its logic the argument would insulate a union worker simply by virtue of that status. In *Atlantic Steel*, the Board looked at four factors to determine if the discharged employee has lost the protection of the Act: (1) the place of the discussion; (2) the subject of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way,

⁹...continue

In *Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 849 (S.D.Ind. 1997), the evidence showed that the defendant’s conduct “was a dramatic public, and powerful attack against union activities.” Indeed, the company fired Hancock “for protected acts that he performed as the union President.” The firing of Frierson is not in any way comparable to what occurred in that case. Quite the contrary.

provoked by the employer. 245 N.L.R.B. at 816. At the time, Frierson wasn't engaged in protected activity. He had been given a verbal warning when, rather than return to his work area when directed, he went into his taunting "yes, boss; no, boss" routine. Again, clearly, the verbal warning was warranted. Unsatisfied with a verbal warning, Frierson escalated the situation on his own volition by demanding a written warning. This was in no way provoked by Chandler; Chandler reminded Frierson it had only been a verbal warning.

The balance of the Petitioner's case – essentially, allegations of threats and rewards – is a question of one side's word against another's, which would put it in the very ordinary range of most cases. As such, the Petitioner does not have to make as strong a showing of no adequate remedy at law/irreparable harm as it does with its claim for reinstatement of Frierson. The Petitioner asks for an interim order requiring MTIL to bargain in good faith with the union. The remedy stems from the Supreme Court's holding in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 614, (1969). There, the Court held that if "at one point the union had a majority" and the employer has engaged in unfair labor practices "to undermine majority strength and impede the election processes," then the N.L.R.B. can consider issuing a "bargaining order." Such an order requires the employer to negotiate with the union, foregoing the normal election procedures in which the union must demonstrate its majority status. *John Cuneo, Inc. v. N.L.R.B.*, 459 U.S. 1178, 1178–80 (1983). *Gissel* cautioned that this remedy was to be used sparingly, in situations where the N.L.R.B. "finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order. *Gissel*, 395 U.S. at 614-615.

First, though, there has to be some evidence that the union has a chance with the employees. The Petitioner submitted 57 authorization cards out of a possible 86 employees to demonstrate majority support. See *Gissel*, 395 U.S. 575, 614 (1969); *N.L.R.B. v. Orland Park Motor Cars*, 309 F.3d 452, 455–56 (7th Cir. 2002). MTIL contends that a number of the cards are invalid for one reason or another, but the ALJ admitted them into the record over MTIL’s objections. MTIL points us to no case that suggests a district court in a 10(j) proceeding can overturn evidentiary rulings made by the ALJ. That’s not surprising given the limited role the district court has in this proceeding: predicting how the ALJ and then the Board will rule. If the ALJ already admitted the cards into evidence, it seems unlikely indeed that MTIL will persuade her to change her mind.

The question then becomes whether the alleged unfair labor practices in this case are enough to warrant the relief the Petitioner seeks. The types of violations here – threats of relocation or closing, offers of benefits – are of the type that courts consider detrimental enough to the union election processes to warrant relief that brings a return to the *status quo*. But the Petitioner’s argument is a bit exaggerated when he says that “[t]he Seventh Circuit has consistently upheld a *Gissel* bargaining order when presented with facts that are present in this case.” [Dkt. # 20, at 11]. The evidence here suggests two meetings where plant relocation and drug tests were threatened, and a union-organizer employee was terminated. But, for the most part, the cases the Petitioner likens this case to involved more serious or more pervasive violations and more compelling evidence. See *N.L.R.B. v. Intersweet, Inc.*, 125 F.3d 1064 (7th Cir. 1997)(*en masse* firings); *Electro-Voice, Inc.*, 83 F.3d 1559 (interrogation of employees about union supporters, firing those supporters under a vague absenteeism policy, soliciting grievances, threatening plant closure, mass firing of one-third of work force); *Am.’s Best Quality Coatings Corp. (ABQC) v. N.L.R.B.*, 44 F.3d 516 (7th Cir.

1995)(threats by supervisors to be carried out in the event that the Union prevailed, i.e., interrogations, layoffs, withholding of benefits and a refusal to bargain); *Q-1 Motor Exp., Inc.*, 25 F.3d at 473(management repeatedly threatened drivers with shutdown and reopening with new employees rather than allow the drivers to unionize, interrogating drivers and one driver's spouse about the union organization efforts and made explicit and implicit threats of retaliation).

Still, at least one case where the Seventh Circuit upheld a *Gissel* order does have a similar fact pattern: *N.L.R.B. v. Gerig's Dump Trucking, Inc.*, 137 F.3d 936, 942 (7th Cir. 1998). There, the president made a threat of selling the company, told a striking employee he could only come back to work if he brought everyone with him, and offered benefits in a letter. As such, Petitioner has shown enough.

G.

The interest at stake in a §10(j) proceeding is the public interest in the integrity of the collective bargaining process. *Am. Red Cross*, 714 F.3d at 557; *Francisco Foods*, 276 F.3d at 300. Where we have evidence of anti-union conduct and erosion of support, a more thorough analysis is unnecessary. *Am. Red Cross*, 714 F.3d at 557. The only harm to the public interest that MTIL seems concerned with, however, is the reinstatement of Frierson, and that issue has already been dealt with before.

CONCLUSION

The Petition of the Regional Director of Region 13 of the National Labor Relations Board for Preliminary Injunction under Section 10(j) of the National Labor Relations Act is granted in part and denied in part consistent with the holdings above. The parties shall submit to the court a Preliminary Injunction that complies with this Opinion and the requirements of Rule 65(d), Federal

Rules of Civil Procedure, within seven days of this Opinion.

ENTERED:


UNITED STATES MAGISTRATE JUDGE

DATE: 11/14/17



JOERG LISZKA LAVERTY SENECZKO P.C.

Management-Side Labor and Employment Law

December 19, 2017

Peter Sung Ohr
Regional Director
National Labor Relations Board, Region 13
219 South Dearborn Street, Suite 808
Chicago, Illinois 60604

**RE: Case No. 17 CV 2656
Peter Sung Ohr, Regional Director of Region 13 of the National Labor Relations
Board, et al. v. MTIL, Inc.**

Dear Mr. Ohr:

In accordance with the Order Granting Preliminary 10(j) Injunction, signed by the Honorable Jeffrey Cole on or about December 6, 2017 in the above captioned matter (copies of the English version and Spanish version of that Order are enclosed with this communique), and the requirement as specified in Paragraph (d) of that Order, I wish to advise you of the following:

1. On Thursday, December 14, 2017, Tyler J. Bohman and the undersigned, Counsel for the Employer, MTIL, Inc., personally posted physical copies of the English and Spanish versions of the aforementioned Judge Cole Court Order at the MTIL Facility in the Employee Breakroom and the Timeclock Area. Enclosed, to substantiate that posting, are pictures of the Order as posted by Messieurs Bohman and Liszka on Thursday, December 14, 2017 in both locations.
2. On December 15, 2017, Human Resources Administrator, Lionel Hudson, Second Shift Supervisor Anthony Gordon, and Third Shift Supervisor Joshua Brandon, passed out paychecks to Employees on the First (Hudson), Second (Gordon) and Third (Brandon) Shifts on



Friday, December 15, 2017. Attached to the individual Employees' paychecks and passed out by either Mr. Hudson, Mr. Gordon or Mr. Brandon, on Friday, December 15, 2017, was a copy of Judge Cole's Order either in English or Spanish depending on the Employee's language preference. Enclosed are the written verifications issued by Mr. Hudson, Mr. Gordon and Mr. Brandon substantiating the dissemination of Judge Cole's Order, either in English or Spanish, on December 15, 2017 with the paychecks.

3. The undersigned has been designated as the Chief Spokesperson for MTIL, Inc. with regard to the initiation of Collective Bargaining and has been in contact with representatives for the United Electrical, Radio and Machine Workers of America, specifically Catharine Schutzius, with regard to the initiation of Collective Bargaining. The parties have agreed to commence bargaining at the First Negotiation Session on Thursday, January 11, 2018.

Should you, upon your receipt and review of this letter and the enclosed documentation, have any questions with regard to compliance with Judge Cole's December 6, 2017 Court Order, feel free to contact me.

Very truly yours,

WESSELS SHERMAN JOERG LISZKA LAVERTY SENECHKO, P.C.

By:



Walter J. Liszka

WJL/csr

Enclosures:

Order (in English and Spanish)

Pictures of Posted Order

Verification of Dissemination of Order

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PETER SUNG OHR, REGIONAL DIRECTOR OF)	
REGION 13 OF THE NATIONAL LABOR)	
RELATIONS BOARD, FOR AND ON BEHALF OF)	Civil No. 17-CV-02656
THE NATIONAL LABOR RELATIONS BOARD)	
Petitioner)	Magistrate Judge Jeffrey
)	Cole
v.)	
)	
MTIL, INC)	
)	
Respondent)	

ORDER GRANTING PRELIMINARY 10(J) INJUNCTION

It is hereby ORDERED, ADJUDGED, AND DECREED that, pending the final disposition of the matters now pending before the Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys, and all persons acting on its behalf or in participation with it, be, and they hereby are, preliminarily enjoined and restrained from:

- (a) coercively interrogating employees;
- (b) soliciting employee grievances to discourage them from engaging in union activities;
- (c) promising benefits to employees to discourage them from engaging in union activities;
- (d) granting benefits to employees to refrain from engaging in union activities;
- (e) threatening employees with plant closure or relocation, job loss and or termination of employment in retaliation for their union and protected, concerted activities;

- (f) threatening employees with random drug testing in retaliation for their union and protected, concerted activities;
- (g) in any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

It is further ORDERED, ADJUDGED, AND DECREED that, pending the final disposition of the matters herein now pending before the Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, shall within five (5) days hereof, take the following steps:

- (a) recognize and bargain in good faith with United Electrical, Radio and Machine Workers of America (UE), herein called the Union, as the collective-bargaining representative of its employees in the bargaining unit concerning their wages, hours and other terms and conditions of employment, including providing the Union with advance notice and an opportunity to bargain over any intended changes to their wages, hours, and other terms and conditions of employment;

The appropriate bargaining unit is:

All full-time and regular part-time production and maintenance employees including quality control, sort stackers, tickers, wrappers, stackers, forklift operators, throwers, mechanics, pallet jackers, loaders, lead persons, and janitors employed by the Respondent at its facility currently located at 400 West Crossroads Parkway, Bolingbrook, Illinois 60440; excluding all office clerical employees, employees of temporary agencies, and guards, professionals, and supervisors as defined by the Act.

- (b) post copies of the Court's Preliminary Injunction Order, in English and Spanish, at Respondent's facility currently located at 400 West Crossroads Parkway, Bolingbrook, Illinois 60440, in all locations where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to

agents of the Board reasonable access to the facility to monitor compliance with the posting requirement;

(c) distribute to employees with their paycheck copies of the Court's Preliminary Injunction Order, in English and Spanish, whichever is the employee's preferred language; and

(d) within twenty (20) calendar days of the issuance of the Court's order, file with the Regional Director of the Board for Region 13 a sworn affidavit, from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the Court's order, including how the opinion and order have been posted.

DATED AT Chicago, IL, this 6th day of December, 2017.



Honorable Jeffrey Cole
United States District Court
Northern District of Illinois Eastern Division
219 South Dearborn, Room 1003
Chicago, Illinois 60604