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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD—DIVISION OF JUDGES

REGION 21

In the Matter of:

CALIFORNIA CARTAGE COMPANY,
LLC; ORIENT TALLY COMPANY, INC.;
NFI CALIFORNIA CARTAGE HOLDING
COMPANY, LLC; CALIFORNIA
CARTAGE DISTRIBUTION, LLC;
CALIFORNIA TRANSLOAD SERVICES
LLC; CORE EMPLOYEE MANAGEMENT,
INC. AND NEXEM-ALLIED LLC, dba
CORE EMPLOYEE MANAGEMENT, INC.

Respondents-Employers-
Successor Employers,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Charging Party-Petitioner-
Union.

**CASES 21-CA-190500
21-CA-207939
21-RC-188813**

**CHARGING PARTY'S
POST-HEARING BRIEF**

**TO THE HONORABLE
DICKIE MONTEMAYOR**

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I. Introduction

A. The Tainted Election

The employees at the Cal Cartage Warehouse¹ were successful in obtaining the support required for a representation election under the National Labor Relations Act (the “Act”) and the Board conducted an election on December 22, 2016. Because of Respondents’ misconduct during the critical period, however, this election did not occur under the laboratory conditions required by the Act to reflect employees’ free choice. Upon the filing of the petition, Respondents began to interrogate employees about their support for the International Brotherhood of Teamsters (the “Union”), going as far as denying work to one of the key union supporters it interrogated. Respondent discriminatorily demoted a key union supporter, Alan Mackey, soon after the petition was filed, and terminated him within weeks of the election in retaliation for his union and protected concerted activity.² Respondents prevented employees from speaking about the Union at the worksite even when they freely allowed employees to discuss other topics of conversation, and prevented the Union from communicating with employees by providing a voter list replete with incorrect contact information to the National Labor Relations Board (the “Board”) and the Union. Respondents first offered carrots in the form of an unprecedented set of coercive gifts: a long company party on paid work time, free food and entertainment, grocery gift cards for all employees, and raffles for thousands of dollars’ worth of additional gift cards.

¹ The worksite in question will be referred to as the “Cal Cartage Warehouse” throughout this brief, even though the warehouse was technically purchased by another entity in 2017.

² Region 21 issued complaint on these allegations regarding Alan Mackey. Consolidated Complaint ¶¶ 21 and 23. The Region settled this charge post-complaint, with Respondents offering reinstatement to Alan Mackey and posting a notice stating, *inter alia*, “WE WILL NOT fire or demote you because of your union membership or support.”

Finally, as its *pièce de résistance*, Respondents utilized the stick to scare employees into voting against the Union. Days before the election, Respondents held captive audience meetings, attended by every single employee at the warehouse, where the company's owner threatened employees with job loss, plant closure, loss of work, and loss of accounts if the employees voted for the Union. In light of this egregious conduct aimed at every single one of Respondents' employees, this Judge should find that Respondent's conduct interfered with the fair conduct of the election and should order a re-run election as soon as all unfair labor practices committed by Respondents are fully remedied. This is the only way to ensure that the employees at the Cal Cartage Warehouse can make a clear and free choice about whether or not they want to bargain collectively with the Teamsters as their exclusive bargaining representative.

B. Cal Cartage's Pervasive Anti-Union History

It is also worth recognizing that the unfair labor practice charges and other objectionable conduct at issue in this case are not isolated incidents occurring in a vacuum—they are part of a years' long campaign by the recalcitrant entities that run the Cal Cartage Warehouse. Although both the entities that own the warehouse and the staffing agency that provides some of the workers for the warehouse have changed over the last several years, the one thing that remains constant is that all of these entities have been hostile towards any efforts by its employees to improve their working conditions.

The workers at the Cal Cartage Warehouse began to engage in protected concerted activity when they filed a wage and hour lawsuit in 2014.³ Almost immediately, Respondents

³ See Kirkham, Chris. "Warehouse workers sue for unpaid wages at Port of L.A." Los Angeles Times (Dec. 18, 2014); Meeks, Karen R. "L.A., Long Beach warehouse workers sue over wages, say they're getting stiffed." Press-Telegram (Dec. 18, 2014) *available at* <https://www.presstelegram.com/2014/12/18/la-long-beach-warehouse-workers-sue-over-wages-say-theyre-getting-stiffed/>.

began to retaliate against some of the key individuals involved in filing and publicizing the lawsuit.⁴ This did not deter the employees, who continued to try to improve conditions at the warehouse by filing complaints with the California Occupational Safety and Health Administration (“Cal/OSHA”). Cal/OSHA found multiple major and minor health and safety violations at the warehouse, and ordered Respondents to fix those violations and pay fines.⁵

On November 28, 2016, the workers at the Cal Cartage Warehouse petitioned for a representation election. From the time the employees started engaging in protected concerted activity, through the election, and through to the present day, Respondents have committed the gamut of unfair labor practices in order to quash anything that resembles protected concerted activity by its employees. The first set of these charges went to hearing in June 2017.⁶ In a decision issued in February 2018, ALJ Sotolongo found that Respondents violated the Act by unlawfully interrogating employees, instructing employees not to engage in protected concerted activity, threatening employees with reprisals because of their protected concerted activity, and suggesting that employees dissatisfied with the working conditions should work elsewhere.⁷

Respondents continued this unlawful conduct after the time period at issue in this case. In mid-2018, Respondents committed a hallmark violation of the Act when they moved, disciplined, and eventually terminated another one of the Union’s top activists, Bruce Jefferson,

⁴ See Second Amended Complaint, BC 566992 Los Angeles Superior Court at 49.

⁵ See “Cal/OSHA Issues Serious Citations Against California Cartage,” Warehouse Worker Resource Center (Dec. 13, 2015) available at <http://www.warehouseworkers.org/osha-issues-serious-citations-against-california-cartage/>.

⁶ *Orient Tally Co.*, 21-CA-160242.

⁷ *Orient Tally Co., Inc., & California Cartage Co. LLC, A Single Employer*, JD(SF)-04-18, 2018 WL 1110296 (Feb. 28, 2018).

because of his union and protected concerted activity.⁸ In fact, Region 21 has already found merit in those allegations and has authorized complaint absent settlement on that charge.

Respondents' conduct since 2014 provides a backdrop for the objectionable conduct and unfair labor practices undertaken by Respondents in the case at hand.

Taken together, Respondents' actions in this case were sufficient to affect the outcome of the election because the objectionable conduct affected well over 300 employees and the Union lost the election by a margin of 159 votes with 113 challenged ballots. Charging Party therefore respectfully requests that the Judge find that Respondents have committed the violations alleged in the Consolidated Complaint⁹ and has additionally committed the objectionable conduct outlined in the Report on Objections.¹⁰ Further, along with ordering all appropriate relief for the unfair labor practices themselves, the Judge should set aside the December 2016 election and order a re-run election as soon as Respondents have fully remedied *all* outstanding unfair labor practices they have committed.

II. Statement of Facts

A. Respondents' Operations

Respondents operate a warehouse, located on property owned by the Los Angeles Harbor Department, that functions as a critical step in the distribution chain for overseas goods received at the Ports of Los Angeles and Long Beach. The approximately 689 warehouse employees at this location primarily unload goods received through the Ports from overseas, and repackage those goods to ship them off to various retail locations—such as Amazon, Sears, K-Mart, Lowes,

⁸ *NFI California Cartage Holding Company LLC*, 21-CA-213042; *NFI California Cartage Holding Company LLC*, 21-CA-220171.

⁹ Consolidated Complaint, 21-CA-190500 and 21-CA-207939.

¹⁰ Report on Objections, 21-RC-188813.

TJ Maxx, and Suzuki. [*see* Tr. 351:5-14]. The warehouse employees can either be employed directly by the company/companies who own the warehouse, or jointly employed by those companies and a staffing agency. [Tr. 376:15-377:19].

When the conduct at issue in this case occurred, the warehouse was owned and managed by the California Cartage Company LLC and Orient Tally Company Inc. (collectively, “Cal Cartage Companies”), two entities that operated as a single employer.¹¹ At that time, CORE Employee Management, Inc. was the temporary staffing agency that operated as a joint employer with the Cal Cartage Companies.¹² Since then, all of these entities have been purchased or otherwise acquired. Now, NFI California Cartage Holding Company, LLC, California Cartage Distribution, LLC, and California Transload Services, LLC (collectively, “NFI Companies”) all comprise the single employer that owns and operates the warehouse.¹³ In addition, Nexem Allied LLC d/b/a CORE Employee Management is the staffing agency now operating as a joint employer with the NFI Companies.¹⁴ This brief will refer to these entities collectively as “Respondents.”

¹¹ Respondents admit that the Cal Cartage Companies “constituted a single-integrated business enterprise and a single employer within the meaning of the Act.” Answer ¶ 4.

¹² Respondents stipulated that “At all material times through about October 1, 2017, Respondents Cal Cartage, Orient Tally and Core were joint employers of the employees of Core assigned to work at the Wilmington Facility.” Jt. Exh. 2.

¹³ Respondents admit that “Respondent NFI, Respondent Cartage Distribution, and Respondent Transload have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.” Answer ¶ 11.

¹⁴ Respondents stipulated that the NFI entities and Core have been a joint employer since October 1, 2017, and that Nexem-Allied, LLC, dba Core Employee Management is “the successor to Core for all relevant purposes under the National Labor Relations Act, as amended.” Jt. Exh. 1 and 2.

B. The Employees

Employees at the Cal Cartage warehouse are responsible for loading, moving, and unloading goods from shipping containers, either manually or with a forklift. [*see* Tr. 143:21-144:12; 171:24-10]. Individuals directly employed by the Cal Cartage Companies or the NFI Companies are typically guaranteed work every day and can show up to work without having to check if there is work available for them. Individuals jointly employed by the staffing agency, on the other hand, are not guaranteed work every day. These employees must show up at the Cal Cartage warehouse every morning to check on the availability of work. They check in with one of the managers for the staffing agency, who is in communication with the client entities regarding how many people are needed and whether they want specific people to be let into work that day [Tr. 39:22-40:9; 81:23-82:8].

C. Representation Petition, Interrogation, and Denial of Work

On November 28, 2016, following their protected concerted activity on both wage and hour and health and safety issues, the employees at the Cal Cartage Warehouse filed a petition for an election to decide whether the Union would be their exclusive bargaining representative. (GC Exh. 1(a)). The Region scheduled a hearing for December 9, 2016, and the election for December 22, 2016, for the 689 employees in the Union. The filing of this petition immediately preceded Respondents intensifying their anti-union campaign and unlawful conduct.

A short time after the petition was filed, Respondent began to interrogate its employees. Approximately two weeks before the election, employee Michael Johnson (“Johnson”) was standing and talking with several of his coworkers when the supervisor for the Kmart/Sears department walked up to the group. [Tr. 86:13-22]. The supervisor asked the group of employees how they were going to vote in the upcoming union election. [Tr. 86:22-87:1]. The supervisor directed this question to the gathered group of four or five employees. [Tr. 87:1-20]. Johnson

was the only one to directly answer the supervisor's questions: he told the supervisor that he would be voting for the people who are helping him get a raise and take care of his family—the Union in other words. [Tr. 87:20-88:4]. The supervisor asked Johnson why he was going with the Union, and Johnson responded that it was because it would help Johnson and his family. [Tr. 88:4-10]. The conversation then ended with the other employees avoiding the supervisor's question. [Tr. 88:11-19].

Johnson was a staffing agency employee, so the next day he showed up to work and checked in with the supervisor. [Tr. 88:20-25]. Johnson showed up at approximately 4:00 a.m., and Respondents typically begin allowing staffing agency employees into work at 5:15 or 5:30 a.m., so Johnson had arrived before anyone was let into work [Tr. 89:1-7]. As soon as Johnson showed up that morning, his supervisor prevented him from signing in, telling Johnson that work was slow and that Johnson would have to wait. [Tr. 89:20-35]. Johnson did not notice other individuals being told that work was slow. [Tr. 89:8-16] Instead, the supervisor was letting in other people without making them wait at all. [Tr. Tr. 89:17-20].

At this point, Johnson went up to Marcos Gonzales, the on-site manager for Respondent Core Employee Management, and asked him what was going on and why he was not being let into work. [Tr. 88:23-25]. Manager Marcos again informed Johnson that work was slow and that he would have to wait. [90:1-3]. This entire time, Johnson noticed individuals who had arrived after him being let into work even though he was still waiting. [Tr. 90:22-91:9]. At around 9:00 or 9:30 a.m., after nearly every other employee had been let into work or had decided to go home, Johnson was one of the only people left waiting in the yard. At that point, it appeared to Johnson that Manager Marcos received a call saying that they needed extra people in the

Amazon warehouse, so Johnson was finally let into work—after being made to wait for several hours for which he would not be paid. [Tr. 90:5-91:9].

D. Rule Prohibiting Union Discussions

Around this same time, Respondents began to prevent its employees from discussing the Union at work. Prior to the filing of the petition, employees would talk with each other during their breaks at work and during other periods of time when they were not actively working, such as when they were waiting for forklift drivers to bring the product they would be unloading. [Tr. 63:10-22]. The employees would discuss everything from sports to the weather to unfair treatment by the company—including during work hours in front of supervisors without ever being disciplined or told to stop having these conversations. [Tr. 63:23-64:14; 144:13-23]. Sometimes management even joined in on these conversations during work time. [Tr. 144:24-145:2].

This changed after the petition was filed. In the lead up to the election, Respondents began having almost daily meetings with the warehouse employees about the union. [Tr. 68:7-22]. A week or two before the election, Johnson and some other coworkers went back to their work groups after one such meeting. Employee Dwayne Wilson (“Wilson”) began talking with an employee named Pacifico regarding union dues, and Johnson joined this conversation along with another employee named Michael Morris. [Tr. 69:13-70:8; 145:3-146:15]. These employees were discussing union dues and comparing dues to the amount they paid to the staffing agency they worked through. [Tr. 146:15-24]. Enrique Gonzalez, one of Respondents’ supervisors, approached the group and told them to stop talking. [Tr. 70:9-12; 146:25-147:9]. Although Wilson does not remember a specific reference to the Union, Johnson remembers Supervisor Gonzalez specifically telling the group to stop talking about the Union. [Tr. 70:9-12; 147:10-11]. Supervisor Gonzalez then asked Johnson to get in a cart with him, and he took Johnson to the

area where they were doing forklift training. [Tr. 70:6-14]. Wilson confirms that Johnson was not working with them after this conversation because Enrique had taken him to the office. [Tr. 147:12-18].

At the forklift training area, Supervisor Enrique wanted to show Johnson that the company was not engaging in discrimination because Johnson regularly complained about discrimination against African-Americans at the warehouse. [Tr. 70:13-21]. Supervisor Gonzalez then took Johnson to see Manager Marcos, who questioned Johnson regarding the Union conversation he had been having with his coworkers, and instructed Johnson to stop talking about the Union. [Tr. 70:22-71:17]. Manager Marcos later repeated this directive to Johnson. [Tr. 71:16-22]. After this conversation, Johnson contemporaneously informed Wilson that Gonzalez had taken him to see Marcos and that Marcos had made him explain the conversation he had been having with Wilson, Pacifico and Michael Morris about the Union. [Tr. 147:16-22].

E. Voter/*Excelsior* List

Following the December 9, 2016 hearing, on approximately December 13, 2016, Respondents provided the Union with a voter list as required by Board election rules. [U. Exh. 4].¹⁵ This voter list contained approximately 644 entries. *Id.* The Union relies on this contact information in its efforts to speak with the employees eligible to vote in the election, and a team of Union staff visited these employees at the addresses provided by the Employer. [Tr. 257:13-259:20]. These organizers track any bad addresses they encounter when visiting, sometimes after attempting the same address several times. [Tr. 257:21]. When organizers encountered a bad

¹⁵ The copy of U. Exh. 4 introduced by Charging Party at hearing included pages 1-56. The version provided by the court reported with the transcripts from the hearing appears to be missing page 1. Charging Party cannot tell how this occurred, but would like to make a motion to correct the record by adding page 1 of the voter list back into U. Exh. 4. Page 1 has been included with this position statement as Attachment A.

address, they would search Google and use other methods to try to find a different address for that individual. [Tr. 264:2-22]. Organizers also track individuals who do not want to be visited for other reasons, although “bad address” and “do not visit” are tracked on separate lists. [Tr. 385:24-286:12; 288:1-23]. During their visits, organizers encountered bad addresses for 132 people out of the 644 people on the voter list, or over 20% of the list¹⁶ [U. Exh. 5; 263:9-10; 263:18-20; 288:16-289:5].

F. Gift Cards, Raffles, and Holiday Party

After the petition was filed and before the election, sometime in December 2016, Respondents handed out \$25 grocery gift cards to all of its employees. [Tr. 93:21-25; 155:5-22; 367:10-22; 367:10-368:11]. Respondents spent over \$10,000 on these gift cards for employees in 2016. [Tr. 369:5-24]. Respondents communicated with their corporate office through email, and corporate sent the Cal Cartage Warehouse the required number of gift cards. [Tr. 370:1-20]. Respondents track who received these gift cards by having each employee sign a receipt when they get the card. [Tr. 370:21-25].

Then, on December 21, 2016, the day before the election, Respondents held a party for employees inside the Warehouse on paid work time, where Respondents provided a lavish pit smoked bbq meal¹⁷, entertainment in the form of a live band, and raffled off gift cards for the employees at the party. [Tr. 91:10-93:15; 151:23-153:16; 155:23-156:12]. Respondents paid employees for the approximately two hours they spent at the holiday party. [Tr. 374:25-375:3]. During this party, Respondent raffled off approximately \$3500 in gift cards--\$2000 from the

¹⁶ Although there were 132 people whom the Union could not visit because their addresses were incorrect, there are a total of 153 bad addresses listed in U. Exh. 4, the Union’s bad address list, because organizers attempted several addresses for some employees.

¹⁷ Respondents spent \$16,852.79 on a three entre meal, plus sides and dessert, for 670 people. [U. Ex. 4 at Respondent/Employer_0260 to 0262].

staffing agency and \$1500 from the Cal Cartage Companies. [Tr. 383:7-17; 365:21-366:15]. For the 2016 holiday party, the raffled gift cards were for \$50 or \$25 dollars, meaning that anywhere from 70 to 140 individuals received these gift cards. [Tr. 373:10-19; 383:24-385:8; 366:16-25]. This same day, employees all received an anti-union pamphlet from Respondents—some employees remember Respondents distributing this pamphlet as they left the party, [Tr. 94:1-17. 131:18-132:10], and some employees remember it being distributed later in the day [Tr. 153:22-155:4].

G. Captive Audience Meeting with Hallmark Violations

In the leadup to the election, management began having regular anti-union meetings with the warehouse employees. [Tr. 71:23-72:15; 147:23-148:6; 173:1-9]. Robert Curry, who owned the Cal Cartage Warehouse at the time, only attended one of these meetings, for each shift, on December 20, 2018—two days before the election. [Tr. 72:16-73:1; 148:7-20; 173:10-22; 191:25-192:16; 214:23-215:8; 233:12-23]. This meeting was mandatory for all employees and supervisors engaged in face-to-face communications instructing employees that they had to attend this meeting. [Tr. 73:2-11; 148:21-149:8; 173:23-174:8; 192:25-193:9; 215:18-20; 234:7-12]. This meeting occurred in the Kmart/Sears department. [Tr. 73:12-16; 149:12-14]. Somewhere between 300 and 700 employees attended the day shift meeting, which amounted to everyone working in the warehouse that day. [Tr. 73:17-20; 149:17-23; 174:24-175:2; 192:17-20; 215:13-17].

This meeting began with Owner Curry speaking first to the group in English, and then Operations Manager Freddy Rivera spoke to the group in Spanish, ostensibly translating the speech Curry had given. [Tr. 74:16-22; 151:4-8; 175:19-13; 216:21-22]. Curry spoke for approximately 30 minutes during this speech. [Tr. 74:23-75:2]. Although he glanced at notecards, Curry was not reading verbatim from a text while giving his speech. [Tr. 216:6-18;

235:23-236:6]. When Curry began to speak, Jose Rodriguez (“Rodriguez”) shook his head because he disagreed, and then he noticed Rivera making a note while looking at him—he thinks that Rivera might have been writing his name down. [Tr. 235:14]. Rivera had been given a translation that was supposed to represent what Curry was going to say. [R. Exh. 5]. When Curry began speaking, Rivera tried to write down variations from what Curry actually said to what was written in his translation, but soon stopped because it was too difficult to keep up with the differences—in other words, Curry’s actual speech did not conform to the written document Rivera had been provided. [Tr. 339:24-341:19; 343:15-344:5].

During his speech, Owner Curry told employees that the Teamsters had previously caused him to go bankrupt and resulted in him having to restart his company. [Tr. 73:21-74:6; 113:9-13; 150:5-7; 151:1-3]. Curry also told employees that, because of the Teamsters, Respondents had lost business, including the Amazon contract. [Tr. 74:6-8; 113:13-15; 115:8-25; 150:18-24; 165:16-20; 312:20-313:2; 350:10-15]. Johnson, one of the employees who heard this comment, was struck by this statement because he was still working on the Amazon account and did not understand how the contract was lost if he was still working on it. [Tr. 113:14-16]. Even one of Respondents managers and an anti-union consultant were concerned upon hearing Curry mention that Amazon business had been lost. [Tr. 380:4-20]. Johnson, who worked in the Amazon department, was never provided with any clarification about what Curry meant when he said that the Amazon account had been lost. [Tr. 116:21-117:9].

Curry also threatened employees that he would have to close or sell or move the company if the Teamsters were voted in by the employees. [Tr. 74:8-10; 113:1-6; 113:16-18; 150:14-17; 175:11-16; 182:21-183:10]. At one point, Curry specifically stated that he would have to close the company if the Teamsters came in because he could not afford to pay employees more. [Tr.

167:8-23]. Curry also informed employees that the Teamsters loved to strike and that there would be strikes if the Teamsters were voted in. [Tr. 167:24-168:8; 179:16-180:2].

After Curry concluded his speech, Manager Rivera began translating Curry's speech into Spanish for the Spanish speaking employees. [Tr. 194:2-4; 216:21-22; 236:9-14; 236:9-14]. Manager Rivera mentioned a previous bankruptcy caused by the Teamsters. [Tr. 194:5-10; 217:21-218:4; 236:15-18]. Rivera also stated that everyone would be left without a job if the Union came in because the warehouse would have to close (or move), and employees would be left without work. [Tr. 194:5-10; 217:21-218:4; 236:15-18; 236:18-24]. Respondent introduced a partial video of Owner Curry's speech, along with incomplete drafts or notes for the speeches by Owner Curry and Manager Rivera. [R. Exh. 2, 3, GC Exh 11, 12, 13

H. Election Day

Two days after this captive audience speech, on December 22, 2016, the representation election was held at the Cal Cartage Warehouse. On this day, there were four voting booths set up and sometime during the morning session a "No" was written on the voting booth. This "No" was written on the voting booth itself in marker, and was about 3 to 5 inches tall. [Tr. 239:3-242:1; 272:14-274:22]. The morning voting session was very busy, with a steady flow of people coming through and lines forming at some points to wait to vote. [Tr. 239:23-240:8; 275:2-16].

I. Unlawful Conduct After the Election

Johnson was concerned about discrimination at the warehouse, particularly when it came to African-American employees being made to wait instead of being given work or not getting work at all. [Tr. 76:25-77:7; 81:23-82:8]. On or about January 18, 2018, Johnson noticed this occurring again and decided to film what was happening outside the warehouse in order to document the discrimination. [Tr. 77:8-10; 81:23-82:9]. Johnson announced that what was happening was discriminatory, as he had yelled out the day before, and began to record on his

cellphone. [Tr. 126:9-127:5] Manager Marcos then approached Johnson and told him that he had to stop filming, which Johnson did. [Tr. 82:9-83:4; 123:11-124:5]. Marcos told Johnson that it was illegal for him to be filming. [Tr. 125:16-21].¹⁸

Approximately 5 minutes later, Johnson thought to himself that he should be able to film people that allow him to film, so he asked some of the coworkers who had still not been assigned work for the day whether he could film them and started filming when he obtained their consent. [Tr. 124:5-19; 128:17-25]. On these films, Johnson was speaking with his coworkers about being denied work and about what they perceived to be discrimination against African-Americans. [Tr. 77:11-81:18; 83:5-85:13; GC Exh. 7]. After Johnson finished filming this second video and was about to start filming a third video, Marcos approached Johnson to tell him that he was causing trouble and was going to call the police if Johnson did not stop filming. [Tr. 85:14-21; 124:20-125:5; 129:1-5]. Johnson complied and stopped engaging in protected concerted activity.

III. Credibility

This Judge's adjudication of the issues in this case will rest largely on the Judge's determination of the credibility of witnesses because, on many key issues, witnesses for the General Counsel and witnesses for Respondents have provided completely different accounts.

As an initial matter, Respondents did not present a single non-supervisory employee witness to talk about any occurrences described by the employee witnesses presented by the General Counsel. Although not an outright presumption of credibility, the Board has recognized that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their

¹⁸ Johnson later looked into it and learned that he had a right to film as long as he was not causing any harm or harassing anyone. [Tr. 125:21-126:4].

pecuniary interests.” *Flexsteel Indus.*, 316 NLRB 745 (1995). Thus, a witness’ status as a current employee is a “significant factor” in making a credibility determination. *Id.* In this case, five out of the six employee witnesses presented by the General Counsel are current employees who testified in contradiction to their supervisors and managers.

Adding to the credibility of the General Counsel’s witnesses is their demeanor and the consistency amongst the testimony provided. In terms of demeanor, the General Counsel’s witnesses appeared “earnest [and] genuine, and . . . they appeared serious and respectful of the hearing process.” *Os Transp.*, 358 NLRB No. 117 at 18 (Aug. 31, 2012). Further, although the General Counsel’s witnesses did not provide identical versions of every occurrence they testified to, their testimony corroborated key parts of each other’s testimony. Any differences can be attributed to the fact that different individuals will each remember things slightly differently based on what made the biggest impact on them personally, especially when looking at conduct that occurred over eighteen months prior.

For example, although not all of the witnesses remembered every single comment that Owner Curry or Manager Rivera made during the captive audience meeting, the witnesses corroborate key statements—all of the witnesses, both English and Spanish speaking, remember them saying that the company would have to close if the Union came in, and both of the English speaking witnesses confirm that Curry talked about having lost the Amazon contract. Similarly, both Wilson and Johnson largely corroborate the incident where they were interrupted while talking about the Union by Supervisor Enrique: the only difference being that Johnson specifically remembers Enrique telling them to stop talking about the Union, while Wilson only remembers Enrique telling them to stop talking. This discrepancy can be partly explained by the time that has elapsed, and it is logical that Johnson would have a clearer memory of that incident

because he was the one that was taken to Manager Marcos who again instructed him to stop talking about the Union—an unusual occurrence that would have cemented the incident in Johnson’s mind. Judges regularly view consistency as indicative of credibility. *G. C. Lingerie Corp*, 146 NLRB 690, 698 (1964); *Hh3 Trucking, Inc.*, 33-CA-14374, 2004 WL 104108 (Jan. 20, 2004).

Throughout trial, Counsel for Respondents made unavailing efforts to impugn the credibility of the General Counsel’s witnesses. The best example of this is their continued attempts to improperly impeach witnesses based on the affidavits that the witnesses had previously provided to the General Counsel. For example, Respondents’ Counsel belabored the fact that a witnesses’ affidavit only included the fact that Owner Curry threatened to close the company if the Teamsters came in, but did not mention the fact that Owner Curry also threatened to sell the company. [Tr.178:25-183:10]. This omission, however, is not a basis for impeachment and is immaterial to any analysis—the threat of closure was the key part of that speech and the threat about selling is unnecessary to finding the alleged violation regarding threats of plant closure. *see Wantagh Auto Sales, Inc.*, 177 NLRB 150, 152 (1969) (“Counsel seeks to discredit some of the testimony of Isaacs and Green, relating to their fears of a strike before announcement time, on the ground that these fears are not reflected in their prehearing affidavits. But mere omissions from affidavits can hardly ever be conclusive.”); *Serv. Spring Co.*, 263 NLRB 812, 825 (1982) (“The mere omission from an investigatory affidavit of a detail or immaterial fact would not be cause for any particular inference. However, the omission of a fact crucial to the ultimate issue of one's discharge raises a substantial question concerning his credibility.”); *Redway Carriers*, 274 NLRB 1359, 1371 (1985) (“For example, when a witness testifies to facts which are not contained in his investigatory affidavit, a finding of contradictory

testimony, i.e., impeachment by omission ordinarily is not warranted.”). Further, Respondents’ questioning of the General Counsel’s witnesses also appeared to imply that these witnesses could only be credible if they remembered *every single thing that was said during this captive audience meeting, in the exact order that it was said*. [see Tr. 112:17-115:7; 158:20-169:13]. This is an impossible and unrealistic expectation because no one has such perfect memory eighteen months after an incident occurred.

In fact, it is telling that when Counsel for Respondent questioned its agent witnesses about this same exact captive audience meeting, he did not have their witnesses elaborate what they remembered hearing *at all*. Instead, Counsel only asked leading yes or no questions about whether its witnesses remembered certain statements being made. Not only are these blanket denials completely self-serving, they do not give any confidence that these individuals actually remember what *was* said at the meeting. Thus, despite Respondents efforts to cast aspersions on the General Counsel’s witnesses, it is clear that the General Counsel’s witnesses were significantly more credible than Respondents’ witnesses. In fact, “the entire tenor of [Respondents’ witnesses’] testimony was of someone searching for a lawful explanation rather than one of someone simply relaying facts.” *United Rentals*, 349 NLRB No. 83 (April 27, 2007).

In addition, the Judge should discredit Respondents’ witnesses and draw adverse inferences based on Respondents’ failure to produce evidence that likely contained information that would hurt its case, while mysteriously being able to produce documents that clearly support its arguments. *Mcallister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004) (“The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and

drawing adverse inferences against the noncomplying party”). For example, Respondent failed to call Manager Marcos to testify about either the incident where Manager Marcos instructed Johnson to stop talking about the Union or about the incident where Marcos threatened to call the police on Johnson for engaging in protected-concerted activity. The Judge should credit Johnsons testimony regarding both of these incidents and should draw the adverse inference that Marcos would have provided testimony further supporting a finding that these actions violated the Act.

Similarly, Charging party alleged that Respondents’ granting of benefits in the form of gift cards, raffles and holiday parties interfered with the fair operation of the election and Respondents’ position appears to be that it had granted the exact same benefits to employees in previous years. Charging Party made requests for documents relating to the gift cards given to employees, about the raffles held for employees, and about the holiday party given to employees. The only thing Respondent produced was documents showing that it had spent the same amount on food for the holiday party in 2016 as for previous years. Respondent was mysteriously unable to provide any documents related to how long the party was compared to other years, how many people received gift cards compared to other years, how much it spent on gift cards compared to other years, how much it spent on entertainment for the party, or even on who actually received gift cards. Respondent failed to produce these documents despite the fact that its own witnesses admitted to these documents existing at one time, and its own witnesses admitting that they had not been asked to compile these documents even though they were the individuals in charge of the party and gift cards. [Tr. 373:25-374:12; 374:13-24; 383:18-23.; 387:17-388:24.; 383:24-385:8; U. Exh. 6; U. Exh. 7].

Even more glaring, Respondents did not produce the final notes that Owner Curry used during his captive audience speech to employees—although they produced multiple earlier drafts, Respondents implausibly claim that they only saved these older versions but destroyed the final version as soon as Curry gave his speech. [Jt. Exh. 3] These omissions cast serious doubt as to the credibility of Respondents, their agent witnesses, and their evidence.

IV. Argument

The gravamen of the case at hand is the question of whether employees had an opportunity to make a free and unencumbered choice about whether or not to collectively bargain with the Union as their representative in the election held on December 22, 2016. Because this free and clear choice is integral to the operation of the Act, the Board has held that objectionable conduct committed amid the pendency of a union election can interfere with an election to a level where a rerun election is necessary. Generally, the Board focuses on conduct occurring during the “critical period” between the filing of the petition and the date of the election to determine if an election should be set aside. *Ideal Electric Mfg. Co.*, 134 NLRB 1275, 1278 (1961). During this critical period, both conduct which qualifies as an unfair labor practice of the Act and other objectionable conduct which does not rise to that level are sufficient to interfere with a free election. *see Gen. Shoe Corp.*, 77 NLRB 124, 126 (1948).

Here, nearly every single allegation contained in both the Consolidated Complaint and the Report on Objections falls within this critical period—the only exception is the allegation that Respondents threatened to call the police upon observing an employee engaging in protected concerted activity. This means that during the critical period, Respondents threatened employees with job loss, plant closure, loss of work, and loss of accounts; interfered both with employees discussing the Union at work and with the Union’s ability to communicate with employees; granted benefits in the form of parties, entertainment, gift cards and a raffle; interrogated

employees and then denied them work. In addition, a voting booth was modified on election day to make it appear as if the Board itself was endorsing a vote against the Union.

Even individually, the objectionable conduct during the critical period is sufficient to invalidate the election results. The Union lost this election 124 to 283, a margin of 159 with 113 challenged ballots. The threats made by Respondents were during a captive audience meeting with over 300 employees present. The raffle likely had over 100 winners. The holiday party and other benefits were provided to the hundreds of employees working that day. This means that as many or more employees than actually voted in the election were subject to objectionable conduct which interfered with their ability to make a free choice during the election. Taken together, the objectionable conduct created an environment of fear and intimidation that made a fair election impossible. That is why the Judge should find that Respondents committed the alleged unfair labor practices, and find merit in the Union's additional objections, ordering both that the unfair labor practices be remedied and that the election be rerun when it can be held under the laboratory conditions necessary for employees to make a free and unencumbered choice.

A. Conduct Rising to the Level of an Unfair Labor Practice

The Board has held that meritorious allegations involving conduct which constitutes an unfair labor practice are, “*a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.” *Playskool Mfg. Co.*, 140 NLRB 1417, 1419 (1963); *see Taylor Motors, Inc.*, 366 NLRB No. 69 (N.L.R.B. April 20, 2018) (Unfair labor practices negated “free and untrammelled choice,” election set aside). The Board has explained that this is because “the test of conduct which may interfere with the ‘laboratory conditions’ for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).” *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-87

(1962). When looking at conduct which violates Section 8(a)(1), the Board has refused to set aside an election only in the narrow circumstances when “it is virtually impossible to conclude that [the violation] would have affected the results of the election.” *Caron International, Inc.*, 246 NLRB 1120, 1121 (1979). In determining whether this conduct is *de minimis* enough to fall under this “virtually impossible” exception, the Board looks at the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election, the proximity of the conduct to the election date, and the number of unit employees affected. *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001).

Thus, this section will examine the conduct described in both the Consolidated Complaint and the Report on Objections that rises to a level of unfair labor practices under the Board’s standards for unfair labor practices. The Consolidated Complaint alleged three different ways that Respondents violated Section 8(a)(1) of the Act—threats made at large captive audience meetings, discriminatorily enforcing a rule preventing discussion about the union, and threatening to call the police on an employee engaged in protected concerted activity. Section 8(a)(1) prohibits an employer from “engag[ing] in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act” and this analysis “does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *Am. Freightways*, 124 NLRB 146, 147 (1959).

1. Respondents Violated Section 8(a)(1) of the Act by Threatening Employees at a Captive Audience Meeting (Objection 1)

The most egregious of the unfair labor practices alleged in the Consolidated Complaint are the threats made by Respondents to hundreds of employees at a mandatory meeting for employees two days before the election. These threats all centered around unlawful predictions about the results of unionization. The Board analyzes these types of statements under the

standard set forth by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 US 575 (1969). Under *Gissel*, employers are only able to make predictions about unionization that are based on objective fact and “convey an employer’s belief as to demonstrably probable consequences beyond [the employer’s] control or to convey a management decision already arrived at to close the plant in case of unionization.” *Id.* at 618. An employer is prohibited, however, from implying that it “may or may not take action solely on [its] own initiative for reasons unrelated to economic necessities and known only to [the employer].” *Id.*

As described above, this allegation largely rests on whether the Judge credits the consistent testimony provided by six employee witnesses whose livelihoods would have been threatened by the statements they heard Owner Curry and Manager Rivera make. These employees were cautious with their answers, relayed the full extent of what they remembered eighteen months after the fact, and were honest about things that they did not remember hearing. Respondents’ witnesses, on the other hand, did not demonstrate any actual memory of the speech in question. Instead, Respondents’ counsel merely relied on reading a laundry list of statements and having each witness deny having heard each of the specific statements on the list. [Tr. 325:2-326:4; 326:5-17; 347:23-350:2; 377:23-380:3; 398:18-400:16; 401:21-402:15]. Coupled with the troubling fact that Respondent magically found documents that it claimed did not exist during the investigation phase for this allegation, [Tr. 341:20-342-1], and the fact that some modifications appear to have been made to the video of Owner Curry’s speech introduced by Respondents between the investigation phase and the hearing [Tr. 328:5-337:15], Respondents witnesses should not be credited with regard to this allegation.

Similarly, the Judge should discredit the documentary evidence which Respondents proffer as proof that Owner Curry and Manager Rivera did not make any unlawful statements.

For Curry's portion of the speech, Respondents point to a video of Curry's speech, a transcript of that speech, and notecards that Curry allegedly used during his speech. [R. Exh. 2, 3, GC Exh 11, 12, 13]. None of these documents, however, preclude a finding that Curry additionally made the statements testified to by the General Counsel's witnesses. The video and transcript of the speech, on their face, are incomplete. [R. Exh. 2, 3]. The video has a break in the middle of the recording, the video ends in the middle of a sentence by Curry, and the video is much shorter than the 30 minute speech that the General Counsel's witnesses remember Curry giving. Similarly, Respondents admits that the different version of the notes and notecards for Curry's speech are not the actual versions used by Curry during his speech—that final version was mysteriously destroyed by Respondents as soon as Curry gave his speech. [Jt. Exh. 3]. Even Manager Rivera admits that Curry deviated from the Spanish version of Curry's speech that Rivera was given, almost as soon as Curry started his speech. [Tr. 340:24-342:11; 343:7-344:5]. As for Rivera's speech in Spanish, nothing introduced by Respondents precludes the fact that Rivera could have easily made additional statements that were not contained in written notes he used. The Judge should therefore not give any weight to the documentary evidence proffered by Respondents regarding Curry's or Rivera's speech to employees.

If the Judge properly credits the testimony provided by the General Counsel's witnesses, the unlawful threats are apparent on their face. The three English speaking employee witnesses remember Owner Curry saying:

Johnson: "Since the Teamsters been back, they had lost all the contracts. One of the contracts was with Amazon. And they told us that they was going to either move the company or they'll have to sell the company if the Teamsters come back in." [Tr. 74:2-10].

Wilson: "He said that he'll probably have to close down the warehouse [if the Teamsters come in]." [Tr. 150:14-17]. That "he could not afford to pay more, and if the Teamsters came in there –and the company might have to close down the warehouse if the Teamsters came in." [Tr.167:19-23]. And that "because of his

fighting with the Teamsters, Amazon thought he was incapable of handling their project, so he had to close the Amazon account.” [Tr. 165:16-20].

Victor Gonzalez: “He said that if the Teamsters came in, he would have to close the company down. He would like us to vote no. And then he just kept saying, we -- we need our jobs so we can afford to pay our rent and buy food.” [Tr. 175:12-15]. And “He said he would need to close the company if the Union came in. He said that if we wanted to keep our jobs, we need to vote no. He said that otherwise, we would lose our jobs because the company's competitors will undercut the company and the company would have to cut prices and lose business.” [Tr. 182:21-183:1].

Although not identical, these accounts substantially corroborate each other. All three employees remember Owner Curry specifically stating that he would have to close the company if the Teamsters came in, two of them coupled with vague and unsubstantiated assertions about an inability to pay wages and/or remain competitive. Although Respondents will no doubt argue that this was a prediction based on objective facts, Board law makes clear that these vague attempts to turn Owner Curry’s statement into anything other than “threat[s] of retaliation based on misrepresentation and coercion” are unavailing. *see Gissel*, 395 US at 617.

In *Coradian Corp.*, 287 NLRB 1207, 1212-13 (1988), the Board found objectionable nearly identical statements which “made it clear that the probable consequence of signing a contract [with the union] was that Respondent would be unable to compete with other companies and would be forced to close.” There, as here, the only arguably objective facts that the employer could use to justify its statements was a long-past prior history with a union, which in any event do not lend support to management prognostication. Owner Curry, for example, allegedly explained his previous dealing with a union *30 years ago*. [*see* Tr. 45:24-46:50; R. Exh. 2 and 3].

The Board soundly rejected this argument in *Coradian*, saying:

Although the underlying memorandum purports to relate objective facts about the Respondent's prior history with IBEW Local 3, and the General Counsel has not challenged the truth of the statements therein, Sofia's cover memo strongly implies that the events recounted in the memorandum will occur once again, nearly 9 years after the most recent event discussed in the memorandum. The

cover memo further implies that such events will render operations in the metropolitan New York City area impossible for the Respondent, without offering any current evidence for this prediction. The Respondent's prediction was thus not based on objective evidence and did not constitute opinion protected by Section 8(c) of the Act.

Coradian Corp., 287 NLRB at 1207.

In addition, in *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1136 (7th Cir. 1974), the Seventh Circuit upheld the Board's determination that an employer violated the Act by telling three "employees that he could not afford to pay the wages provided in the Retail Clerks' contract and would go out of business if the employees voted for the Retail Clerks as their bargaining representative." The Seventh Circuit found that *Gissel* places a "severe burden . . . upon employers seeking to justify such statements." *Id.* In that case, the comment about increased costs was more specific than in the case at hand because the employer appeared to be pointing to specific wages in an actual contract. Yet, the Seventh Circuit found that even that statement was not protected speech under *Gissel*. *Id.* In our case, Respondents vague and speculative assertions about not being able to afford the wages that Teamsters would demand, or that they would be unable to afford to compete, do not come close to providing the objective evidence necessary to protect those statements under *Gissel*. *Id.* Thus, Owner Curry's statements about plant closing and job loss both violate Section 8(a)(1) of the Act and constitute objectionable election conduct during the critical period.

This exact same analysis applies to the threats made by Rivera to the Spanish speaking employees at the meeting. The three Spanish witnesses recall Rivera stating that:

Carbajal: "that if the Union came back, the company was going to go bankruptcy [sic], and that it was going to have to close; that everyone was going to be left without a job." [Tr. 194:5-10].

M. Rodriguez "That if the Union came back, the company would have to close or change location." [Tr. 217: 21-25].

J. Rodriguez “[I]f the Union came in, the company would have to close or move to a different location and all the employees would be left with no work.” [Tr. 236:14-23].

More so than even the English speaking witnesses, the Spanish speaking witnesses have almost identical recollection of the statements that Rivera made, particularly the fact that the company would have to close if the Union came in. Again, the only arguably objective facts these statements are tied to is the ancient history between Curry and another union over 30 years before the statements in question. The Board has roundly rejected this type of defense, and Manager Rivera’s comments thus violate the Act and constitute objectionable conduct in the same manner as the threats made by Owner Curry.

The final statement worth examining is Owner Curry’s statement regarding losing the Amazon account, or other accounts, because of the Teamsters. [Tr. 182:21-183:1]. [Tr. 165:16-20]. [Tr. 74:2-10]. Even Respondents’ own witnesses admit that Curry made a vague statement about losing Amazon business, although they claim Curry did not attribute that loss directly to the Teamsters. [Tr. 312:20-313:2; 350:10-15; 399:16-24]. At the hearing, Respondents’ witnesses explained in detail the fact that Respondents had not lost the main Amazon business they were engaging in, but had instead lost a smaller amount of Amazon business which the warehouse never actually started doing—although there is no evidence that this detailed account was even summarized or identified for employees during the captive audience meeting. [Tr. 350:17-351:4; 351:5-352:5; 352:6-353:20].

Although Respondents claim that this Amazon business was objectively lost because of the Teamsters, this evidence consisted mostly of uncorroborated hearsay. The only firsthand testimony Respondents provided was that Amazon reps had visited the warehouse and had asked about a strike notification that Respondents had received. [Tr. 357:5-358:23]. All other evidence took the form of out of court statements being offered for the truth of the matter asserted: Diana

West testified that an Amazon representative called her to tell her that corporate had not liked what they had heard about the strike and union activity [Tr. 357:5-358:23], although Respondents did not present anyone from Amazon to corroborate this out of court statement. Diana West testified that she received an email from another one of Respondents' managers informing her that Amazon had pulled out because of union activity, [Tr. 358:24-359:13; 359:16-361:10]—yet the other manager was not called to explain how he learned this information nor was anyone from Amazon called to verify this out of court statement. The Judge should therefore not credit the testimony that some Amazon business was lost because of the Union, which would mean that Respondents had no objective basis for making this representation to employees and the statement therefore violated Section 8(a)(1).

Even if the Judge does credit this testimony, however, the statement communicated at the captive audience meeting did not contain any of this detail regarding the business that was actually lost. No one even alleged that Owner Curry explained what Amazon work was lost or even clarified during the captive audience meeting that he was not referring to the larger Amazon account that made up a large portion of the warehouses' operations. In fact, Lisa Lyons, the Regional Vice President for the staffing agency, admitted that both she and one of the company's union consultants were worried about what Curry said about Amazon because workers could interpret it as referring to the larger Amazon account. [Tr. 380:4-20]. In order to counteract this problematic statement, Lyons testified that they went to the Amazon department to clear up the fact that Curry was not referring to the entire Amazon operation. [Tr. 380:21-382:11]. This claim is suspect because one of the individuals working on the Amazon account testified that he never received this clarification in the Amazon department. [Tr. 116:21-118:7]. But even if the claim is accepted at face value, there is no evidence that this clarification was ever given to the hundreds

of other employees who attended the captive audience meeting and would have likewise been concerned about the possibility of the warehouse losing one of its biggest clients and Curry's statement therefore violated Section 8(a)(1).

Further, if any of these comment are somehow considered to be borderline between permissible and impermissible, the Judge should find that the comments violated the Act because:

Communications which hover on the edge of the permissible and unpermissible are objectionable as "[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double entendre should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians.'"

Turner Shoe Co., 249 NLRB 144, 146 (1980) (quoting *Georgetown Dress Corp.*, 201 NLRB 102, 116 (1973))

Here, the concern that Lyons and the consultant had about Curry's statement demonstrates that these employees in particular would have understood these statements as "coercive threats rather than honest forecasts." *Gissel*, 395 US at 620. Similarly, Manager Rivera's reluctance to repeat some of the comments made by Owner Curry in English. [Tr. 324:24-325:1] also implies that Respondents' knew that the employees would understand these statements as threats. Respondents have therefore violated the Act by making threats of job loss, plant closure, loss of work, and loss of certain accounts as alleged in Paragraph 19 of the consolidated complaint.

2. Respondents Violated Section 8(a)(1) of the Act by Enforcing a Rule Prohibiting Employees from Discussing the Union

Board law makes clear that "[e]nforcing a rule which prohibits discussion of the Union or distribution of union materials on working time or in working areas, where there has been no enforcement of restrictions on other subjects or materials, is discriminatory and violates Section

8(a)(1) of the Act.” *Hertz Corp.*, 316 NLRB 672, 687 (1995). Here, both Wilson and Johnson testified that before the petition was filed, employees were free to have conversations during slow work time about any subject, even with managers joining in, without ever being told that they cannot have those conversations. Soon after the petition was filed, they both testified about an incident where a supervisor approached them and a group of other workers and instructed them to stop having the conversation they were having about union dues. Respondents went even further with Johnson when the supervisor took Johnson to see Manager Marcos. Marcos not only questioned Johnson about the union conversation he was having with his coworkers, Marcos twice repeated the directive that Johnson stop discussing the Union with his coworkers.

Respondent does not provide any evidence that this rule was enforced with regards to any other topics of conversation at the worksite. While Respondents did present the supervisor involved in this incident who provided a blanket denial that this incident occurred, [Tr. 405:9-407:12], Respondents failed to present Manager Marcos to refute the testimony that he also instructed Johnson to not have discussion about the Union at the warehouse. The Judge should therefore credit the testimony provided by Johnson and Wilson and find that Respondents violated Section 8(a)(1) by discriminatorily enforcing a rule prohibiting employees from having discussions at the workplace against employees speaking about the Union.

3. Respondents Violated Section 8(a)(1) of the Act by Threatening to Call the Police on an Employee Engaged in Protected Concerted Activity

Threats to call the police for engaging in protected concerted activity, like threats of discipline for engaging in protected concerted activity, clearly violate Section 8(a)(1) of the Act. *See Borun Bros., Inc.*, 257 NLRB 156, 169 (1981); *Saint Johns Health Ctr.* 357 NLRB 2078, 2083 fn. 1 (2011). In this case, Johnson credibly testified that in January 2017, he engaged in protected concerted activity by discussing concerns about racial discrimination with his

coworkers while waiting outside the warehouse, but inside the property, to be let into work. Johnson credibly testified that he vocally complained about the discrimination that was occurring in front of Manager Marcos, and that he would be filming that discrimination. At first, Marcos stopped Johnson from filming by telling him that it was illegal for him to film.¹⁹ Then, when Johnson realized that he had a right to film and asked for the consent of the individuals he was filming, Marcos went further and threatened to call the police on Johnson for engaging in this protected concerted activity.

With regards to this allegation, Johnson’s credible testimony stands alone because Respondent did not present Manager Marcos to refute his allegations. In this scenario, Johnson’s testimony regarding this event must be credited. Respondents may attempt to argue that Marcos was not aware that Johnson was engaging in protected concerted activity, but without Marcos testifying, the Judge must credit Johnson’s testimony that he had announced his intentions with regards to documenting discrimination at the workplace and discussing that discrimination with his coworkers—clearly a discussion protected by Section 7 of the Act. Respondents therefore violated Section 8(a)(1) of the Act by threatening to call the police on an employee for engaging in protected concerted activity.

¹⁹ This statement is arguably false because California Law allows individuals to record others who are in public without an expectation of privacy—such as individuals standing in an area where hundreds of employees gather in close quarters before going into work. *See* Cal. Penal Code 632 (“Confidential communication” excludes “a communication made in a *public gathering* or in any legislative, judicial, executive, or administrative proceeding open to the public, or in *any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.*”) (emphasis added)

4. Respondents Unfair Labor Practices During the Critical Period Require That the Election be Set Aside and Rerun the Election

Having established that Respondent engaged in two violations of Section 8(a)(1) during the critical period,²⁰ the only remaining question is whether this conduct is sufficient to require a rerun election or whether the conduct is so *de minimis* that a rerun election is not required. Here, the sheer reach of these violations is persuasive that the violations were sufficient to interfere with the fair operation of the election. Focusing on the factors identified by the Board, it is true that there are only two violations during the critical period. These two violations, however, are extremely serious—particularly the threats made during the captive audience meeting attended by hundreds of employees. Further, Respondents’ threats an objectionable conduct was widely disseminated: over three hundred people attended the captive audience meeting and were affected by the unlawful threats, while at minimum a half dozen individuals were directly affected by the disparate enforcement of the no talking rule. These hundreds of affected employees were numerically sufficient to swing an election decided against the Union by a margin of 159 votes, with an additional 113 challenged ballots. This means that as few as 46 votes could have swung the election, and Respondents’ violations of Section 8(a)(1) were therefore not *de minimis*. See *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001).

B. Respondents Engaged in Other Objectionable Conduct During Critical Period Sufficient to Require a Re-Run Election

The Board will set aside an election based on conduct that is not an unfair labor practice when that conduct creates “an atmosphere calculated to prevent a free and untrammelled choice

²⁰ Although only one of these unfair labor practices is alleged as an independent objection, it is proper for the Board to consider this conduct in deciding to set aside the election because “the interests of employee free choice require that the unfair labor practice allegations be considered as grounds for setting aside the election even though not specified in the election objections.” *In Re Cmty. Med. Ctr.*, 354 NLRB 232, 234 (2009).

by employees.” *Gen. Shoe*, 77 NLRB at 126. To determine whether conduct rises to this level, the Board applies an objective test which looks at whether the conduct “has a tendency to interfere with employees’ freedom of choice.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). This includes looking at the following factors: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157, 158 (2001) (citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986))

1. Objection 1: Threats During Captive Audience Meetings

As this objection is coextensive with the unfair labor practice allegation involving these same threats, the discussion above makes clear that this conduct constituted objectionable election conduct by Respondents during the critical period.

2. Objection 9: Anti-Union Message Inside Voting Booth

Even though it is not clear who wrote the “No” message inside the voting booth on election day, this conduct nonetheless was sufficient to constitute objectionable conduct because it had the effect of conveying to employees the false impression that the Board itself was endorsing a vote against the Union. The Board’s jurisprudence around altered Board documents has mostly focused on the question of reproduced sample ballots. In *Ryder Memorial Hospital*, 351 NLRB 214 (2007), the Board provided a history of this jurisprudence. Initially, the Board found that *any* alteration to a sample ballot was per se objectionable conduct. *Id.* The Board later

adopted a two part analysis focused on whether the ballot at issue “is likely to have given voters the misleading impression that the Board favored one of the parties to the election.” *Id.* In *Ryder*, the Board adopted a new approach where the determining factor as to the objectionability of a reproduced ballot is whether or not the ballot included the disclaimer now added by the Board to every ballot. *Id.*

In this case, we are not dealing with a sample ballot, but the same considerations come into play. Because there is no disclaimer at issue, it is appropriate to apply the Board’s previous two part test which looks at “whether the altered ballot on its face clearly identifies the party responsible for its preparation” and, if not, the Board further evaluates the nature and contents of the document to determine whether it would have a tendency to mislead employees into believing that the Board favors one party over another.” *Id.* Here, the parties stipulated that this message did appear in one of the four voting booths for up to 30 minutes before it was discovered. [GC Exh. 3]. Because of the large number of individuals voting during the morning session, it is likely that dozens of employees saw this message, as they entered the booth to vote, before the message was discovered. Without some indication of who wrote this message, any employee walking into the booth would be expected to see that “No” on the official Board approved voting booth and conclude that the Board – not merely one party or the other -- was quietly endorsing a “No” vote against the Union. This means that the alteration to the voting booth has “a tendency to mislead employees into believing that the Board favors one party over another.” *Id.* This message therefore constitutes objectionable conduct.

3. Objections 10 and 12: Grants of Benefits and Gifts

Objections 10 primarily involves Respondents’ grant of benefits to employees on the day before the election, including a raffle for every employee who attended Respondents’ holiday party that day. Objection 12 involves a grant of benefits in the form of a gift card sometime

earlier during the critical period in December 2016. Although grants of benefits during the critical period are not *per se* objectionable, they can be sufficient to set aside an election if “the benefits were granted for the purpose of influencing the employees’ vote in the election and were of a type reasonably calculate do have that effect.” *United Airlines Services Corp.*, 290 NLRB 954 (1988). In other words, an employer may only grant benefits “as it would if the union were not on the scene.” *R. Dakin & Co.*, 284 NLRB 98 (1987).

(a) Party. Gift Cards, and Other Benefits

In this case, Respondents admits that they held a holiday party for all unit employees on the day before the election and that it provided employees with paid work time to attend the party, with food and entertainment during the party, and with the opportunity to win gift cards that it raffled off. Respondent also admits that in December 2016, it gave every employee who was working a \$25 grocery gift card. Respondents will likely defend their actions by stating, as they testified, that this grant of benefits/gifts to the employees was of the exact same nature and scope as previous benefits/gifts conferred on employees around the holidays. For example, Respondents allege that they spent the exact same amount on food, entertainment, and gift cards in 2016 as they had in previous years.

These claims must be discredited, however, because Respondents failed to provide subpoenaed documents directly relevant to the question of whether it increased its spending for these gifts, or the reach the gifts it handed out. Although admitting that such documents did exist at one point, Respondent failed to provide any documents referencing how much it spent on entertainment, how much paid time off employees received for the party, how much was spent on gift cards, or even how many employees received gift cards [Tr. 371:1-372:2; 373:25-374:12; 383:18-23; 387:17-388:24]. All we have to go on for those items is Respondents’ claim that they were equivalent to other years. Yet, somehow, Respondents were able to produce documents

showing that approximately the same amount was spent on food in 2016 as in previous years. [Tr. 374:13-24]. Respondents unexplained failure to produce all of these documents should lead to an adverse inference that, had these documents been produced, they would have demonstrated that Respondent increased the amount of money it spent on these gifts and that it found ways to make sure that more individuals received these gifts—such as by raffling off more gift cards than the previous year. In fact, Respondents admit that it is possible that they did not start raffling off \$25 gift cards until 2016, in lieu of larger denominations, meaning that more employees would have benefited from winning a gift card on the eve of the election than had received gift cards in other years. [Tr. 373:10-19].

With this adverse inference, it becomes apparent that these gifts were not equivalent to what they would have been had the union not been on the scene, which leads to the inference that these benefits were intended to influence employees on the eve of the election. Further, these gifts are not of such minimal value that they are considered allowable—such as buttons, stickers, or t-shirts. *see e.g. R.L. White Co.*, 262 NLRB 575, 576 (1982). These gifts are substantial enough to constitute objectionable conduct and were available to the hundreds of people working the day shift at the warehouse, either on the day of the party or on the day Respondent handed out the grocery gift cards.

(b) Raffle

Even if the Judge does not find that the other grants of benefits listed above constitute objectionable conduct, the Board has established a *per se* rule that raffles conducted within 24 hours of the election are objectionable conduct. *Atlantic Limousine*, 331 NLRB 1025, 1029 (2000). Here, there is no dispute that the election party and the raffle were held on the day before the election, [Tr. 365:21-24; R. Exh.9]—well within the 24 hour period identified in *Atlantic Limousine*. Thus, the raffle held by Respondents was *per se* objectionable conduct.

Further, because of Respondents' failure to provide relevant documents, the Judge should draw the adverse inference that up to hundreds of employees won the raffle. Even if we accept the number provided by Respondents, that \$3500 was spent on gift cards for the raffle in \$50 and \$25 dollar increments, that means that at least 70 and up to 140 employees actually won gift cards at this raffle (not to mention the untold number that were eligible for the raffle). This means that this objection, standing alone, would be sufficient to overturn the election which could have been swung by 46 votes.

4. Objection 11: Anti-Union Lit Within 24 Hours

The General Counsel's witnesses testified that on the day before the election, either as they exited the holiday party or a little later in the day, they were given anti-union pamphlets by the employer. Respondents admit that these documents were handed out the day before the election, on the day of the party. [Tr. 326:25-327:4; 385:14-19]. Although the *Peerless Plywood*, 107 NLRB 427 (1954), rule prohibiting election speeches within 24 hours before the scheduled time for an election does not *per se* apply to campaign literature, special circumstances in this case make this conduct likewise objectionable. Specifically, the fact that this literature was handed out on the day after Respondents made grave threats of plant closure, and on the same day as Respondents conferred benefits on all of its employees, would have imbued the literature with the implication that Respondents' generosity, or lack thereof, is conditioned on employee's doing what the pamphlet instructs them to do "Vote NO." (U Exh. 1). While this conduct might not rise to the level of an unfair labor practice, it nonetheless constitutes objectionable conduct because employees would reasonably be compelled to follow the instructions on the pamphlet in order to ensure they continue receiving the benefits and gifts Respondents were giving them, and to avoid the possible harm that could result from Respondents' threats.

5. Objection 13 and 14: Interrogation Employees and Not Permitting them to Work

Objections 13 and 14 are grouped together because they both involve conduct which could, arguably, also be analyzed as a possible violation of the unfair labor practice provisions of the Act. Although there is no complaint allegation mirroring these objections, the Board may nonetheless consider these allegations because there were no concurrent allegations dismissed by the General Counsel, and because “it is not necessary to conclude that an employer committed an unfair labor practice in order to find conduct objectionable.” *Siemens Mfg. Co.*, 322 NLRB 994, 994 (1997). In other words, because interrogations are not *per se* violations of Section 8(a)(1), it is possible that an interrogation would not be coercive enough to be an unfair labor practice but would be objectionable election conduct under *General Shoe*. Similarly, although maybe unable to prove discriminatory 8(a)(3) conduct, the denial of four hours of work to an individual who was interrogated the previous day can interfere with a free election.

In this case, Johnson provided credible testimony that he was interrogated by one of Respondents’ supervisors, and that the following day he was denied work for nearly four hours even though he showed up to work before other employees and those other employees were given work before him. Because Johnson was a vocal union supporter, including telling the supervisor that he supported the Union when he was interrogated in the presence of several other workers, this conduct would have a tendency to interfere with a free choice for any employee who knew of Johnson’s vocal support for the Union and then saw him being kept out of work for hours. This conduct is therefore objectionable conduct.

6. Objection 19: Voter/*Excelsior* List

The final objection raised by the Union is that the voter list it received and used to contact employees was replete with defective addresses. Under the new election rules, the Board

codified in its rules and regulations the requirement that “the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers) of all eligible voters.” Sec. 102.62(d). In a recent case, the Board stated that “it is important that the information on the voter list be complete and accurate because of the important public policies that the list advances,” and has ordered rerun elections based on inaccuracies in that list. *Rhcg Safety Corp. & Constr*, 365 NLRB No. 88 (June 7, 2017). Similarly, the Board regularly set aside elections based on inaccuracies in the preceding *Excelsior List* requirement. See *Mod Interiors, Inc.*, 324 NLRB 164, 164-165 (1997); *American Biomed Ambulette, Inc.*, 325 NLRB 911, 914 (1998).

As testified to by the Union agent Manny Valenzuela, at least 132 out of the 644 addresses on the voter list in this case were incorrect addresses—over 20 percent of the eligible voter. This means that the Union was impeded in its ability to communicate with these 132 voters—nearly three times the amount of voters than would have been necessary to swing this election. Although it is not clear whether these omissions were intentional or not, the Board has made clear that this voter list “is not intended to test employer good faith, nor is employer bad faith a precondition to finding substantial noncompliance with the list requirements.” *Rhcg Safety*, 356 NLRB No. 88, *6 (internal citation omitted). Therefore, the inaccuracies on this list constitute objectionable conduct and, especially when viewed in light of the fact that Respondents also limited the ability of employees to communicate with each other about the Union in the warehouse, interfered with the free operation of the election by limiting the

opportunity of a significant number of employees to be informed about the election and what their choice in that election meant.

7. Respondents' Other Objectionable Conduct Was Sufficient to Set Aside the Election

As with Respondents' objectionable conduct based on unfair labor practices, Respondents' other objectionable conduct also rises to a level requiring a rerun election based on the factors identified in *Taylor Wharton*, 336 NLRB at 158. As described above, this election could have been swung by as few as 46 votes if the challenged ballots are taken into account. Most of the objectionable conduct described above, even on its own, would therefore rise to a level sufficient to swing the results of the election. Taken together, they make it clear that a free and clear election was impossible and that a rerun election is necessary.

Reviewing the relevant factors leads inexorably to the imperative to re-run the election. First, the number of incidents, when coupled with the unfair labor practices also alleged, is significant. Second, many of these violations are extremely severe—from the unlawful threats of closure made by Respondents, to the *per-se* unlawful raffle held by Respondents. Third, the number of employees affected by this objectionable conduct is exceedingly large—hundreds of employees heard the Respondents' unlawful threats, the Respondents conferred benefits to hundreds of employees at the holiday party and through gift cards, hundreds of employees were eligible for and actually won more gift cards during the raffle, and another 132 employees were unable to be contacted by the Union because of Respondents' provision of inaccurate addresses. Fourth, all of this objectionable conduct occurred within weeks of the election, during the critical period. Fifth, this objectionable conduct has persisted in the minds of employees since it occurred over 18 months before their testimony, as demonstrated by their testimony. Sixth, by virtue of the number of employees affected, this misconduct and its deleterious effect on union

support was widely disseminated amongst the unit. Seventh, there does not appear to be any successful efforts to rehabilitate the misconduct. Eight, although the election does not appear close, it could have been swung by 46 votes and nearly every single instance of objectionable conduct affected at least that many employees. Finally, nearly all of the misconduct alleged can be attributed directly to Respondents. Therefore, nearly every single factor from *Taylor Wharton Division* supports a finding that the objectionable conduct in this case was sufficient to set aside the election because it “has a tendency to interfere with employees’ freedom of choice.” *Cambridge Tool*, 316 NLRB 716.

V. Remedy and Conclusion

As Respondents have both violated Section 8(a)(1) of the Act and have engaged in other significant and severe objectionable conduct, the Union respectfully requests that the Judge order all appropriate remedies for the unfair labor practices, including notice reading by the owner of the company, and order a rerun election once those violations have been fully remedied and laboratory conditions have been restored.

Further, because of the changes in employing entities and successor issues, it should be noted that the current successor entities are responsible both for remedying the unfair labor practices and rerunning the election. “With respect to any re-run election that may be ordered,” Respondents NFI Companies and Nexem-Allied dba Core Employee Management have “stipulate[d] and agree[d] that they are now the Employers.” [Jt. Exh. 2].

In addition, these same successor entities are responsible for remedying any unfair labor practices as *Golden State* successors. In order for this liability to apply, the Board requires that there is “substantial continuity of the employing enterprise after the sale and it must be clear that the successor had knowledge of the predecessor's unfair labor practice liability at the time of the sale.” *Honeycomb Plastics Corp.*, 304 NLRB 570, 574 (1991) (citing *Golden State Bottling Co.*

v. NLRB, 414 U.S. 168, 174-185 (1975)). In this case, Respondents NFI Companies and Nexem-Allied dba Core employee management have admitted (or stipulated) to these facts. In parts (a)-(c) of paragraph 14 of its Answer, Respondents admit these individual facts and in part (d) Respondents admit that “Based on the conduct and operations described above in paragraphs 14(a) through (c), Respondent NFI, as a single employer with Respondent Cartage Distribution and Respondent Transload, has continued the employing entity with notice of Respondent Cartage and Respondent Orient's potential liability to remedy its alleged unfair labor practices, and is a successor to Respondent Cartage and Respondent Orient.” Similarly, Respondents have stipulated that “Since on or about July 23, 2017, Nexem-Allied, LLC, dba Core Employee Management (hereafter Nexem-Allied) has continued the operations of Core Employee Management, Inc. (hereafter Core) at the Wilmington facility in basically unchanged form. For purposes of these consolidated cases . . . only, Nexem-Allied stipulates and agrees that it is the successor to Core for all relevant purposes under the [Act], as amended, and no other statute or law.” [Jt. Exh. 2].

Therefore, the Judge should properly order that these successor entities remedy both the unfair labor practices committed by Respondents and rerun the election once laboratory conditions have been reestablished.

DATED: September 28, 2018

Respectfully submitted,

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By: 

HECTOR DE HARO

By: 

JULIE GUTMAN DICKINSON

CERTIFICATE OF SERVICE

I hereby certify that a copy of **CHARGING PARTY'S POST-HEARING BRIEF** was submitted by e-filing to the Division of Judges of the National Labor Relations Board on September 28, 2018.

The following parties were served with a copy of said documents by electronic mail on September 28, 2018:

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Attachment A

Case No. 21-RC-188813
Voter List

Last Name	First Name	Home Street Address	Home City	State	Zip Code	Home Phone Number a/o Cell Number	Personal Email	Job Title	Shift	Work Location
Adkins	Christopher	3430 Elm Ave. APT 6	Long Beach	CA	90807	310-493-4695		Forklift	First	CC Wilmington
Aguilar	Jose	1541 N Roman Ave	Wilmington	CA	90744	310-835-8337		Lumper	Second	CC Wilmington
Agyeman	Edward	1030 W. Florence	Los Angeles	CA	90044	310-341-5668		Lumper	First	CC Wilmington
AIKENS	GEORGE	116 E. 68TH STREET	LOS ANGELES	CA	90003	909-756-4849		Lumper	First	CC Wilmington
Ajijolaiya	Adeoba	1537 E Harding St	Long Beach	CA	90805			Lumper	Second	CC Wilmington
Aldaco-Leal	Ruben	16112 S Bullis Rd	Compton	CA	90221	310.608.2826		Forklift Operator	First	CC Wilmington
ALFARO	YAZER	115 EAST HILL ST.	LONG BEACH	CA	90806	562-753-1793		Lumper	First	CC Wilmington
ALFORD	KELDRICK	2001 CEDAR AVE., APT# 9	LONG BEACH	CA	90806	562-349-2305		Lumper	Second	CC Wilmington
Allan	Sam	3125 E 7th ST	Long Beach	CA	90804	310-709-8440		Lumper	Second	CC Wilmington
ALLOH	OROBOME SAH	2050 CANAL AVE	LONG BEACH	CA	90810	562-326-4328		Lumper	First	CC Wilmington
Almanza	Oscar	1875 Harbor Ave	Long Beach	CA	90810	562-350-7265		Forklift	First	CC Wilmington
Alamirano	Pedro	1929 N Palmer Ct	Long Beach	CA	90806	562-326-8408		Lumper	First	CC Wilmington
Alvarado	Edilberto	723 1/2 Pioneer Ave	Wilmington	CA	90744	562-507-5696		Forklift	First	CC Wilmington
ALVARADO	LUIS	1776 CHESTNUT	LONG BEACH	CA	90813	562-726-8170		Lumper	First	CC Wilmington

Next #

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