

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**SYSCO GRAND RAPIDS, LLC**

Respondent

**and**

**Cases 07-CA-197034  
07-CA-206108  
07-CA-206109**

**GENERAL TEAMSTERS LOCAL UNION NO.  
406, INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Before: David Goldman, Administrative Law Judge

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I. Statement of the Case

Between April 17 and September 12, 2017, General Teamsters Union Local No. 406, International Brotherhood of Teamsters (hereinafter “the Union”)<sup>1</sup>, filed six unfair labor practice charges, alleging that Respondent violated Sections 8(a)(1) and (5) by, *inter alia*, threatening employees, making unilateral changes to employees working conditions without bargaining with the Union, and refusing to provide the Union with relevant requested information [GC1(a)-(c), (g), (i), (k), (m), (q)-(s), (x), (z), (bb), (dd)]. Those charges were amended several times, and were eventually consolidated in the Second Order Consolidating Cases, Second Consolidated Amended Complaint (“Complaint”) issued by the Regional Director of Region 7 on June 21, 2018 [GC1(nn)].

Because the 8(a)(5) allegations were dependent on the final adjudication of prior unfair labor practice charges at the Board in *Sysco Grand Rapids, LLC 2017 WL 830017*, JD 15-17(“Sysco I”)<sup>2</sup>, on September 9, 2018, the parties entered into a conditional settlement agreement on those allegations. Based on that conditional settlement, on September 25, 2018, the Regional Director issued a Corrected Order Approving Settlement Agreement and Withdrawing Certain Portions of the Consolidated Amended Complaint [GC 1(ww)]. As such, only the 8(a)(1) allegations in charges 07-CA-197034, 07-CA-206108 and 07-CA-206109 remained outstanding at the outset of the hearing.

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<sup>1</sup> For the remainder of the document, the transcript will be cited as [Tr. at page number]. General Counsel Exhibits will be designated as [GC(followed by exhibit number)] and Respondent exhibits as [Respondent(followed by exhibit number)].

<sup>2</sup> That decision will be cited as [ALJD, page number].

The hearing was held in Grand Rapids, Michigan on September 26 and October 18, 2018. At the hearing the Complaint was further amended to clarify the language of the allegation in paragraph 12 and to withdraw paragraph 10 of the Complaint [GC 3, Tr. 330-331].<sup>3</sup>

## II. Introduction

While the specific allegations of the current case are relatively discrete, they occurred within the context of a series of severe unfair labor practices committed by Respondent in relation to a union organizing campaign in 2015. While those unfair labor practices have been fully litigated, they are currently pending final resolution at the Board. *Id.*

In that prior case, administrative law judge Michael A. Rosas (hereinafter “Judge Rosas”) determined that Respondent’s lead driver in the Alanson facility, Kevin Lauer, was a supervisor within the meaning of Section 2(11) of the Act. The record evidence in the current proceeding demonstrates that there have been no changes to his duties, responsibilities or supervisory authority in the time between the commission of the prior unfair labor practices in 2015 and the commission of the current unfair labor practices in 2017. At all material times, Lauer continued to assign, schedule, interview, and lay off employees and otherwise hold himself out as a supervisor and representative of Respondent.

The credible evidence further demonstrated that Lauer, as Respondent’s agent in the Alanson facility, violated Section 8(a)(1) on two separate occasions in August 2017 when he threatened employees both with the stricter enforcement of work rules and with reprisals including reduced or altered work schedules. Those statements, under the circumstances, were

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<sup>3</sup> The 8(a)(1) allegation in Paragraph 10 were alleged in charge 07-CA-197034. Because the only other allegation in that charge is covered by the conditional settlement that was approved on September 25, 2018, the only two cases that are currently in dispute are 07-CA-201608 and 07-CA-206109. While the formal papers and other documents reference all the case numbers in the original Complaint (most likely due to the late nature of the Order Severing), Counsel for the General Counsel moves that the case caption be amended to reflect the appropriate case numbers only (07-CA-201608 and 07-CA-201609).

not mere expressions of the objective consequences of unionization, but were direct threats made against employees who had expressed any interest in the Union and violated Section 8(a)(1) of the Act.

### III. Background and Relevant Facts

Sysco Grand Rapids is a broad-line grocery delivery company that operates six interrelated facilities in the State of Michigan. While the Grand Rapids location serves as the central office and houses drivers, warehouse operations and management personnel, there are six depot locations throughout the state – Alanson, Cadillac, Kalkaska, Niles, West Branch and White Pigeon - that employ only drivers. Those depot drivers are responsible for picking up items from the Grand Rapids warehouse and then delivering the products to various customers within their respective jurisdictions. Overall, the depots employ approximately 28 drivers at the six locations. The Alanson depot in northern Michigan is the largest of the depots and is the situs of the current dispute [ALJD 3; Tr. 227, 271].

#### A. Prior Litigation/Sysco I

In late 2014 and early 2015, the Union began to organize all of the approximately 161 the drivers and warehouse employees, including those in the depots. The Union's organizing drive continued throughout early 2015 and resulted in an election on May 7, 2015 [ALJD 1-24].

Based on the Respondent's conduct both throughout the organizing drive and continuing after the election, the Charging Party filed numerous unfair labor practice charges that were consolidated and litigated before Judge Rosas on sixteen dates in 2016. During that hearing, the parties had a full opportunity to present evidence and make legal arguments to support their respective positions. To that end, the parties presented more than twenty witnesses and hundreds of pages of documentary evidence [ALJD].

After considering that extensive record evidence, Judge Rosas issued his decision and recommended Order to the Board on March 2, 2017. In that decision, he found that the Respondent violated 8(a)(1) by making numerous, repeated and severe threats to employees including threats to close the facility, threats that the Respondent would lose business and that the employees would have to strike, threats to employees that they would lose seniority, wages and benefits, that they would be subjected to more onerous working conditions, and that they would ultimately be laid off if they selected the Union as their bargaining representative. Respondent was further found to have engaged in unlawful coercive conduct by interrogating numerous employees about their union support and sympathy, prohibiting employees from discussing the union with each other, and prohibiting employees from wearing union insignia.<sup>4</sup> Respondent also solicited grievances, promised to remedy those grievances, video recorded employees engaging in union activity and reinforced that perception among the employees. Respondent was also found to have violated 8(a)(3) by granting benefits to employees, reducing the hours of Alanson driver Jesse Silva and terminating the main union organizer George Brewster. Judge Rosas determined that the severe, pervasive and continuing unfair labor practices committed by Respondent could not be remedied by a second election, but rather required the issuance of a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) [ALJD 38-40].

Judge Rosas also made specific findings and conclusions related to the supervisory status of Alanson Lead Driver Kevin Lauer. To wit:

ALJD at 3(22-30):

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<sup>4</sup> Notably, the threat regarding union insignia involved an incident where an employee wore a Teamster hat, much as in the current case. [ALJD 30(23-33)].

*However, Alanson lead driver Kevin Lauer has several responsibilities in addition to serving as delivery driver. Lauer approves driver vacation schedules and prepares delivery schedules for the Company's northern depots. While required to submit them to the Company's Transportation Department in Grand Rapids for review, they are routinely approved [footnote 5: The Company denies the allegation that Lauer, a current employee who was not called to testify, is a Section 2(11) supervisor or Section 2(13) agent.]. Lauer is also responsible for interviewing and selecting temporary drivers. In that capacity he serves as the company's representative to the employment agency which supplies temporary drivers during the busy summer season. Lauer interviews the drivers sent by the employment agency and decides who to hire. Unlike other drivers, Lauer is provided with a company laptop and email address.[fn. 6: It is not disputed that Lauer had significantly more supervisory duties than any other lead driver. (Tr. 58-59, 400, 685-687, 797, 980-985, 1021, 1026-1031, 1093-1094, 1375-1378; GC Exh. 42-49, 61).*

And further, at ALJD:

*The Company did, however, seek to insulate itself from Lauer's statement by contesting his status as a Section 2(11) supervisor. The weight of the credible evidence strongly suggests otherwise. In contrast to other lead drivers, Lauer exercised independent judgment in assigning, approving and changing the schedules of 25 drivers in the northern depots just like Quisenberry did in the southern territories. The filing of the paperwork at the Grand Rapids facility was merely perfunctory. Lauer also hired and terminated temporary drivers as necessary. In essence, he was the only Company representative in the northern territories and it is clear that he represented its interests as only a supervisor would. See, *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003)( *Lack of other supervisors on site is a significant considering a lead employee's supervisory status*).*

Judge Rosas specifically determined that Lauer directly violated 8(a)(1) on April 28, 2015 when he threatened two union supporters with termination if the Union was selected as the employees bargaining representative and violated Section 8(a)(3) on April 10, 2015 when he that discriminatorily reduced in the hours of a union organizer [ALJD 26 (46), 38(10)].<sup>5</sup>

The record evidence presented in the current proceeding demonstrated that from 2014 through the commission of the current unfair labor practices in August 2017, Lauer's duties, responsibilities and authority – which included assigning and scheduling employees, granting vacation requests and interviewing temporary employees [Tr. 35, 67, 228, 232, 297-298] did not

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<sup>5</sup> Judge Rosas indicated that Lauer's threats were the "bluntest job threat on behalf of the Company" and constituted a hallmark violation for the purposes of recommending a *Gissel* bargaining order [ALJD (26) and (38)].

change. Until Respondent hired a Transportation Supervisor for the northern depots in 2018, Lauer was responsible for: assigning routes and scheduling employees [Tr. 207, 226-227, 277-278]; taking employee call-ins [Tr. 234, 309] ; accepting employee vacation requests [GC 4, Tr. 228, 232] ; communicating Respondent policies to employees [Tr. 233], communicating with customers on day to day issues [Tr. 326, 310-311]; interviewing and vetting temporary employees [Tr. 232, 234, 297, 303-304] ; and laying off temporary employees [Tr. 305]. He continued to set aside on day per week to perform those duties in an office that was almost exclusively used by him, on a computer assigned to him by Respondent [Tr. 31, 285-287]. While he did submit his scheduling assignments and recommendations to management in Grand Rapids, his work continued to be routinely approved [Tr. 301]. He was the only lead driver of Respondent's with those duties and the majority of those same duties were only performed at by 2(11) supervisors in Grand Rapids [Tr. 36, 225-226, 230, 234-236, 295-297, 308].

B. Facts Underlying the Current Dispute

Because Judge Rosas' decision in *Sysco I* was pending before the Board, the question of whether the Union was the representative of the employees or whether a second election would be held remained unresolved throughout 2017. As such, the topic of the Union continued to come up among employees from time to time throughout 2016 and 2017 generally and specifically in the Alanson facility [Tr. 37].

One such instance was on about August 9, 2018, when 33-year veteran driver Mike Evoy brought a union update flyer to the Alanson facility and left it on the table that was used by the drivers for both work-related paperwork and for other items of common interest [Tr. 39]. Several other drivers came and went from the room as they either finished or started their shifts at the same time Evoy placed the paper on the table [GC 2, Tr. 37-39, 52, 267].

As the employees were milling about, Lauer approached Evoy and engaged in a discussion about the Union. After Evoy had expressed his support for the Union and Lauer expressed his opposition, Lauer then enlisted the support of two temporary drivers, Aaron Vorac and Doug Schlappi [Tr. 40, 52, 78, 312]. Schlappi echoed his own anti-union preference, citing his own personal experience with a unionized facility. While Schlappi eventually wandered away from the exchange, Lauer and Evoy continued to discuss the Union [Tr. 41-42, 78, 264, 290, 311].

In explaining his opposition to the Union, Lauer told Evoy that Evoy was a good employee who “bust[ed] his ass” on the job and because of that, the Employer would likely “work with him” if there were any disciplinary issues [Tr. 43]. Lauer then referenced another driver, Mark Larson, who had been fired earlier in 2017. Lauer indicated that Larson also “busted his ass” but he had to be fired because the “union would have made a deal out of it, because everyone wasn’t being treated the same” [Tr. 43 ]. After Evoy indicated that he wanted everyone to be treated the same, the conversation ended [Tr. 43].

Within a week of the conversation between Evoy and Lauer, in August 2017, Alanson driver Dean Enos was subjected to a similar, but more direct threat from Kevin Lauer. As Enos was a relatively recent hire who had formerly worked for Respondent as a temporary driver, he had not had any involvement with the initial union organizing campaign or the subsequent litigation in 2016 [Tr. 64-65]. He did, however, come to support the Union in the summer of 2017 and in August began expressing that support by wearing a hat with the Teamster logo on it [Tr. 68].

Enos wore his union hat for the first time on a Sunday evening in late August [Tr. 68]. While Enos wore the hat without incident on that particular day, it became the subject of

conversation a few short days later [Tr. 69]. On that following Tuesday, Enos, who was again wearing his Teamster hat, was smoking in the parking lot with Lauer [Tr. 68-71]. There was a discussion regarding Enos' schedule and how it compared to that of a temporary driver, Jon Ware. Enos directly asked Lauer why he had been assigned a schedule with a day off in the middle of the week and Lauer replied that it was because the "hat [Enos] had been wearing." (Tr. 70-71) Enos immediately informed Lauer that he would report the statement Grand Rapids Transportation Supervisor Joe Quisenberry [Tr. 72].

Enos contacted Quisenberry the next day by telephone and reported the comment Lauer made tying the undesirable schedule with the Teamster hat. (t. 72) Quisenberry indicated that he would look into the matter and at some point, contacted Lauer to ask whether he had cut Enos' days in retaliation for wearing a union hat [Tr. 294].

The next day, Thursday, Lauer approached Enos again at the Alanson facility and stated that he felt that Enos had "stabbed [him] in the back" [Tr. 75, 295]. Enos followed Lauer into the parking lot to continue the discussion. [Tr. 76]. Lauer stated that the employees were wasting their time supporting the union and that it would not do anything for the employees [Tr. 91]. Lauer told Enos that the union supporters did not seem to realize that their routes would all be subject to change if the Union was their representative and that he would personally ensure that Enos' schedule would be reduced to the "bare minimum" of three days a week. [Tr. 76] Lauer indicated that the other employees did not like Enos and Enos indicated that he did not care [Tr. 76-77].

Bothered by the exchange, Enos decided to report the comment to Transportation Manager Todd Yocum the following week when he was in the Grand Rapids facility. Enos repeated the exchange to Transportation Manager Todd Yocum in Yocum's office [Tr. 218, R5].

Yocum indicated that he would “look into it” [Tr. 73-74, R5]<sup>6</sup> but did not follow up with Enos to allay his concerns or assure him that his union hat would not result in any retaliation [Tr. 218].

#### IV. Credibility

Given the nature of the allegations in the current case and the fact that the record evidence is almost exclusively testimonial, credibility resolutions are crucial. The fact finder must assess witness testimony in the context of all other testimony, including the demeanor of the witnesses, the weight of the other record evidence, established or admitted facts, reasonable inferences that may be drawn from the record and the inherent probabilities of the testimony. *Double D Construction Group*, 339 NLRB 303, 305 (2003). Of course, these resolutions need not be all or nothing propositions and a judge may believe some but not all of the testimony of individual witnesses. *Daikichi Sushi*, 335 NLRB 622 (2001).

The Board has long recognized that the testimony of employee witnesses that is adverse to their employer is particularly reliable because the employees are testifying adversely to their pecuniary interests. *Homer D. Bronson Co.*, 349 NLRB 512, 534 (2007) citing *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961). See also *Shop Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977) (The testimony of current employees that is adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment ... and for this reason is not likely to be false”).

In this regard, the testimony of the General Counsel’s witnesses – Mike Evoy and Dean Enos - was straight-forward, sincere and convincing. The testimony of both witnesses was in

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<sup>6</sup> Yocum testified that as a result of the conversation with Enos, he contacted Lauer directly about the statement and that Lauer confirmed that there was a conversation between him and Enos about the Union hat, but it was Enos who had brought it up to *him* and not the other way around. While the testimony was clearly hearsay, it corroborates Enos’ recollection of events [R5, 218]. Yocum also reduced his version of the meeting with Lauer to writing, which confirm Enos’ testimony [R5].

many cases either uncontroverted or directly corroborated by Respondent's witnesses.<sup>7</sup> While both witnesses were forthright and honest when they were mistaken or could not recall a detail, they maintained specific and clear recollections regarding the unlawful and coercive statements made to them by the individual they perceived to be their supervisor – Kevin Lauer.

While the majority of the testimony of Respondent's witnesses corroborated those of the General Counsel, the areas of divergence most often involved a failure of specific recollection instead of an outright contradiction. For example, while Schlappi<sup>8</sup> and Lauer recall having a conversation with Evoy about the Union in the Alanson facility in August 2017, neither of them had any *specific* recollection about all that was discussed [Tr. 264, 290]. Their testimony was vague and stood in stark contrast to Evoy's detailed and clear recollection [Tr. 263-264, 290].

Furthermore, the testimony of Jon Ware was inherently incredible and was directly contradicted by the testimony of Respondent's other witnesses. While Ware initially denied having any conversations with Enos at any time,<sup>9</sup> let alone in August 2017, Lauer later testified that Ware and Enos were often arguing and that the two generally did not care for each other [Tr. 314-315].<sup>10</sup>

In fact, the only direct contradiction of Evoy and Enos came from Lauer, who was not only present during the entirety of the other witnesses' testimony, but who served as the

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<sup>7</sup> As a specific example, Enos testified that Lauer referenced his hat as the reason his schedule was undesirable and that he informed both Joe Quisenberry and Todd Yocum about the statement. This testimony was specifically corroborated by Yocum's testimony and his written record of the meeting [R5, Tr. 218, 295]. Furthermore, Lauer himself admitted that he told Enos that he felt Enos had stabbed him in the back [Tr. 295]. Lauer, Schlappi and Enos all corroborated large portions of Evoy's testimony and admitted that they either did not recall or were not present for the duration of the entire conversation [Tr. 263, 264, 290-291].

<sup>8</sup> Schlappi's testimony was, given his lack of recollection, not terribly probative, but it is important to note that he is related to Kevin Lauer and was recruited for the position by Lauer himself [Tr. 265]. Such a familiar relationship, while not dispositive, can suggest bias. See generally, *Boulder Excavating Company*, 260 NLRB 1283, 1285 (1982).

<sup>9</sup> Ware's testimony was initially that he had "never" spoken to Enos despite them working together for the entire summer [Tr. 253].

<sup>10</sup> As with Schlappi, Ware's testimony was not particularly probative, but the animus described by Lauer as existing between him and Enos could indicate a bias in his testimony [Tr. 314-315].

Employer's representative at the table.<sup>11</sup> Clearly, as his statements were the basis for the current litigation and could serve as an additional source of legal liability for his employer, he had a significant incentive to deny those allegations. This is particularly true given that he had previously been found to have violated the Act in *Sysco I* and that those violations were at least a portion of the reason Judge Rosas recommended a *Gissel* bargaining order.

Lauer's testimony was patently false on at least one occasion. After specifically denying that he had ever held himself out as a supervisor, he was presented with and forced to acknowledge paperwork that he signed that designated him as a supervisor [GC 4, Tr. 289]. The evidence strongly suggests that he had a motive to obscure the truth to avoid any liability and that he was willing to testify in a way that served that motive.<sup>12</sup>

In sum, the entirety of the record evidence supports resolving credibility in favor of Evoy and Enos to the extent that testimony is contradicted by Respondent's witnesses. Their testimony was logical, straight forward and largely corroborated by the majority of the testimony of Respondent's witnesses.

#### V. Kevin Lauer was a Supervisor and Agent at All Material Times

After taking administrative notice of Judge Rosas' decision in *Sysco I*, ALJ Goldman granted Counsel for the General Counsel's motion *in limine* and instructed the parties to limit the presentation of evidence regarding the supervisory status of Kevin Lauer to "new evidence" from

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<sup>11</sup> While Respondent is clearly allowed to have Lauer as its representative despite its stance that he is not an agent, it must be noted that he was present during the entire hearing, including during testimony of employees on topics that he later testified to. While not technically a violation of the sequestration order, Lauer's presence during the testimony against him must be taken into consideration when assessing his credibility. See, *North Hills Office Services*, 342 NLRB 437 fn. 2 (2004)(representative presence at hearing part of credibility determination). As the Board has noted, "the less a witness hears of another's testimony, the more likely he is to declare his own unbiased knowledge..." *Unga Painting Corp.* 237 NLRB 1306 (1978).

<sup>12</sup> Lauer's testimony was also evasive and contradictory regarding his own opposition to the Union. He testified that he didn't express his union opposition "too much," [Tr. 313] but such testimony was contradicted both by the fact that he literally threatened employees with discharge for supporting the Union in 2015 [ALJD (28)] and by his later testimony that Enos was "antagonizing" him with his union hat [Tr. 314].

the time he committed the last unfair labor practice in 2015 to the time of the current unfair labor practice allegations in August 2017 [Tr. 14].

No new evidence regarding Lauer's supervisory status was presented. To the contrary, every witness called to testify regarding Lauer's status, including Lauer himself, admitted that his duties, responsibilities, and obligations remained completely unchanged from the time he took the position as lead driver in 2014 to the time he was replaced by a transportation supervisor in the spring of 2018 [Tr. 36, 67, 228-231, 296]. As such, all of Respondent's evidence relating to Lauer's status that goes beyond the affirmation that there were *no* changes to his duties between the time he committed the prior unfair labor practices in 2015 through August 2017 when he committed the current violations should be stricken from the record as outside the limiting instructions of the ALJ. At the very least, that evidence should not be considered in making a final determination.

It is well-established that an administrative law judge may rely on the factual findings of a prior decision under the doctrine of collateral estoppel. *Wynn Las Vegas, LLC*, 358 NLRB 690 (2012). That reliance extends to cases such as this one where the final determination is still pending at the Board. *Id.*, citing *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394 (1998), *Detroit Newspaper Agency*, 326 NLRB 782 fn.3 (1998). Thus, in the absence of "newly discovered or previously unavailable evidence" a party may *not* re-litigate issues that were or could have been litigated in the prior proceeding. *Wynn Las Vegas, supra*; *Nursing Center at Vineland*, 318 NLRB 901, 903 (1995).

Here, Respondent chose not to present Lauer as a witness in Sysco I, despite numerous opportunities to do so [ALJD 3, fn. 5]. It is only *after* the adverse findings made by Judge Rosas that Respondent decided to present Lauer as a witness in the current proceeding. All of

Lauer's current testimony regarding his duties and responsibilities was available during the previous litigation and *had not changed* in any way until well after the current unfair labor practices were committed. Respondent is clearly attempting to get another "bite at the apple" regarding Lauer's supervisory status by introducing evidence that it could have, but chose not to present at the prior hearing. This manipulation of the Board's processes must not be allowed. There is no new evidence regarding Lauer's duties during the relevant time period. There were no changes to Lauer's duties and responsibilities during the relevant time period. Having presented no evidence that any of Lauer's duties changed at any time before spring 2018, Respondent must endure the consequences of its prior litigation strategy and be bound by Judge Rosas determination that Lauer possessed sufficient supervisory authority to be considered a supervisor within the meaning of Section 2(11).

A. Record Evidence Supports Finding Lauer a 2(11) Supervisor

Even if Respondent's evidence regarding Lauer's supervisory status is considered, there remains sufficient evidence to find that Lauer was a 2(11) supervisor in August 2017. To establish Lauer's authority as a supervisor under Section 2(11), the General Counsel must show by a preponderance of evidence that: (1) Lauer hold the authority to engage in any *one* of the 12 supervisory functions enumerated in Section 2(11); (2) his exercise of such authority was not routine or clerical but required independent judgment; and (3) his authority was held in the interest of the Employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

As in *Sysco I*, the evidence supports a finding that Lauer possessed the authority under Section 2(11) to assign the approximately 28 drivers [ALJD 3(19), Tr. 226-227] working out of the northern depots and that he continued exercise independent judgment in doing so. To

“assign” means to designate an employee to a place, appoint an employee to a time or give an employee significant overall duties. *Id.* at 689, 692.

Lauer testified that that he created the schedules and assigned routes for all the northern depot drivers [Tr. 281]. In making those weekly assignments, Lauer testified that he considered drivers’ seniority, preference, familiarity with the various routes, and the employees’ vacation requests (which were submitted directly to him) [Tr. 277-278, 280, 300].

Lauer created the weekly driver schedules and assigned routes not only for the delivery and shuttle drivers at the four northern depots, but also for the other two lead drivers in Kalkaska and Cadillac as well the summer temporary drivers [Tr. 208]. Lauer was also required to assign senior drivers – at his discretion – to train the summer temporary drivers before they were put on the schedule [Tr. 305]. While the schedules were ultimately submitted to Grand Rapids for final approval, they were routinely approved [Tr. 301].

Lauer’s assessment of a driver’s skill, familiarity and experience in assigning routes and training assignments is beyond routine or clerical in nature, and demonstrates the exercise of independent judgment and indicates that he possessed sufficient supervisory status under Section 2(11) of the Act. See, *Rose Metal Products*, 289 NLRB 1153 (1988)(assignments based on independent assessment of skill required and knowledge of skill level of employees performing work sufficient to demonstrate supervisory authority).

The record evidence further showed that Lauer served as a recruiter and initial screener for Respondent regarding summer temporary employees. There is no dispute that Lauer conducted preliminary interviews with temporary summer employees, conducted an initial review of their qualifications and made a preliminary determination as to whether they were fit to be hired by Respondent [Tr. 83-86, 216, 234, 245, 265]. While Lauer testified that the

qualifications were not particularly onerous, there is no dispute that it was he who was the initial arbiter of whether those employees would be recommended to management in Grand Rapids [Tr. 274, 302].<sup>13</sup> Lauer also confirmed that he remained the liaison for those temporary employees and was the individual who would lay those employees off at the end of the busy season [Tr. 305].

In addition to assigning work and screening applicants, Lauer also possessed numerous secondary indicia of supervisory status. *Juniper Industries*, 311 NLRB 109 (1993). Lauer was Respondent's customer liaison for day-to-day issues, was the only individual who used the office, and set aside one day per week to perform those supervisory duties [Tr. 31-, 286-287]. None of Respondent's other lead drivers schedule routes or accept vacation requests. In fact, Lauer completed the schedules for the two *other* lead drivers in the northern depots. There was no evidence that any of those other leads took vacation requests, had laptops<sup>14</sup> assigned to them, communicated with customers, assigned individuals to train temporary employees, or held any of the authority that was possessed by Lauer [Tr. 230-235, 239, 247, 308]. It is also noteworthy that before 2018, the entire transportation management team was located more than 200 miles away from the Alanson facility [Tr. 270]. Lauer was the only person at any of the remote northern depots who the employees could approach about scheduling, time off, or other day-to-day issues. *Dale Service Corp.*, 269 NLRB 924 (1984)(senior operators responsible for operations when managers not present sufficient to establish supervisory status) ; *AJ Schmidt*

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<sup>13</sup> Enos testified that Lauer interviewed him for his temporary position and that he was never re-interviewed when hired by Respondent [Tr. 86].

<sup>14</sup> There was evidence that there were two lead drivers in Grand Rapids who shared a laptop on Saturdays. However, those employees were not assigned the computer as individuals, did not prepare schedules, take vacation requests, interview or recommend temporary employees, have their own assigned office or exercise any of the enhanced authority of Lauer.

*Co.*, 269 NLRB 579 (high ratio of employees to supervisors weighs in favor of finding supervisory status).

Additionally, the promotion of Alanson driver Dennis Winter to Transportation Supervisor in spring 2018 is noteworthy.<sup>15</sup> For five years, Lauer performed his duties, including assigning and scheduling drivers, assigning routes, assisting drivers with day-to-day issues, interviewing and overseeing temporary employees without change. After the filing of the current charges however, Respondent determined that it was necessary to have an official transportation supervisor for the northern depots [Tr. 225]. That transportation supervisor then occupied what was Lauer's office, was assigned what was presumably Lauer's laptop, scheduled and assigned drivers, accepted vacation requests, interviewed and hired temporary employees and communicated with clients, just as Lauer had done up to that point [Tr. 227-228, 245]. In contrast, Lauer, who remained a lead driver, had no further responsibility in any of those areas [Tr. 296]. The fact that Lauer's now former duties largely mirrored those of an admitted 2(11) supervisor, and that the employees all perceived him as a 2(11) supervisor further demonstrates that the duties he performed pre-2018 were supervisory in nature. See generally, *Babcock & Wilcox Construction Co.*, 288 NLRB 620 (1988); *Cooper Hand Tools*, 328 NLRB 145 (1999)

Thus, even if Respondent's evidence is accepted and considered, that evidence mirrors the evidence presented in the prior case and demonstrates that Lauer is a supervisor under Section 2(11) of the Act. He possessed the authority to assign, direct and effectively recommend temporary drivers for employment. He possessed authority that was unique to him from 2014 to 2017 and was not shared by any other employee with a similar "lead" designation anywhere else

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<sup>15</sup> While not dispositive, it must be noted that the decision to create and fill the Transportation Supervisor position in Alanson was made after Judge Rosas found Lauer to be a 2(11) supervisor, but subsequent to the filing of the current charges alleging that Lauer's statements violated the Act. It seems logical that Respondent, when faced with the fact that Lauer's singular duties and responsibilities as they existed from 2014 to 2017 opened it up to legal liability for his repeated coercive comments to other drivers, decided on a subsequent remedial measure.

in Respondent's facilities. The only other of Respondent's employees who possessed such authority were 2(11) supervisors.

B. Record Evidence Supports Finding Lauer a 2(13) Agent

Even assuming that Respondent's improper evidence is considered *and* Respondent is correct and Lauer did not possess sufficient supervisory authority to be considered a supervisor under Section 2(11) of the Act, he was very clearly an agent of Respondent under Section 2(13). The Board applies common law principles to determine whether an employee is an agent of the employer. Apparent authority can result from the manifestation by the employee to a third party that creates a reasonable basis for the third party to believe that the employer has authorized the alleged agent to perform the act in question. *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether under all the circumstances, the employees would "reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." See *Waterbed World*, 286 NLRB 425, 426 (1987); *D&F Industries, Inc.*, 339 NLRB 618 (2003)(employee acting as "conduit" for transmission of information from employer to employees sufficient to establish agency under Section 2(13)). The Board looks to whether, under the circumstances, the employees have just cause to believe that the person is acting for the employer. *Albertson's, Inc.*, 344 NLRB 1172 (2005); *Pan-Oston Co.*, 336 NLRB 305, 306 (2001)(employee placed by management in a position where employees could reasonably believe he spoke on its behalf').

There is a plethora of evidence on the record that demonstrates that the drivers reasonably believed Lauer to be their supervisor and that he was speaking and acting for management. Lauer was the only individual who possessed any authority over employees' schedules, assignments and vacation requests for all employees in the northern depots. Even if his work was reviewed or

approved by management in Grand Rapids, the employees at those four depots had a reasonable perception that *he* was ultimately in control of those aspects of their jobs and that *he* was the supervisory representative in the north. There was no other individual at any of the northern locations to whom they would go for day-to-day issues, problems, call-ins or schedule changes. Thus, those employees would reasonably believe he was “in charge” for the northern depots. *Sweeny & Co., Inc.*, 176 NLRB 208(1969)(individual’s status as sole representative of Respondent on site on a regular basis, comments reinforcing statements that individual was in charge gave employees reasonable impression that he spoke for Respondent); *Mid-Continent Refrigerated Service Co.*, 228 NLRB 917, 920 (1977)(In finding sole individuals at remote site who directed work found to have sufficient supervisory and apparent authority, Board affirmed finding that “It defies reason to believe that Respondent intended to permit two crews to function without on-the-job supervision”).

Furthermore, three employee witnesses testified that Lauer was their direct supervisor [Tr. 35, 66, 83]. Several employees testified that they were interviewed or recruited by Lauer, and Enos indicated his belief that Lauer was the individual who had actually “hired” him [Tr. 83]. Similarly, Schlappi testified that he was recruited as a temporary driver by Lauer in 2017 [Tr. 65] See, *Tradesmen International, Inc.* 351 NLRB 399, 427 (2007)(conducting preliminary interview and screening on behalf of Respondent’s hiring officials sufficient apparent authority to render individual agent under 2(13) of the Act); Furthermore, while Ware could not recall much about his time working for Respondent as a temporary driver, he did recall that Lauer was the individual to whom he addressed his request for a day off in August 2017 [Tr. 254]. *Schnuck Markets* 303 NLRB 256 (1991), overturned on other grounds at *961 F.2d 1992 (8<sup>th</sup> Cir. 1992)*(scheduling employees can confer apparent authority).

In fact, Lauer's own testimony regarding the incidents in August 2017 involving Enos underscores the fact that the employees firmly believed that Lauer not only had the power to create driver schedules, but also had the power to alter those schedules within his discretion.<sup>16</sup> During that August 2017 conversation, Enos was actively complaining to Lauer about his schedule and Lauer did not disavow or otherwise attempt to disabuse Enos of the notion that he was responsible for his and Ware's schedule. Instead, Lauer admitted that he had given Enos a mid-week day off and he did so based on Enos' wearing of the Union hat. The circumstances involved in those conversations clearly show that all parties were working under the perception that Lauer was independently responsible for scheduling drivers and adjusting the schedules based on his preferences [Tr. 70-71, 293]. See, *SAIA Motor Freight*, 334 NLRB 979 (2001)(foreman vested with apparent authority where he, *inter alia*, assigned and directed work and had authority to grant time off); *Faccina Construction Co*, 343 NLRB 886 (2004) (foreman whose duties including daily assignments as well as dealing with employees regarding taking time off possessed apparent authority to act for employer).

The most concrete evidence demonstrating this apparent authority is the fact that Lauer accepted employees' vacation requests and signed them in a space that was designated as being a signature line for a supervisor [Tr. 318-319, GC 4]. The employees clearly saw Lauer as the person to whom such requests would be made, and he reaffirmed that belief when he signed the sheet, signaling not only receipt, but tacit approval of such a request. See, *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998)(apparent authority found when individuals

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<sup>16</sup> The evidence in the prior case also shows that Lauer held himself out as the person who held the power over scheduling and that employees' support for the union was a relevant factor in his exercise of that perceived authority. Specifically, in *Sysco I*, Judge Rosas found that Lauer discriminatorily reduced the schedule of Alanson union supporter Jesse Silva: "On April 10, Lauer informed Silva of a change in his route schedule for the following week. Silva asked if the schedule change had anything to do with Silva's exchange with Shaeffer the previous day and Lauer simply responded, "I'm sure you know why." The double run...was reassigned to another driver listed by the company as opposed to the Union." ALJD 22(7-12).

served as the “link between employees and upper management, sign-off on vacation requests and otherwise implement company policies...”).

The record evidence demonstrated that the employees all reasonably believed, based on Lauer’s duties, interactions and representations that he had the authority to speak on behalf of and in the interest of the Employer. As such, Lauer was an agent of Respondent within the meaning of Section 2(13). *Cooper Hand Tools*, supra.

VI. Lauer’s August 2017 Statements Were Coercive and Violated 8(a)(1)

Because Lauer was clearly an agent of Respondent, his coercive statements to Enos and Evoy violated the Act. Whether a statement violates 8(a)(1) depends on whether “the employer engaged in conduct which, it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959). Section 8(a)(1) violations do not turn on the employer’s motive or on whether the coercion succeeded or failed. *Gissel Packing Co.*, supra; *Almet, Inc.*, 305 NLRB 626 (1991). While the Employer is free to express its opinion on unionization it must do so by making statements that are predictions of the effects of unionization based on objective fact or related to consequences beyond the Company’s control. *Gissel Packing Co.*, 395 U.S. at 618; *Systems West, LLC*, 342 NLRB 851 (2004). The Board still holds employers liable for all threats that could reasonably tend to be coercive, even if the statement is oblique, ambiguous, or nonsensical. See, *Fixtures Mfg. Corp.*, 332 NLRB 565, 565 (2000).

In his conversation with Mike Evoy, Lauer was not making an objective prediction on the effects of unionization. He was specifically communicating to Evoy, a known union supporter [Tr. 312], and the other employees in the room, that management would be more lenient in applying the rules without the presence of the Union. He contrasted that statement with a

specific example about how another well-known employee would most likely not have been fired if the Union had not been in the picture. This linkage of the union with the termination of a specific, well-regarded employee<sup>17</sup> was clearly coercive. Lauer's statements were not only directed at Evoy, who had high seniority and experience, but were made in the presence of temporary employees who may have been seeking employment with Respondent. Lauer's statement would likely chill any possible inclination those employees may have had to support the union or to express such support. Lauer's statements constituted a clear threat of reprisal against employees who supported the Union. *Olympic Supply, Inc.*, 359 NLRB 797 (2013)(statement to employee that supervisor would "rather be lenient in such situations but would have to strictly apply the rules if the Union [was] employees' bargaining representative" violated 8(a)(1)); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004)(statement that presence of union caused employer to be less lenient about break times unlawful); *Treanor Moving & Storage Co.*, 311 NLRB 371, 374 (1993)(statement that employer "used to let" employees "get away with this kind of stuff" but would not any longer because of the union, unlawful).

Lauer's comments to Enos later that month were similarly coercive, and perhaps more so, given that they were much more direct. While Lauer's statement that the Union would change the way that schedules were awarded could be an objective prediction on its own, he coupled it with a statement that Enos' schedule had already suffered because of the Union and that he would *personally* see to it that Enos' schedule suffered if the Union was determined to be the employees' bargaining representative. Comments linking reprisals with the Union generally and Union insignia more specifically is clearly coercive and violates Section 8(a)(1). *SW.C. McQuaide, Inc.*, 319 NLRB 756 (1995)(threat to discipline employee for wearing union hat

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<sup>17</sup> Larson was the lead driver in the Kalkaska depot [Tr. 55].

violated 8(a)(1)); *Pottsville Bleaching Co.*, 303 NLRB 186 (1991)(supervisor statement that union supporter remove Union hat if employee planned “to keep [his] happy home” violated 8(a)(1)); *Willamette Industries, Inc.*, 341 NLRB 560, 561 (2004)(statements that employees needed to “kind of let this union thing blow over” or they “could” go to rotating shifts are coercive and violate 8(a)(1)).<sup>18</sup>

Lauer’s comments to Enos during the week in late August were all designed to communicate not only Lauer’s opposition to the Union, but to ensure that Enos knew that his support for the Union would not go without negative consequences. Such comments clearly constituted threats of reprisals and violated 8(a)(1).

#### V. Conclusion

The totality of the credible record evidence demonstrates that Lauer was, at all material times, a supervisor and agent of Respondent and that he made repeated threatening and coercive statements to Alanson employees in August 2017. As such, Counsel for the General Counsel respectfully requests that Respondent be found to have violated Section 8(a)(1) of the Act and that Respondent be ordered to: (1) Cease and desist from threatening employees with the stricter enforcement of work rules because of the Union; (2) threatening employees with reprisals including schedule changes because of the Union; (3) post appropriate notices (as recommended in the Proposed Notice to Employees) in its facilities; and (4) read the proposed notice to employees on work time, in the presence of a Board agent at a meeting scheduled to ensure the widest possible attendance.

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<sup>18</sup> The statements remain threats even if the reprisal (here a schedule change) did not, in fact, take place. *Interstate Truck Parts, Inc.* 312 NLRB 661 (662?)(1993)

Respectfully submitted this 26<sup>th</sup> Day of November, 2018.

/s/ Colleen Carol

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Proposed Notice to Employees:

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

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

**WE WILL NOT** do anything to prevent you from exercising your rights as listed above.

**WE WILL NOT** threaten employees that the work rules will be more rigorously enforced or that employees will be disciplined more often if you choose to be represented by the Union.

**WE WILL NOT** threaten you with reprisals or changes to your schedule if you choose to be represented by the Union.

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

CERTIFICATE OF SERVICE

The undersigned hereby affirms that on November 26, 2018, the Counsel for the General Counsel's Brief to the Administrative Law Judge was filed by the Board's electronic case filing system, and a copy was served on the following parties by electronic mail at the addresses listed below:

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