

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

SYSKO COLUMBIA, LLC

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL UNION 509

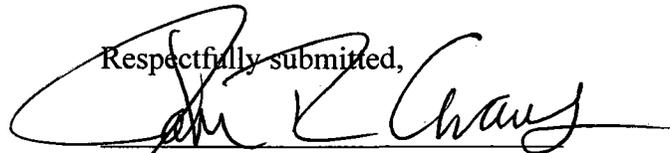
Cases 10-CA-197586
10-CA-197588
10-CA-203636
10-CA-210623

COUNSEL FOR GENERAL COUNSEL'S BRIEF
IN ANSWER TO RESPONDENT'S EXCEPTIONS

To: National Labor Relations Board

Dated: January 25, 2018

Respectfully submitted,



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I. SUMMARY OF CASE

This case is about the Administrative Law Judge’s decision that Respondent repeatedly interfered with its employees’ right to a free and fair election to determine whether their union would be legally recognized as the employees’ exclusive bargaining representative. In March 2017, Teamsters Local 509 organized Respondent’s drivers and mechanics and petitioned the Board for a representation election for two units; one for drivers and one for mechanics. Respondent then began campaigning in earnest against the Union, and in that process Respondent violated the National Labor Relations Act in multiple instances.¹

The Judge’s findings can essentially be divided into five basic categories. First, the judge found that Southeast Market President, and Respondent’s former President Michael Brawner² solicited employee complaints and grievances and promised to fix those issues. (ALJD 23:19-30.)³ The Judge found that during many of Respondent’s captive audience meetings, and in one-on-one conversations Brawner repeatedly asked employees to give him 12 months to fix things at Sysco Columbia and that if employees would just vote against the Union he could “affect a lot of things,” or “make it right.” (ALJD 23:19-30.)

Second, the Judge found that Maintenance Supervisor Jim Fix was a supervisor of Respondent within the meaning of Section 2(11) of the Act and that he committed a multitude of

¹ The Union filed the charge in Case 10–CA–197586 on April 26, 2017 and amended charges on August 9 and September 29, 2017. The Union also filed the charge in Case 10–CA–197588 on

² The Judge inadvertently refers to Brawner as “Brawley” twice in his decision. (ALJD 2:35; 3:5.) This is a simple spelling error that does not affect the Judge’s decision or prejudice Respondent.

³ In this brief, the following citations apply: “ALJD” designates a portion of the Administrative Judge’s decision, “GC” designates a General Counsel exhibit, “J” designates a joint exhibit, “R” designates a Respondent exhibit, “R Br.” designates a portion of Respondent’s Brief in Support of Exceptions, and “Tr.” designates a portion of the hearing transcript.

violations including soliciting employee complaints and grievances, promising increased benefits and improved terms and conditions of employment if employees rejected the Union, and changed employees' terms and conditions of employment. (ALJD 18:36-19:40, 24:4-27.) The Judge found that in mid-April, Fix held a group meeting with the Spotters and "directly asked what was bothering them as far as the issues," that Fix wrote down the complaints and grievances, and that the next day he announced that he resolved one of the issues: parking. (ALJD 24:12-14.) The Judge also found that in a one-on-one conversation with Mechanic Christopher Bookert, Fix asked Bookert to give him an opportunity to resolve the specific issue of pay. (ALJD 24:11-12.) The Judge found that in a one-on-one conversation with Mechanic Robert Anderson, Fix told Anderson that pay raises would be granted sooner if Anderson rescinded his position and voted against the Union. (ALJD 24:14-17.) The Judge also found that in this same conversation Fix told Anderson that if employees voted for the Union "his hands would be tied, everything would be frozen, and employees would be put in status quo." (ALJD 24:17-18.) The Judge reasoned that by this conduct, Fix violated Section 8(a)(1) of the Act by unlawfully soliciting grievances, promising benefits if the employees rejected the Union, and threatening that employees pay and other benefits would be frozen at the status quo if they voted for the Union. (ALJD 24:19-22.)

Third, the Judge found that in captive audience meetings Respondent played a DVD in which it told employees that if they voted for the Union their wages would be frozen at the status quo during possibly months or years of negotiations. (ALJD 21:1-30.) The Judge correctly reasoned that this was a coercive statement as the evidence indicated that Respondent had a past practice of granting periodic wage increases. (ALJD 21:1-30.)

Fourth, the Judge found that Respondent mailed a letter to all employees in September 2017, threatening to withhold employees' "typical September wage adjustment" due to the

Union's filing of representation petitions and unfair labor practice charges. (ALJD 24:29-25:11.) The Judge correctly reasoned that this letter constituted a violation of Section 8(a)(1) of the Act because the letter did not make clear to employees that wage adjustments would be granted regardless of the outcome of the election and that the sole purpose of the postponement was to avoid the appearance of attempting to influence the election. (ALJD 24:29-25:11.)

Fifth, as the Judge found, Respondent did what it threatened to do; it withheld from its employees the typical September wage adjustments. (ALJD 25:14-26:9.) The Judge found that by withholding employees' wage adjustments, Respondent violated Section 8(a)(3) and (1) of the Act since employees otherwise would have been granted the pay raises in the normal course of the employer's business. (ALJD 25:14-45.)

Respondent filed objections to Judge Sandron's decision on December 31, 2019. General Counsel respectfully submits this brief in answer to Respondent's exceptions. As shown below, Respondent's exceptions to the Judge's decision lack merit and General Counsel respectfully submits that the Board should deny Respondent's exceptions and adopt Judge Sandron's ALJD in toto.

II. FACTS

A. Background

As the judge found, Respondent, Sysco Columbia, is a limited liability company with an office and distribution facility located in Columbia, South Carolina. (ALJD 7:14-15). Respondent is a nationwide food distributor that distributes foods and food-related products to institutions and businesses such as restaurants, hospitals, and colleges. (ALJD 7:14-25.)

Respondent is a subsidiary of Sysco Corporation, which is headquartered in Houston Texas. (ALJD 7:19-25.) The Judge relied on Respondent's admission to jurisdiction in its Answer. (ALJD 7:16-17.)

Respondent's distribution facility in Columbia, South Carolina is its main or home facility. (ALJD 7:26.) In addition, Respondent maintains six additional domicile yards in Charleston, Myrtle Beach, Hilton Head Island, Florence, and Greenville, South Carolina; and Augusta, Georgia. (ALJD 7:26-29.)

Respondent has three classifications of drivers that work out of Columbia and all of the domicile yards: delivery drivers, shuttle drivers, and specialty drivers. (ALJD 7:41-8:2.) Route drivers, also called delivery drivers, deliver product to customers on set routes that vary daily using trucks and trailers. (ALJD 7:43-44.) Shuttle drivers are responsible for moving empty trailers to the Columbia facility from the domicile yards and vice versa. (ALJD 7:45.) Specialty drivers make deliveries to customers in small delivery vans and other vehicles which do not require a commercial driver's license. (ALJD 8:1-2.)

All of Respondent's mechanics, also called fleet technicians, and spotters, also called maintenance utility worker technicians, work out of the Columbia, South Carolina facility. (ALJD 8:4-5.) The mechanics are responsible for performing repairs and preventative maintenance on Respondent's fleet. (ALJD 8:5-6.) Respondent maintains three classifications of mechanic: fleet technician 1 (master), fleet technician 2 (journeyman), and fleet technician 3 (apprentice). (ALJD 8:6-7.) Spotters are responsible for moving the equipment to be loaded around the facility and washing out the trailers. (ALJD 8:7.)

B. The Judge found that in March 2017, Respondent's drivers and mechanics petitioned to be represented by the Union, but blocked their elections by filing the unfair labor practice charges at issue in this case.

Employees began contacting the Union in about April 2016 (ALJD 8:9.) On March 15, 2017, the Union first filed a petition with Region 10, seeking to represent a unit of drivers, mechanics, and spotters. (ALJD 8:9-10.) The parties ended up executing a stipulated election agreement based on that petition that only included the three categories of driver at all of Respondent's facilities: route, shuttle, and specialty. (ALJD 8:15-17.) On March 29, the Union filed another petition seeking to represent only mechanics and spotters in a bargaining unit separate from the drivers. (ALJD 8:10-12.)

The driver's election was conducted, in part by mail, and the ballots were to be counted on April 28. (ALJD 8:15-18.) The mechanics election was scheduled for April 27. (ALJD 8:21-24.) However, because the Union filed a unfair labor practice charges on April 26, before the ballots could be counted in the driver's election and before the mechanic's election could be conducted, the Region blocked further processing of the Union's petition. (ALJD 8:15-24.) On April 26, the drivers' ballots were impounded and the mechanic election was cancelled. (ALJD 8:15-24.)

C. The Judge found that in multiple instances and in multiple locations in March and April 2017, Michael Brawner solicited employee complaints and grievances and promised employees increased benefits and improved terms and conditions of employment if the employees rejected the Union

The Judge found that from February 6-8, 2017, prior to the Union filing its first petition in March, Respondent, through then-President Troy Barnes or Vice President Michael Turner, began holding meetings presenting management's argument against unionization. (ALJD 8:40-43.) After the Union filed its first petition, Respondent hired two labor consultants, Peter List and

Ronn English from Kulture Consulting LLC, to lead more meetings with employees. (ALJD 9:1-5.) At about the same time, Respondent enlisted Southeast Market President Brawner to return to Columbia, where he had once been president, to help in its efforts to persuade employees to vote against Union representation. (ALJD 9:16-24.)

From the end of March to the first of April 2017, Brawner spoke at meetings with employees to discuss their rights in the Union's campaign and to talk about the positives and negatives of the Union. (ALJD 9:18-22.) Brawner attended and spoke at all of the "25th Hour" meetings. (ALJD 9:21-22.)

The Judge found that during some of these meetings employees brought up their issues and concerns and asked Brawner questions, including concerns regarding pay and driver routes. (ALJD 10:7-12.) In so finding, the Judge relied on the testimony of Supervisor Ashley Buster⁴ (Tr. 873); Driver Todd Shanning (Tr. 1214; 1216); and "several other drivers," which implicitly must include Driver Joshua Cantrell (Tr. 882); Shuttle Driver Joseph Perisee (Tr. 265-266); and Driver Kelvin Bacon (Tr. 846-847) all of whom testified about discussions Brawner had during meetings concerning driver routes and pay. (ALJD 10:7-9.)

The Judge also found that a substantial number of employees testified that during these meetings Brawner asked employees to give him 12 months to a year to turn things around or fix things. (ALJD 10:13-21.) In his decision, the Judge points to the testimony of numerous witnesses in support of this finding. Specifically, of the testimony of the Columbia Drivers, the Judge relied on the testimony of Kelvin Bacon (Tr. 845-847); Jonathan Brewer (Tr. 126); Travis

⁴ In his decision, the Judge mistakenly refers to Supervisor Ashley Buster as "Ashley *Butler*." (See ALJD 3:7; 10:8; 10:19; 11:22; fn. 10; compare Tr. 865.) It is clear from the record that no witness named "Butler" testified, and therefore, this is merely an inadvertent error that did not impact the Judge's decision or prejudice Respondent.

Gates (Tr. 336); and Kyle Hughes (Tr. 281). (ALJD 10:13.) Of the Charleston Drivers, the Judge relied upon the testimony of John “Jackie” Gruber (Tr. 708; 710; 717); Phillip Otto (Tr. 317); and former-Driver Joshua Taylor (Tr. 671). (ALJD 10:14.) The Judge also relied on the testimony of Hilton Head Driver Dane LaCount (Tr. 236.) (ALJD 10:14.) The Judge also relied on the testimony of Mechanic Robert Anderson (Tr. 460); and Spotter Carlos Nuttry (Tr. 376). (ALJD 10:16. The Judge relied on the testimony of Labor Consultant Ronn English (Tr. 605). (ALJD 10:14-15.) Finally, the Judge relied on the admission of Brawner himself (Tr.743) and the tape recording of Brawner speaking at a 25th Hour Meeting (GC 6 pp. 15, 40.). (ALJD 10:30-35; 10:36-11:24.)

The Judge found that at these same 25th Hour Meetings, Respondent played for its employees a DVD that was also mailed to employees’ homes. (ALJD 9:37-42.) The Judge found that the DVD contained the statement “And even if you didn’t pay dues or didn’t support the union, your wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations.” (ALJD 10:4-6.)

D. The Judge found that Brawner had one-on-one conversations with six employees, both in person and by telephone, in which he solicited their complaints and grievances and made implied promises of improved benefits

The Judge also found that Brawner had one-on-one conversations with six employees both in person and by telephone in which he directly or indirectly solicited their complaints and made implied promises of improved benefits. (ALJD 23:31-34.) In so finding, the Judge explicitly relied on the testimony of Florence Driver Patrick Windham (Tr. 351-355); Charleston Driver Joshua Taylor (Tr. 664-666); Nuttry (Tr. 377-381). (ALJD 23:34-40.) The Judge also

implicitly relied on the testimony of Charleston Driver John “Jackie” Gruber (Tr. 704-706); Columbia Driver John Porter (Tr. 191-193); and Mechanic Robert Anderson (Tr. 461-464.). (ALJD 12:19-13:21.)

E. The Judge found that Fleet Maintenance Supervisor James Fix was a 2(11) Supervisor in mid-April, that Fix had a number of conversations with employees concerning their complaints and grievances, and that Fix changed the parking for Mechanics in mid-April prior to their election

The Judge found that in mid-April Fleet Maintenance Supervisor Jim Fix had sufficient authority to be considered a supervisor under Section 2(11) of the Act. (ALJD 19:16-22.) The Judge relied on Fix’s own testimony that in mid-April he was learning the “complexities and the administrative responsibilities and computer technology required of his new position.” (ALJD 14:3-13; Tr. 1133-1135.) The Judge also relied on the testimony of Vice President Michael Turner to find that during this time Fix was also being trained on how to schedule work, coach employees, and write performance reviews. (ALJD 14:5-6; Tr. 932-934.) The Judge relied on a March 31 email from outgoing Fleet Maintenance Supervisor Randall Drafts to Supervisor Len Bolduc in which Drafts told Bolduc that Fix had taken over for Drafts and that Drafts was merely training him. (ALJD 14:7-9; GC 24(a)). The Judge relied further on a number of April emails that showed that Fix participated in in interviews for a fleet technician apprentice position. (ALJD 14:9-10; GC 29-31.) The Judge also considered that Respondent did not include Fix on its April 8 list of eligible voters for the upcoming mechanics election. (ALJD 14:10-12; GC 9(a).)

Having found that in mid-April Fix was a 2(11) Supervisor, the Judge then found that Fix unlawfully solicited grievances, promised benefits if employees rejected the Union, and threatened that employees’ pay and other benefits would be frozen at the status quo if they voted

for the Union. (ALJD 24:19-22.) The judge relied on the testimony of Mechanic Christopher Bookert (Tr. 413-420); Mechanic Robert Anderson (Tr. 464-468); and Spotter Carlos Nuttry (Tr. 382-387.). (ALJD 14:18-23 (Bookert); 15:5-14 (Anderson); 14:30-35 (Nuttry).)

The Judge also found that the day after Fix met with the spotters to solicit their grievances, which included complaints about parking, that Fix individually told the mechanics and spotters that they could begin parking in the back closer to their work areas. (ALJD 20:1-40.) The Judge again relied on the testimony of Mechanic Bookert (Tr. 422-424), Mechanic Anderson (Tr. 483-484), and Spotter Nuttry (Tr. 387-388). (ALJD 14:24-15:4.) The Judge also relied on Fix's own testimony (Tr. 1147-1148) and Vice President Turner's (Tr. 942-943).

F. The Judge found that Respondent mailed each employee a letter on September 25, 2017 in which Respondent threatened to withhold its annual wage adjustments

The Judge found that Respondent's September 25 letter to employees explaining to employees that Respondent would not be granting its annual wage increases amounted to coercive conduct in violation of Section 8(a)(1) of the Act. (ALJD 24:27-25:1-12.) The Judge explicitly relied on the letter itself in reaching this conclusion. (ALJD 18:4-7; GC 3.) The Judge also implicitly relied on the testimony of Vice President Turner who admitted that he signed the letter and that Respondent did indeed mail and deliver it to employees. (ALJD 18:1-9; Tr. 82-85.)

G. The Judge found that Respondent has an established practice of granting annual wage adjustments to its drivers, mechanics, and spotters and that Respondent did not grant those employees' their annual wage adjustment in September 2017

The Judge found that Respondent violated Section 8(a)(1) and (3) by not conferring its annual wage adjustment for drivers, mechanics, and spotters, in September 2017. (ALJD 25:14-

26:12.) The Judge found that Respondent has an established practice of granting annual wage adjustments. (ALJD 25:36-37). In arriving at his conclusion, the Judge relied on documentation from as far back as Fiscal Year 2011 that establishes Respondent's pattern of annually adjusting employees' wages. (ALJD 15:35-17:355; J. 5-19; R. 19-39.) The Judge also relied in part on charts contained in Respondent's Brief to the Judge which succinctly summarizes this evidence. (ALJD 15:35-36; Respondent's Brief to the Administrative Law Judge pp. 16, 21.) The Judge also relied on Respondent's September 25 letter to find that employees expected a wage increase in September. (ALJD 25:37-40; GC 3.) The Judge correctly found that Respondent withheld its annual wage increases in September 2018, expressly on the basis the pending representation petitions and unfair labor practice charges. (ALJD 25:16-20.)

III. ARGUMENT

A. The Judge correctly admitted into evidence a recording of one of the 25th Hour Meetings over Respondent's objections to authentication

The Judge correctly found that the General Counsel introduced sufficient evidence to authenticate an audio recording⁶ and accompanying transcript of one of Respondent's "25th Hour" meetings. (ALJD 4:1-5:14; GC 6 (transcript of the tape);⁷ GC 16 (the tape).) In his decision, the Judge points to seven specific factors upon which he relied to find that the tape was

⁵ A formatting error in the Administrative Law Judge's decision appears to have caused page 16 of that decision to have been left blank. (ALJD 16.)

⁶ In his decision, the Judge refers to this recording as a "tape." The recording itself was offered and admitted into the record as General Counsel's Exhibit 16 in the form of a compact disc. Nevertheless, "tape" is an often used colloquial term for an audio recording and in the interest of consistency with the Judge's decision this recording will be referred to as a "tape" throughout this brief.

⁷ For the sake of convenience, citations to the contents of the tape will be to the court-reporter-produced transcript of the tape, admitted into evidence as General Counsel's Exhibit 6. The format of these citations will be GC 6 [page number]:[line numbers].

properly authenticated and admissible. (ALJD 5:4-14.) Accordingly, the Judge rejected Respondent's argument that the tape was not properly authenticated and found the tape and transcript admissible and reliable evidence. (ALJD 5:13-14.) Respondent excepts to the Judge's decision to admit into evidence, and to rely in part, on the tape and transcript, arguing that it was not properly authenticated. (R. Br. 8-11.)

Under the Federal Rules of Evidence, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims that it is." Fed.R.Evid. 901(a). As the Judge correctly noted, a tape recording can be authenticated by testimony of a witness with knowledge that supports a finding that the recording is what the presenting party claims it is. (ALJD 4:36-37 (citing *H & M International Transportation*, 363 NLRB No. 139, slip op. at 1 fn. 1 (2016).)) The Judge also correctly noted that a tape recording can be authenticated by circumstantial evidence. (ALJD 5:1-3 (citing *U.S. v. Damrah*, 412 F.3d 618, 628 (6th Cir. 2005) (videotape); *U.S. v. Carrasco*, 887 F.2d 794, 803-804 (7th Cir. 1989) (audiotape).))

The first factor the Judge considered when weighing the admissibility of the tape was the contents of the tape itself. (ALJD 5:6.) Here, the Judge correctly considered statements on the tape which make it abundantly clear that the tape captured one of the 25th Hour meetings. For example, Head of Human Resources Kema Weldon can be heard saying that everyone in the meeting is a "Columbia driver"⁸ and describing voting procedures that were unique to the driver's election, such as the dates and times of the election and the fact that the Columbia drivers voted manually while the domicile yard employees voted by mail, and that the ballots

⁸ This contradicts Respondent's argument that insufficient evidence existed for the Judge to have concluded that the tape was made by a driver. (R. Br. 8 fn. 5.)

would be counted at the Board's office in Winston-Salem, North Carolina. (GC 6 4-9; compare GC 8(a) (stipulated election agreement for the driver's election containing the election specifics).) This portion of the tape alone contains sufficient information to support the Judge's finding that this is a tape of one of Respondent's 25th Hour meetings.

The second factor that the Judge considered was the Judge's own comparison of the voices on the tape with hearing their voices as witnesses. (ALJD 5:6-7.) Respondent argues that it was improper for the Judge to "opine as to the identity of the voices on the recording," yet it offers no authority in support of that position. (R. Br. 11.) In fact, such an opinion is proper under the Federal Rules of Evidence. The specific examples of authentication enumerated in the Federal Rules of Evidence include "a comparison with an authenticated specimen by an expert witness or the trier of fact." Fed.R.Evid. 901(b)(3). The identification of a voice, "whether heard firsthand or through mechanical or electronic transmissions or recording," may be authenticated by opinion testimony that is "based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Fed.R.Evid. 901(b)(5).

A witness can authenticate a voice by an opinion "identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker." Fed.R.Evid. 901(b)(5).

Here, Brawner and English testified extensively before the Judge, essentially providing the Judge with an authenticated specimen of their voices. The Judge had the opportunity to compare the voices he heard on the recording with the voices he heard in the court room. The Federal Rules do not require that the Judge be familiar with the voices prior to hearing the

recording. In fact, the Federal Rules do not require even a familiarity with the voice. That the Judge *heard* the voice at *any time* under circumstances that connect it with the alleged speaker is sufficient. Surely, hearing English and Brawner testify before him satisfies this requirement. Thus, under the Federal Rules of Evidence the Judge was correct to consider his own comparison of the voices on the tape with the voices he heard testify before him.

The third factor that the Judge considered in finding that the tape was properly authenticated was the testimony of Hilton Head Driver Jonathan Brewer. (ALJD 5:7-8.) As previously discussed above, an opinion identifying a person's voice may be based on "hearing the voice at any time under circumstances that connect it with the alleged speaker." Fed.R.Evid. 901(b)(5). During the hearing the General Counsel played the tape for Brewer, pausing it as different individuals spoke, and asked Brewer to identify the voices, and explain how he was familiar with the voices. (See generally, Tr. 128-141.) Brewer identified Weldon's voice from having worked with her (Tr. 129-130); Labor Consultant Ronn English's voice from talking to him during the union campaign and hearing him speak during the management meetings (Tr. 130-131.); and Brawner's voice from hearing him speak at management meetings (Tr. 133-134.) The Judge correctly considered Brewer's identification of the voices on the tape as a factor weighing in favor of authentication under the Federal Rules of Evidence.

Fourth, the Judge considered that Brawner and English made concessions indicative of the authenticity of the tape. (ALJD 5:8.) After hearing portions of the tape, both Brawner and English conceded that Brawner made statements consistent with the statements attributed to Brawner on the tape. For example, in his testimony, Brawner admitted that at the 25th Hour meetings he would tell employees that he "could affect things like routes, loads, things like that." (Tr. 741) and he can be heard on the tape saying substantially those same types of things. (GC 6

13:12-20.) Brawner also admitted that at 25th Hour meetings he told employees to “give me a year to help influence the processes, relationships, those type things within the company,” which he also says on the tape. (Tr. 743; GC 6 40:3-41:25.) English testified that in the meetings he attended where Brawner spoke that Brawner would say that he was going to “put his boots on.” (Tr. 605.) Brawner makes the same sorts of statements on the tape regarding “put[ting] his boots on,” and getting to work fixing the employees’ problems. (GC 6 15:12, 40:3-5.) It was therefore correct for the Judge to consider these testimonial concessions as indicative of the authenticity of the tape.

Fifth, the Judge considered the fact that Respondent did not object to the portion of the tape and transcript that captured the portion of the meeting in which a DVD was played. (ALJD 5:8-9.) During the 25th Hour meetings, Respondent played a DVD for its employees. (R 6 p. 5.) Since the tape captured the contents of an entire 25th Hour meeting, it of course includes the audio of the DVD that was played for employees. (ALJD 4:31-32; GC 6 16:7-32:20.) During the hearing, Respondent’s counsel (Mr. Andrew Frederick) checked the accuracy of the portion of the transcript where the DVD was played against Respondent’s own script from that DVD and “did not notice any material differences” between the transcript and Respondent’s script. (Tr. 105:21-106:22; 134:19-23.) Respondent did not object to the Judge’s request to perform this comparison. (See generally, Tr. 105:9-142:8.) Respondent’s counsel (Mr. Mark Stublely) then stated that he did not have any objection to the receipt of that portion of the transcript concerning the contents of the DVD, other than as to relevance. (Tr. 134:24-135:17.) Respondent’s counsel also stipulated that the portion of the transcript outside of the DVD was substantially accurate for what is in the recording. (Tr. 140:6-15; 142:2-6 (reiterating the stipulation without objection from Respondent’s counsel).)

Respondent now asserts for the first time that it was improper for the Judge to have asked its counsel to compare Respondent's transcript with the General Counsel's and that doing so was indicative of the Judge's bias. (R. Br. 11.) Respondent offers no authority or further explanation in support of this proposition. (R. Br. 11.) Respondent had ample opportunity to decline to compare the transcripts and to decline to enter into these stipulations if it believed them to be improper, and it did not do so. To now argue that it was improper for the Judge to have considered these stipulations in assessing the authenticity of the tape and transcript is disingenuous at best. The Judge correctly considered these voluntary stipulations as relevant factors in finding the tape and transcript authentic.

Sixth, the Judge considered the fact that the meeting heard on tape is generally consistent with Respondent's script for 25th Hour meetings. (ALJD 5:9-10.) Respondent's Exhibit 6 is a six page script that lays out management's talking points for the 25th Hour meetings. (R 6.) As the Judge reasoned, the contents of the tape generally track what was is on the script. The script states that Head of Human Resources Kema Weldon (or another supervisor) will provide an introduction to the meeting and lay out the voting procedures. (R 6 pp. 1-3.) Weldon can be heard doing exactly this on the tape. (GC 6 3:2-9:10.) According the script, Brawner was then to take over the meeting and discuss Respondent's commitments to its employees, to compare his record with the Union's, and to introduce the DVD, which was then played. (R 6 pp. 3-5.) This comports with what happens on the tape. (GC 6 9:11-16:6.) According to the script, after the DVD played, Brawner was to give concluding remarks which included stating his committmenet to the facility, urging employees to consider the facts, and urging the employees to vote "no" against the Union. (R 6 pp. 5-6.) Once again, the tape generally matches the script's prescribed format of the meeting. (GC 6 32:21-42:9.)

Respondent argues that was error for the Judge to have considered his comparison between Respondent's script of 25th Hour meetings with what can be heard on the tape as indicative of the tape's authenticity. (R. Br. 11, fn. 7.) Respondent offers no authority or further argument in support of this proposition, except to say that significant differences exist between what is on the script and what was on the tape. (R. Br. 11, fn. 7.) Both English and Brawner himself conceded that Brawner deviated from the script in 25th Hour meetings. (Tr. 627:21-24.) (English); Tr. 754:10-12 (Brawner).) There should be no expectation that the script and the tape would be entirely consistent. It was logical for the Judge to consider that the format of the meetings as prescribed in the script should generally track what is on the tape if the tape were an authentic recording of a 25th Hour meeting. The evidence showed that was the case, and the Judge so relied. Therefore, it was correct for the Judge to have considered the "general consistency" between the script and the tape in assessing the authenticity of the tape.

Lastly, the Judge found that general consistency between other drivers' testimony and what is on the tape weighed in favor of finding that the tape is authentic. (ALJD 5:10.) Respondent excepted to the Judge's comparison between other driver witnesses and the tape on the same grounds as the use of the script, and likewise offered no authority or argument in support other to say that significant differences exist between what driver's testified to and what is on the tape. However, there are substantial similarities between what drivers testified to and what Brawner can be heard saying on the tape. For example, on the tape, Brawner repeatedly asks employees "to give him 12 months" to turn things around, or to "get his boots on," or to "get involved," or other such similar statements. (GC 6 15:10-12; 40:3-5; 41:2-4; 41:14-17; 41:24-25.) Seven separate driver witnesses testified that they heard Brawner make similar statements about giving him 12 months to fix things. (Tr. 126 (Driver Brewer); 281 (Driver

Hughes); 317 (Driver Otto); 336 (Driver Gates); 665, 671 (Driver Taylor); 708, 717 (Driver Gruber); 845-847 (Driver Bacon).) The Judge correctly reasoned that these types of overwhelming consistencies between witness testimony and what is on the tape weigh in favor of finding that the tape is an authentic record of a 25th Hour meeting.

As the Judge correctly reasoned, with all of this evidence taken together, “to believe that the voices on the tape could have been those of any other individuals and made at a meeting attended by persons other than the Respondent’s drivers would be so far-fetched as to be absurd.” (ALJD 5:11-13.) Federal Rule of Evidence 901 requires only that General Counsel produce sufficient evidence to support a finding that the recording at issue was what the General Counsel claimed it to be: a recording of Brawner (and others) speaking at a 25th Hour meeting. The Judge correctly found that General Counsel met its burden and the recording and transcript were properly authenticated and admitted into evidence.

B. The Judge’s credibility determinations do not indicate clear bias and are supported by the record

Respondent excepts to the Judge’s credibility determinations, arguing that they indicate clear bias. (R Br. 11-14.) Respondent argues that the Judge failed to explain adequately why he resolved almost all of the credibility issues in favor of the General Counsel’s witnesses. (R. Br. 13.) Contrary to Respondent’s contention, the Judge clearly articulated the basis for his credibility determinations and cited to appropriate authority supporting his decisions. (ALJD 3:14-8:5.)

The Judge did not completely discredit witnesses based on discrediting the witness in one area (ALJD 3:14-16 (citing *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970))). The Judge correctly found that that testimony of current employees that contradicts

their supervisors is particularly reliable (ALJD 3:25-31; *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) (internal citations omitted). When resolutions were not based on testimonial demeanor, the Judge correctly considered “the weight of the evidence, the established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.” (ALJD 3:32-36 (citing *Taylor Motors*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock*, 298 NLRB 209, 209 fn. 1 (1990)).)

Respondent argues that the Judge “improperly relied on amorphous concepts of general plausibility when explaining how he came to his conclusions.” (R Br. 13.) However, reliance on plausibility and “inherent probabilities” is not improper. In fact, as the Judge cites in his decision, it is well established that,

a witness’ testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. *Ibid* at 798–799; see also *MEMC Electronic Materials*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997).

(ALJD. 3:17-21.) The Judge also cites to *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018) and *Lignotock*, 298 NLRB 209, 209 fn. 1 (1990) for the proposition that credibility determinations, when not based on the witness’ demeanor, should be determined in part by “inherent probabilities.” (D 3:32-36.)

Contrary to Respondent’s claims, the Judge clearly articulated his methodology for resolving credibility disputes, including by citations to appropriate authority. In contrast, Respondent offered no authority to support its contention that the Judge’s methodology and reliance on the relevant authorities was in error. The Judge’s credibility resolutions were grounded in the appropriate authority and therefore do not indicate bias. Accordingly, Respondent’s exceptions to the Judge’s credibility resolutions are without merit.

C. The Judge correctly sustained General Counsel's objections to Respondent's inquiries into employees subjective interpretation of the coercive statements and in sustaining General Counsel's objection to one of Respondent's questions that called for a legal conclusion

On three occasions in the hearing, the Judge correctly sustained General Counsel's objections to the relevance of Respondent's counsel's questions to employees about their subjective interpretations of the unlawful threats at issue. Specifically, these questions were:

- “Was it your impression that Mr. Brawn – or was it your belief that Mr. Brawner was asking you about operational concerns?” (Tr. 364:6-8 (Driver Patrick Windham).)
- “I think you testified that when Mr. Fix showed you this, you had doubts that any increase would be provided, right?” (Tr. 505:2-4 (Mechanic Robert Anderson).)
- “What did you understand that to mean?” (Tr. 1107:23 (Driver Fernando Robinson).)

Respondent argues that the Judge erred in refusing to allow questions posed by Respondent concerning employee's interpretations of its supervisors' and managers' coercive statements. (R. Br. 14.) Respondent's argument draws a fine line between questions regarding the “impact” of the statement (which it says would be irrelevant) and questions regarding the “interpretation” of the words (which it contends are relevant). (R. Br. 14.) Respondent, however, was unable to cite to any authority supporting its contention, in effect, that it is up to witnesses to weigh and “interpret” an agent's coercive statements rather than the Administrative Law Judge. The only authority to which Respondent cites expressly rejects this argument. *Pine Valley Meats*, 255 NLRB 402, 410 (1981). In *Pine Valley Meats*, the Board adopted Administrative Law Judge Michael Miller's reasoning that,

I must reject Respondent's contention that, because Gunderson and Abrahamson testified that they did not consider the additional earnings to be a bribe and were

not influenced by it, Respondent's conduct was not a violation of the Act. “[I]t is axiomatic by now that a finding of restraint or coercion depends not on the subjective impressions of employees, but on the objective standard as to whether such conduct reasonably 'tends to interfere with the free exercise of employee rights.’” *Helena Laboratories*, 228 NLRB 294 (1977). Such grants of benefit as were here given have the reasonable tendency so to interfere.

Id.

An employee’s subjective interpretations of the coercive statements are therefore entirely irrelevant to the inquiry and the Judge correctly sustained General Counsel’s objections to the relevance of these questions.

Respondent further excepts to the Judge’s refusal to allow it to ask employee witness Robert Anderson a question that solicited a legal conclusion on cross-examination. (R. Br. 14.) Respondent’s counsel asked, “Mr. Anderson, the complaint in this matter alleges that Mr. Fix on or about April 17th, interrogated employees about the impact of the Employer’s promises to gauge employees’ level of support of the Union. Mr. Fix did that, did he?” (Tr. 515:18-23 (Mechanic Robert Anderson).) The Judge sustained General Counsel’s objection that this question called for a legal conclusion. (Tr. 515:18-23.)

The Judge’s ruling was not in error. The term “interrogation,” as it is used by the Board is a term of art that carries a specific meaning outside of its everyday use and therefore the question called for a legal conclusion. Even if sustaining the objection was error, it was not prejudicial as Respondent’s counsel reworded the question moments later in an unobjectionable form: “Did Mr. Fix ever question you about your love or support for the Union?” (Tr. 515:12-13.) The Judge did not “foreclose this line of questioning.” The record indicates that the Judge permitted Respondent’s counsel to question Anderson about the interrogation allegation but simply required that he did so in a permissible manner. Respondent is unable to cite to any authority in

support of its position that the Judge erred in refusing to allow Respondent to ask Anderson for a legal conclusion.

D. The Judge correctly found that Respondent violated Section 8(a)(1) of the Act by its September 25, 2017 letter

The Judge correctly found that Respondent violated Section 8(a)(1) of the Act by its September 25, 2017 letter. (ALJD 24:29-35:13.) On September 25, 2017, Respondent mailed to its drivers and mechanics, and posted in various locations throughout its Columbia facility, a letter concerning wage adjustments. (ALJD 18:1-9; GC 3; Tr. 82-85.) The September letter reads as follows:

We have had several associates ask about wage adjustments that would typically be made in September. We appreciate your inquiries and understand the concerns expressed by some.

As you know, the Teamsters filed petitions to gain representation rights over Columbia Drivers and Mechanics earlier this year. At that point, federal law requires that a company maintain wages and benefits at the status quo until the petition is resolved through an election, withdrawal by the union, or dismissed. In short, **this means that we cannot legally make any discretionary adjustments to wages until the union's petitions are resolved.**

The Teamsters' filing of unfair labor practice claims against the company effectively blocked the Driver and Mechanics elections. We have tried to expedite the dismissal of these claims so that the Drivers' ballots can be counted, the Mechanics can have their election and the results of both are finally certified. However, the union recently filed additional charges that must go through the same investigative process. We regret any inconvenience this has caused you but this is not a matter that we can control. There can be no changes to wages, benefits or other terms of employment while this process continues.

Please understand that we intend to comply with all legal requirements and remain committed to doing what is right for our associates. Please be patient as we work through this and let us know if you have any additional questions.

(GC 3 (emphasis added).) Respondent excepts to the Judge's findings concerning the September letter on essentially two grounds. (R. Br. 24; 34-37.)

As an initial matter, Respondent argues that the Judge erred in finding that the September letter violated Section 8(a)(1) of the Act because “at no point in the hearing did the GC attempt to glean Sysco Columbia’s motivation in issuing the [September letter].” (R. Br. 24.) Once again, Respondent’s argument turns on shoehorning a subjective element into an objective analysis. Respondent offers no authority in support of this proposition. As previously stated, the standard for finding a violation of Section 8(a)(1) is a completely objective one. *Pine Valley Meats*, 255 NLRB 402, 410 (1981) (citing *Helena Laboratories*, 228 NLRB 294 (1977)). Respondent’s subjective motivations for issuing the September letter are completely irrelevant to the question of whether the letter constituted “conduct [that] reasonably ‘tends to interfere with the free exercise of employee rights.’” *Id.*

The Judge found that the September letter violated Section 8(a)(1) of the Act because the letter failed to make clear to employees that wage adjustments would be granted regardless of the outcome of the representation election, that the sole purpose of withholding the wage adjustments was to avoid the appearance of attempting to influence the election, and because the letter attributed Respondent’s failure to implement the adjustment to the presence of the Union. (ALJD 24:29-25:12.) Respondent excepts to the Judge’s findings, arguing that the September letter satisfied the necessary requirements for Respondent to lawfully withhold employees’ wage adjustments. (R. Br. 34-37.) Respondent’s argument is not that the Judge applied the wrong standard, but that he reached the wrong result. (R. Br. 36-37.)

The Judge relied on the Board’s long-held doctrine that an employer may lawfully postpone an expected wage adjustment if it communicates that decision to employees in such a way as to satisfy three criteria first established in *Uarco Inc.*, 169 NLRB 1153 (1968). (ALJD 24:33-39.) The employer must “make it clear” to the affected employees that,

(1) the benefits will be granted regardless of the election results, (2) the “sole purpose” of the postponement “is to avoid the appearance of influencing the election outcome,” and (3) the “onus for the postponement” is not placed upon the union.

Earthgrains, 336 NLRB 1119, 1126-27 (2001) (citing *Atlantic Forest Products*, 282 NLRB 855, 858 (1987); *AutoZone*, 315 NLRB 115, 122 (1994), *enfd. mem.* 83 F.3d 422 (6th Cir. 1996)); see also *Woodcrest Health Care Center*, 366 NLRB No.70, slip op. at 1 fn. 11 (2018); *Sam’s Club*, 349 NLRB 1007, 1012 (2007); *Grass Valley Grocery Outlet*, 332 NLRB 1449 (2000); *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995).

The Judge found that the September letter failed to adequately provide any of the *Uarco* assurances. (ALJD 24:29-25:12.) First, the September letter did not assure employees that the benefits would be granted regardless of the election results. While the letter does say that, “we cannot legally make any discretionary adjustments to wages until the union’s petitions are resolved,” it did not assure employees that the adjustments *would be granted* once the petitions were resolved. (See GC 3.) Nor did the September letter assure employees that they would receive their annual adjustments regardless whether employees selected the Union as their bargaining representative. (See GC 3.)

Respondent argues that it “could not make it any clearer that the discretionary benefits *could* be distributed in the future.” (R. Br. 36 (emphasis added).) Even if it were true that Respondent could not have made it clearer, it is still not enough to assure employees that the wage adjustments *could* be distributed in the future. Rather, *Sam’s Club*, the case upon which Respondent relies for its position, required that Respondent, “[make] clear to employees that the adjustment *would* occur whether or not they select a union” *Sam’s Club*, 349 NLRB 1007, 1012 (2007) (internal quotations and citations omitted) (emphasis added). Therefore, the Judge

correctly found that the September letter did not make it clear to employees that their wage increases would be granted in the future. (ALJD 14:39.)

The Judge found that the September letter also did not assure employees that the “sole purpose” of the postponement was to avoid the appearance of influencing the election outcome. Nowhere in the September letter does Respondent indicate that the sole reason it withheld the wage adjustments was to avoid the appearance of influencing the election. Rather, a reasonable employee would read the September letter as saying that the sole reason Respondent withheld this established employee benefit was that doing so was required by law. In reality, the decision to withhold those annual wage adjustments was just one of the options available to Respondent, the other being to maintain the status quo by granting the annual wage adjustment.

The Judge found that the September letter also placed the onus of withholding the wage adjustments on the Union. The September letter incorrectly states that once the Union filed its representation petitions, Respondent was required to withhold wages in order to maintain the status quo. In fact, as previously discussed, the Board has consistently held that in order to maintain the status quo, Respondent was required to continue its established practice of granting annual wage adjustments. Here, the September letter attributes the delay entirely to the Union “filing unfair labor practice claims against the company,” and “fil[ing] additional charges.” (GC 3.) In that same paragraph, Respondent avoids taking responsibility for its decision to withhold the wage increases, saying, “**We have tried to expedite the dismissal of these claims** so that the Drivers’ ballots can be counted, the Mechanics can have their election and the results of both are finally certified. [. . .] We regret any inconvenience this has caused you but **this is not a matter that we can control.**” (GC 3 (emphasis added.)) The Judge correctly found that the letter

attributed Respondent's failure to implement the expected September wage adjustment to the presence of the Union.

Respondent did not present any other evidence that it gave employees the three *Uarco* assurances in any other manner. In the absence of any evidence to the contrary, the Judge correctly found that Respondent violated Section 8(a)(1) of the Act by threatening to withhold employees' annual wage adjustments in its September letter.

E. The Judge applied the correct standard in finding that Respondent violated Section 8(a)(1) and (3) of the Act by withholding employees' expected September wage adjustment

The Judge correctly found that Respondent violated Section 8(a)(1) and (3) when it withheld employees' expected wage adjustments in September 2017. (ALJD 25:16-26:12.) Respondent excepts to the Judge's conclusion and contends that it had no obligation to provide wage adjustments under Section 8(a)(5) of the Act. (R Br. 15-37.) While it is true that some of Respondent's employees, especially the delivery drivers, are compensated using a complicated formula, Respondent over-complicates the issue. The issue is whether Respondent actually withheld employees' "typical September wage adjustments," as it promised it would in its September letter.

Respondent's argument turns entirely on its analogizing the situation here to cases in which the Board has found a violation of the duty to bargain under Section 8(a)(5) of the Act when employers withhold regular raises while bargaining for a new contract. (See R. Br. 24-41.) However, there is no reason to stretch the law when the Board has established clear principles for withholding wage adjustments during the pendency of a representation election. Respondent's reliance on cases concerning an employer's obligation to bargain with a union under Section

8(a)(5) of the Act is misplaced. Respondent offers no explanation or argument as to why the Board should reject the longstanding principles applied by the Judge, and to instead replace those principles with the principles regarding an employer's obligation to bargain. (See R. Br. 24-41.) To put it simply, Respondent's arguments rely entirely on applying the incorrect standard, while the Judge applied the correct one.

The Judge relied on *SNE Enterprises*, 347 NLRB 472 (2015), for the correct analytical framework. "The withholding of pay increases from employees who are awaiting the holding of a Board election violates Section 8(a)(3) and (1) of the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business." (ALJD 25:22-27 (citing *SNE Enterprises*, 347 NLRB at 472; *AutoZone, Inc.*, 315 NLB 115 (1995), enfd. mem. 83 F.3d 422 (6th Cir. 1996); *Florida Steel Corp.*, 230 NLRB 1201, 1203 (1975), affd. 538 F.2d 324 (4th Cir. 1976)). "The Board law is quite clear that, in the midst of an on-going union organizing or election campaign, an employer must proceed with an expected wage or benefit adjustment as if the organizing or election campaign had not been in progress." *SNE Enterprises*. 347 NLRB at 478 (2015); see also *Earthgrains*, 339 NLRB at 28 (2003); *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001); *America's Best Quality Coatings*, 313 NLRB 470, 484 (1993); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).). In relying on the analytical framework from *SNE Enterprises* and similar cases, the Judge implicitly found (1) that the wage adjustments were "expected," and (2) that Respondent failed to make it clear to employees that the granting of the adjustment was not dependent on the result of the union organizing campaign and that the sole purpose of the postponement is to avoid the appearance of influencing employees in their decision to support the union or influencing the election's outcome.

- i. The wage adjustments were expected

The first step in the analysis is to determine whether or not employees reasonably could have expected wage adjustments. *SNE Enterprises*. 347 NLRB at 478 (2015). This is easily established from the record evidence and the Judge correctly found that the evidence overwhelmingly shows Respondent’s practice of adjusting employee wages for the coming fiscal year since fiscal year 2011. (ALJD 25:36-37.) The relevant evidence is summarized in the chart below.

FY	Route Drivers	Shuttle Drivers	Specialty Drivers	Mechanics	Spotters
2011	\$0.65 increase to base rate (Tr. 980; R 19.)	\$0.66 increase to base rate (Tr. 983:10-14.)	N/A (position did not yet exist) (Tr. 1006:6-8.)	\$0.55 to \$0.80 increase (R 33.)	\$0.50 increase (R 33.)
2012	Eligibility for a \$35 incentive (Tr. 987.)	Eligibility for \$35 incentive (Tr. 992:12-993:5.)	N/A (position did not yet exist) (Tr. 1006:6-8.)	\$0.55 to \$0.75 increase (R 34.)	\$0.45 increase (R 34.)
2013	Eligibility for a \$60 incentive (Tr. 997-998)	Eligibility for \$60 incentive (Tr. 1001:10-16.)	Creation of position at \$12/hour (Tr. 1006:9-10.)	\$0.40 to \$0.55 increase (Tr. 1033:22-1034:6; R 35.)	\$0.29 increase (Tr. 1036:13-18; R 36.)
2014	1.5% increase; Grid Rate changed to \$27.00 (Tr. 1008)	Moved from incentive pay to straight-hourly; \$23.20 hourly rate (Tr. 1009:14-17.)	5% increase and eligibility for additional \$3/hour for CDL license (Tr. 1006:10-16.)	\$0.23 to \$0.39 increase (Tr. 1036:13-18; R 36)	\$0.22 increase (Tr. 1036:13-18; R 36.)
2015	Grandfathered driver base rate increased \$0.45; New drivers \$5.00 increase to base (Tr. 1014; R. 28)	\$0.35 hourly rate increase (Tr. 1016:19-1017:2.)	No evidence of wage adjustment	\$0.23 to \$0.33 increase (R 37.)	\$0.22 increase (R 37.)
2016	All drivers receive \$1,000 bonus (Tr. 1019)	\$0.47 hourly rate increase (Tr. 1020:8.)	\$0.47 increase to hourly rate (Tr. 1021:21-22.)	2.5% increase (R 38.)	2% increase (R 38.)
2017	All drivers become eligible for \$500 safety bonus (Tr. 1022); non-Grandfathered	\$0.25 hourly rate increase (Tr. 1022:20-21.)	\$0.25 increase to hourly rate (R 32.)	2% increase to all but one Master Mechanic who received	1.5% increase (R 39.)

	drivers receive \$1.00 increase (R. 32.)			a 1.5% increase (R. 39.)	
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Except for the Specialty Drivers, in every fiscal year since Fiscal Year 2011, every classification of driver, mechanic, and spotter received some sort of wage adjustment. The Specialty Driver position was not created until Fiscal Year 2013, but with the exception of Fiscal Year 2015, Specialty Drivers received annual wage adjustments as well. There is no question that the evidence clearly establishes Respondent’s past practice of granting annual wage adjustments for the Mechanics and Spotters. Every year, Respondent granted those classifications an increase to their pay. The Judge correctly reasoned that the evidence clearly established a past pattern of granting wage adjustments. (ALJD 25:36-37.)

The Judge correctly reasoned that the September letter amounts to an admission that employees expected a wage adjustment. (ALJD 25:36-40.) The September letter said that, “We have had several associates ask about wage adjustments that would typically be made in September. We appreciate your inquiries and understand the concerns expressed by some” (GC 3.) Not only does Respondent admit that wage adjustments “would typically be made in September,” but that “several associates” had asked about those raises. These statements, along with the seven year history of fiscal-year wage adjustments, show conclusively that employees could reasonably expect some sort of wage adjustment at the end of the fiscal year in September 2017.

- ii. Respondent failed to make it clear to employees that the granting of the adjustment is not dependent on the result of the union organizing campaign and that the sole purpose of the postponement is to avoid the appearance of influencing employees in their decision to support the union or influencing the election’s outcome.

In relying on *SNE Enterprises* to find that Respondent violated Section 8(a)(1) of the Act by withholding annual wage adjustments, the Judge implicitly found that Respondent failed to assure employees that the wage adjustment would be granted regardless of the outcome of the election and that the sole purpose of the postponement was to avoid the appearance of influencing the election's outcome. (ALJD 25:22-45.)

[A]n employer may postpone the implementation of such a wage or benefit adjustment if it makes clear to its employees that the granting of the adjustment is not dependent upon the result of the union organizing campaign and that the 'sole purpose' of the postponement is to avoid the appearance of influencing employees in their decision to support the union or influencing the election's outcome.

SNE Enterprises, 347 NLRB at 478 (2006) (citing *Grouse Mountain Lodge*, 333 NLRB at 1324 (2001); *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991).).

The analysis here is the same analysis that the Judge performed in finding that Respondent's letter failed to sufficiently communicate the *Uarco* assurances in its September letter. (ALJD 24:19-25:11.) As is discussed above, the *Uarco* assurances include assurances that the postponement of the adjustment is not dependent on the result of the union campaign and that the sole purpose of the postponement is to avoid the appearance of undue influence. As discussed above, Respondent failed to provide any evidence that it did so, and the Judge correctly found that the September letter is evidence that Respondent *did not* give these assurances to its employees.

F. The Judge was correct in finding that Respondent, through Brawner, violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and promising its employees increased benefits and improved terms and conditions of employment if the employees rejected the union

The Judge correctly found that Respondent, through Brawner, violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and promising its employees increased

benefits and improved terms and conditions of employment if the employees rejected the Union. (ALJD 21:31-24:3.) Respondent excepted to the Judge's finding of a violation on several grounds. (R. Br. 37-57.)

As a preliminary matter, the Judge explicitly rejected Respondent's argument that Brawner was not employed by Respondent and had no authority to effectuate any promises, and that no employee would reasonably have construed his comments as representing promises by the Respondent. (ALJD 21:33-41.) Although Respondent excepted to this finding, it provided no authority in support of its position. (R. Br. 37-38.) The Judge based this finding on three factors. First, that Sysco Columbia is a subsidiary of Sysco Corporate.⁹ (ALJD 21:36-38.) In describing his relationship with Respondent, Brawner explained that his position was over Respondent's President in the corporate structure, and that he was responsible for Respondent's performance at the end of the year. (Tr. 723:20-25.) Brawner testified further that when Respondent did not adhere to Sysco's processes and business practices it was his job to help fix those problems. (Tr. 820:16-821:1.) Brawner testified as to several types of "processes" that he could fix at Sysco Columbia, including communication (Tr. 821:10-18); interactions between employees and management (Tr. 821:19-25); balancing sales and the rest of the company (Tr. 738:11-20); reducing the number of small deliveries that drivers had to make (Tr. 739:23-740:1); and driver routes and loads (Tr. 741:2-10). The Judge was therefore correct in finding that Brawner was able to affect meaningful change on the terms and conditions of employees' work by virtue of his senior position at Sysco Corporate.

⁹ The Judge mistakenly refers to Sysco Corporate as "Sysco Southeast." The error is a semantic one that does not affect the Judge's decision or prejudice Respondent.

Second, the Judge correctly considered Brawner's own admission that Sysco Corporate and Respondent's management acted together to request that he address employees on behalf of Respondent at 25th Hour meetings. (ALJD 21:38-39; Tr. 729:21-25.) In so doing, Respondent and Sysco Corporate implicitly held Brawner out to employees as speaking on behalf of Respondent.

Third, the Judge considered Brawner's many statements that reasonably gave employees the impression that he could influence management decisions relating to their wages, benefits, and working conditions. (ALJD 21:39-41.) Witnesses identified at least 22 instances in which Brawner made statements that reasonably gave employees the impression that he could affect their working conditions:

- He asked then-Driver Taylor to give him 12 months to change everything, and if not, then he would personally call the Union himself." (Tr. 665.)
- He told Taylor, "something along the lines that he was here to make things better." (Tr. 664.)
- In response to Taylor's complaint about there not being supervisory opportunities for Charleston employees, Brawner said, "All it takes is one call to fix that." (Tr. 666.)
- He asked employees to "give him 12 months to fix the problems and he'd have it fixed where it would be better for [the] drivers," and "to give him 12 months to fix the problems and he can get it fixed. But he couldn't fix it with the Union in." (Driver Brewer, Tr. 126.)
- He told the employees that he wanted to help them and to let him know if he could help them. (Driver Porter, Tr. 202-203.)
- He said "He was disgusted with what was going on and he wanted us to give him a year to make any changes and then if we still weren't happy then we could vote the Union in then." (Driver Hughes, Tr. 281.)

- He said, “If you vote yes then I can’t help you but if you vote no and I can help you. [...] [J]ust give me one year and I promise you I can make it right.” (Driver Gates, Tr. 336.)
- He said, “give him you know six months to a year to get everything kind of sorted out and we will actually see more of him to ensure that, you know, would take place.” (Spotter Nuttry, Tr. 376.)
- He asked for employees to, “give them a chance, you know, to fix the problems around the warehouse, the issues, you know, that we’re having and stuff like that, you know.” (Driver Robinson, Tr. 1107.) Brawner also said that he wanted to fix communication issues between drivers and management, to bring back the family atmosphere, and “fix problems what’s going on around the warehouse, you know, like, issues that drivers have.” (Driver Robinson, Tr. 1109.)
- He talked about making improvements to wages and benefits. (Driver Cantrell, Tr. 882).
- He said, “[G]uys we don’t want this union here in Sysco Columbia. He said, I can fix things; I can make things better; just give me time. And he said – he kept repeating basically the same thing over and over again and – and so in the – one thing he did say, which was odd. He said if I can’t fix things within a year, I’ll bring the Teamsters in myself.” (Driver Otto, Tr. 317.)
- He spoke at one meeting, “and told everybody that he was very sorry what happened, and if we just give him a year he would fix everything.” (Driver Gruber, Tr. 708; 717.); and at a different meeting, when he “just reiterated about how sorry he was that it had come to this, and just give him a year and he said he’ll take care of it.” (Driver Gruber, Tr. 710; 717.)
- He asked employees to, “give me 12 months to fix it; that’s all I’m asking.” (Former-Driver Taylor, Tr. 671.)

- He said, “give him 12 months. Give him 12 months and try to turn things around. He repeated that quite a few times during that meeting.” (Driver Bacon, Tr. 845-846.); and when he “kept saying give him 12 months” in response to employees who voiced concerns and grievances. (Driver Bacon, Tr. 846-847.)
- He said that, “if he could get the no vote, he believed he could affect Sysco Columbia in a positive way. He – that he couldn’t change the way the earth rotated but he believed he could affect things positively, but he didn’t know if that’d be possible if he didn’t get the no vote.” (Driver LaCount, Tr. 236-237.)
- He said, “he didn’t know things had gotten so bad and he needed a chance to fix it, and based on his reputation to give him a chance to fix it.” (Shuttle Driver Perisee, Tr. 259-260.)
- He asked employees about, “giving the company a chance to make things right, you know, things that we were complaining about, to give the company a chance to make – you know, give them a chance to make the things right that were – you know, that we thought were wrong.” (Shuttle Driver Mayers, Tr. 1069.)
- He said in response to Driver Shanning’s complaints about guaranteeing 40 hours for shuttle drivers, that, “we can do that” (Tr. 260; 1069; 1214.)
- He said in response to Driver Shanning’s complaints about pay that Respondent was working on a new incentive pay plan for delivery drivers, and that Respondent would “look into that.” (Tr. 265-266; 1214; 1216.)
- He said in response to Driver Shanning’s complaints about supervisors, “[Respondent is] going to look into the supervisor coverage of drivers.” (Tr. 1215-1216.)

- He asked, “just for us to give him a chance and think about what decision we’re making. Just think about what’s going on. Let’s try to, you know, give me a chance to try to change things. Give me a chance to look at things.” (Driver Shanning, Tr. 1218.)

The Judge’s conclusion that Brawner’s statements reasonably gave employees the impression that he could influence decisions related to their wages, benefits and working conditions is clearly well founded.

The Judge was correct in finding that that Brawner’s numerous statements to employees asking them to give him a year to fix things, constituted unlawful solicitation of grievances and unlawful promises of benefits. (ALJD 24:1-3.) Respondent’s argument relies on the incorrect assumption that Brawner must have made explicit, express promises to improve employees terms and conditions of employment in order for those statements to violate the Act. (R. Br. 41-53.) However, as the Judge reasoned, this is not the case.

The Judge correctly found that during Brawner’s statements that he could “affect a lot of things” or “make it right,” were enmeshed in employee complaints and grievances. (ALJD 25:26-30.) The Judge correctly relied on *Purple Communications*, 361 NLRB 575, 578 (2014) and *Auto Nation*, 360 NLRB 1298 (2014) for the proposition that “a statement indicating that the employer is ‘looking into’ making changes desired by employees indicates that action is being contemplated and constitutes an implied promise of improvements.” (ALJD 22:40-23:2 (citing *Purple Communications*, 361 NLRB 575, 578 (2014); *Auto Nation Inc.*, 360 NLRB 1298, 1299 (2014).))

The Judge found that during some of these meetings employees brought up their issues and concerns and asked Brawner questions, including concerns regarding pay and driver routes.

(ALJD 10:7-12.) In so finding, the Judge relied on the testimony of Supervisor Ashley Buster (Tr. 873); Driver Todd Shanning (Tr. 1214; 1216); and “several other drivers,” which implicitly must include Driver Joshua Cantrell (Tr. 882); Shuttle Driver Joseph Perisee (Tr. 265-266); and Driver Kelvin Bacon (Tr. 846-847) all of whom testified about discussions Brawner had during meetings concerning driver routes and pay. (ALJD 10:7-9.) Brawner himself testified that statements that he made during meetings that deviated from the scripts were in response to employee questions and concerns. (Tr. 744:7-745:4; 756:25-757:11.)

It is clearly established in the record that at 25th Hour meetings Brawner discussed the complaints and grievances that he previously solicited from employees. Then *during those same meetings*, Brawner asked employees to give him 12 months so that he can fix things. As in *Purple Communication*, Brawner made “no express promise to take specific action on the matter[s].” *Purple Communication*, 361 NLRB at 578. But, like *Auto Nation*, his request for employees to give him a chance to address employees’ issues before the employees’ voted in the Union constituted an implicit promise to remedy those complaints. *Auto Nation*, 360 NLRB at 1299. The Judge correctly reasoned that by linking the remedying of employees’ grievances with employees’ rejection of the Union, Respondent, through Brawner, implicitly promised to improve employees’ terms and conditions of employment if they rejected the Union. (ALJD 23:26-30.)

The Judge also relied on *Valerie Manor*, 351 NLRB 1306 (2007) and *Reno Hilton*, 319 NLRB 1154 (1995) in his decision. (ALJD 22:24-29.) Those cases taken together stand for the proposition that an employer’s request for a chance to “prove itself,” accompanied by promise to “fix things,” is unlawfully coercive in violation of Section 8(a)(1). *Valerie Manor*, 351 NLRB

1306, 1315-16 (2007); *Reno Hilton*, 319 NLRB 1154, 1156 (1995). Although the Judge did not find a violation under this theory, he would have been correct in doing so.

In *Reno Hilton*, the Board found that the employer implicitly promised benefits aimed at discouraging support for the Union, when the employer's president asked employees to "give Hilton and give me a chance, and I'll deliver." *Reno Hilton*, 317 NLRB at 1156 (1995). Similarly in *St. Francis Hospital*, 263 NLRB 834 (1982), the Board adopted the judge's reasoning that the employer violated Section 8(a)(1) of the Act by asking employees to be "given a year." 263 NLRB at 841 fn. 5. The judge relied on the context of the statement to differentiate it from other cases in which similar statements were found lawful, specifically finding that the "timing, content, and frequency of such statements belie their innocence and ambiguity." *Id.*

In *Valerie Manor*, the Board adopted Judge Edelman's analysis that the employer in that case violated Section 8(a)(1) by making unspecified promises or benefits by making the following statements:

Quarles told employees to **remember that a no vote is a vote to give me one chance – 1 year – 12 months – 365 days to work with you directly to resolve our issues and concerns. If at the end of that time you feel that you made a mistake by voting no, you can call this union or any other union that you feel you need. All I ask is that you give me one shot!**

Christiano told the employees to work it out and to **please give Denise [the employer's administrator] a chance!**

Rosetti also ended her portion of the speech with a plea **to give Denise a chance and Athena a second chance, and telling employees that they have been heard and it did not cost them a dime.**

Thomas ended his presentation by repeating his plea to **give "Denise a chance . . . give Athena a second chance"** and telling employees that they already won, they got Respondent's attention and Respondent won't "blow it again."

351 NLRB at 1315-1316 (emphasis added).

Respondent went beyond merely asking employees to give it a second chance. (See ALJD 22:6-29.) Rather, Respondent, through Brawner, repeatedly promised employees that if they gave Respondent six months to a year, that he would personally ensure that he would improve conditions at Sysco Columbia. Sixteen witnesses, including four of Respondent's own employee witnesses, testified that during Respondent's meetings with employees to discuss the Union, Brawner promised to improve conditions at Sysco Columbia if employees gave him a year to fix all of the problems at Sysco Columbia. Accordingly, what Brawner told employees in this case is almost identical to the statements in *Valerie Manor*.

Furthermore, as in *Valerie Manor*, the record fully supports finding that Respondent engaged in a "constant and extensive antiunion campaign with a multitude of 8(a)(1) violations." 351 NLRB at 1316. First, there is no question that Respondent's antiunion campaign was constant and extensive. Employees testified about receiving brochures and other literature in their company mailboxes and at their homes. Respondent also mailed an antiunion campaign DVD to every driver and mechanic. (GC 14.) In the four week period leading up to the election, Respondent held weekly meetings at almost all of its locations, in which it showed employees videos. (Tr. 68, 71.) Respondent even hired two labor consultants to lead these meetings and enlisted Brawner to return to Columbia to help in its efforts to persuade employees to vote against Union representation. (Tr. 67; 808.) Taken together, it is clear that Respondent's antiunion campaign was both constant and extensive.

Next, just as in *Valerie Manor*, "a multitude of 8(a)(1) violations" occurred during Respondent's campaign. *Valerie Manor*, 351 NLRB at 1316. The complaint alleges 15 distinct

8(a)(1) violations. (GC 1(x).) Brawner alone made over 25 statements similar to those in *Valerie Manor* to employees at Respondent's Columbia, Charleston, Hilton Head, and Florence facilities. *Valerie Manor*, 351 NLRB at 1315-1316; see also *St. Francis Hospital*, 263 NLRB at 841 fn. 5 (where the Board adopted the judge's consideration of the frequency that such statements were made as a factor in finding the statements unlawful). Brawner repeated these statements at different times, and to employees in both the drivers' and mechanics' units. The 8(a)(1) violations in this case are just as pervasive as the violations in *Valerie Manor* and *St. Francis Hospital*.

G. The Judge correctly found that Respondent, by Fleet Maintenance Supervisor James Fix violated Section 8(a)(1) of the Act when he told mechanic unit employees that Respondent would grant wage adjustments sooner if they voted against Union representation; solicited employee complaints and grievances; blamed the Union for employees not getting wage adjustments because Respondent's "hands were tied" by the Union; and granted benefits employees by allowing them to park closer to their work areas

- i. The Judge correctly found that Fix was a statutory Supervisor when he committed the unfair labor practices in mid-April

The Judge correctly found that as of mid-April, Fix had the authority to perform various indicia of supervisory authority and exercised the authority to assign and direct employees. (ALJD 19:17-19.) Respondent excepts to this finding arguing that the Judge based his decision on matters outside of the 2(11) supervisory indicia.

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) of the Act. "However, possession of authority consistent with any of the indicia is sufficient to establish supervisory authority even if such authority has not been exercised.

Avante at Wilson, 348 NLRB 1056 (2006), citing *Pepsi-Cola*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 fn. 8 (2001).” (ALJD 19:2-5.)

In finding that Fix is a supervisor within the meaning of Section 2(11) of the Act, the Judge relied on the following:

- Fix’s testimony that in mid-April he was learning the “complexities and the administrative responsibilities and computer technology required of his new position.” (ALJD 14:3-13; Tr. 1133-1135.)
- Vice President Michael Turner’s testimony that during this time Fix was also being trained on how to schedule work, coach employees, and write performance reviews. (ALJD 14:5-6; Tr. 932-934.)
- A March 31 email from outgoing Fleet Maintenance Supervisor Randall Drafts to Supervisor Len Bolduc in which Drafts told Bolduc to that Fix had taken over for Drafts and that Drafts was merely training him. (ALJD 14:7-9; GC 24(a)).
- Several April emails that showed that Fix participated in interviewing applicants for a fleet technician apprentice position. (ALJD 14:9-10; GC 29-31.)
- The fact that Respondent did not include Fix on its April 8 list of eligible voters for the April 27 mechanics election. (ALJD 14:10-12; GC 9(a).)
- Mechanic Bookert’s testimony that Fix was working out of Drafts’ office and it had become Fix’s office (ALJD 19:10; Tr. 426.)
- Spotter Nuttry’s testimony that Fix was adjusting spotters’ daily work schedules as needed (ALJD 19:10-11, Tr. 408.)

The Judge explicitly relied on Nuttry's testimony that in mid-April, Fix exercised the authority to assign and direct employees consistent with Section 2(11) supervisory status. (ALJD 19:10-11.) Respondent excepts to this finding, arguing that Nuttry was not credible and that the Judge erred in crediting his testimony as Nuttry worked outside of the shop and would not have been in regular contact with Fix. (R. Br. 59.) Respondent's argument ignores Nuttry's actual testimony. When asked by the Judge whether there times in mid-April when Fix exercised authority over employees, Nuttry answered,

A scheduling on the day – I can give an example. Like, scheduling the day, say, like, if one of the guys are actually off, you know we have four guys that run our shift, if one guy is out, that means the other two guys have to stagger their time. So he would have to – he was the one who would have to inform us that the time has to get staggered from the other two guys that work nights to come in a little bit on days to help full in until the next shift can pick up.

(Tr. 408:6-14.) The Judge then asked if what Nuttry was describing was Fix assigning shifts, to which Nuttry responded "Yes, sir." (ALJD 408:15-16.)

Respondent's argument is that Nuttry could not have known that Fix was responsible for re-assigning spotters' shifts because Nuttry did not work in the mechanic shop where Fix worked. (R Br. 59.) This is nonsensical. Nuttry *was* a spotter and would of course know that Fix was assigning shifts to him and his co-workers. In support of this proposition, Respondent cites only to Respondent's Exhibit 3,¹⁰ which is a portion of Mechanic Bookert's affidavit which was admitted only as to paragraphs one through three. (R Br. 59; R 3; Tr. 441:20-442:19.) Nothing in those paragraphs concerns Nuttry or the spotters.

Respondent next attempts to argue that since there were only four spotters at the time, that no independent discretion was necessary in order to ensure that all of the spotters' shifts

¹⁰ In its brief, Respondent refers to its exhibits as SC (for "Sysco Columbia"), and the specific citation is to "(SC 3)."

were covered. (R. Br. 59.) However, Respondent is unable to point to any evidence in the record supporting this proposition. Someone would need to coordinate coverage for the spotters if one called out, otherwise how would they know to come in early to cover the missing shift? Respondent failed to call any of the other three spotters to refute Nuttry's testimony and even though Fix testified extensively, Respondent never asked him if he was responsible for assigning spotters' shifts. (See Tr.1126-1167.)

Given Respondent's failure to offer any evidence that contradicts Nuttry's testimony that Fix was assigning spotters' shifts as of mid-April, the Judge was correct in relying on that testimony to find that Fix exercised sufficient supervisory authority to deem him to be a supervisor within the meaning of Section 2(11) of the Act.

- ii. The Judge correctly found that in about mid-April 2017, in Fix's office at Respondent's Columbia, South Carolina distribution facility, Fix violated Section 8(a)(1) of the Act by telling Bookert that Respondent would grant wage increases sooner if employees voted against the Union.

The Judge correctly found that Respondent, through Fix, violated Section 8(a)(1) of the Act when he told Mechanic Christopher Bookert that Respondent would grant wage increases sooner if employees voted against the Union. (ALJD 24:20.) Respondent excepts to this finding, arguing again that Fix was not a supervisor at the time of the discussion, and that Bookert believed that the conversation with Fix was more from a personal standpoint since Fix had been his mentor. (R Br. 64.)

The Judge implicitly relied upon the following longstanding principles in reaching his decision. Employers are not free to promise improved benefits to employees to persuade them to forego their statutory right of representation. *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). Nor are employers free to make such promises by implication. *Schroeder Distributing*, 171 NLRB

1515 (1968); *Landis Tool Co. v. NLRB*, 460 F.2d 23, 24-25 (3d Cir. 1972). An employer violates Section 8(a)(1) of the Act by attributing its failure to implement the expected wage or benefit adjustment to the presence of the union or by disparaging or undermining the union by creating the impression it impeded the granting of the adjustment. *Twin City Concrete*, 317 NLRB 1313, 1318 (1995); see *Sacramento Recycling Station*, 345 NLRB 564 (2005), (employer attributed the withholding of the raise to the petition, unlawfully placing the onus for the denial of that benefit on the union); see also *Pyramid Management Group*, 318 NLRB 607 (1995), enfd. mem. 101 F.3d 681 (2d Cir. 1996).

The facts establish that Fleet Maintenance Supervisor Fix, in mid-April said to Bookert that the mechanics were underpaid. (Tr. 418.) Fix asked Bookert to “give him an opportunity to try and resolve some of the issues and fix the [. . .] pay scale and trying to make sure that we are being treated based upon what was on the computer or what he had saw.” (Tr. 418.) Fix then told Bookert that employees were going to get the wage adjustment, “but we would get it quicker, within six months, if we didn’t vote the Union in. If we did vote the union in, it would be out of their control at that point.” (R 3.)

Respondent’s exceptions are without merit. First, as fully discussed above the Judge was correct in finding that Fix was a 2(11) supervisor at the time of this conversation, and Respondent’s argument to the contrary fails for the same reasons as previously stated. Second, Respondent argues that the conversation between Fix and Bookert could not have been a violation because Bookert did not consider Fix to be his supervisor also fails. “[I]t is axiomatic by now that a finding of restraint or coercion depends not on the subjective impressions of employees, but on the objective standard as to whether such conduct reasonably tends to interfere with the free exercise of employee rights.” *Helena Laboratories*, 228 NLRB 294

(1977); see also *Pine Valley Meats*, 255 NLRB 402, 410 (1981). Bookert's subjective impression of his personal relationship with Fix at the time is irrelevant to the inquiry.

Fix's statement to Bookert, that employees would get raises much sooner if they voted against the Union, clearly violates Section 8(a)(1) of the Act. There is no reasonable interpretation of Fix's statement to Bookert other than that Fix created the impression that voting for the Union would impede the granting of a wage adjustment. See *Twin City Concrete*, 317 NLRB at 1318. In fact, Fix's statement went beyond the proscription in *Twin City Concrete*, because Fix not only blamed the Union for the wage being withheld, but told Bookert that the wage adjustment would be granted sooner if employees voted against Union representation. Accordingly, the Judge correctly found that Fix's statement violated Section 8(a)(1) of the Act by blaming the Union for a wage adjustment being withheld and promising that a wage adjustment would happen sooner if employees voted against the Union.

- iii. The Judge correctly found that in about mid-April 2017, in the break room at Respondent's Columbia, South Carolina distribution facility, Respondent, through Fix, violated Section 8(a)(1) of the Act by soliciting employee complaints and grievances and promising its employees increased benefits and improved terms and conditions of employment if employees rejected the Union.

The Judge correctly found that Fix unlawfully solicited the spotters' complaints and grievances by holding a meeting for that purpose about one week prior to the driver's election. (ALJD 24:19-20.) Respondent excepts to this finding, arguing that nothing the Judge references in his decision is coercive or related to the Union. (R Br. 64 (citing ALJD 24:13-14.)

The Judge found that in mid-April, Fix held a meeting with the four spotters, including Nuttry at the fleet shop break room at about 5 p.m., one week prior to the driver's election. (ALJD 14:30-35; Tr. 381:10-382:12.) The Judge found that Fix opened the meeting by asking

the spotters what could be worked out and asked them what was bothering them as far as issues that they wanted to bring up. (ALJD 14:32-34.) Fix took notes at the meeting. (ALJD 14:34-35.) One of the complaints that the spotters raised was a complaint about the mechanics and spotters having to park so far away from their work area. (ALJD 14:35.) At the end of the meeting, Fix looked at the list and told the spotters, “that much couldn’t be done because his hands was tied with the union situation.” (Tr. 384:22-385:5.) The Judge found that later that day Fix asked Turner if the mechanics and spotters could start parking at the back of the facility closer to their work area and Turner agreed. (ALJD 14:36-15:1.) The Judge found that the day after Fix solicited the spotters’ complaints about the parking, Fix announced to the mechanics and spotters that they could begin parking in the back. (ALJD 15:4.)

The Judge relied on well-established Board precedent to find that Fix’s solicitation of the spotters’ grievances during an organizing campaign created a “‘compelling inference’ which the Board can make, that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act. (ALJD 22:30-39 (citing *Traction Wholesale Center.*, 328 NLRB 1058, 1058 (1999); citing *Reliance Electric*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972)); *see also* ALJD 24:22 (“See the cases I previously cited with regard to the DVD and to Brawner’s statements.”).)

This compelling inference, along with Fix telling the spotters that he would look into their complaints, but that his hands were tied by the union situation, dispels Respondent’s argument that nothing in the meeting was coercive or related to the Union. (R Br. 64.) Accordingly, the Judge was correct in finding that Fix’s meeting with the spotters constituted unlawful solicitation of complaints and grievances in violation of Section 8(a)(1) of the Act.

- iv. The Judge correctly found that Fix violated Section 8(a)(1) of the Act by blaming the Union for employees not getting wage increases by telling employees that Respondent's "hands were tied" because of the Union.

The Judge correctly found that Respondent by Fix, threatened that employees' pay and other benefits would be frozen at the status quo if they voted for the Union. (ALJD 24:20-21.) The Judge found that in mid-April in Mechanic Anderson's work bay, Fix told Anderson that he would not be able to get employees a higher wage increase because "his hands were tied" and that wages would be frozen at the status quo. (ALJD 24:14-18; Tr. 468.) The Judge referred his analysis back to the same standards used in assessing the violation relating to the DVD. (ALJD 24:22 ("See the cases I previously cited with regard to the DVD and to Brawner's statements.")) Similarly, Respondent essentially re-applies its argument from the DVD portion of its analysis, arguing that Fix's statement was a correct statement of law and therefore not a violation of the Act. (R Br. 65-66.)

An employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wages increases. *Jensen Enterprises*, 339 NLRB 877, 878 (2010), citing, inter alia, *Illiana Transit Warehouse*, 323 NLRB 111, 113-114 (1997) and *More Truck Lines*, 336 NLRB 772, 773-775 (2001), *enfd.* 324 F.3d 735 (D.C. 2003). The Board reasoned that following its employees' selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases, and that such a statement suggests that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. See also, *DHL Express*, 355 NLRB 1399, 1399 (2010) (employer gave no assurances that the status quo of granting scheduled wage increases would continue during contract negotiations).

(ALJD 21:11-21.) The Judge found that Respondent had a past practice of granting annual wage adjustments. (ALJD 21:7-10.) The Judge found that Respondent's September letter also indicated Respondent's past practice of granting annual wage adjustments because the letter stated that wage adjustments "would typically be made in September." (ALJD 21:7-10.) As the

Judge reasoned, it was coercive for Fix to tell Anderson that his wages would be frozen when Respondent is legally obligated to continue its past practice of granting annual wage adjustments during contract bargaining. Therefore, Fix's statement that wages would be frozen violated Section 8(a)(1) of the Act. (ALJD 24:20-23.)

- v. The Judge correctly found that Respondent violated Section 8(a)(1) and (3) of the Act by granting benefits to mechanics by allowing employees to start parking closer to their work area to discourage them from voting for the Union

The Judge found that Respondent violated Section 8(a)(3) and (1) of the Act by conferring a parking benefit on the mechanics and spotters in mid-April to discourage them from voting for the Union. (ALJD 20:37-39.) Respondent excepts the Judge's finding, arguing that "the benefit of free parking provided to employees did not change." (R Br. 68.)

The Judge found that prior to about mid-April, mechanics and spotters parked their personal vehicles in parking lot in front of Respondent's main building. (ALJD 14:24-29.) The mechanics and spotters had to walk through Respondent's entire warehouse in order to reach the fleet shop. (ALJD 14:24-25.) Bookert testified that he would sometimes park in the back when the weather was bad, but that he was also told by then then-Maintenance Manager Duane McCloud that he was not allowed to do so. (ALJD 14:25-27; Tr. 432:1-13.) The Judge also credited Nuttry's testimony that parking in the back was "way better [...] due to the weather and the time, considering. You know, sometimes you might be running a tad bit late and things of that nature." (ALJD 14:27-29; Tr. 386:18-387:5.)

The Judge reasoned:

An employer violates Section 8 of the Act by conferring employee benefits while a representation election is pending if the purpose is to induce employees to vote

against the union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 406 (1964); *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). See also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). The burden is on the employer to show a legitimate business reason for the timing of a grant of benefits during an organizing campaign, or the Board will infer improper motive. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); see also *Kanawha Stone Co.*, 334 NLRB 235, 235 fn. 2 (2001).

(ALJD 1-10.) Here, there is no question that Respondent began allowing mechanics and spotters to park near the fleet shop during the pending representation election. (R. Br 65-67.) The Judge found that Respondent had not offered any legitimate business purpose for the timing of the parking change. (R Br. 20:22-23.) Accordingly, the Board should follow the Judge's logic and infer improper motive. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992).

Respondent argues that the parking change was not a grant of benefits because the change did not improve the conditions of the mechanics and spotters any more than Respondent's other employees, all of whom enjoy free parking. (R Br. 65-66.) Respondent does not support its position with any authority. The Judge correctly rejected this argument, reasoning that the proper focus of the inquiry is whether the change is an improvement for the mechanics and spotters, not whether it was a grant of benefits beyond what other employees enjoyed. (ALJD 20:24-28.)

Absent a legitimate business reason for making this change, it was appropriate for the Judge to infer both an improper motive and interference with the mechanics' Section 7 rights. Accordingly, the Judge correctly found that Respondent violated Section 8(a)(1) of the Act by granting the mechanics and spotters the increased benefit of more convenient parking.

H. The Judge correctly found that Respondent violated Section 8(a)(1) of the Act by playing for employees and mailing to their homes, a DVD stating that "wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations."

The Judge correctly found that Respondent violated Section 8(a)(1) of the Act by playing a DVD with coercive statements to employees and mailing the DVD to their homes. (ALJD 21:29-30.) On the DVD, a male actor says, “And even if you didn’t pay dues or didn’t support the union, your wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations.” (ALJD 21:1-6.) Respondent admits to showing this DVD at the meetings with drivers and mechanics and mailing it to their homes. (GC 14 p. 5.) However, Respondent excepts to the Judge’s finding, arguing that the statement concerning frozen wages was legally permissible. (R Br. 68-72.)

[A]n employer’s statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases.” *Jensen Enterprises*, 339 NLRB 877, 877 (2003) (citing *Illiana Transit Warehouse.*, 323 NLRB 111, 113-114 (1997); *299 Lincoln Street*, 292 NLRB 172, 174 (1988); and *More Truck Lines*, 336 NLRB 772, 773-775 (2001), *enfd.* 324 F.3d 735 (D.C. Cir. 2003)).

(ALJD 21:11-15.) The Judge correctly relied on Respondent’s well-documented history of granting annual wage adjustments to find that Respondent had an established practice of granting annual wage increases. (ALJD 21:7-8; 15:35-17:43.) The Judge also found that the past practice of granting annual wage adjustments was supported by Respondent’s September letter, which read in part that wage adjustments, “would typically be made in September.” (ALJD 21:8-10.) Given the bulk of the evidence, the Judge was correct in finding that Respondent has a past practice of granting annual wage adjustments.

Once the practice is established the analysis boils down to whether Respondent told employees that wages would be frozen during contract negotiations, if so, Respondent violated Section 8(a)(1) of the Act. (See ALJD 21:11-15.) As the Judge found, that is exactly what happened in this case. (ALJD 21:1-30.) The Judge correctly reasoned that, as the Board held in

Jensen, the statement on the DVD that wages would be frozen until an agreement was signed violates Section 8(a)(1) of the Act. *Jensen*, 339 NLRB at 877.

IV. THE JUDGE ORDERED THE CORRECT REMEDIES NECESSARY TO DISSIPATE THE COERCIVE EFFECTS OF RESPONDENT’S NUMEROUS, PERVASIVE, AND OUTRAGOUS UNFAIR LABOR PRACTICES

In addition to the traditional remedies, the Judge also ordered that Respondent pay backpay to its drivers, mechanics, and spotters and that Brawner, Former President Propps, or a Board Agent read the prescribed notice to employees at each of its facilities. (ALJD 29; 12-23 (backpay); 29:40-44 (notice reading).) Respondent excepted to the backpay and notice reading remedies. (R Br. 72-75.)

A. The Judge correctly found that Respondent’s unfair labor practices were numerous, pervasive, and outrageous.

The Judge correctly found that Respondent’s unfair labor practices were numerous, pervasive, and outrageous. (ALJD 28:7-21.) The Judge applied the correct standard in determining whether notice readings were appropriate.

The Board may order extraordinary remedies, including such a reading of the notice, where the Respondent’s unfair labor practices are “so numerous, pervasive and outrageous” that such remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (and cited cases).

(D 27:374-40). The Judge reasoned that had the case merely concerned Respondent’s unlawful statements during Respondent’s campaign they would not “be sufficiently numerous, pervasive, and outrageous to warrant a special remedy.” (ALJD 28:7-10.) Respondent, however, then withheld employees’ regular wage adjustment and issued the September letter blaming the Union, its representation petitions, and unfair labor practice charges for the withheld adjustment.

(ALJD 28:7-21). Contrary to Respondent's argument, these violations are not "garden variety 8(a)(1) violations." (R Br. 74.)

Respondent's violations of the Act are clearly numerous, pervasive, and outrageous. The Judge found that Respondent: (1) Solicited employee grievances and complaints (ALJD 26:19-23); (2) Promised benefits to employees (ALJD 26:25); (3) threatened employees that their pay and benefits would be frozen if they voted for the Union (ALJD 26:27-28); (4) withheld pay adjustments for employees (ALJD 26:36); and (5) conferred a parking benefit on employees (ALJD 26:38). The withheld wage adjustment directly affected every driver, mechanic, and spotter. The September letter contained a threat to withhold employees' annual wage adjustment and was mailed to every driver, mechanic, and spotter. Respondent actually withheld every driver, mechanic, and spotters' annual wage adjustment. The parking benefit also directly affected every employee in the mechanic's unit. Respondent, through Brawner, committed at least 22 counts of unlawful solicitation of employees' complaints and grievances, which is sufficiently numerous to justify a notice reading. The Judge found that Respondent's actions "discouraged employees from supporting the Union and drove home the point that they were being punished for seeking to organize, reinforcing the earlier unlawful message that voting for the Union would result in no wage increase." (ALJD 28:14-21.)

Given the numerous, pervasive, and outrageous nature of these violations, the Judge correctly found that notice readings were necessary to dissipate the coercive effects of each of these violations.

B. The Judge correctly ordered backpay to remedy Respondent's unlawful withholding of employees' annual wage adjustment

The Judge also found that Respondent discriminatorily withheld wage adjustments and must make employees whole for any loss of earnings or benefits they experienced. (ALJD 27:5-15.) Respondent excepts to the Judge's ordering of backpay. (R. Br. 74-75.) Specifically, Respondent argues that the Judge erred in ordering backpay since he did not "provide guidance regarding the timing of the backpay obligation or the method by which backpay should be calculated." (R. Br. 74.) However, Respondent offers no authority to support this contention.

The issue at hand is how to determine the "raise not given." Admittedly, determining a correct backpay amount in these circumstances is more difficult than, for example, determining the backpay owed to an unlawfully discharged discriminatee. This, however, is a question for compliance, not in a trial on the merits. Therefore, the Judge did not err by awarding backpay without providing guidance as to the timing and methodology of calculating backpay as the Judge has not obligation to do so.

V. CONCLUSION

Respondent Violated Section 8(a)(1) and 8(a)(3) of the Act in multiple instances

The Judge was correct in finding that Respondent's response to its employees' organizing efforts crossed the line of permissible campaign conduct. By repeatedly promising employees that he would fix things at Sysco Columbia if they voted against the Union, Respondent, through Brawner violated Section 8(a)(1) of the Act. Respondent, by Fix, violated Section 8(a)(1) by meeting with spotters and soliciting their complaints and grievances, by changing the parking for mechanics in the period directly preceding the representation election, by promising that Respondent would have granted wage adjustments sooner if employees rejected the Union, and by telling both Anderson and Nuttry that his "hands were tied" by the Union. Respondent

committed further violations of Section 8(a)(1) of the Act by playing a DVD threatening the that employees' wages would be frozen at the status quo for months and possibly years of negotiation if the employees chose the Union as their representative. Respondent also violated Section 8(a)(1) of the Act by mailing this same DVD to employees' homes. In its September letter, Respondent violated Section 8(a)(1) of the Act by threatening to withhold employees' "typical September wage adjustment" without communicating the *Uarco* assurances, and by blaming the Union for the withholding of those adjustments. The Judge correctly found that Respondent violated Section 8(a)(1) and (3) of the Act by following through on that threat and withholding those typical September wage adjustments without communicating the *Uarco* assurances and while blaming the Union for Respondent's decision to do so, which was an unlawful change in the terms and conditions of its employees' employment.

For all of the foregoing reasons, Respondent's exceptions lack merit. The Board should adopt the Judge's decision in toto.

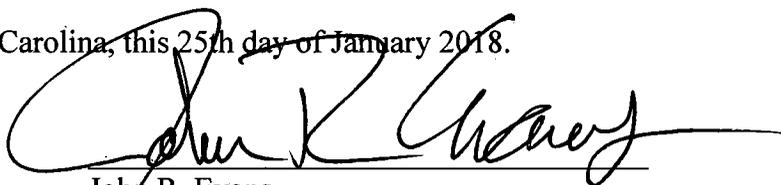
CERTIFICATE OF SERVICE

I certify that a true and correct copy of Counsel for General Counsel's Brief in Answer to Respondent's Exceptions was served by electronic mail on January 25, 2018, on the following:

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Dated at Winston-Salem, North Carolina, this 25th day of January 2018.



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