

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

GRAPHIC COMMUNICATIONS
CONFERENCE/INTERNATIONAL
BROTHERHOOD OF TEAMSTERS LOCAL UNION
NO. 735-S

and

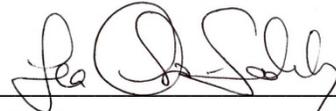
Case 04-CB-215127

BEMIS COMPANY, INC.

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT
OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Dated: March 29, 2019

Respectfully submitted,



LEA F. ALVO-SADIKY
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
The Wanamaker Building
100 Penn Square East, Suite 403
Philadelphia, Pennsylvania 19107

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY..... 2

III. STATEMENT OF FACTS 2

 A. *Background* 2

 B. *Respondent’s Secretary Treasurer Lynn Andrews Seeks to Intimidate Stasko* 3

 C. *Respondent Vice President Kevin Davidovich Threatens Mike Samsel*..... 4

 D. *On January 25 Respondent’s Secretary Treasurer Lynn Andrews Repeatedly Reports Stasko to Bemis*..... 4

 E. *Lynn Andrews’ History of Reporting Complaints to Bemis* 8

V. LEGAL ANALYSIS..... 9

 A. *The Judge Wrongly Failed to Find that Respondent, by Lynn Andrews, Impliedly Threatened Stasko with Unspecified Reprisals in Violation of Section 8(b)(1)(A)* 9

 B. ***The ALJ Wrongly Failed to Find that Respondent, by Kevin Davidovich, Violated Section 8(b)(1)(A) When He Told Mike Samsel that Respondent’s President had Instructed Respondent’s Board Members to Harass Employees Who Reported Alleged Misconduct by Respondent’s President to Bemis*** 11

 C. *Applicable Section 8(b)(2) Law* 12

 D. ***The Judge Erred in Not Finding that Respondent, by Lynn Andrews, Violated Section 8(b)(1)(A) and (2) by Seeking to Have Joe Stasko Disciplined*** 15

VI. CONCLUSION..... 22

TABLE OF CASES

Acklin Stamping, 351 NLRB 1263 (2007)..... 12, 13
Battle Creek Health System, 341 NLRB 882 (2004) 9
Big Moose LLC, 359 NLRB 300 (2012)..... 12
Caravan Knight Facilities Mgmt., Inc., 362 NLRB 1802 (2015), enf. den. 844 F.3d 590 (6th Cir. 2016)..... 13, 17
Carpenters Local 720 (Stone & Webster), 274 NLRB 1506 (1985) 18
Good Samaritan Medical Center, 361 NLRB 1294 (2014), enf. den. 858 F.3d 617 (1st Cir. 2017)..... 13, 14, 17
Graphic Communications Workers Local I-M (Bang Printing), 337 NLRB 662 (2002)..... 13, 19
International Packings, Corp., 221 NLRB 479 (1975), enfd. 542 F. 2d 1163 (1st Cir. 1976)..... 10
Iron Workers Local 455 (Precision Fabricators), 291 NLRB 385 (1988)..... 16, 17
McLean Trucking Co., 257 NLRB 1349 (1981)..... 10
Nationsway Transport Service, 327 NLRB 1033 (1999)..... 17
North American Meat Packers Union (Hormel & Co.), 291 NLRB 390 (1988)..... 9
Operating Engineers Local 478 (Stone & Webster), 271 NLRB 1382 (1984)..... 13
Paperworkers Local 1048 (Jefferson Smurfit Corp.), 323 NLRB 1042 (1997) passim
Plasterers, Local 299 (Wyoming Contractors Assn.), 257 NLRB 1386 (1981)..... 14
Plumbers Local 392 (Oberle-Jorde Co.), 273 NLRB 786 (1984)..... 17
Postal Workers, 350 NLRB 219 (2007) 13
Security, Police, and Fire Professionals of America (SPFPA), Local 444, 360 NLRB 430 (2014) 13, 14, 17, 22
Smithers Tire, 308 NLRB 72 (1992)..... 9
Spirit Aerosystems, supra, 363 NLRB No. 165 (2016) 13, 14
St. Joe Paper Co., 135 NLRB 1340 (1962), enfd. 319 F.2d 819 (2d Cir. 1963)..... 12
Stagehands Referral Service, 347 NLRB 1167(2006)..... 14
Standard Fruit & Steamship Co., 211 NLRB 121 (1974) 19
Teamsters Local 298 (Schumacher Electric), 236 NLRB 428 (1978)..... 9
Teamsters Local 391 (United Parcel Service), 357 NLRB 2330 (2012)..... 9
Teamsters Local 980 (Neilson Freight), 249 NLRB 46 (1980)..... 19
Town & Country Supermarkets, 340 NLRB 1410 (2004) 12, 14, 17
Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982)..... 13, 14, 19

I. INTRODUCTION

Administrative Law Judge David I. Goldman issued his Decision on February 1, 2019. He concluded that Graphic Communications Conference/International Brotherhood of Teamsters Local Union No. 735-S (Respondent) threatened employees of Bemis, Inc. (Bemis) with blacklisting members from employment opportunities in retaliation for reporting Respondent's President to Bemis for engaging in misconduct and threatened an employee with reprisal including destruction of property in violation of Section 8(b)(1)(A). (ALJD 17:16-25)¹ Judge Goldman further found that Lynn Andrews, Respondent's Secretary Treasurer and an employee at Bemis, angrily confronted employee Joe Stasko "for turning in" Respondent's President. (ALJD 11:18)

Judge Goldman also found that Andrews twice reported Stasko to Bemis management for safety violations. First, Andrews complained to Stasko's supervisor and her own supervisor that Stasko was not wearing his hearing protection—a *de minimus* safety violation that is not normally cause for discipline. (ALJD 8:4-13) Second, Andrews complained to Bemis that Stasko had cut a pizza at a safety meeting with his safety knife. As found by Judge Goldman, Andrews did not just complain about this— she called the corporate hotline to report the incident. Then, she called the Safety Manager about the incident. (ALJD 9:28-48) And finally, she called Bemis' Human Resource Manager and Safety Manager demanding an investigation into the incident and stated that Bemis had "disciplined people for less." (ALJD 9:49-52; 10:1-2) Notwithstanding these findings, Judge Goldman concluded that Respondent did not violate Section 8(b)(2) of the Act, based on his reasoning that "reporting an employee for a violation for which he will not be

¹ Throughout this brief, abbreviated references are employed as follows: "ALJD" followed by page and line numbers to designate the ALJ's Decision; "T" followed by page number to designate Transcript pages; "GCX" followed by exhibit number to designate General Counsel's Exhibits; and "RX" followed by exhibit number to designate Respondent's Exhibits.

disciplined is not an attempt to have him disciplined.” (ALJD 15:1-2) He recommended dismissal of paragraph 7 of the Complaint. Counsel for the General Counsel respectfully submits that neither the facts nor case law supports this conclusion. Accordingly, Counsel for the General Counsel takes exception to the decision.

II. PROCEDURAL HISTORY

Charging Party Bemis filed the charge in Case 04-CB-215127 on February 20, 2018, and amended it on March 6, May 29 and June 18, 2018. (GCX1(a)-(h)) Complaint issued on June 25, 2018, alleging that Respondent had engaged in conduct that violated Section 8(b)(1)(A) and (2) of the Act. (GCX1(i)) On July 29, 2018, Respondent filed an Answer to the Complaint. (GCX1(k)) Judge Goldman held the hearing in this case in Hazleton, Pennsylvania on October 22, 2018.

III. STATEMENT OF FACTS

A. Background

Bemis has operated a plant in West Hazleton, PA, where it makes plastic bread bags. Respondent represents a bargaining unit of about 350 production and maintenance employees. The current collective-bargaining agreement between the parties runs from August 15, 2016 through August 14, 2020. (ALJD 2:28-34)

Around December 14, 2017, Bemis heard from employee Jimmy Kassak, a Journeyman Press Operator, that Dominic DeSpirito, Respondent’s President and Journeyman Press Operator, had been verbally harassing Joe Stasko, a Press Assistant, from September 2017 through December 2017, with lewd and insulting comments. Bemis promptly started an investigation into the matter, calling employees, including Stasko, to speak with Human Resources and suspended

DeSpirito. (ALJD 2:36-41; T. 68) On January 18, 2018, Bemis terminated DeSpirito for violation of the Bemis harassment policy and core values. Respondent has grieved DeSpirito's discharge and has been proceeding through arbitration.² (ALJD 3:1-3)

In mid-December 2017, Journeyman Press Operator Michael Samsel participated in the investigation concerning DeSpirito. That evening, when he was exiting work, DeSpirito called him on his cell phone and asked him what was going on in the Plant. Samsel told him that employees were getting called in about things going on with DeSpirito. DeSpirito told him he was suspended. Samsel replied, "Well, I'm not going to lie for you if I get called." DeSpirito said he did not want Samsel to lie and did not expect him to. Samsel credibly testified that DeSpirito then said that when he gets back, that "nobody was safe, they better watch their back," and DeSpirito "wasn't going to do anything for them." (ALJD 3:5-12)

*B. Respondent's Secretary Treasurer Lynn
Andrews Seeks to Intimidate Stasko*

About December 18, 2017, a day or two after DeSpirito was suspended, Stasko and Samsel were in the Press break room sitting at a table. Andrews, who as a Bag Operator does not normally use the Press break room, came into the Press break room. (ALJD 3:16-19, 4:16; T. 165) Andrews testified that DeSpirito told her that she needed to go and see the employees who had taken part in the investigation and talk to them herself about the investigation. (ALJD 3:37-38) Stasko and Samsel credibly testified that Andrews was clearly upset and started yelling at Stasko while waving her finger in his face that she was going to get to bottom of it; how could he do this to Dominic? She told him she does not know what's going on and she was going to

² Respondent filed an unfair labor practice charge against Bemis, Case 04-CA-215775, over DeSpirito's discharge. That case has been deferred. (T. 15, 66)

conduct her own investigation. Stasko did not say anything. She then left the break room. The whole incident lasted 30 to 45 seconds. (ALJD 3:21-34, 4:5-10)

*C. Respondent Vice President Kevin Davidovich
Threatens Mike Samsel*

In late January 2018, at around 6:45 p.m., as Samsel was ending his shift, Respondent Vice President Kevin Davidovich walked up to Samsel, and asked if Leslie Pienkowski, Bemis' HR Manager, was on the floor shaking hands and congratulating people that DeSpirito got fired. Samsel denied that Pienkowski had done that. Samsel then told Davidovich that he did not appreciate the things that were being found or left at his press. Samsel was referring to notes being left with "rat" on it, Christmas cards with the word "rat" on it, and homemade paper rats around his work area.³ (ALJD 5:7-18) Davidovich replied, "it could get much worse." Samsel asked him what he meant by that. Davidovich said, "Thankfully it's not settled like the old days smashing lockers, people's personal properties and cars." Samsel responded that he was the Vice President of the Union and he shouldn't be talking that way. He said, "That's not how it's supposed to go." Davidovich replied, "It's going to get worse." Samsel said, "Well, why?" Davidovich answered, "Because Dominic's told him to go after the rats." (ALJD 7:19-30)

*D. On January 25 Respondent's Secretary Treasurer Lynn
Andrews Repeatedly Reports Stasko to Bemis*

On the morning of January 25, 2018, Andrews came to Pienkowski, upset. Andrews claimed that the night before when she was leaving work she noticed employee Stasko staring at her from approximately two parking spots down. He did not say anything or make any gestures toward her. Stasko was not disciplined. (ALJD 7:38-39; 8:1-2 and fn. 7; 16:fn. 12)

³ There is no allegation that Respondent was responsible for placing the "rat" notes and items near Press 23. (T. 176)

That same day, Andrews, who was on her way to the bag department office, saw Stasko, without his hearing protection. Andrews admitted that she reported Stasko to Bemis for not wearing his hearing protection. She testified, “I went in [to the office] and I said, you know, he doesn't have his earmuffs on. . . None of you say anything. He gets away with anything.” Although she did not mention Stasko’s name, it was clear who she was referring to. (ALJD 8:4-10; T. 97-98, 215-216) Andrews admitted that prior to this she had never reported a fellow employee for a safety violation. (ALJD 8:12-13) Andrews further testified that there was a feeling in the Plant that certain people, including Stasko, get away with everything—and those were the employees who have testified or who have participated in the investigation against DeSpirito. (T. 220)

About four or five minutes later, Denise Eisley, the safety advocate, came out on the floor and told Stasko to put on his hearing protection PPE.⁴ (ALJD 8:17-19) Stasko was not disciplined. Eisley testified that Stasko has occasionally been seen not wearing his proper hearing protection and that in those circumstances she has told him to put it on. She further testified that she was not aware of employees receiving discipline for failing to wear safety equipment. (ALJD 8:26-30) Safety Manager Carl Passler testified that Stasko was not known as a habitual safety violator. Nor was he advised by supervisors or the safety advocate that Stasko was not wearing his hearing protection PPE. (T. 133, 140, 142)

Employees are not routinely disciplined for not wearing PPE. (T. 43, 49, 114) In the last two years, only one bargaining unit employee, Kevin Gadzeak, was given a verbal discipline for not wearing PPE—his safety glasses—after he was repeatedly asked to put them on. (T. 50, 55, 135) Safety violations run from minor to major violations. On that scale of minor to major, PPE

⁴ PPE refers to personal protective equipment. (T. 42, 110)

violations are considered to be in the minor or medium range. There are no PPE violations that fall under the major category.⁵ (T. 132-133)

Later that day, Stasko attended a safety meeting. Passler brought pizza for the meeting. At some point in the meeting, Stasko took the blade out of his hook knife and cut the crust on the pizza. A hook knife is one of the cutting tools used at the Plant to remove certain layers of film off of a roll or to cut film. Employee Michelle Hernandez said, "Hey, he's cutting the pizza with his knife." When Passler looked in that direction, he saw Stasko putting a hook knife in his pocket. Passler said, "I didn't see it." Nothing further was said at the meeting about this. The meeting went on from there. (ALJD 9:1-15; T. 125-126, 144, 145)

After the safety meeting, Hernandez, outraged that Stasko, the person who had caused problems for DeSpirito, was not even reprimanded by Bemis, reported the incident to Andrews as her Union Representative. (ALJD 9:19-26)

At 2:17 p.m. that day, Andrews reported the incident to Bemis' anonymous hotline for employee complaints because she wanted something done against Stasko. Andrews reported the incident using her name and Pienkowski received a copy of it. (ALJD 9:28-29) The complaint stated:

These girls came to me and said that they were at a safety meeting and they had pizza. This gentleman that was sitting next to Michelle took out his cut knife, took the razor blade out with his bare fingers, cut the pizza, wiped it on his pants, put the blade back in his knife and put it in his pocket. The safety director Carl Passler said "I didn't see anything." I am not allowed to touch or remove the razor blade and have to use gloves if I use the knife. This all happened right in front of the safety director. I wonder if he is going to go cut film with that blade because we make plastic bags for bread. (GCX4)

⁵ A major safety violation would be putting oneself or another employee at serious risk of serious harm or death. (T. 133)

Almost immediately after making that complaint, at 2:24 p.m., Andrews called Passler. As he was not in his office at that time, she left him an irate voicemail: (ALJD 9:19; GCX5(a))

“Hello, this is Lynn Andrews calling. I heard what happened at the safety meeting with a gentleman taking a razor blade out and cutting the pizza, putting it back in his knife to go cut film. And you said nothing, absolutely nothing. He used a razor blade between his fingers and didn't have any protection on, and you let that happen at a safety meeting? Unbelievable.” (GCX5(a)-(b))

After listening to the voicemail, Passler forwarded it to Pienkowski. (T. 36, 119; GCX5(a))

Passler, knowing this voicemail referred to the pizza incident with Stasko, considered the voicemail from Andrews to be a safety complaint—that Stasko had taken the hook knife apart, taken the razor blade out of the knife and used the razor blade to cut the pizza without using the proper PPE. Bemis has PPE—cut gloves—that are worn for cutting tools that have exposed blades. (T. 127, 130) So, after receiving the voicemail, he called Eisley, the safety advocate, and instructed her to go out and talk to Stasko and make sure that he had replaced the blade in the knife and to talk to him about proper use of cutting tools. Eisley did as she was told but Stasko had already removed the blade and discarded it. She reported back to Passler that Stasko had already replaced the blade in the hook knife before she even got there. (ALJD 10:6-9; T. 51, 55, 126-127,147, 151)

On January 26, 2018, between 9:00 and 10:00 a.m., Andrews called Pienkowski on her cell phone while Pienkowski and Passler were in their morning leadership meeting. Pienkowski got Passler and they went to her office to speak to Andrews. Pienkowski put Andrews on speakerphone. (ALJD 9:49-51) During the call, Andrews was angry. Andrews asked when they were going to conduct the investigation into Stasko cutting his pizza with his hook knife. (ALJD 9:49-52) She said that he was not wearing proper PPE while he was cutting the pizza using the

cutting tool. She said that they were giving him preferential treatment and that Bemis had disciplined people for less and wanted to know what they were going to do about Stasko.⁶ (ALJD 10:1-2; T. 35, 128) Passler asked her what she wanted him to do. He said, “Do you want me to go out on the shop floor right now and write every single person up who's not wearing their PPE?” Andrews responded, “I can't talk about this right now” or “I don't have time for this” and hung up. Andrews admitted that during this call she was very upset that Stasko was not disciplined. (ALJD 9:52, 10:fn. 8; T. 35, 55, 105,128, 156)

Following the conversation with Andrews, neither Passler nor Pienkowski further followed up on the incident because Passler had already directed Eisley to address the issue with him. (T. 36, 147) Stasko was not disciplined for this incident, which was considered a minor PPE violation. (T. 52, 131, 133) Passler testified that when the incident happened he did not think it was important at the time, and that even if he had witnessed it, he would not have issued disciplinary action for a first PPE offense like this. He would have taken Stasko aside and reported the incident to his supervisor and proceeded from there. (ALJD 9:16-17; T. 131, 145, 155)

E. Lynn Andrews' History of Reporting Complaints to Bemis

Passler testified that the type of safety issues Andrews reported to him, prior to this incident, mainly concerned air quality or temperature issues within the bag department, such as excessive dust or excessive haze. She had not reported any particular employee to him for safety violations. (T. 98)

⁶ The Judge credited Andrews, whose testimony on this conversation was vague, that she did not specifically say she wanted Stasko disciplined but that she did say that she wanted something done. (ALJD 10:2-4) The Judge also credited Pienkowski and Passler that she stated employees had been disciplined for less. (ALJD 10:1-2) The Judge ignored both Pienkowski and Passler's testimony, that Andrews then asked, “what we were going to do” about Stasko, which is supported by Andrews own admission that she wanted “something done.” (T. 35, 128)

Andrews testified that other than her complaint against Stasko, she called the corporate complaint hotline on two other occasions. The first occasion was a couple of years ago when employee Joe Harvey was hurt at work and Bemis sent two managers, Cindy Sable and Frank Seltzer, to the doctor with him. The doctor asked Harvey to remove his pants to show the affected area while the two managers were in the room. Harvey complained to her and she called the corporate hotline. The second occasion was two or three months prior to the hearing when new pallets were ordered that had mold on them. An employee in the pit area where they handle the pallets got a rash and came to her because Passler did no more than give him a shirt with long sleeves to wear. That led her to call the corporate hotline. (T. 102-103) Andrews admitted that prior to reporting Stasko for safety violations she never reported any employee for a safety violation directly to Bemis. (ALJD 8:11-12; T. 98)

V. LEGAL ANALYSIS

A. The Judge Wrongly Failed to Find that Respondent, by Lynn Andrews, Impliedly Threatened Stasko with Unspecified Reprisals in Violation of Section 8(b)(1)(A)

Section 8(b)(1)(A) prohibits unions from restraining and coercing employees' Section 7 rights, including engaging in threats, violence, or other forms of intimidation. *North American Meat Packers Union (Hormel & Co.)*, 291 NLRB 390, 395 (1988), citing *Teamsters Local 298 (Schumacher Electric)*, 236 NLRB 428 (1978). In evaluating threatening statements, the Board applies an objective standard of "whether a remark can be reasonably interpreted by an employee as a threat,' regardless of the actual effect upon the listener." *Teamsters Local 391 (United Parcel Service)*, 357 NLRB 2330 (2012), citing *Battle Creek Health System*, 341 NLRB 882, 894 (2004), quoting *Smithers Tire*, 308 NLRB 72 (1992). A threat of reprisal by a Union

representative to an employee for raising complaints about working conditions violates Section 8(b)(1)(A). See *McLean Trucking Co.*, 257 NLRB 1349, 1354 (1981); *International Packings Corp.*, 221 NLRB 479, 484-85 (1975), enfd. 542 F. 2d 1163 (1st Cir. 1976).

As found by the Judge, in mid-December 2017, Andrews came into the Press break room, wagged her finger in Stasko's face, and angrily asked him that how could he do this to DeSpirito, and said that she was going to get to the bottom of this and conduct her own investigation. While a union investigating an employees' discipline may very well be a "core union activity" as described by the Judge, Andrews did not go to Bemis and make clear that she was going to investigate the matter, with due diligence, which would have been lawful. She went instead to Stasko, the alleged victim of Respondent's President's harassment and member of the bargaining unit who is entitled to have Respondent fairly represent him, and belligerently attacked him verbally. This was not an investigation. This was coercive behavior. By her actions, Andrews made an unlawful implied threat to Stasko that employees who oppose Respondent or report alleged misconduct by DeSpirito to Bemis, would be subject to unspecified reprisals. Her conduct sent a message that would reasonably tend to interfere with employees' likelihood of opposing Respondent or reporting verbal harassment by its officers. *McLean Trucking Co.*, supra, 257 NLRB at 1354. In these circumstances, the Board should find that the Judge erred in dismissing this allegation and find that Andrews' statement to Stasko violated Section 8(b)(1)(A).

B. The ALJ Wrongly Failed to Find that Respondent, by Kevin Davidovich, Violated Section 8(b)(1)(A) When He Told Mike Samsel that Respondent's President had Instructed Respondent's Board Members to Harass Employees Who Reported Alleged Misconduct by Respondent's President to Bemis

As the Judge correctly found, in response to Samsel's complaint about being harassed with "rat" notes and objects left at his work station because of his cooperation with Bemis' investigation against DeSpirito, Davidovich, Respondent's Vice President, responded with a violent threat, "Thankfully it's not settled like the old days smashing lockers, people's personal properties and cars." The Judge correctly found Davidovich's statement threatened further reprisals against Samsel because of his cooperation with Bemis in its investigation of DeSpirito in violation of Section 8(b)(1)(A). (ALJD 12:27-32)

However, the conversation with Davidovich did not end there. After Samsel responded that Davidovich was the vice president of Respondent and should not be talking that way, Davidovich replied, "it's going to get worse." Samsel asked why, to which Davidovich responded "because Dominic's told him 'to go after the rats.'" (ALJD 7:30 and fn. 6) While finding that Davidovich made the statement, the Judge failed to make a finding that Davidovich's follow-up comment that DeSpirito told him "to go after the rats" also violated Section 8(b)(1)(A) of the Act. Given that Samsel and Stasko were already being impacted by their cooperation in the DeSpirito investigation, this second statement by Davidovich is also clearly coercive. Davidovich was essentially telling Samsel that Respondent's President had directed him to harass employees who were suspected or known to have participated in Bemis' investigation of DeSpirito. This is consistent with the remarks by DeSpirito to Samsel on the day that he was suspended that "nobody was safe, they better watch their back [sic]" and that DeSpirito "wasn't going to do anything for them." In these circumstances, the Judge erred in

failing to find that Respondent violated Section 8(b)(1)(A) by Davidovich telling Samsel that Respondent's President had told him to harass those employees who had cooperated in the investigation.

C. Applicable Section 8(b)(2) Law

Section 8(b)(2) prohibits a union directly or through its agents from causing or attempting to cause an employer to discriminate against an employee in regard to any term or condition of employment in violation of Section 8(a)(3) of the Act. A union which causes an employer to discriminate against an employee presumptively breaches its fair duty of representation. See *Acklin Stamping*, 351 NLRB 1263, 1263 (2007). The Board does not require that a request to discipline or discharge be made explicitly. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997); *St. Joe Paper Co.*, 135 NLRB 1340, 1341-1342 (1962), *enfd.* 319 F.2d 819 (2d Cir. 1963) (Board found the union's president telling the employer's general manager that the charging party was a "trouble maker," "a bad actor," "a problem," one who "had to be watched," and that "he was always running to the Labor Board," violated Section 8(b)(2) of the Act even though the union president never made an explicit request to the company to discharge the charging party). See also *Big Moose LLC*, 359 NLRB 300, 301 (2012). The Board has found the necessary element of causation in a union's reporting of supposed employee misbehavior to an employer. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004) (union seized upon union dissident's statement, "next time I see you I'm going to kick your ass. I'm not afraid of you" by reporting this to employer as a threat in violation of employer's handbook knowing that dissident employee would be discharged for making the statement).

To determine whether Union conduct violates 8(b)(2), the Board has applied both the duty of fair representation standard and the analytical framework established in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). See, e.g., *Caravan Knight Facilities Mgmt., Inc.*, 362 NLRB 1802, 1805 (2015) *enf. den.* on other grounds 844 F.3d 590 (6th Cir. (2016)); *Good Samaritan Medical Center*, 361 NLRB 1294, 1295 (2014), *enf. den.* 858 F.3d 617 (1st Cir. 2017). It is not necessary to find that a union has violated both standards in order to find a violation. See *Spirit Aerosystems*, 363 NLRB No. 165, slip op. at 1, fn. 3 (2016); *Good Samaritan Medical Center*, *supra*. A derivative violation of Section 8(b)(1)(A) also arises where an 8(b)(2) violation has been proven. *Security, Police, and Fire Professionals of America (SPFPA), Local 444*, 360 NLRB 430, 435 (2014). The reason is that a union's causation of an employee's change in terms and conditions of employment necessarily constitutes restraint and coercion of the employee's exercise of his or her Section 7 rights. *Id.*; *Postal Workers*, 350 NLRB 219, 222 (2007).

Under the duty-of-fair-representation standard, whenever a labor organization causes, or attempts to cause, the discipline or discharge of an employee, there is a rebuttable presumption that it acted unlawfully because by such conduct it “demonstrates its power to affect the employees' livelihood in so dramatic a way as to encourage union membership among the employees.” *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB 662, 673 (2002), quoting *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 fn. 2 (1984). See also *Good Samaritan*, *supra*, at 1295. A union may rebut the presumption that it acted unlawfully in doing so by “showing that its action ‘was necessary to the effective performance of its function of representing its constituency.’” *Acklin Stamping*, *supra*, 351 NLRB at 1263, quoting *Graphic Communications Workers Local 1-M (Bang Printing)*, *supra*.

The Board has also stated that the union may rebut the presumption by showing that its actions were “done in good faith, based on rational considerations, and were linked in some way to its need effectively to represent its constituency as a whole.” *Spirit Aerosystems*, supra, 363 NLRB No. 165, slip op. at 1, fn. 3 quoting *Plasterers, Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981).

Under the *Wright Line* analysis, the General Counsel must prove, by a preponderance of the evidence, that the employee engaged in activity protected by the Act, that the union was aware of the employee's protected activity and that the union was motivated by animus against the protected activity in taking adverse action against the employee. If the General Counsel meets this burden, the burden shifts to the union to show, again by a preponderance of the evidence, that the same action would have been taken against the employee even in the absence of protected activity. See *Good Samaritan Medical Center*, supra, 361 NLRB at 1296 (union representatives reporting employee's conduct to employer unlawful as union reasonably would have foreseen that it would lead to employee's discipline); *SPFPA, Local 444*, supra, 360 NLRB at 435 (union's reporting of employee to employer “smacked of discriminatory motivation”); *Town and Country Supermarkets*, supra, 340 NLRB at 1411 (violation where the union reported a threat as a pretext to purge the bargaining unit of a vocal opponent to the union president's administration of the union); *Stagehands Referral Service*, 347 NLRB 1167, 1170-1171(2006) (union's truthful observation that employee had missed work was undercut by evidence that the union took no action against other employees with similar or worse attendance records).

D. The Judge Erred in Not Finding that Respondent, by Lynn Andrews, Violated Section 8(b)(1)(A) and (2) by Seeking to Have Joe Stasko Disciplined

As found by the Judge, on January 18, 2018, on two occasions Andrews, as a Respondent official, reported Stasko to Bemis. The first occurred when she saw Stasko not wearing his hearing protection for a few moments. Almost immediately after seeing him without his hearing protection, she reported him to both of their supervisors stating, “Nobody says anything. He gets away with anything.” The second incident occurred after Stasko used the razor from his hook knife without any PPE to cut pizza at a safety meeting. This was a safety violation for which Stasko was not disciplined or reprimanded. Although she did not witness the incident, Andrews, as Hernandez’ Union Representative, immediately contacted Bemis’ corporate hotline to complain about it. She then called Passler to protest that Stasko had not been disciplined. When he did not pick up the phone, she left an irate voicemail clearly indicating that she was upset that Stasko had not been disciplined, stating, “you said nothing, absolutely nothing ... you let that happen at a safety meeting!?” (GCX5(b)) Still not satisfied, she called Pienkowski in HR the next morning to make clear her displeasure that Stasko had not been disciplined. She argued to Pienkowski and Passler that other employees had been disciplined for less and asked what they were going to do to Stasko.

The Judge credited Andrews’ denial that during her conversation with Passler and Pienkowski she did not say she wanted Stasko “disciplined.” From her purported failure to use the word “discipline,” he wrongly determined that her statements were not an explicit request to discipline Stasko. However, Andrews’ request for an investigation into Stasko’s conduct, and her statements that Bemis “had disciplined people for less,” and that she wanted to know what

they were going to do about Stasko, were clearly tantamount to a direct request for discipline. Indeed, Andrews admitted that she was upset that she was upset that Stasko was *not* disciplined.

The Judge, however, did not find that Andrews sought to have Bemis discipline Stasko because he wrongly concluded that since there was no likelihood of discipline against Stasko by Bemis, there could not be any action by Respondent intended to cause a violation of Section 8(a)(3). He further found that because there was no likelihood of discipline, Andrews' conduct was not an attempt to cause Bemis to discipline Stasko but was instead to make a point about disparate treatment given by Bemis to Stasko as opposed to Respondent's President.⁷ General Counsel respectfully contends that this analysis is incorrect.

First, although the Judge credited Andrews' denial that during her conversation with Passler and Pienkowski she did not say she wanted Stasko "disciplined" because she would not say that word, he wrongly found that her overall statements were not an explicit request to discipline Stasko. In both instances, Andrews was not merely reporting an incident. She was making clear that she thought Stasko should be disciplined. Indeed, the Judge credited that with regard to the incident over the hearing protection, Andrews said "Nobody says anything. He gets away with anything." And with regard to the pizza incident, he also credited that during the conversation with Passler and Pienkowski she told them that she wanted an investigation into the incident and that other employees had been disciplined for less. Andrews herself testified that she was angry and wanted something done. What Andrews wanted done was for Stasko to be reprimanded or disciplined by Bemis. *Iron Workers Local 455 (Precision Fabricators)*, 291

⁷ General Counsel takes exception to the Judge's characterization of the filing of the charge over the incidents giving rise to the Section 8(b)(2) allegations as "careful 'policing' of union action" instigated by Bemis. (ALJD 16:34-35) The record provides insufficient support for this unnecessary finding.

NLRB 385, 387 (1988) (statements which constitutes directions or instructions constitutes an "attempt to cause" within the ambit of Section 8(b)(2)).

Second, the Judge's view that causation is solely dependent on the likelihood of a union being successful in its attempt to cause discipline ignores the plain language of Section 8(b)(2) which finds a violation when a union "attempt[s] to cause" an employer to discriminate against an employee. Causation may be shown either by evidence of a direct union request or by evidence supporting a reasonable inference of a union request. *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044. As shown above, there is more than sufficient evidence supporting the finding that Andrews explicitly or implicitly requested that Stasko be disciplined even without using the word "discipline." Nonetheless, the Judge imposed an additional requirement for causation. He required that her attempts to cause Bemis to discipline foreseeably would result in discipline, citing *Caravan Knight Facilities Management, Inc.*, supra, 362 NLRB at 1805; *Good Samaritan Medical Center*, 361 NLRB at 1296; *Security, Police & Fire Professionals (SPFPA) Local 444*, 360 NLRB at 435; *Town & Country Supermarkets*, 340 NLRB at 1430; *Nationsway Transport Service*, 327 NLRB 1033, 1045 (1999); and *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, supra. In all these decisions, however, the unions merely reported alleged misconduct to the employer but did not explicitly ask to discipline or discharge the relevant employee. Unlike those cases, here Andrews was not just reporting the incident but actively demanding that Bemis do something. See *Plumbers Local 392 (Oberle-Jorde Co.)*, 273 NLRB 786, 793 (1984) (finding that a "bare request" that an employer discriminate against a traveler, even when that request is unaccompanied by threats and ultimately ignored by the employer, violates Section 8(b)(2)); *Iron Workers Local 455 (Precision Fabricators)*, supra.

Third, even if the Judge was correct that the Board requires that it be foreseeable that a request could result in discipline, the Judge further incorrectly found that there was no chance that Andrews' complaints could result in discipline being imposed against Stasko. Although the Judge correctly stated that Bemis's culture is not to discipline for minor safety violations, there is record evidence of at least one employee who had been disciplined for habitually violating safety practices. Indeed, Andrews insinuated that Stasko habitually failed to wear his hearing PPE (T. 98). Significantly, with regard to the pizza incident, Andrews told Passler and Pienkowski that Bemis had disciplined employees for less than what Stasko had done. Moreover, Andrews did not just complain to Passler and Pienkowski about the pizza incident, she also complained to the corporate hotline, as she had successfully done previously where she had felt that Bemis management at the Plant had not responded properly to safety issues. Thus, Andrews clearly believed, and could reasonably foresee, the possibility of discipline. The fact that Andrews was unsuccessful in her attempt to have Stasko disciplined does not mean that there was no likelihood of discipline. See *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, supra 323 NLRB at 1044; *Carpenters Local 720 (Stone & Webster)*, 274 NLRB 1506, 1511 (1985) (unsuccessful attempt by union to cause the layoff of employee, because of the employee's efforts to monitor the union's administration of the referral procedures violated 8(b)(2)).

Lastly, it is clear that Andrews' complaints to Bemis were not intended merely to make a point about disparate treatment or favoritism. In making this finding, the Judge is ignoring what Andrews admittedly said—that she wanted Stasko to be reprimanded or disciplined. While the Judge may have discounted her statement “Yeah, he wasn't even told about it” in response to the question as to whether she was upset that he had not been disciplined, as an admission by Andrews that she attempted to have Stasko disciplined or explicitly told Bemis to do so, the

record demonstrates he was clearly wrong in asserting that this was not the purpose of her actions. (ALJD 10:fn. 8) Moreover, although Andrews was ultimately unsuccessful in her attempt to have Stasko disciplined in each of these two instances, she most certainly tried. And in so trying, there was clearly an attempt to cause discrimination, an attempt which should be found unlawful. “An unsuccessful attempt is, nonetheless, an attempt” to cause unlawful discrimination. *Standard Fruit & Steamship Co.*, 211 NLRB 121, 126 (1974). See *Graphic Communications Workers Local 1-M (Bang Printing)*, 337 NLRB at 678 (“the Act prohibits both causing and, separately, attempting to cause employer-discrimination. It does not restrict the unfair labor practice which it prohibits to successful action by labor organizations”); *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB at 1044; *Teamsters Local 980 (Neilson Freight)*, 249 NLRB 46 (1980) (Attempt to cause an employer to discriminate against an employee because of union representative’s personal hostility towards the employee violated 8(b)(2) even though unsuccessful). Thus, contrary to the Judge, there is sufficient evidence of causation.

As the Judge found no causation, he did not address whether Respondent met its burden of proof under *Wright Line* regarding Andrews’ attempt to cause Stasko to be disciplined. General Counsel asserts, however, that under a *Wright Line* analysis, Andrews’ conduct should be found to violate Section 8(b)(2). As shown above, General Counsel has met the burden of showing that Stasko engaged in activity protected by the Act when he cooperated in Bemis’ investigation against DeSpirito, that Respondent was aware of his protected activity and that Respondent was motivated by animus against the protected activity in taking adverse action against Stasko. Respondent has failed to rebut that it would have taken the same action against Stasko even in the absence of protected activity.

Initially, it should be noted that Andrews admitted that she had never reported any employee to Bemis management prior to reporting Stasko twice in one day for safety violations. With regard to her safety complaint that Stasko was not wearing his hearing protection, Respondent posited that Andrews had heard that from other employees that Stasko habitually failed to wear his hearing protection. However, the record failed to show that Stasko was any worse than other employees; at most, Eisley testified that she had reminded Stasko on a half dozen occasions over an unspecified time period to put his hearing protection back on. Furthermore, Andrews had no knowledge even of Stasko's identity until he cooperated in the investigation of Respondent's President. It is highly suspicious that suddenly, in the less than two-month period after DeSpirito was suspended, in Andrew's view Stasko was a major violator of Bemis' safety policies, deserving of discipline. Furthermore, she chose to report him even though Bemis' policy with regards to wearing PPE was to remind employees when they were not wearing their hearing protection to put it on, unless the employee habitually failed to comply, rather than seeking to discipline them for it. Indeed, the Judge drew the incorrect conclusion from the triviality of the offense. Contrary to the Judge, the fact that Andrews reported Stasko for such a minor safety violation, does not go to causation, instead, it shows the lengths that Andrews would go to have Stasko disciplined.

With regard to Andrews' safety complaint concerning Stasko using the razor blade from his hook knife, Respondent's defenses are equally unavailing. Respondent argues that Andrews received a complaint from another employee about Stasko and she was just following up on that with Bemis as she does "when one union member is being [disciplined] about the same thing another union member is already doing or getting away with." (T. 97) This defense is belied by Andrews' own testimony. Andrews, who has been Secretary Treasurer for about 12 years,

admitted that she had never reported any employee for a safety violation directly to Bemis prior to reporting Stasko twice in one day. Respondent may point to the fact that Andrews has called the corporate hotline on other occasions as evidence that she was not acting differently here than she had on other occasions. However, on the two other occasions that Andrews called the corporate hotline to protest an action, her intent was to protect unit employees from actions by Bemis rather than cause them discipline. In her first example, she called to protest the fact that an injured employee had been forced to undress in front of HR personnel. In her second example, she called to protest Passler's response to an employee who had gotten a rash from a moldy pallet. These two situations are starkly different from her reason for calling the corporate hotline in the incident concerning the pizza. Andrews' other safety complaints made to Bemis also were for the benefit of the bargaining unit as a whole, mainly concerning air quality issues or temperature issues within the bag department. Again, this is a starkly different type of safety violation than the safety incidents she reported against Stasko. Respondent has not rebutted the initial inference of unlawful motivation by showing that Respondent would have made this safety complaint against Stasko for reasons other than Stasko's protected activity of cooperating in Bemis' investigation into DeSpirito's alleged misconduct.

Under the duty of fair representation framework, Respondent also has no valid defenses. There is no evidence suggesting disciplining Stasko was necessary to the effective performance of Respondent's function of representing its constituency. Indeed, Respondent admitted that Andrews, a long-term representative of Respondent, has never sought to report other employees for engaging in any safety violation. Rather, Respondent's action was intended to retaliate against Stasko because of his cooperation in the investigation of Respondent's President alleged misconduct, not unit welfare. Thus, under this framework, the presumption that Respondent's

conduct was unlawful remains unrebutted, and Respondent must be found to have violated the Act.

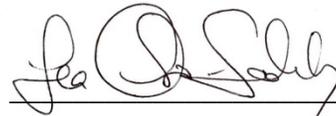
Respondent has failed to provide good-faith, rational considerations for its actions and further, failed to prove that Andrews would have complained against Stasko had he not cooperated in the investigation against Respondent's President. Andrews has admitted that she wanted Stasko to be disciplined and was very upset that nothing happened to him. This is so, even though she had never reported an employee for a safety violation previously. See *SPFPA, Local 444*, supra at 435; *Jefferson Smurfit Corp.*, supra, 323 NLRB at 1044 (union official belatedly reported employee for alleged racial harassment only after dissident activity, contrary to its practice of not involving management in disputes between employees). In these circumstances, Respondent, through Andrews, attempted to cause Bemis to discipline Stasko in violation of Section 8(b)(2) of the Act. Andrews' conduct impacted Stasko directly and thus also tended to restrain and coerce him—and other employees—in the exercise of their protected rights in violation of Section 8(b)(1)(A) of the Act.

VI. CONCLUSION

For the reasons set forth above, Counsel for the General Counsel respectfully urges the Board to find that the Administrative Law Judge: (1) erred in failing to find that Respondent violated Section 8(b)(1)(A) by Andrews' December 18, 2017 confrontation and "tirade" with Stasko in the press break room; (2) erred in failing to find that Respondent violated Section 8(b)(1)(A) by Davidovich's statement that Respondent's President had told him to go after the rats; (3) erred in finding that there is insufficient evidence to prove that Andrews attempted to cause the Employer to discriminate against Stasko; (4) erred in finding that there was no chance that Stasko was going to be disciplined or have any adverse action taken against him by the

Employer for either or both of the two alleged safety violations for which Andrews reported him; and (5) erred in failing to find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by reporting employee and member Stasko to Bemis for purported safety infractions on January 25 and 26, 2018 in an attempt to cause Bemis to discipline Stasko because (i) Stasko participated in Bemis' investigation of alleged misconduct by Respondent's President and (ii) for reasons that are arbitrary, discriminatory, or in bad faith.

Respectfully submitted,



LEA F. ALVO-SADIKY
Counsel for the General Counsel
National Labor Relations Board
Fourth Region
The Wanamaker Building
100 Penn Square East, Suite 403
Philadelphia, Pennsylvania 19107
lea.alvo-sadiky@nlrb.gov

Dated: March 29, 2019