

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

SAM

DATE: December 30, 2015

TO: George Velastegui, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Taylor Farms Pacific, Inc., et al.
Cases 32-CA-116854, et al.

The Region submitted this case for advice as to whether: (1) the Employers' alleged unfair labor practices preclude the holding of a fair rerun election such that a remedial *Gissel* bargaining order for the bargaining unit comprised of Taylor Farms employees is appropriate,¹ and, if so (2) whether the procedural rule in *Irving Air Chute Co*² precludes such a remedy. We conclude that a *Gissel* bargaining order remedy is appropriate in this case and that *Irving Air Chute* does not preclude the issuance of a *Gissel* bargaining order under the circumstances presented here.

FACTS

Taylor Farms Pacific, Inc. ("TFP") is a major producer of fresh-cut fruits and vegetables and prepared food products. Its operations are conducted out of two facilities in Tracy, California that are commonly known as the MacArthur and the Valpico facilities. The MacArthur facility generally employs around 1000 employees and the Valpico facility, a mile away, generally employs 200-250 employees. The employees of the two facilities consist of direct employees of TFP and jointly employed employees of TFP and Abel Mendoza, Inc. ("AMI") or Slingshot Connections, LLC ("SSC").³ The

¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

² 149 NLRB 627, 630 (1964), *enfd.* 350 F.2d 176 (2d Cir. 1965).

³ We agree with the Region that the evidence demonstrates that TFP is a joint employer with AMI and with SSC (neither agency appears to be a joint employer with the other agency). Despite this joint-employer determination, we will refer to AMI and SSC employees and managers only by their immediate employer's name for purposes of clarity.

employees work on a commingled basis on various production lines, each of which is headed by a crew leader who may be a TFP, AMI, or SSC employee. Each employer employs roughly a third of the employees at each facility. TFP also operates a third plant in Salinas, California, which is unionized and not involved in this case.

In 2013, the Teamsters⁴ (“the Union”) began an organizing campaign at the two non-unionized TFP facilities. In September and October 2013, the Union made house visits to employees and, due to the positive response, began soliciting signed authorization cards on October 22, 2013. The Union’s campaign was successful in obtaining 468 signed cards (out of about 1050 employees at both facilities at that time) between October 22 and 31, 2013.

During late October or early November 2013, TFP began to distribute and make available a flyer entitled “The Truth About The Union” at the two facilities.⁵ Among the other assertions in the flyer, points 8, 9, and 15 (out of 16 overall points) informed the employees that unionizing could result in lost jobs. Specifically, the flyer stated:

8. If the union gets into Taylor Farms, and the additional costs cause us to raise our prices to our customers, that could cause us to lose our business and result in decreased sales and less work.

9. With the union it is easier to terminate any employee because the supervisors will document any violation of company rules, no matter how small, this could result in termination of employees and the union would not be able to do anything in their favor when the Company has the proper documentation to support their disciplinary action.

15. If the union wins an election and gets a contract with the Company, our customers could start doing business with another company, if our cost rise or they are not satisfied with our performance.

⁴ Teamsters Local 601 sought to organize the two TFP facilities with assistance from the International Union.

⁵ Employee testimony suggests that this flyer was disseminated over time and in a variety of ways. Some employees say they saw it on break room tables. Others say that they saw it posted in various locations, including break room doors, break room walls, and bulletin boards. One employee stated that [REDACTED] was requested to help hang a poster-size version of the flyer on a door. Still others say this flyer was distributed by low- or mid-level supervisors. Regarding the timing of the flyer, the Region notes that the evidence concerning the timing of the flyer’s distribution is inconsistent.

In (b) (6), (b) (7)(C) 2013, the Union engaged in its first handbilling activity at the TFP facilities. At the same time, AMI terminated a Union supporter. This occurred the day after this employee participated in a Union rally outside of TFP's Valpico facility and after which TFP (b) (6), (b) (7)(C) interrogated (b) (6), (b) (7)(C) about (b) (6), (b) (7)(C) role with the Union. The Union later relied on the termination of this employee to support its organizing drive.

In late October or early November 2013, TFP MacArthur (b) (6), (b) (7)(C) (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) held a meeting with four AMI employees and told them that if the Union came in they would have to become TFP employees and provide documentation regarding their immigration status or they would lose their jobs. The (b) (6), (b) (7)(C) also told these employees that, because of the Union, TFP could close or move to another state and that its customers would leave because Union wages would be higher, causing TFP to raise its prices. The managers also told these employees that if the loss of customers resulted in workers being discharged, the AMI and SSC employees would be the first to go. At least one of the four employees discussed this meeting with coworkers.

On November 14, 2013, the Union held a large public rally in front of TFP's MacArthur facility, which was attended by local political leaders and the media. That rally included an interview with an employee who accused TFP of using child labor. Shortly thereafter, TFP released a second flyer to its employees containing threats that the Union's attacks could lead to customer loss and stating that "[i]f we lose customers we lose work, if we lose work, we have to reduce our employees. . . ." Employees testified that they saw this flyer in break rooms at the Valpico facility, posted by the time clock at the MacArthur facility, received it in the mail along with their paychecks, and that it was distributed directly to them by various TFP managers and supervisors.

During November 2013, TFP held small meetings for 15 to 18 TFP employees that were led by TFP (b) (6), (b) (7)(C) and Valpico (b) (6), (b) (7)(C). A TFP employee recalls the (b) (6), (b) (7)(C) stating that if the Union employees would have to work for TFP and that workers without proper immigration documents would be discharged. AMI employees testified that during November they attended meetings with TFP and AMI (b) (6), (b) (7)(C) at which they were again threatened with job loss. The threats again were related to immigration status (i.e., if the employees unionized, they would have to become TFP employees and would be terminated if they were unable to produce proper documentation) and job loss for the agency employees (i.e., AMI and SSC employees could be discharged and other agency employees hired as replacements). During November, TFP also granted a benefit to employees by issuing \$20 Thanksgiving gift cards to employees who previously had not received this benefit.

In (b) (6), (b) (7)(C) 2013, AMI interrogated and then discharged a second employee who was a known Union supporter. The discharge occurred under suspicious circumstances, including a significant delay in investigating the employees' alleged

misconduct of behaving unprofessionally with truck delivery drivers. The Union again used this termination to obtain employee support for the organizing campaign. After employees began placing Union stickers on their helmets referencing the discharge of this employee, TFP imposed a ban on wearing those Union stickers. The Union obtained 70 additional signed cards during the month of November.⁶

In December 2013, TFP learned from the Union's website that it planned to engage in picketing activities at certain TFP customer locations with support from a sister Teamsters Local. On December 12, 2013, TFP distributed a third flyer to its employees, which contained the TFP logo at the top and the names of TFP (b) (6), (b) (7)(C) and TFP (b) (6), (b) (7)(C) at the bottom. This third flyer criticized the Union's proposed a s you, the people they are trying to get to join them and your families in danger of possibly losing your jobs and putting your families' economic security at risk." As with previous flyers, TFP goes on to speculate that it will lose customers and be "forced to reduce the workforce, or possibly even close due to lack of business." The flyer stresses that the Union is putting each employee's "family's financial security at risk" and "putting each of [the employees] at risk of financial loss" during the holiday season.

On December 17, 2013, the Union demanded recognition from TFP, but it received no response.⁷ On (b) (6), (b) (7)(C) SSC discharged an employee it believed to be supporting the Union campaign.⁸ SSC discharged the employee allegedly due to various work-related incidents for which (b) (6), (b) (7)(C) was never formally or informally disciplined. The discharge occurred shortly after a TFP (b) (6), (b) (7)(C) learned that this employee was telling coworkers in the pack out area that they should be getting paid more for their work and that they needed to request a raise.

On December 19, 2013, the Union held rallies at the Valpico and MacArthur facilities, which were attended by local politicians and clergy, and it also sent picketers to two or three TFP customer locations. In response to the Union's rallies, TFP offered employees pro-company shirts and solicited them to participate in an anti-Union rally while the Union rally was taking place. Also on December 19, TFP held mass employee meetings at which plant closure threats were communicated to employees. At this

⁶ The signed cards were from employees of TFP, AMI, and SSC combined, and not from TFP employees alone.

⁷ The Union's demand letter, which stated that it had the support "of your workforce," did not distinguish between the employees of TFP, AMI, or SSC.

⁸ Unlike with the prior two discharges, the Union did not rely on this event to garner further employee support for the organizing campaign.

meeting, and others in the month of December, TFP (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) told employees that the Union's conduct would result in the loss of business and result in job loss for them.

By the end of December 2013, the Union obtained 11 more signed authorization cards, and it reached a card majority in the TFP unit—but not in the AMI or SSC bargaining units. Specifically, the Union produced 231 signed authorization cards for the TFP unit that can be authenticated. This represents signed cards from 60 percent of the TFP unit employees.

At the end of December 2013, the Union experienced a decrease in support for the organizing campaign. In January 2014, the Union reported a brief resurgence of employee support, with some employees again wearing their Union shirts to work and joining the Union's handbilling activities. In January and February, the Union obtained an additional 44 signed authorization cards from TFP, AMI, and SSC employees combined.

In early February 2014, at a meeting with approximately 15 SSC employees, SSC (b) (6), (b) (7)(C) renewed the immigration-related threat by stating that if they wanted to be TFP employees, their papers would be checked. (b) (6), (b) (7)(C) also stated that (b) (6), (b) (7)(C) did not want them to join the Union and that if employees did not like their jobs they could leave and find another one. TFP Valpico (b) (6), (b) (7)(C) was also present and concurred with (b) (6), (b) (7)(C) comments.

On February 19, 2014, the Union filed representation petitions seeking to represent three separate bargaining units of TFP, AMI, and SSC employees. The next day, the Union filed with the Region a request to proceed to an election notwithstanding the nine pending unfair labor practice charges it had filed, three of which involved the terminations from (b) (6), (b) (7)(C) to (b) (6), (b) (7)(C) 2013. On February 21, 2014, the Union requested that the Region seek a *Gissel* bargaining order remedy, relying on the numerous unfair labor practices at the facilities and asserting that those unfair labor practices had “destroyed the laboratory conditions required for conducting a fair election.”⁹ The Union did not reference its request to proceed in this letter to the Region.

On March 6, 2014, the Union and each employer entered a stipulated election agreement, setting the election for March 27 and 28. Subsequently, TFP continued its anti-Union campaign. TFP labor consultant (b) (6), (b) (7)(C) began to hold meetings with groups of 10 to 30 employees from both TFP and AMI at which employees were

⁹ That same day, the Union's attorney also sent a letter to the Region objecting to the postponement of the hearing in the R-cases.

told that a lot of plants had closed because of unionization and that employees could lose their jobs by supporting the Union. (b) (6), (b) (7)(C) also told the employees that if the Union got into TFP, the company would use E-verify to check their immigration status and that AMI and SSC employees would be left out. (b) (6), (b) (7)(C) also stated that if the Union requested terms that TFP could not afford, it would most likely close.

Also in late March 2014, a few days before the election, TFP (b) (6), (b) (7)(C) held a large captive audience meeting at which (b) (6), (b) (7)(C) stated that if employees continued fighting (b) (6), (b) (7)(C) was going to have to close the plant. (b) (6), (b) (7)(C) also stated that if production decreased (b) (6), (b) (7)(C) would have to close the plant and move it to another state, and if work orders continued to decrease (b) (6), (b) (7)(C) would move part of the company's operations to its facility in Salinas, California.¹⁰

On March 27, 2014, the election began without incident. On the second day, March 28, the Union rescinded its request to proceed at the close of the election, and the Region impounded the ballots. By letter dated May 8, 2014, the Union again requested that the Region seek a *Gissel* bargaining order remedy for the alleged unfair labor practices, and the Region did, in fact, commence an investigation to determine whether there was sufficient evidence to do so.

Over a year later, in mid-2015, the Region requested that the Union give it permission to count the ballots from the TFP bargaining unit to potentially demonstrate the impact that the unfair labor practices had on the election. On June 16, 2015, the Region counted the ballots from the TFP unit, which showed 154 votes for and 168 votes against the Union.¹¹ Pursuant to the Board's Rules, the Union had until June 23 to file its objections to the election.¹² On June 29, 2015, outside the seven-day deadline, the Union filed its official objections.

Under the rule in *Irving Air Chute*, the Board will not grant a *Gissel* bargaining order remedy in a case where a majority of the unit employees did not vote for the union and the union failed to file timely and meritorious objections to the results of the election.¹³ The Union maintains that its correspondence to the Region of February 21

¹⁰ As noted above, TFP's Salinas facility is unionized. Although this was a widely attended meeting, we note that the Region reports having only a few witnesses who can testify to the substance of (b) (6), (b) (7)(C) statements.

¹¹ There were 43 determinative challenged ballots. The ballots from the AMI and SSC bargaining units have not been counted.

¹² 29 C.F.R. 102.69(a).

¹³ 149 NLRB at 630.

and May 8, 2014, in which it requested a *Gissel* remedy, constituted the requisite election objections and, therefore, there is no impediment to seeking a *Gissel* remedy in this case under current Board law. The Union further argues that even if the Region does not believe it timely filed objections, it should seek a *Gissel* remedy because the requirement of meritorious objections in *Irving Air Chute* elevates form over substance and should be overturned. The Employer relies on *Irving Air Chute* to assert that a *Gissel* remedy cannot be obtained in this case.

ACTION

We conclude that a *Gissel* bargaining order remedy is appropriate in this case because the number and severity of the unfair labor practices at the facilities have precluded the holding of a free and fair election. We also conclude that *Irving Air Chute* does not preclude a *Gissel* bargaining order in this case because the principles underlying the *Irving Air Chute* rule are not at issue here.

I. A *Gissel* Bargaining Order Remedy Is Warranted to Remedy the Employer's Unfair Labor Practices.

The number and severity of the unfair labor practices at TFP's facilities have precluded the holding of a free and fair election. The Employer committed multiple hallmark violations, including the threats of job loss and plant closure that were made in the flyers TFP distributed in late 2013, in statements by various (b) (6), (b) (7)(C) at employee meetings, and in a captive audience meeting held by (b) (6), (b) (7)(C) during the critical period in (b) (6), (b) (7)(C) 2014, and the job loss threats related to E-verify/immigration status that were made by TFP (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) from TFP, AMI, and SSC. In addition, the non-hallmark violations discussed below further support the need for a *Gissel* remedy.

In *Gissel*,¹⁴ the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election where an employer has committed unfair labor practices so serious that they make a fair election unlikely. The Board examines a number of criteria in determining whether to impose a *Gissel* bargaining order remedy,¹⁵ including (1) the presence of "hallmark" violations (such as threats of plant closure and

¹⁴ 395 U.S. at 614-615.

¹⁵ See GC Memorandum 99-08, "Guideline Memorandum Concerning *Gissel*," dated November 10, 1999.

job loss¹⁶ and the discharge of union adherents¹⁷); (2) the number of employees affected by the violation (either directly or by dissemination of knowledge of their occurrence among the workforce);¹⁸ (3) the identity of the perpetrator of the unfair labor practice;¹⁹ (4) the timing of the unfair labor practices;²⁰ (5) direct evidence of impact of the violations on the union's majority;²¹ (6) the size of the bargaining unit;²² (7) the

¹⁶ See, e.g., *T&J Trucking Co.*, 316 NLRB 771, 773 (1995), *enfd.* 86 F.3d 1146 (1st Cir. 1996)(Table); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enfd. mem.* 47 F.3d 1161 (3d Cir. 1995); *NLRB v. Horizon Air Services, Inc.*, 761 F.2d 22, 31 (1st Cir. 1985); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1301-02 (6th Cir. 1988), *enfg.* 287 NLRB 796 (1987).

¹⁷ See *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999), *enfd.* 267 F.3d 1059 (10th Cir. 2001).

¹⁸ See *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), *enfd.* 531 F.3d 321 (4th Cir. 2008); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000), *enfg.* 328 NLRB 1114, 1115 (1999); *Cardinal Home Products, Inc.*, 338 NLRB 1004, 1010-1011 (2003); *Aqua Cool*, 332 NLRB 95, 97 (2000); *NLRB v. Horizon Air Services*, 761 F.2d at 31; *Abramson, LLC*, 345 NLRB 171, 176-77 (2005); *Garvey Marine*, 328 NLRB 991, 993 (1999), *enfd.* 245 F.3d 819 (D.C. Cir. 2001); *Blue Grass Industries*, 287 NLRB 274, 276 (1987).

¹⁹ *M.J. Metal Products*, 328 NLRB at 1185; *Consec Security*, 325 NLRB 453, 454 (1998), *enfd. mem.* 185 F.3d 862 (3rd Cir. 1999); *NLRB v. Horizon Air Services*, 761 F.2d at 31.

²⁰ See, e.g., *Bakers of Paris*, 288 NLRB 991, 992 (1988), *enfd.* 929 F.2d 1427, 1448 (9th Cir. 1991). See also *M.J. Metal Products*, 328 NLRB at 1185; *State Materials, Inc.*, 328 NLRB 1317 (1999)(unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp.*, 320 NLRB 356, 368 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998) (employer's "prompt" response); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), *enfd.* 44 F.3d 516 (7th Cir.), *cert. denied.*

²¹ *J.L.M., Inc.*, 312 NLRB 304, 305 (1993), *enf. den. on other grounds* 31 F.3d 79 (2d Cir. 1994); *NLRB v. Horizon Air Services*, 761 F.2d at 32.

²² *Compare Garvey Marine, Inc.*, 328 NLRB at 993 (gravity of impact of unfair labor practices heightened in small, 25 employee unit), *with Beverly California Corp.*, 326 NLRB 232, 235 (1998) *enf. den. on other grounds*, 227 F.3d 817 (7th Cir. 2000) (*Gissel* not warranted where unit was "sizeable" (approx. 100 employees) and violations generally did not affect a significant number of employees).

likelihood the violations will recur;²³ and (8) the change in circumstances after the violations. Based on a consideration of these factors, we have concluded that a *Gissel* remedy is warranted here.

Initially, the threats of job loss and plant closure contained in TFP's flyers and reiterated in various meetings attended by employees were hallmark violations unprotected by Section 8(c) of the Act. The Board has long held that threats of plant closure and job loss have a "devastating and lingering effect on employees, an effect that most effectively can be remedied by an order to bargain."²⁴ An employer's predictions of the negative impact of unionization are lawful under Section 8(c) only if "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."²⁵ Where an employer fails to meet its burden to demonstrate the objectivity of its assertions, the Board finds a violation.²⁶

²³ *General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999), *enf.* 222 F.3d 218 (6th Cir. 2000).

²⁴ *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1086 (2000), *enfd.* 282 F.3d 972 (7th Cir. 2002) (citing *White Plains Lincoln Mercury*, 288 NLRB 1133, 1140 (1988)). See also *Cohen Bros. Fruit Co.*, 166 NLRB 88, 90 (1967) ("Threats of loss of work and income are a type of threat likely to have the most substantial impact upon employee attitudes and reactions."); *General Stencils, Inc.*, 195 NLRB 1109, 1109 (1972), *enf. den. on other grounds* 472 F.2d 170 (2d Cir. 1972) ("A direct threat of loss of employment, whether through plant closure, discharge, or layoff, is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative."); *NLRB v. Jamaica Towing*, 632 F.2d 208, 213 (2d Cir. 1980) (a threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees").

²⁵ *NLRB v. Gissel Packing Co.*, 395 U.S. at 618.

²⁶ See, e.g., *DTR Industries*, 350 NLRB 1132, 1132-33 (2007), *enfd.* 297 Fed.Appx. 487 (6th Cir. 2008) (employer's predictions of job loss due to unionization were not supported by objective facts; similar statements made by the employer earlier in the campaign were lawful because the employer had explained why customers might move some of their business to another supplier based on the employer's industry experience and knowledge of the customer base); *Contempora Fabrics, Inc.*, 344 NLRB 851, 851, 862-64 (2005) (employer unlawfully predicted customer loss and plant closure without providing an objective basis for its predictions).

In the instant case, TFP's threats of job loss and plant closure, accompanied by those from (b) (6), (b) (7)(C) of joint employers AMI and SSC, were purely speculative and lacked an objective factual basis. There is no evidence that any customer had communicated to TFP the intention to stop purchasing products from TFP if its employees became unionized. TFP has not identified a single specific cease-doing-business threat. Indeed, TFP's Salinas facility is unionized and has retained its customers. In short, TFP and its two joint employers did not have an objective basis for threatening employees that unionization would result in lost customers and, as a result, job loss or plant closure.

The cases that TFP relies on to assert that its statements in the flyers and during employee meetings were protected by Section 8(c) are distinguishable from the present circumstances. In *Curwood, Inc.*,²⁷ and *Super Sagless Spring Corp.*,²⁸ the employer provided evidence that its customers had communicated their concerns about the effects of unionization and, therefore, the employer's predictions of job loss were based on objective facts.²⁹ In *TNT Logistics North America, Inc.*,³⁰ the majority found the employer's prediction that it would lose a specific customer, Home Depot, was protected because it was undisputed in the record that Home Depot was anti-union, did not use any unionized carriers, and that the employer's contract with Home Depot was soon to expire.³¹ In *Buck Brown Contracting Co.*,³² the Board found no violation where the employer predicted it would lose its contract if there were "union problems" on the site and where a non-union company, also doing work for the contractor, was poised to take over.³³

²⁷ 339 NLRB 1137 (2003).

²⁸ 125 NLRB 1214 (1959).

²⁹ Member Liebman dissented from the majority's finding in *Curwood* that the threats of job loss were supported by objective evidence because the employer disclosed that evidence at trial—after the fact and not to the employees who received the job loss threat—and because it was not evident from the evidence provided that the employer's customers were expressing negative views of unionization.

³⁰ 345 NLRB 290 (2005).

³¹ Member Liebman dissented in *TNT Logistics* because the employer did not provide an objective factual basis for its predictions. See 345 NLRB at 293 & fn.2.

³² 283 NLRB 488 (1987).

³³ In *Superior Coach Corp.*, 175 NLRB 200 (1969), also cited by TFP, the Board did not pass on the General Counsel's exceptions concerning the ALJ's failure to find a

In addition to the plant closure and corresponding job loss threats, the repeated threats to discharge employees based on their immigration status were hallmark violations. The Board has held that job loss threats by an employer “touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees.”³⁴ Significantly, TFP and its joint employers were willing to tolerate potential undocumented status until the employees began exercising their Section 7 rights to engage in Union activities. The subsequent threats regarding immigration status should be deemed highly coercive.

Moreover, the effect of these hallmark violations on the unit employees was exacerbated because they originated from high-level managers, including TFP's (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C).³⁵ were made directly to most (if not all) of the TFP unit employees, and occurred in direct response to the Union's organizing campaign, including during the critical period before the election in late March 2014. Indeed, the Union went from having 231 signed cards in the TFP unit, which represented 60 percent of the unit employees, in late December 2013 to obtaining only 154 votes and losing the election in late March 2014.³⁶ This significant loss of employee support provides objective evidence of the negative effect of the unfair labor practices.

violation where a supervisor threatened employees with job loss if the union won the upcoming election because the Board's Order “would not be materially changed regardless of [the] holding.” *Id.* at 200, fn.1.

³⁴ *Labriola Baking Co. & Juventino Silva*, 361 NLRB No. 41, slip op. at 2-3 (2014) (citing *Viracon, Inc.*, 256 NLRB 245, 246-247 (1981)).

³⁵ The involvement of high ranking company officials in the unlawful conduct exacerbates its impact. *See, e.g., Mercedes Benz of Orland Park*, 333 NLRB 1017, 1018 (2001), *enfd.* 309 F.3d 452 (7th Cir. 2002) (citing *M.J. Metal Products*, above); *Consec Security*, 325 NLRB at 455 (“When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten”); *L.S.F. Transportation, Inc.*, above (citing *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), *enfd.* 25 F.3d 473 (7th Cir. 1994)); *General Stencils, Inc.*, above.

³⁶ *See J.L.M. Inc.*, 312 NLRB at 305 (“clear dissipation of union support” revealed by the stark drop from card majority of 128 to only 62 votes in election); *Koons Ford of Annapolis, Inc.*, 282 NLRB 506, 508-9 (1986), *enfd.* 833 F.2d 310 (4th Cir. 1987) (dissipation of union support evidenced by drop from 38 valid authorization cards to 27 votes for the union at the election).

In addition to the threats of job loss and plant closure at the two TFP facilities, it is evident that TFP and its two joint employers made clear to the unit employees in a multitude of ways that any interest in the Union would have a negative impact on their employment. Thus, although the threats of job loss and plant closure in the flyers and at employee meetings alone are sufficient to warrant a *Gissel* bargaining order, the Employer's other violations further support the need for this remedy. Those violations included: discharging three employees in late 2013, unlawfully polling employees in mid-December 2013 by distributing pro-company t-shirts and inviting employees to join an anti-Union rally, interrogating an employee about (b) (6), (b) (7)(C) role with the Union, granting employees benefits in the form of a \$20 Thanksgiving gift card, directing employees not to discuss the Union, and prohibiting employees from wearing Union stickers on their helmets without any justification.³⁷

II. *Irving Air Chute* Does Not Preclude a *Gissel* Bargaining Order Remedy in this Case.

In *Irving Air Chute*, the Board found that the employer had engaged in objectionable conduct, set aside the election that the union had lost, and ordered the employer to bargain.³⁸ But the Board stated in dicta that, “[w]ere the election not set aside on the basis of objections in the present representation case, we would not now direct a bargaining order even though the unfair labor practice phase of this proceeding itself established the employer's interference with the election.”³⁹ The Board has held to this principle in subsequent cases.

For instance, in *Bandag, Inc.*,⁴⁰ the Board refused to issue a *Gissel* bargaining order remedy because the union, although it had filed timely objections, withdrew those

³⁷ See *Evergreen America Corp.*, 348 NLRB at 180 (relying on “the coercive impact of the [employer]’s nonhallmark violations” in addition to hallmark violations to decide that a bargaining order was an appropriate remedy); *General Fabrications Corp.*, 328 NLRB at 1115 (considered hallmark and nonhallmark violations when deciding that a *Gissel* bargaining order was appropriate); *Harrison Steel Castings Co.*, 293 NLRB 1158, 1158-59 (1989) (predictions of job loss because of increased administrative costs of having a union were unlawfully coercive in context of employers other unlawful conduct, including interrogations, prohibitions on distribution of union literature, discriminatorily denying pro-union employees overtime, and two discriminatory discharges).

³⁸ 149 NLRB at 627.

³⁹ *Id.* At 630.

⁴⁰ 225 NLRB 72 (1976).

objections. The Board reasoned that by withdrawing its objections, the union had chosen not to contest the results and “removed any question as to the election’s finality.”⁴¹ In *NTA Graphics, Inc.*,⁴² the union had failed to timely file objections to the election but continued to argue for a bargaining order based on the employer’s alleged unfair labor practices. The Board denied the union’s request for a bargaining order, reasoning that “*Irving Air Chute* stands for the proposition that a party that does not object to an election has implicitly agreed to be bound by its result.”⁴³

The principle of finality underlying *Irving Air Chute*, and further expounded upon in *Bandag* and *NTA Graphics*, is also articulated by the Board in Rule 102.69(a), which requires election objections to be filed within seven days of the tally of ballots. The Board has strictly interpreted this rule, finding that objections filed shortly after the deadline could not stop the certification of election results.⁴⁴

However, other Board cases are in tension with these principles. For example, the Board has a “longstanding policy which permits a Regional Director to set aside an election based on conduct which he has discovered during his investigation, even though that particular conduct had not been the subject of a specific objection.”⁴⁵ The Board’s rationale for this policy is its “obligation to provide voters with the ‘laboratory conditions’ under which they may exercise their franchise in a free and informed manner.”⁴⁶ Indeed, if a Regional Director “receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election.”⁴⁷

⁴¹ *Id.* at 72. The Board later granted a bargaining order in *Bandag, Inc.*, 228 NLRB 1045 (1977) (*Bandag II*), because, upon reconsideration, it found that the union had not, in fact, withdrawn all of its objections.

⁴² 303 NLRB 801 (1991).

⁴³ *Id.* at 804.

⁴⁴ See e.g., *American Federation of Casino*, 166 NLRB 544, 549 (1967).

⁴⁵ *White Plains Lincoln Mercury*, 288 NLRB 1133, 1136 (1988) (citing *American Safety Equipment Corp.*, 234 NLRB 501, 501 (1978), *enf. den. on other grounds* 643 F.2d 693 (10th Cir. 1981) and *Dayton Tire & Rubber Co.*, 234 NLRB 504, 504 (1978)).

⁴⁶ *American Safety Equipment Corp.*, 234 NLRB at 501.

⁴⁷ *Nelson Tree Service, Inc.*, 361 NLRB No. 161 (2014) (citing *American Safety Equipment Corp.*, above).

Similarly, despite the *Irving Air Chute* rule, the Board has ordered a *Gissel* bargaining order remedy in cases where the union did not file meritorious objections—relying instead upon conduct alleged by the union in an unfair labor practice charge—in order to ensure that employee sentiment regarding union representation was not trumped by a procedural formality. Thus, in *White Plains Lincoln Mercury*, the ALJ overruled the union’s objections but found that the employer committed serious unfair labor practices that were not encompassed by those objections. Applying *Irving Air Chute*, the ALJ concluded that no *Gissel* bargaining order could issue because there were no meritorious objections. The Board disagreed and reversed, reasoning that an election may be set aside—and a bargaining order issued—based on conduct not specifically objected to but uncovered during the Regional Director’s investigation of the unfair labor practices.⁴⁸ And, in *Dawson Metal Products*, the Board imposed a *Gissel* bargaining order notwithstanding that the ALJ had properly denied all the specific objections to the election.⁴⁹ The Board in *White Plains* described the essence of its holding in *Dawson* as follows: “when the unlawful conduct is, *a fortiori*, conduct that interferes with a free choice in an election, it cannot be treated as somehow falling outside the legitimate and appropriate scope of the investigation of the election process simply because it was not cited in the specific objections to the election.”⁵⁰

Moreover, in *Avis Rent-A-Car*,⁵¹ the Board held that an employer’s timely filing of an unfair labor practice charge regarding objectionable conduct was sufficient to

⁴⁸ 288 NLRB at 1139. *White Plains Lincoln Mercury* also involved the resolution of a determinative challenged ballot.

⁴⁹ 183 NLRB 191 (1970), *enf. den. on other grounds* 450 F.2d 47 (8th Cir. 1971). In *Dawson*, the employer had committed various Section 8(a)(1) violations, including interrogating employees, promising them benefits, and physically threatening union supporters, which the ALJ concluded had interfered with the election results.

⁵⁰ *White Plains Lincoln Mercury*, 288 NLRB at 1138. See also *Pure Chem Corp.*, 192 NLRB 681 (1971) (“Simply stated, a ‘meritorious objection’ is anything that would justify setting aside the election, whether that misconduct was raised by the union in its objections or discovered subsequently by the Agency’s own procedures in resolving the questions raised as to the propriety of the election”; allowing an employer to “avoid the ramifications of [its coercive conduct] simply because the [union] failed to frame the scope of such conduct within [its] objections would frustrate the rights of employees which are of paramount importance.”).

⁵¹ 324 NLRB 445 (1997).

constitute timely-filed “objections,” stating: “[t]hat the allegations were contained on an unfair labor practice charge form and were not explicitly identified as election objections does not, by itself, undermine the otherwise clearly expressed intent by the employer to allege the occurrence of conduct interfering with the election.”⁵² The Board distinguished *Bandag* and similar cases because “there was no contention in those cases...that the unfair labor practice charges were intended to serve as objections to the election.”⁵³

Here, although the Union filed untimely objections (as opposed to timely but non-meritorious objections), the Regional Director has determined that there were serious unfair labor practices that precluded the holding of a fair election. And, the Union filed timely charges that it intended to serve as objections to the election. Therefore, the principles enunciated in *White Plains Lincoln Mercury* and *Avis Rent-A-Car* should apply, and the policy rationale underlying *Irving Air Chute* and subsequent cases -- that without meritorious objections the election tally represents the final, agreed-to result -- is not implicated.

Thus, notwithstanding its failure to file timely objections, the Union has made it clear that it has not agreed that the election results reflect an uncoerced expression of employee sentiment regarding union representation. The Union informed the Region through its correspondence of February 21, 2014 (pre-election) and May 8, 2014 (post-election but before the tally of ballots) that it contested the conduct of the election and requested that the Region seek a *Gissel* bargaining order.⁵⁴ And, the Region has, in fact, been investigating the propriety of seeking a *Gissel* remedy—an investigation that had been ongoing for over a year when the seven-day objection period expired in this case—and made its request that the Union permit a counting of the ballots as part of that investigation. Finally, regardless of the absence of timely-filed objections, the R-case proceeding is open because of the 43 determinative challenges, and the ALJ will have both the R-case and C-case before him when he considers and decides this case. In these circumstances, the principles underlying the *Irving Air Chute* rule are not applicable, and the failure to issue a bargaining order would elevate form over substance, compromise the integrity of the Board’s election processes, and improperly defeat the statutory rights of the employees.

⁵² *Id.* at 446.

⁵³ *Id.* at 445.

⁵⁴ And the Union did, albeit after the deadline for filing objections, file formal objections to the election on June 29, 2015.

Accordingly, the Region should issue complaint, absent settlement, and seek a *Gissel* bargaining order.

/s/
B.J.K.

ADV.32-CA-116854.Response.TaylorFarmsPacific3 (b) (6), (b) (7)(C)