

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

ROEMER INDUSTRIES, INC.

and

CASES

08-CA-188055

08-CA-192702

08-CA-204521

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED-INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO/CLC**

**BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO
ADMINISTRATIVE LAW JUDGE SHARON STECKLER**

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**BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO
ADMINISTRATIVE LAW JUDGE SHARON STECKLER**

This matter was heard by Judge Sharon Steckler in Cleveland, Ohio on April 24 through April 26, 2018.

I. Issues Presented

- 1) Whether Roemer Industries, Inc. (Roemer) violated Section 8(a)(1) and (3) of the National Labor Relations Act¹ (the "Act") when it suspended and thereafter terminated Bruce Haas.
- 2) Whether Roemer, through its owner Joseph O'Toole, violated Section 8(a)(1) of the Act by making coercive and threatening statements to employees.
- 3) Whether Roemer, through O'Toole, violated Section 8(a)(1) and (5) of the Act by engaging in direct dealing with unit employees by soliciting employees' position on ongoing contract negotiations.

¹ National Labor Relations Act, 29 U.S.C. § 151 et seq. (Act)

- 4) Whether Roemer violated Section 8(a) (1) and (5) of the Act by unilaterally implementing a wage increase and thereafter unilaterally rescinding that wage increase in the absence of the parties reaching a valid impasse in contract negotiations.
- 5) Whether Roemer violated Section 8(a)(1) and (4) of the Act by rescinding its wage increase in retaliation for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC (Union) filing an unfair labor practice charge on behalf of its employees.
- 6) Whether Roemer violated Section 8(a)(1) and (5) of the Act by unlawfully refusing to provide the Union with requested and relevant information regarding surveillance cameras.

II. Background

The events at issue in this matter took place at Roemer's Masury, Ohio facility. The facility is small with only seventeen to twenty-one hourly employees. (Tr. 35-36; 301)² Roemer manufactures identification name plates for various businesses. (Tr. 515) Roemer and the Union have a long-standing bargaining relationship, with the Union having represented the production and maintenance employees at the Masury facility since 1973. (Tr. 36)

Despite this long-standing relationship, the parties have had difficulty reaching a successor agreement after the most recent collective bargaining agreement expired in April 2016. (Tr. 36-37; GC 2) They have been bargaining for a contract since March 2016 but have yet to reach an agreement. (Tr. 305, 384)

Early in negotiations, the Union, through Unit Chair Ronald Merrick, handed out signs stating "Fair Contract Now." They were approximately twelve by eighteen inches and had the Union's logo at the bottom. (Tr. 92-94) Merrick handed out the signs in the employee parking

² "Tr" will be used to refer to the transcript, "GC" will be used to refer to General Counsel's exhibits, and "R" will be used to refer to Respondent's exhibits.

lot and employees placed them in their car windows when the cars were parked in the employee parking lot. (Tr. 480) The signs did not go unnoticed by Roemer's owner Joseph O'Toole, as he asked Merrick for a sign and later that sign was posted on the door leading into customer service with the Union logo covered up by a Roemer sticker. (Tr. 394; R. 10)

A central issue during these negotiations has been Roemer's desire to remove the union security clause and dues check-off language from the agreement. (Tr. 354-55; 364) Roemer's initial bargaining proposal included such a proposal and Roemer has maintained this position throughout bargaining. (Tr. 306-08; GC 8, 9) The removal of the union security clause from the collective bargaining agreement is of particular importance to O'Toole. O'Toole has worked at the company since 1973 and he testified that the proposal is important to him as he believes the removal of the union security clause is important for him to be able to sell the company. (Tr. 33, 41-42) O'Toole has made his position on the union security clause known to his employees.

Former employee Bruce Haas testified that in the summer of 2016, he attended an employee meeting. (Tr. 192) During this meeting, O'Toole addressed the employees regarding contract negotiations, explaining that he felt that his idea of an open shop was a fair contract, and that he needed that in place to be able to sell the shop. (Tr. 193)

Current maintenance employee Harold Hrabowy was called into a meeting on January 3, 2017 during which O'Toole asked employees and supervisors how he could propel the contract. Hrabowy suggested he drop his demand for an open shop and O'Toole replied no. O'Toole then followed up this exchange by questioning the employees and supervisors present regarding whether they wanted to continue working at Roemer. (Tr. 101)

Current production employee and the Union's Unit Chair, Ronald Merrick,³ was called into a meeting with O'Toole and Connie Bistarkey, Administrative Services, around June 14 or June 15, 2017. During this meeting, O'Toole told Merrick several times that it would be over his dead body that he would have a closed shop and asked Merrick what it was going to cost him to get one. (Tr. 388-90)

O'Toole made it clear to employees that his demand for the removal of the union security clause from the collective bargaining agreement was unwavering. Unfortunately, Haas decided to take a stand on the one issue where O'Toole was unwilling to accept dissent.

III. Roemer suspended and terminated Bruce Haas for passing out "No Open Shop" stickers

Bruce Haas worked for Roemer for just over forty years. (Tr. 180) He held almost every position in the facility and, at the time of his termination, worked in fabrication. (Tr. 180-81) Supervisor Amanda Shinkovich testified that he could be depended on to come to work and he knew his job. (Tr. 84) Production Supervisor Ann Fraley served as Haas' immediate supervisor for the last ten years of his employment and had generally given him high rankings on his evaluations, including one in 2015 where he received the highest rating in almost all categories except on two pieces of equipment. This included high ratings for efficiency. (Tr. 571-75; GC 53 -58)

Over the forty years Haas worked for Roemer, he received his share of discipline.

Although Haas had accumulated enough progressive discipline to be terminated as far back as

³ Counsel for the General Counsel called witness Merrick as part of her case-in-chief and questioned him on direct. Roemer chose to not cross Merrick at that time, and instead later called Merrick as part of its own case, questioning him on direct. Roemer requested Merrick's pre-trial affidavits and Counsel for the General Counsel objected on the grounds that Roemer was not entitled to the affidavits for a witness it called on direct. Judge Steckler denied Roemer's request and Roemer objected to this denial. (Tr. 427-32) Roemer was not entitled to review Merrick's affidavits before questioning him on direct. Roemer was entitled to the affidavits only of individuals questioned on cross. Rules and Regulations of the National Labor Relations Board, §102.118(e); Film Inspection Service, Inc., 144 NLRB 1040, 1041 at fn. 1 (1963). Judge Steckler's ruling was appropriate.

nine to possibly thirteen years ago, Roemer did not terminate him. (Tr. 182, R. 4, p. 027) In fact, even though O'Toole made disparaging remarks about Haas' slowness and attitude on Haas' evaluations, O'Toole never terminated him.⁴ That is, until Haas passed out "No Open Shop" stickers in Roemer's employee parking lot.

It is Counsel for the General Counsel's contention that Roemer suspended Haas on September 30, 2016 and then converted this suspension to a termination on October 11, 2016 in retaliation for Haas passing out those stickers. Under Wright Line, 251 NLRB 1083, 1089-91 (1980), Counsel for the General Counsel has the initial burden of establishing that Roemer's actions against Haas were at least partially motivated by anti-union animus. This burden is met by showing that Haas was engaged in union activities, Roemer held animus towards those activities, and Roemer knew of Haas' activities. Camaco Lorain Mfg. Plant, 356 NLRB 1182, 1184-85 (2011). Roemer may rebut Counsel for the General Counsel's prima facie case by establishing it would have taken the same action against Haas regardless of his protected activities. 251 NLRB at 1089.

A. Haas' union activity

Like other employees at Roemer, Haas received and displayed a "Fair Contract Sign" in his car window. Haas testified that he received the sign during the summer of 2016 and that he placed it in the driver's side rear window of his vehicle, displaying it when he was parked in the employee parking lot at Roemer. (Tr. 192) Haas always drove to Roemer and usually pulled into this spot front first. (Tr. 203) Due to his seniority, Haas had been assigned a special spot in the front row nearest the entrance to Roemer. (Tr. 203, 229; GC 4) His car was parked where

⁴ These statements included: "Get the lead out Bruce! Too often I observe you at 80% or less. I want to make sure the Company gets value for the paycheck we provide. Even if you think you are working at a good pace, you're not. I am a better judge of that than you." (GC 53); "Stop your bitching and get better yourself!" (GC 54); "After 37 + years, should have all 4's." (GC 55); "Get the lead out!" (GC 57); and "Too many 3's for 25+ years." (GC 58). The parties stipulated at hearing that these comments were written by O'Toole. (Tr. 297-98)

most individuals parking in the employee lot and walking into the plant would walk past the driver's side of his car. Haas continuously displayed the sign until his termination. (Tr. 224)

However, unlike other employees who simply received a sign from the Union, Haas took it upon himself to have his own bumper stickers made. He did not have just any stickers made. In late August 2016, he asked his niece to make "No Open Shop" bumper stickers for him. He wanted to show support for the Union. Haas' niece made the bumper stickers and delivered them to Haas in mid-September 2016. (Tr. 201) The day after he received them from his niece, Haas took about twenty-four of these stickers to work and started handing them out to employees in the parking lot before and after work. (Tr. 202-03, 231) He handed them out near his car over the course of four days and left the ones he did not hand out on his front seat so that employees could grab them out of his unlocked car. (Tr. 203, 271) In total, he handed out around twelve of the stickers. (Tr. 203) Haas also placed one of the stickers next to his "Fair Contract Now" sign in his car window, openly displaying his disagreement with O'Toole's bargaining position to each and every person who walked into the plant. (Tr. 203)

Haas consistently testified the he handed out the stickers from mid to late September 2016. (Tr. 201-02, 231, 271) Harold Hrabowy was one of the employees who took the sticker. (Tr. 94) He testified that it was likely before work when Haas gave it to him in the parking lot. (Tr. 130, 137) He clipped the sticker to his "Fair Contract Now" sign and displayed the "No Open Shop" sticker when he drove his motorcycle to work. (Tr. 95, 127-28) Hrabowy testified that he received the sticker from Haas shortly before Haas was terminated. (Tr. 95, 133)

Merrick also took one of Haas' stickers and displayed it with his "Fair Contract Now" sign in his car window. (Tr. 395-96) Merrick had difficult remembering when he received the sticker, confirming that it was definitely before Haas was terminated, and could have been two

months before, but he was unsure. (Tr. 396, 398) Regardless, he was confident he had received the sticker from Haas in the parking lot before work. (Tr. 396)

Haas' display of the "Fair Contract Now" sign and the "No Open Shop" sticker as well as his distribution of the stickers in the company parking lot was clearly protected union activity. *See International Business Machines Corp.*, 333 NLRB 215, 219-221 (2001) (Employer's threat to discipline employees for displaying homemade pro-union signs in their vehicles in company parking lot and instruction to remove signs violated Section 8(a)(1)); *Whirlpool Corp.*, 337 NLRB 726, 726-29; 731 (2005) (Employer may not maintain a policy prohibiting off-duty employees from engaging in the protecting activity of distributing union literature in non-working areas without legitimate business justification).

While other employees displayed the "Fair Contract Now" sign, Haas took this action a step further. He was not a union official, nor a participant on the bargaining committee. Yet, he took it upon himself to directly attack O'Toole's proposal to eliminate the union security clause from the contract by paying for the "No Open Shop" stickers, handing them out, and openly displaying his own.

B. O'Toole's animus towards union activity

As detailed above, Roemer's proposal to eliminate the union security clause from the contract was important to O'Toole and he had openly let employees know this. Haas, Hrabowy and Merrick all testified to statements O'Toole made regarding either his belief that he needed an "open shop" to sell the business or his unwillingness to compromise on his proposal to eliminate the union security clause. (Tr. 101, 192, 388-90) Roemer did not offer any witnesses to rebut this testimony, despite the fact that there were managers present in each instance at issue.

When employees acted in concert to display “Fair Contract Now” signs, O’Toole not only noticed, he reacted. He asked Merrick for a sign. (Tr. 394) Thereafter, an altered sign was placed on the doors entering the customer service area of Roemer. The Union’s logo was covered up with a sticker referencing Roemer. (Tr. 394) Haas, Merrick and Hrabowy all saw this altered sign posted on the doors to customer service. (Tr. 93-94, 225, 394) Roemer’s action of posting the altered sign sent a clear message to employees that their protected, concerted activity had been noticed by management and that Roemer, and particularly O’Toole who had actually requested a copy of the sign, was not taking it lying down.

Roemer will argue that because numerous employees displayed the “Fair Contract Now” signs and were not disciplined, and Ron Merrick handed out the signs and was not disciplined, there is no evidence that Roemer’s management held animus towards the activity. However, it is clear by Roemer’s action of posting the altered sign it did hold animus towards the activity. While Unit Chair Merrick may not have been disciplined for handing out the Union’s “Fair Contract Now” signs, this does not mean that Roemer did not discipline Haas for handing out his “No Open Shop” signs. After all, Haas did not have the cover of a Union position and he admittedly had a history of discipline. He was an easier target and he chose to pay for and pass out bumper stickers on the contract issue that O’Toole was openly advocating. O’Toole had already reacted to the employees’ display of the “Fair Contract Now” signs and there is no reason to believe he would not have reacted to the display of the “No Open Shop” signs.

Additionally, O’Toole had already exhibited hostility to Haas expressing his opinion about contract negotiations. Haas testified that, in August 2016, he had a conversation with supervisor Amanda Shinkovich in the parking lot after work. He called Shinkovich over to his car, where he asked her if the stress levels in the office were as high as they were in the shop

over the extended contract negotiations. Shinkovich replied she thought everything was good in the office. The whole conversation appeared rather innocent. (Tr. 194-94)

Yet, Haas' simple question landed him in a meeting with O'Toole and management. The significance of this event should not be overlooked. First, O'Toole somehow became aware of Haas and Shinkovich's conversation. There is nothing particularly remarkable about the exchange, yet the owner of the company became aware of it. Perhaps this is not surprising, as Roemer is a small facility and O'Toole testified that he expects that his management team reports problems to him. (Tr. 35)

Second, the conversation was bothersome enough to management that Haas was called into a meeting to explain himself. The day after Haas' exchange with Shinkovich, Bistarkey escorted Haas to a conference room, where he met with O'Toole, attorney Matt Austin, and General Manager Mike Farmer. (Tr. 194-95) In this meeting, O'Toole asked Haas why he had asked Shinkovich the question about stress levels and what Haas was going to do with the information. O'Toole demanded Haas repeat the question he had asked Shinkovich to everyone sitting in the room and when Haas objected, O'Toole threatened to discipline Haas for insubordination. Haas gave in, and repeated his question to the entire room. (Tr. 195) Then, O'Toole had Bistarkey escort Haas throughout the office to ask his question regarding stress levels from the extended contract negotiations to the dozen employees working in the office. (Tr. 196)

Haas' simple question regarding whether management felt stress from the protracted contract negotiations garnered an extreme response from O'Toole where he pulled Haas into a conference room with his attorney and the General Manager, interrogated him regarding his conversation with Shinkovich, and then had Bistarkey parade him throughout the office forcing

him to ask the people who worked there about their stress levels. The entire event portrays O'Toole as an owner who wanted absolute control over his employees' discussions and views regarding contract negotiations and demonstrates that he held animus for even the most innocent comment by an employee that might paint a negative picture of those negotiations.

Haas' account of the August 2016 meeting went entirely unrebutted by Roemer at the hearing. Roemer called no witness to address the events and asked no witness questions regarding the events.

Roemer also has a history of disciplining employees for union activity. In Roemer Industries, Inc., 362 NLRB No. 96 (2015), the Board affirmed Administrative Law Judge David Goldman's holding that Roemer violated Section 8(a)(1) and (3) by suspending Unit Chair Ronald Merrick and Unit Griever Geraldine Dolata for their protected activity associated with investigating a grievance filed by Haas. This case may be relied on for background evidence of animus in this matter. The Grand Rapids Press of Booth Newspapers, Inc., 327 NLRB 393, fn. 1, 395-95 (1998). This is particularly true where the same supervisors are involved in the discriminatory acts. Southern Maryland Hospital, 293 NLRB 1209 fn. 1 (1989). As in the current case, O'Toole was directly involved in the decision to issue the discriminatory discipline at issue in the prior case. Further, a prior case may appropriately be considered for background evidence of animus when the allegations in the current matter are substantially similar to those in the prior matter. Opelika Welding, 305 NLRB 561, 566 (1991). While Haas was not involved in the investigation of a grievance, he was, like Merrick and Dolata in the prior case, involved in routine protected concerted activities when he passed out a bumper sticker promoting the Union's position in collective bargaining to his fellow employees and then displayed that bumper sticker in the window of his car. Counsel for the General Counsel is not required to make a

particularized showing of animus toward Haas' protected activity specifically in order to establish that the protected activity was a motivating factor in Roemer's decision to suspend and terminate him. Commercial Air, Inc., 362 NLRB No. 39, slip op. at 1, fn. 1 (2015); Libertyville Toyota, 360 NLRB No. 141, slip op. at 4, fn. 10 (2014).

C. The evidence establishes Roemer knew of Haas' union activity

Knowledge of an employee's union activity may be established by "circumstantial evidence from which a reasonable inference may be drawn." Montgomery Ward and Co., 316 NLRB 1248, 1253 (1995). The Board may infer knowledge from the co-existence of factors such as: "(1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment." Id. at 1252; *See also* Metro Networks, Inc., 336 NLRB 63, 65 (2001). The Board has also inferred knowledge where the weakness in the employer's offered reasons for its action against the employee lead to a suspicion of unlawful motivation. 316 NLRB at 1253.

Under the small plant doctrine, the Board can infer knowledge when there is a small workforce and the employees carry out their union activities at work. Mid-west Telephone Service, Inc., 358 NLRB 1326, 1333 (2012). Under this doctrine, knowledge may be inferred "where the facility is small and open, the work force is small, the employees made no great effort to conceal their union conversations, and management personnel are located in the immediate vicinity of the protected activity." BLT Enterprises of Sacramento, 345 NLRB 564, 575 (2005). The small plant doctrine relies on circumstantial evidence but the Board does not have to apply the small plant doctrine in order to infer knowledge from the overall circumstances of the case. *See* 345 NLRB at 575; 358 NLRB at fn. 2; 316 NLRB at 1255.

Roemer is a small facility with only seventeen to twenty-one bargaining unit employees. (Tr. 35-36; 301). Early in negotiations, and before Haas was terminated, Merrick passed out “Fair Contract Now” signs in the employee parking lot and employees displayed them in their cars. (Tr. 91-92; 192; 480) At the time, O’Toole was mainly parking in front of facility, as he did not start regularly parking in the employee parking lot until after Haas was terminated. (Tr. 521) Yet, the record establishes that O’Toole knew about the “Fair Contract Now” signs in the employee parking lot because he asked Merrick for one and Haas saw the altered sign on the office doors before he was terminated. (Tr. 225, 394).

O’Toole testified that he expects his managers to report problems to him. (Tr.35) The evidence supports that news definitely got to him quickly, as he pulled Haas into the conference room regarding Haas’ conversation over contract negotiations with Shinkovich the day after their conversation occurred. (Tr. 194-95)

Like Merrick, Haas passed out his “No Open Shop” signs in the employee parking lot. He also left his car open so that employees would be free to take stickers off the seat. (Tr. 202) Due to his seniority, Haas parked very close to the entrance to Roemer, with only the handicap spot in between the entrance and his parking space. (Tr. 50, 203, 229; GC 4) Haas displayed both the “Fair Contract Now” and “No Open Shop” sticker in the back driver’s side window. (Tr. 192, 203) Thus, anyone who walked into the facility, including Shinkovich and Fraley, who both parked in the employee lot, would have been able to see the sign and sticker as they entered the facility. (Tr. 82; 521) Shinkovich admitted that she had seen the “No Open Shop” signs in the cars in the employee lot but she could not recall when she saw them. (Tr. 81-82) O’Toole also admitted that he was aware Haas passed out the stickers and that he had learned this from Bistarkey. (Tr. 71) The record does not reflect the timing of this event.

It is reasonable to infer that if O'Toole learned of the "Fair Contract Now" signs, he would have learned of the "No Open Shop" signs too and, given the size of the facility and his expectation that problems would be reported to him, it is also reasonable to infer that the news would have traveled quickly. Haas also testified that, during the third week of September 2016, O'Toole told him that he knew Haas had passed out the stickers. (Tr. 279-80) The credibility of the witnesses will be addressed below. However, two things should be noted at this point. First, Haas' testimony went un rebutted. Roemer did not put O'Toole on the stand to address Haas' assertion. Second, it is unnecessary to rely on Haas' statement to establish knowledge in this case, as there is ample support to infer knowledge on the record.

In addition to Haas' car being parked such that anyone entering the facility would pass it, Roemer maintains security cameras, one that monitors the parking lot. (Tr. 42-54; GC 3 and 4) The view from the security camera clearly shows the area where Haas parked his car. His car, and particularly his back driver's side window, is in clear view from the camera. (GC 3, 4) In addition, the camera covers the area of the parking lot where both Merrick and Haas distributed the pro-union signs and stickers. (Tr. 118, 202)

The supervisors have access to the camera footage on their office computers. (Tr. 43) O'Toole testified that he can view the footage from his office computer or remotely on his i-Pad. (Tr. 42-43) He testified that he views the footage regularly and he views the camera covering the employee parking lot in the morning to make sure Fraley has arrived and at night in the winter months to make sure all the employees have left. (Tr. 44-45)

Fraley arrives to work between 6:15am and 6:30am when she is not on an overtime schedule. (Tr. 502) Haas started work at 7:00am and passed the stickers out before work, the same timeframe when O'Toole checks on Fraley's arrival. (Tr. 203, 272)

Haas testified that he has seen Fraley viewing the camera footage on her computer in her office. (Tr. 189-90) During summer 2016, O'Toole called Haas into his office to tell him that, on the cameras, he saw Haas talking to a UPS driver for too long. (Tr. 190) Again, this testimony went un rebutted. In 2013, Haas was disciplined on the basis of activity viewed on camera C14. The Union grieved the discipline on the basis that the Roemer violated the contract provisions regarding when cameras can be used as a basis for disciplinary action. (Tr. 160, 401; GC 59, 60)

Hrabowy routinely works on the cameras as part of his maintenance duties. Hrabowy testified that he has adjusted the cameras while O'Toole and Fraley simultaneously viewed the footage from their offices to let him know if the cameras were adjusted correctly. (Tr. 96-97) Hrabowy has seen both O'Toole and Fraley viewing the camera footage in their offices. (Tr. 97)

In Montgomery Ward & Co., 316 NLRB 1248, 1255 (1995), the Board inferred knowledge under circumstances where the two discharged employees had engaged in limited union activity over the course of a few days. One talked to between eighteen and twenty employees in the lunchroom. Id. at 1250. They both engaged in limited solicitation of employees in the parking lot and break rooms. Id. at 1249-51. There, the employer maintained a closed-circuit television system that it admittedly monitored and that covered areas where union activity took place. Id. at 1254. The Board found that those factors combined with evidence of multiple coercive statements made by supervisors during employee meetings during an organizing drive, and the fact that the reasons for the employees' discharge appeared to be pretextual, were a valid basis for inferring the employer had knowledge of the employees' union activities. Id. at 1253-55.

Similarly, here Haas engaged in union activity over the course of a few days in the employee parking lot, an area covered by a surveillance camera that O'Toole admittedly watches at the time of day when Haas was passing out his stickers. Further, other supervisors have access to the cameras and there is evidence that Haas has been asked about and disciplined over activity viewed on the cameras.

There is evidence that, in summer 2016, O'Toole held an employee meeting where he talked about the importance of having an open shop, the very contract issue Haas attacked with his stickers. As will be discussed below, the timing of the issuance of the discipline and evidence of disparate treatment also support that knowledge should be inferred in this case.

Additionally, this case is distinguishable from cases where the Board has declined to infer knowledge. In BLT Enterprises, the Board affirmed the Administrative Law Judge's finding that the General Counsel had not established knowledge. 345 NLRB at 565. There, the Judge had determined that the small plant doctrine did not apply because the employees' union activity had occurred in a large truck yard away from supervisors and in conversations over a CB radio that supervisors did not monitor. Id. at 575. Here, Haas' activity occurred solely in the employee parking lot where some supervisors parked and was monitored by a surveillance camera.

This case is also distinguishable from Pizza Crust Company, 286 NLRB 490 (1987), where the Board affirmed the Administrative Law Judge's determination that the General Counsel had not established knowledge. The Judge declined to infer knowledge in that case in part because the employees had deliberately attempted to conceal their activity. Id. at 495. However, here, Haas passed out his stickers in the employee parking lot shared with supervisors and in clear view of a surveillance camera.

There is evidence that Roemer was aware of employees' union activities in the employee parking lot. O'Toole made his knowledge of the "Fair Contract Now" signs known. O'Toole and other supervisors monitored the security cameras including the one covering the employee parking lot. Haas engaged in his union activities within view of the camera covering the parking lot, and his car was easily viewable by anyone entering the facility. O'Toole demonstrated his animus toward the employees' "Fair Contract Now" signs and directly towards Haas for discussing contract negotiations with a supervisor. Additionally, Haas' sticker attacked O'Toole's proposal to eliminate the union security clause, which O'Toole had openly stated was important to him. These factors, combined with the timing of the discipline, evidence of disparate treatment and the weak explanation provided by Roemer for its decision to suspend and terminate Haas make it appropriate to infer knowledge in this case.

D. Roemer suspended and terminated Haas in violation of the Act

Respondent argues that Haas was disciplined for events occurring on September 14, 2016 and his discharge was inevitable under the progressive disciplinary procedure. However, the record evidence supports that Roemer seized on the events of September 14, 2016 to discipline and terminate Haas only after he had passed out his "No Open Shop" stickers.

On September 14, 2016, Haas was at work. He was using the Spartanics shear to shear an aluminum sheet down into strips. When sheared, the strips were approximately four inches wide by twenty-four inches long. (R. 1, 2) Haas took the aluminum sheets from a bin across from his machine where smaller jobs were stored, sheared them, and then, when he had sheared a stack, he carried them to a shelf near the next machine. (Tr. 197-98) The shelf is used to store parts. (Tr. 580) While Haas used carts for bigger jobs, he testified that smaller jobs were carried to the next machine all the time. (Tr. 198) He performed this job in his usual manner. (Tr. 200)

While Haas was continuously performing his work, O'Toole called to him from Fraley's office, where O'Toole and Fraley had been talking. (Tr. 198) There is no dispute that O'Toole told Haas to get a cart to transport the parts from his machine to the next. O'Toole gave these instructions twice, telling Haas that if he could not find a cart he should notify his supervisor. (Tr. 198-200; 246). Haas did not get a cart on his own and Fraley later confronted him about this and brought him a cart. (Tr. 548) At this point, the event ended. Fraley got him the cart, and Haas kept working. Haas was not disciplined that day. He was not disciplined the next day. In fact, he was not disciplined until September 30, 2016. (Tr. 200, 204)

The fact is Roemer did not consider the events of September 14, 2016 to be significant until Haas handed out his "No Open Shop" stickers. Haas testified multiple times that he received the "No Open Shop" stickers in mid-September and passed them out in mid to late September 2016. (Tr. 201-02, 231, 271) This places his union activity in the gap of time between the events of September 14, 2016 and Roemer issuing the September 30, 2016 suspension.

Fraley testified that at the end of the day on September 14, 2016, she went to O'Toole and told him that she thought Haas should be written up. Fraley testified that she told O'Toole that Haas was not being efficient, did not follow direct rules, and did not listen to what he was told to do. Fraley testified that she told O'Toole that she considered it insubordination and O'Toole agreed. (Tr. 554-55)

Curiously, no action was taken against Haas because for some unexplained reason Fraley thought O'Toole was taking care of it. (Tr. 556-57) Fraley went on vacation starting September 27, 2016. (Tr. 527-28) However, she was present from September 14, 2017 until that time.

Fraley did not discipline Haas during this time period. (Tr. 556) O'Toole did not discipline Haas during this time period. No one followed-up on the matter during this time period.

Fraley provided an affidavit on March 2, 2017 during the investigation of the Union's allegations regarding Haas' termination. (Tr. 587) At that time, Fraley testified that she had a conversation with O'Toole about the need to write Haas up but she could not recall when the conversation occurred and notably, her affidavit testimony did not include any recommendation to write up Haas. (Tr. 590-91)

At hearing, Fraley, for the first time, testified to a specific conversation occurring at the end of the day on September 14, 2016 in O'Toole's office where she told O'Toole that she thought Haas needed to be written up for insubordination. (Tr. 554-55) However, Fraley did not handle the matter as if Haas had been insubordinate. O'Toole testified that under the progressive discipline procedure, insubordination leads to an employee being sent home and possibly a three-day suspension. (Tr. 58) Fraley confirmed that most the time when an employee is written up for insubordination, he is sent home immediately and, in fact, O'Toole had made the decision to handle insubordination in that manner. (Tr. 580) Documentation shows that in 2015 O'Toole made the decision that employees were to be sent home for the first insubordination offense. (GC 50-52) Fraley further testified that, if she was the only one involved, an insubordinate employee would be sent home. (Tr. 584)

Fraley is the Production Supervisor who supervises all hourly employees. (Tr. 35, 514) In fact, she is the only supervisor who regularly supervises all hourly employees. (Tr. 35) She was Haas' immediate supervisor for ten years. (Tr. 571) She conducted his evaluations and there is ample evidence in the record that she was responsible for writing him up. (Tr. 563; GC 25, 59; R4) She had disciplined employees, including Haas, for insubordination in the past. (GC

49, 50-52; R4, p. 10) Thus, there is no reason Fraley would go to O'Toole to report she thought Haas needed to be written up and then expect that O'Toole would handle it. The records make clear that Fraley had authority to write-up Haas and send him home. Based on O'Toole's directive and her own practice, she would have sent Haas home on September 14, 2016 if she thought he was insubordinate. Interestingly, after Fraley was asked about the policy for immediately sending home employees accused of insubordination, she changed her testimony and asserted she had not actually told O'Toole that she thought Haas was insubordinate during their conversation. (Tr. 592)

O'Toole testified that when he becomes aware of a disciplinary problem he attempts to resolve it quickly: "Like right at that moment? Yes." (Tr. 57) According to Fraley, she informed O'Toole on the afternoon of September 14, 2016 that she thought Haas should be disciplined, yet O'Toole did not discipline him.

Roemer argues that a delay in issuing discipline is not unusual. However, an overview of Haas' disciplinary record shows that in the majority of cases Roemer notified Haas of the discipline within three days of the incident. (R 4, pp. 3, 6, 10, 12, 15, 16, 17, 18, 21, 22, 24, 26, 28, 30, 31, 34, 35, and 36) Further, in many cases where there was a significant delay in disciplining an employee, that delay could be explained by the fact that rejected parts from customers triggered the disciplined. (Tr. 183-84, 498-500; GC 25; R9, pp. 2, 3, 6)

Animus can be inferred from Roemer's sixteen day delay in issuing Haas the five-day suspension for the events of September 14, 2016. 356 NLRB at 1185 ("Animus can be inferred from circumstantial evidence, including timing and disparate treatment.") This delay strongly suggests that the issuance of the five-day suspension was actually in retaliation for Haas' distribution of the "No Open Shop" stickers in mid to late September 2016. The delay in issuing

the discipline is also evidence that Roemer knew about Haas' activities. Kajima Engineering and Construction, Inc., 331 NLRB 1604 (2000) (Knowledge of union activities may be inferred by factors such as "the timing of the discharge in relation to the employee's protected activities").

Roemer argues that Haas' suspension and subsequent termination were inevitable because Haas had reached the five-day suspension level under the progressive discipline policy. Roemer utilizes a progressive discipline policy that culminates with employees receiving a five-day suspension pending discharge. (Tr. 56, GC 34, p.11) There is no dispute that at the time of receiving the September 30, 2016 five-day suspension, Haas had underlying discipline that put him at that level of the progressive discipline policy, at least under the category of Quality of Work. (Tr. 181, 183-88, GC 25-28)

O'Toole testified that, while the disciplinary forms have three different categories of offenses, progressive discipline does not occur within a category. (Tr. 61) However, Bistarkey testified that she has the responsibility to track discipline for purposes of the progressive discipline policy and, in that role, her practice was that discipline falls off an employee's record after a year if the employee has no further discipline in that category during the year. (Tr. 156-58) Haas testified that he believed discipline progressed within a category. (Tr. 219-20) Notably, discipline for insubordination was treated as an Intolerable Offense, and at the time of receiving the five-day suspension on September 30, 2016, Haas' disciplinary history was limited to "Quality of Work" issues that are not included in the "Intolerable Offense" category. (Tr. 58, 220; GC 7, 49, 50) Thus, had Haas been disciplined for insubordination, as Fraley asserts she recommended, he did not have the underlying progressive discipline in that category and, according to O'Toole's 2015 instruction, Haas should have been sent home immediately and suspended for one day. Simply stated, Haas was not at the disciplinary level to face discharge.

More importantly, O'Toole had discretion in determining whether to issue discipline and what level of discipline to issue. He testified that he could skip progressive steps if necessary and "had authority to throw the whole system out." (Tr. 57, 60) O'Toole testified that the five-day suspension level does not always result in termination, as sometimes the suspension is extended beyond five days, or there is last chance agreement. (Tr. 63)

In fact, records show that Roemer has issued lesser discipline for offenses than that required by its progressive discipline procedure. For instance, Roemer issued employee Shane Merchant a written warning for a Quality of Work issue on January 6, 2015, which under the progressive discipline procedure would have remained on Merchant's disciplinary records for at least a year. (Tr. 156-58; GC 44) However, in May 2015, rather than issuing Merchant a suspension for another Quality of Work issue, Merchant was given a verbal warning- a step down from his prior discipline and clearly not within the progression called for in the progressive discipline procedure. (GC 45)

There was nothing inevitable about Haas receiving the five-day suspension on September 30, 2016. Roemer could have issued lesser discipline had O'Toole determined to do so.

O'Toole testified that he made the decision to issue the five-day suspension to Haas and that it was issued because Haas was struggling to carry parts piecemeal and was making several trips from his operation to the storage shelf. O'Toole testified that these were the only infractions leading to the write-up. (Tr. 66) He did not mention Fraley's recommendation that Haas be disciplined for insubordination. O'Toole testified that he drafted the Employee Warning Notice that Haas was presented on September 30, 2016 and he agreed with the description on it. (Tr. 67) Under description, the warning states in part, "Not utilizing 'Theory of Constraints' Methodology. Specifically, hand carrying in a piecemeal manner, work to a shelf near next work

station instead of using an available cart, one trip and using said cart as an in-processing storage device.” (GC 5)

Fraley testified that O’Toole is “big on” the Theory of Constraints and that she tries to employ concepts from the Theory of Constraints as a production supervisor. (Tr. 529-30) However, Fraley admitted that she had only read part of one book covering the topic and that was in 2006 when she first became a supervisor. (Tr. 529) Merrick, who has worked at Roemer for twenty-five years and regularly represents employees who are disciplined, had never heard of the Theory of Constraints before Haas received his five-day suspension. Merrick further testified that he had never been trained on it. (Tr.400, 434, 439-40, 466) Haas also testified he had not been trained on the Theory of Constraints. (Tr. 208)

In response to the trial subpoena, Roemer did not provide personnel files for any individuals who were suspended or disciplined for the same or similar reasons as Haas for his September 2016 suspension or his October 2016 termination. (Tr. 161, GC 33) Bistarkey, who acted as Roemer’s Custodian of Records, testified that there were no such files. (Tr. 161-62)

Apparently, Roemer has not disciplined any other employees for the failure to use the “Theory of Constraints.” Such disparate treatment supports that the five-day suspension issued to Haas was retaliatory. Disparate treatment may be considered as circumstantial evidence that an employer had knowledge of an employee’s union activities and held animus towards it. 356 NLRB at 1185; 316 NLRB 1248 at 1253.

Once Haas received the five-day suspension, he was subject to termination. Yet, Roemer was unable to offer a reasonable explanation for why this forty-year employee’s suspension was converted to a termination. O’Toole testified that there were no additional events beyond those of September 14, 2016 that led to the termination. (Tr. 70-71) Roemer will

argue that efficiency is important for its production process. Roemer will point to the fact that Haas had been disciplined for problems with efficiency before. This is true but the discipline Roemer points to dates back to 2013. (R. 4, pp. 3, 5) There is no evidence to show that efficiency was an on-going problem for Haas. In his 2015 evaluation, Fraley gave him three's and four's, the two highest ratings for efficiency. (GC 53) Fraley gave him similar ratings for efficiency on his evaluations dating back to 2013. (GC 54-58) Thus, there is no evidence that Haas had an ongoing problem.

All of Haas' underlying discipline in Quality of Work resulted from problems with parts. The parts were made incorrectly and needed to be fixed or led to scrap. (Tr. 183-88, GC 25-28) He had not received any discipline since April 2016 and his most recent evaluations all reflected that he was performing at a good or superior level. O'Toole testified that a five-day suspension did not automatically lead to termination. (Tr. 63) Yet, Haas was terminated.

O'Toole testified that he held a meeting with his managers to solicit their input and they all wanted Haas gone because he was a "pain in the ass." (69-70) Shinkovich testified that she believed such a meeting occurred but she could not recall the date or what was discussed. She could not recall everyone agreeing to terminate Haas. (Tr. 82-84) Moreover, Shinkovich admitted she testified in her affidavit during the investigation of this matter that she played no role in making the decision to terminate Haas. (Tr. 86)

At the hearing, Fraley did not testify to any meeting of managers. She testified that O'Toole came to her and asked her opinion of what to do about Haas. (Tr. 559) Fraley contends she told O'Toole that he had to terminate Haas because "it's constant, with Bruce, write-ups, him not listening, and it was just trouble. At this point, he's already been warned so many times." (Tr. 560) Yet, when Fraley provided her affidavit testimony on March 2, 2015, she did not

testify that she had told O'Toole that Haas should be terminated. Rather, she testified that she did not remember playing any role in the decision to terminate Haas. Fraley did not testify that she had made any recommendation regarding the termination. (Tr. 593, 598)

Roemer offered no other explanation of its decision-making process for terminating Haas. O'Toole testified that his preference is to meet with the employee and Union before making the determination to terminate. He asserted that there was no time for such a meeting in this case. However, the record does not reflect the reason for this. (Tr. 64) Haas did not meet with O'Toole regarding his suspension before he was terminated. (Tr. 207) Jose Arroyo, the Union's staff representative, did not meet with O'Toole regarding the suspension before Haas was terminated. (Tr. 339)

The overall evidence supports that Roemer seized on the events of September 14, 2016 after the fact, for an excuse to discipline Haas. The incident was not considered serious enough for Fraley or O'Toole to take action at that time. Yet, once Haas handed out "No Open Shop" stickers in mid to late September 2016, O'Toole decided the September 14, 2016 events merited discipline on a manufactured Quality of Work violation based on an otherwise unknown Theory of Constraints. No other employee had ever been disciplined for violating the Theory of Constraints. Then, the five-day suspension was converted to a termination without consulting Haas or his union. O'Toole's explanation for why Haas was terminated was that he was a "pain in the ass." O'Toole's comments on Haas' evaluations show that he had considered Haas to be a pain for a long time. Yet, O'Toole never terminated Haas during his 40-year career. In fact, he had done the opposite, retaining him the last time Haas reached the five-day suspension level. The only thing that changed about Haas was that he handed out "No Open Shop" stickers. O'Toole suspended and terminated Haas because he had become a "pain in the ass" about the

wrong thing, namely O'Toole's dearly held contract proposal to eliminate the union security clause.

IV. O'Toole directly dealt with employees and made both coercive and threatening statements to them at the January 3, 2017 meeting⁵

Hrabowy testified that he was called to a meeting on January 3, 2017 in the lunch room. When he arrived, he found O'Toole, Fraley, and Shinkovich present as well as Senior Operators Brian Moury and Jeff Tolone. Both Moury and Tolone are bargaining unit employees. O'Toole told those in attendance he wanted some ideas to help propel the contract. Hrabowy told O'Toole to take open shop off the table, to which O'Toole replied no. Hrabowy told O'Toole that he did not think he was going to get a contract then.

O'Toole asked Fraley and Shinkovich if they wanted to continue working there, to which they both replied yes. O'Toole directed this same question to Moury and Tolone, and he asked them if they had any suggestions. Moury said he wanted a contract so he could continue working. Tolone was quiet. (Tr. 98-101)

During this meeting, O'Toole made statements about the fact that he thought the Union's representative, Jose Arroyo, had lost his bargaining notes and needed copies from O'Toole's attorney. O'Toole referred to his attorney as a union busting attorney. Hrabowy asked him if he really thought he needed one of those. (Tr. 99-100)

⁵ In its Answer (GC 1(t)), Respondent denies the appropriateness of unit as alleged in paragraph 10(A) of the Second Consolidated Complaint. O'Toole testified that the Union represented the production and maintenance employees at Roemer since 1973. (Tr. 36) As alleged at paragraph 10(b) of the Second Consolidated Complaint, this recognition was last embodied in a collective bargaining agreement effective from February 22, 2013 to April 11, 2016. Roemer admits this in its Answer. Roemer offered no evidence as to why the long-standing production and maintenance unit is now inappropriate. When determining the appropriateness of the unit, the Board gives substantial weight to parties' bargaining history. *ADT Security Services, Inc.*, 355 NLRB 1388 (2010); *Canal Carting*, 339 NLRB 969, 969-70 (2003). Roemer has offered no evidence of changed circumstances that would not make this traditional production and maintenance unit working out of a single facility inappropriate. *See* 355 NLRB at 1388. There was no evidence presented that the existing unit is somehow "intrinsically inappropriate." 339 NLRB at 970. Thus, Counsel for the General Counsel urges that there is no basis to find that the unit is inappropriate.

Despite the fact that O'Toole, Fraley, and Shinkovich were all present at this meeting, and they were all available at the hearing, Roemer offered no evidence to rebut Hrabowy's account.

O'Toole's question to the bargaining unit employees if they had ideas to propel the contract forward constitutes direct dealing. An employer engages in unlawful direct dealing by communicating: (1) directly with union-represented employees; (2) to establish or change wages, hours, or terms and conditions of employment, or undercut the union's role in bargaining; (3) to the exclusion of the union. Permanente Medical Group, Inc., 332 NLRB 1143, 1145 (2000). The Board has found that an employer may consult with its union represented employees for the purpose of formulating its contract proposals. Id. The key question is whether the discussion was such that the Employer's communication with employees was for the purpose of the employees making specific proposals and the employer responding to them. Id. at 1156; El Paso Electric Co., 355 NLRB 544, 545 (2000).

Here, O'Toole was clearly communicating with bargaining unit employees, as Hrabowy, Moury, and Tolone are all bargaining unit employees. The communications were to the exclusion of the Union, as there was no union representative present at the meeting. (Tr. 122-23)

O'Toole's questioning was not in the vein of formulating contact proposals, rather a solicitation of specific proposals to which he responded. O'Toole asked for ideas to propel the contract forward. Hrabowy offered his ideas and O'Toole responded that he would not abandon his proposal to eliminate union security. O'Toole's statement was made to the exclusion of the Union and concerned a mandatory subject of bargaining on a topic Roemer and the Union were actively negotiating. This is the epitome of direct dealing.

Moreover, the overall context of the meeting shows that O'Toole's communication was to undercut the Union in negotiations. He disparaged the Union's actions in bargaining by suggesting the Arroyo had lost his bargaining notes. *See Thill, Inc.*, 298 NLRB 669, 671 (1990) (The employer violated Section 8(a)(1) and (5) when owner held small group meetings with employees where he invited them to discuss problems they had with their jobs and criticized the Union's bargaining positions). O'Toole also paired his response that he would not budge on his proposal to eliminate the union security clause with a statement that he had hired a union busting attorney and questioning whether the employees wanted to work there. Through these statements, O'Toole attempted to achieve his bargaining goals by coercing his employees rather than by bargaining with the Union.

O'Toole's statement that he hired a union busting attorney and his question to those present regarding whether they wanted to continue working violate Section 8(a)(1). Section 8(a)(1) of the Act prohibits an employer from engaging in activity that constitutes interference, restraint or coercion of employees in exercising their Section 7 rights. *See discussion Whirlpool Corp.* 337 NLRB 726, 730-31 (2002). A violation is established when the employer's conduct may be reasonably found to interfere with employees' free exercise of their rights under the Act. *American Freightways Co.* 124 NLRB 146, 147 (1959). The test is an objective one, based on consideration of all the surrounding circumstances. *Int'l Brotherhood of Electrical Workers, Local 6*, 318 NLRB 109 (1995). It is irrelevant whether the coercion was successful. 124 NLRB at 146.

It is true that, in the context where a Union calls an Employer's representatives "union busters," the statements have been found to be nothing more than hyperbole. *See Springfield Hospital*, 281 NLRB 643, 681 (1986). However, here the owner of the company called

employees into a meeting where he disparaged the Union's actions in bargaining, stated an absolute refusal to budge on his proposal to eliminate the union security clause, and stated that he had hired a union busting attorney. O'Toole sent a clear message that his intent was to get rid of the union or, at a minimum, frustrate the bargaining process as long as necessary to get what he wanted. *See Pratt (Corrugated Logistics, LLC)*, 360 NLRB 304, 312 (2014) (Board affirmed ALJ's finding that consultant acted as agent when he solicited grievances and, thus, 8(a)(1) violations were supported where ALJ found the timing of consultant's arrival with an organizing campaign and his advertisement of himself as a union buster on his website supported the inference that his promise to resolve grievances was conditioned on employees rejecting the union).

O'Toole's questioning of both the supervisors and employees regarding whether they wanted to continue working at the facility also violated Section 8(a)(1). His questioning, when considered in context, clearly suggested that the company would close if he was not successful in getting the Union to agree to his proposals. O'Toole asked employees for suggestions on how to propel the contract forward, outright rejected Hrabowy's suggestion that he abandon his proposal to eliminate the union security clause, said he hired a union busting attorney, and then asked employees if they wanted to continue working. O'Toole's questioning sends the message that the company's continued existence was tied to the Union giving in to his contract demands. While the threat is not explicit, it constitutes an implied threat of plant closure. *See Double D Construction Group, Inc.* 339 NLRB 303 (2003) (Board found violation where two days before rerun election company president shook his figure at employee and stated "Remember your bills.") Further, the fact that O'Toole directed his question to supervisors as well as unit employees does not change its coercive nature, as all the questioning was conducted in the

presence of unit employees. *See* Electrical Workers, UE Local 1150 (Cory Corp.), 84 NLRB 972, 998 (1949) (Board affirmed ALJ's dismissal of 8(b)(1)(A) allegation where Union agent's statement to supervisor was not coercive because no employees were present.); Unico Replacement Parts, Inc., 281 NLRB 309 (1986) (Supervisor's statement to non-supervisory lead man that they would close doors in response to unprotected activity still an unlawful threat of plant closure where it was made in front of other employees and could reasonably be construed as retaliation for collective action.).

V. Roemer's unilateral implementation of the 6% wage increase

A. Events surrounding the wage increase

The Union and Roemer began negotiations for a successor agreement around March 2016. (Tr. 384) The Union made a proposal regarding wages as early as March 18, 2016. (Tr. 330, GC 19) The Union made proposals on wages at various points throughout negotiations. (GC 10-12) Arroyo, the Union's staff representative, and Merrick, Unit Chair, have represented the Union throughout bargaining. (Tr. 305) Roemer's primary representative has been attorney Matt Austin. O'Toole has also participated on a less regular basis. (Tr. 305) Arroyo testified that wages have been part of ongoing negotiations and, as of May 2017, the parties had not reached an agreement on wages. (Tr. 330) In fact, as of the hearing, the parties had not reached an agreement on wages. (Tr. 337)

In its Answer, Respondent admits that it implemented a wage increase for unit employees on or about May 19, 2017. (GC 1(t)) Merrick testified that he learned of the wage increase from other employees. He explained that employees receive electronic notification of their pay in their personal emails. (Tr. 385) Employees noticed the raise on their paystubs and approached Merrick, who went to Connie Bistarkey to investigate. Bistarkey explained that O'Toole had

directed her to provide every employee with a six percent wage increase. (Tr. 385-86) Bistarkey confirmed that O'Toole sent her an email on May 9, 2017 requesting a spreadsheet detailing the increases by job classification and then, on May 10, 2017, emailed her instructing her to proceed with the wage increase. (Tr. 173-74, GC 41-43)

Merrick testified that no manager or supervisor notified him as Unit Chair that it intended to implement the wage increase. (Tr. 386) Arroyo testified that no one from Roemer notified him of its intention to implement a wage increase. Rather, Arroyo learned of the wage increase from Merrick. (Tr. 331) Arroyo then sent a letter dated May 16, 2017 to O'Toole proposing an additional six percent increase in the first year of the contract and demanded to bargain over this issue.⁶ (Tr. 332; GC 20, R 6)

The Union and Roemer met for contract negotiations around June 5, 2017. (Tr. 319; 335) The Union presented Roemer with a proposal that cited Roemer's wage increase and proposed additional increases over the life of the contract. (Tr. 335, GC 15, p. 3) The parties again met around June 28, 2017. (Tr. 321) The Union presented Roemer with another proposal addressing wages decreasing its demand. (Tr. 321; GC 16, p. 3) During this session, Roemer presented the Union with a package proposal that addressed wages. (Tr. 336-37) The proposal references Roemer's six percent increase and proposed an additional increase beginning January 1, 2018. (GC 9, p. 1) The Union responded to this with its own package proposal. In its package proposal, the Union agreed to Roemer's wage proposal, but because the parties did not reach agreement on all terms of the package there was no ultimate agreement on wages. (Tr. 336-37; GC 18, p. 1) Wages were still an open item in the parties' on-going negotiations. (Tr. 337)

⁶ In this letter, Arroyo also addressed a recent bonus under the CAP program. Counsel for the General Counsel does not allege this bonus was unlawful and it is not alleged as such in the Second Consolidated Complaint. (GC 1(r)) However, Counsel for the General Counsel does allege that a statement made by O'Toole regarding this bonus was unlawful, as will be discussed below.

B. Roemer's wage increase violated the Act

In order to find that an Employer has made a unilateral change, the Board must find that an Employer has made a material change to working conditions without providing the Union notice and an opportunity to bargain over the change. See Bottom Line Enterprises, 302 NLRB 373, 374 (1991). A change to wages constitutes a material change in working conditions. McClatchy Newspapers, Inc., 339 NLRB 1214 (2003).

When parties are engaged in negotiations for a contract, an employer's duty to refrain from unilateral changes extends beyond giving a union notice and an opportunity to bargain. An employer must refrain from implementation unless an overall impasse is reached on the agreement as a whole. 302 NLRB at 374. Neither the Union nor Roemer has indicated it believes an impasse exists in the negotiations for a successor contract. (Tr. 305)

Here, it is clear that Roemer's implementation of the six percent raise without reaching an overall impasse in bargaining or an agreement with the Union violated the Act. The parties were actively negotiating wages as part of contract negotiations at the time Roemer implemented its change, and the parties continued to negotiate wages after the change.

Any assertion by Roemer that it was entitled to implement that change because the six percent raise was not more than it had offered at the bargaining table is without merit. First, other than the wage proposal made after Roemer's implementation of the six percent wage increase, the record does not contain evidence of the nature of Roemer's wage proposals over the course of bargaining. Arroyo testified to the Union's proposals and the fact that wages were an ongoing issue.

Second, controlling precedent clearly establishes a violation. In U.S. v. Katz, 369 U.S. 736 (1962), the Supreme Court held that an employer's unilateral change to working conditions

under negotiation violates 8(a)(5) even absent an overall refusal to bargain. Id. at 743. There the Court considered three separate changes made by the Employer, one of which was an implementation of a raise mid-bargaining. While the Court noted that the implementation of wages higher than what were offered at the bargaining table manifested bad faith, the Court's holding was not reliant on the fact that the implemented wages were higher than those previously offered. Rather, the Court focused on the unilateral nature of the change, implemented at a time when no impasse in negotiations existed, and found that the implementation of wages increases mid-bargaining violated the Act. Id. at 741-46. Roemer was not free to implement any changes in wages, even those within the range of its contract proposals, without reaching an impasse.

Any reliance by Roemer on A.H. Belo Corp., 411 F.2d 959 (5th Cir. 1969) and Tex-Tan Inc., 318 F.2d 472 (5th Cir. 1963) is misplaced. While both cases contain language that supports the contention that an employer is free to implement a wage increase that was no higher than what had been offered to a union at bargaining, both cases also make clear that an employer must give the union notice of its intended action. 411 F.2d 959, 970-71; 318 F.2d 472, 480-81. Here, Arroyo and Merrick testified that Roemer provided it no notice of its intent to implement a wage increase. (Tr. 331, 386)

Roemer's implementation of the six percent raise without reaching a valid overall impasse in bargaining violated Section 8(a)(1) and (5) of the Act.

VI. O'Toole threatens to eliminate the CAP bonus

A. The CAP program and O'Toole's meeting with Merrick

Roemer offers a Certification and Advancement Program known as the CAP program. (Tr. 518) The program allows individuals to train in other job classifications and gain pay increases as they master new skills. (Tr. 518-19) The program is administered by a joint labor

management committee known as the CAP committee. (Tr. 386-87, 518) This committee agreed to implement a bonus program as part of the CAP program that was new in 2017. The change allowed employees to receive a fifteen cent raise when they became certified in another area. Merrick serves on the CAP committee and testified that he believed the change took effect around July 2017, but the CAP committee had been discussing it during the previous months. (Tr. 387-88)

Arroyo referenced this bonus in his May 16, 2017 letter, demanding a higher bonus. (GC 20, R 6) The Union also proposed a higher bonus in its bargaining proposal at the parties' June 5 or June 6, 2017 meeting. (GC 15, p. 3)

On June 13, 2017, the Union held a membership meeting. On either June 14, 2017 or June 15, 2017, O'Toole called Merrick into his office. Bistarkey was present for this meeting. Merrick testified that after he went to O'Toole's office, O'Toole asked Merrick if they had taken a strike vote. Merrick replied, yes, and explained that he did not know the results because they were locked up at the Union's office. O'Toole told Merrick that they were gullible and that no one trusted or liked him. During this meeting, O'Toole told Merrick several times that they would have closed shop over O'Toole's dead body. Merrick replied they he would not wish that on anybody.

During the meeting, O'Toole told Merrick that if Arroyo pursued bargaining for more than the fifteen cent CAP bonus, O'Toole would delete the program. He followed this with again stating he would have a closed shop over his dead body and asked Merrick if he believed him. O'Toole then asked what it was going to cost him. (Tr. 389-90)

Roemer offered no witnesses to rebut Merrick's account of the mid-June meeting.

B. O'Toole's threat violated the Act

While Merrick is the Union's Unit Chair, he is also an employee of Roemer. (Tr. 382) Thus, a threat made to him, even in the context of collective bargaining, violates the Act if it has a reasonable tendency to coerce him as an employee. See PRC Recording Co., 280 NLRB 615, 646 (1986) (Statement at bargaining table coercive where employees were present at bargaining.)

At the time O'Toole called Merrick into his office, Arroyo had sent his May 16, 2017 letter demanding a higher CAP bonus and he had proposed a higher CAP bonus during bargaining. This action may have annoyed O'Toole, as the fifteen cent bonus was a result of deliberations by the joint labor management committee for the CAP program. However, the CAP program is part of the parties' successor collective bargaining agreement. (GC 2, pp. 27-28) The Union was entitled to make a bargaining proposal on a newly implemented bonus program that would lead to higher bonuses and, thus, higher wages for unit employees. As the bonuses lead to higher wages, they are a mandatory subject of bargaining. Lenawee Stamping Corp., 365 NLRB No. 97 at fn. 2 (June 14, 2017). The Union made a proposal for higher bonuses as part of its wage proposal. O'Toole then threatened Merrick that he would unilaterally eliminate the bonus program, which had been agreed to by the joint labor management committee on which Merrick sits, if the Union did not abandon seeking higher bonuses. This was an unlawful threat of loss of benefits. See LRM Packaging, Inc. 308 NLRB 829, 830 (1992) (Threatening a loss of promised benefits because Union filed objections to election unlawful, as it put the onus on the union for the withholding of benefits.); Alamo Rent-A-CAR, 362 NLRB No. 135 at fn. 3 (June 25, 2015) (Managers telling employees that they were losing short-term disability benefits due to their union contract unlawful); 280 NLRB at fn. 2 (Statement that employer would retract last contract offer if employees' exercised right to strike unlawful).

Further, the statement was made in the context of a meeting where O'Toole disparaged Merrick by calling him gullible and stating no one liked him, and told Merrick that the Union would achieve its contract proposal to maintain the union security clause over his dead body. Clearly, in this context, considering the overall circumstances, the threat to reduce a benefit and unilaterally cease a bonus program if the Union does not change its bargaining proposal on a mandatory subject was coercive.

VII. Roemer's unilateral rescission of the 6% wage increase

A. Roemer rescinds the pay raise

On June 22, 2017, the Union, through Arroyo, filed Case Number 08-CA-201076 with the National Labor Relations Board. The charge alleged that Roemer violated Section 8(a)(1) and (5) of the Act by direct dealing, failing to provide information, and refusing to bargain over a mandatory subject. (Tr. 338; GC 22) Arroyo testified that the charge was filed, in part, over Roemer's implementation of the wage increase. (Tr. 338)

In its Answer, Roemer admits that about July 14, 2017, it rescinded the wage increase. (GC 1(t)) O'Toole's direction to rescind the pay increase is documented in an email he sent Bistarkey on July 7, 2017. (Tr. 174-75; GC 40) Both Merrick and Hrabowy testified to the rescission. Around July 13, 2017, employees did not receive an emailed paystub as usual. (Tr. 103, 390-91) Fraley announced there was going to be a meeting in the cafeteria. (Tr. 391) All the bargaining unit employees and managers convened in the lunchroom, where O'Toole addressed the crowd. (Tr. 103, 391) O'Toole started the meeting by discussing his health and the fact that he had cataract surgery. (Tr. 104, 391)

Merrick testified that O'Toole then announced that he had to rescind the six percent wage increase because Arroyo and Merrick filed a charge against the raise. (Tr. 391) Hrabowy also

testified that O'Toole referenced the Union's charge during the meeting and cited it as the reason that O'Toole was taking the pay raises back. (Tr. 104) Both Merrick and Hrabowy testified that O'Toole also informed those present that he was giving management a raise or bonus. (Tr. 104, 391)

When Merrick and Hrabowy received their pay that Friday, the six percent pay raise had been rescinded. (Tr. 104-05, 392) Merrick testified that no one from management told him that Roemer intended to rescind the raise. (Tr. 392) Likewise, Arroyo was not notified by Roemer of the intention to rescind the raise. (Tr. 339)

Despite that fact that management attended the July 2017 meeting and O'Toole spoke, Roemer offered no witnesses to rebut Merrick and Hrabowy's account of the meeting.

B. Roemer's rescission of the pay raise constituted an unlawful unilateral change.

Roemer's rescission of the wage increase was yet another unilateral change to wages without reaching a valid impasse. At the time Roemer rescinded the wage increase, the parties had met on two separate occasions and exchanged proposals that all referenced maintaining the wage increase in some manner. In JPH Management, Inc., 337 NLRB 72 (2001), the employer implemented a wage increase that was negotiated with the Union as part of a tentative agreement but not yet approved by the employer's president. The president disapproved of the increases and the employer rescinded them without providing notice and an opportunity to bargain to the union. The Board held this rescission was an unlawful unilateral change, noting that it was well-established that during contract negotiations an employer could not make unilateral changes without bargaining to impasse. Id. at 73.

In Faro Screen Process, Inc. 362 NLRB No. 84 (Aug. 30, 2015), the employer implemented its proposed two percent raise a week before the parties reached an agreement for a

new contract, which ultimately did include the same raise. The employer had anticipated the raise would be part of the new contract and made the change to align with beginning of the New Year. Much like here, the employer then rescinded the wage increase when the Union objected to it. The employer did so without providing the Union notice of its intent to rescind the increase or providing the Union an opportunity to bargain over the change. The Administrative Law Judge found both the implementation and rescission of the pay raise to violate Section 8(a)(1) and (5) of the Act. While no exceptions were filed regarding these findings, the Board affirmed the Administrative Law Judge's finding that the appropriate remedy in the case was to restore the wage increase. 362 NLRB No. 84 at 1.

Roemer's rescission of its six percent wage increase constituted a unilateral change and the appropriate remedy is restoration of the wage increase.⁷

C. Roemer rescinded the wage increase in retaliation for the Union filing a charge

Case law supports that an Employer withdrawing previously agreed to contract terms because a Union seeks to file unfair labor practice charges violates Section 8(a)(1) and (5) of the Act. 10 Elliot Square Court Corp., 320 NLRB 762 (1996). Thus, a refusal to bargain, such as unilaterally rescinding a pay raise, in response to a Union filing a charge can violate Section 8(a)(5).

However, when analyzing whether a violation of 8(a)(4) has occurred, the Board applies the framework of Wright Line, 251 NLRB 1083 (1980). Newcor Bay City Division of Newcor, Inc., 351 NLRB 1034, at fn. 4 (2007). Under this framework, the General Counsel has the burden of demonstrating that there was protected activity and the employer had knowledge of

⁷ Arroyo testified that Roemer reinstated the pay raise with some retroactivity during the fall of 2017. Thus, the appropriate remedy would be for Roemer to restore the wage increase to the extent it has not done so. (Tr. 378)

this activity. The General Counsel must show that protected activity was a motivating factor behind the employer's adverse employment action. Id.

In Newcor Bay City Division of Newcor, Inc., the Administrative Law Judge found that the union's filing of a charge and the employer's knowledge of the filing fulfilled the first two requirements. 351 NLRB at 1036. The union alleged that the employer had subcontracted unit work in retaliation for the filing of a charge challenging other alleged unilateral changes. The Judge found that there was a class of employees impacted by the subcontracting, as it was made up of the employees who would have been recalled from lay-off to perform the work. Id. at 1037. However, the Judge did not find that the General Counsel had met her burden of establishing a nexus between the decision to subcontract the work and the union's activity of filing the charge in part because he discredited the union's witnesses' testimony that the employer's representative had cited the charges as the reason for the subcontracting. Id. at 1039. The Board upheld the Judge's finding due to his credibility determinations. Id. at 1034, fn. 4.

Here, the first two requirements of Wright Line are met, as the Union filed Case No. 08-CA-201076 on June 22, 2017 and the Roemer clearly had knowledge of the charge. Both Merrick and Hrabowy testified that O'Toole referenced the charge during the employee meeting where he announced the rescission of the raise. (Tr. 104, 391) The requirement of Section 8(a)(4) that there be an adverse employment action is met here, as each individual member of the bargaining unit had received the raise and, thus, lost the raise when it was rescinded.⁸ (Tr. 173-75, GC 40-43)

Further, the rescission of the raise can be linked to the Union's act of filing the charge. Both Merrick and Hrabowy gave un rebutted testimony that O'Toole specifically cited the

⁸ The fact that the Union and not an employee filed the charge is irrelevant to the analysis. An 8(a)(4) violation can be found where an Employer directs it retaliatory conduct towards employees on the basis of a charge filed on their behalf. Quality Engineered Products, 267 NLRB 593, 596 (1983).

Union's charge as the reason he was rescinding the raise. (Tr. 104, 391) In addition to O'Toole connecting the rescission to the charge filing, O'Toole also made a point to state that he was giving a bonus to the office employees. (Tr. 104, 391) This attempt to demonstrate that the non-union employees were being rewarded while the union employees were suffering a loss is further evidence that his decision to rescind the raise was motivated by animus towards the Union's charge filing.

In addition, O'Toole's statement that he was rescinding the raise because of the Union's charge constitutes an independent violation of Section 8(a)(1) of the Act, as the statement blames the Union for preventing a wage increase. 362 NLRB No. 84, at 2 (2015). The statement tended to undermine the Union and misrepresented the Union's position. O'Toole's statement suggested the Union was attempting to prevent the raise, when in fact the Union had simply challenged its unilateral implementation in its charge and had, by letter and bargaining proposals, requested to bargain for a higher amount. (GC 20, 15, p. 3, 18, p. 1; R 6)

VIII. Roemer unlawfully refused to provide the Union with requested information on surveillance cameras

A. The Union's request for information

As discussed above, Roemer utilizes surveillance cameras at its Masury, Ohio facility. The cameras are referenced in the parties' most recent collective bargaining agreement in a Letter of Understanding. (Tr. 309) The contract addresses when the cameras can be used for disciplinary purposes and that they cannot be referenced by either party in the grievance process. (GC 2, p. 25) During the recent contract negotiations, the Union sought changes in this language. Arroyo testified that members had expressed concerns about the cameras, and their desire for the cameras to be eliminated or to be able to be used for purposes of exculpatory

evidence during the grievance process. (Tr. 312-13) Initially, the Union sought language that would either eliminate or reduce the use of the cameras. (Tr. 310)

Over the course of negotiations, the Union made various proposals on the cameras, including a proposal submitted around June 28, 2016 to eliminate the cameras entirely. (GC 10, p. 10) Around November 21, 2016, the Union submitted a proposal to limit the number of cameras, limit the nature of the infractions for which the cameras could be used for disciplinary purposes, and to prevent only Roemer and not the Union from using the cameras during the grievance procedure. (GC 11, p. 2) The Union submitted yet another proposal around November 28, 2016 that further tweaked the November 21, 2016 proposal. (GC 12, p. 2)

During a bargaining session on May 8, 2017, Arroyo, who was in a separate room from Roemer's representatives, emailed attorney Austin asking him to stop by because Arroyo had an information request regarding the surveillance cameras. (Tr. 315-16, GC 13) Austin came to the hallway outside the room where the Union's bargaining committee was meeting and Arroyo handed him a request for information related to the cameras. (Tr. 317) After Arroyo handed Austin the request, Austin responded that Arroyo would have to file a charge to get the information. (Tr. 317)

The Union's written request for information covered items related to the type and location of cameras, their operation, the costs associated with their use, the reason for their installation, the manner in which they were used, the company's future plans regarding the cameras, and the Union's ability to use the cameras.⁹

⁹ The Union specifically requested the following information: (1) the total number of cameras currently in the plant; (2) whether the company had plans to install additional cameras; (3) whether the cameras were operational yet; (4) who had access to the cameras; (5) where the cameras were monitored from and what the monitors' make and model numbers are; (6) if the cameras were able to record and who had access to the recordings; (7) whether they had remote access to the cameras; (8) why the cameras were installed and whether they were installed specifically for security, discipline or strike possibilities; (9) information on security breaches in the last five years; (10) why the cameras were pointed in the direction they are pointed; (11) who decided on the location of the cameras; (12) what

Arroyo testified that he requested the information to help him craft bargaining proposals regarding the cameras. (Tr. 318) Arroyo followed up on his request for information by emails sent to Austin on June 14, 2017, June 16, 2017 and June 28, 2017. (Tr. 323-25, GC 17) Around June 28, 2017, the Union presented a proposal that maintained its existing proposal from November 28, 2016 on security cameras and referenced that its proposal was pending R.F.I. or request of information. (Tr. 322; GC 12, p. 2, 16, p. 2) During the June 28, 2017 bargaining session, Roemer and the Union exchanged package proposals, and the Union was agreeable to the company's proposed language on the use of cameras. (Tr. 326-28; GC 9, 18) However, because the proposals were package proposals they required agreement on the entire package for there to be an agreement on any part. (Tr. 328) Since the parties did not reach agreement on the overall package, the issue of the use of surveillance cameras remained open and was still an open topic as of the date of the hearing. (Tr. 329)

Roemer never responded to the Union's information request and never provided an explanation as to why it would not respond. (Tr. 325-26) Roemer did not ask the Union for clarification of the request and did not ask the Union to limit the request. (Tr. 380) Roemer simply failed to respond at all.

B. Roemer violated the Act by failing to respond to the Union's request

An employer is obligated to provide a union with requested information that is potentially relevant to the union performing its duties as employees' bargaining representative. NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967). The test for relevance is a broad "discovery-

field of view each camera has; (13) what is each camera's resolution; (14) whether the cameras pan or zoom and, if so, which cameras had this capability; (15) if the cameras pan or zoom, how this is controlled, where this is accomplished and who can do so; (16) whether the Union had access to pan or zoom the cameras in the event the Union thought someone should not be in the plant; (17) whether the Local Union would have access to view the cameras to verify the information provided to the request; (18) the cost of the surveillance project, whether there is annual upkeep and, if so, who does the upkeep; (19) whether the company had done a study on the need for the project and, if so, the results of the study; and (20) whether the video feeds were being sent elsewhere.(GC 14)

type standard.” Id. at 437. A union is entitled to information necessary to enforce provisions of the collective bargaining agreement. American Signature Inc., 334 NLRB 880, 885 (2001). Here, the surveillance cameras and their acceptable use are covered by the parties’ most recent collective bargaining agreement. The duty to provide information includes a duty to provide information relevant to contract negotiations. Pulaski Construction Co., 345 NLRB 931, 935 (2005). Arroyo testified that he requested the information in order to have the background he needed to formulate bargaining proposals. (Tr. 318)

In regards to information specifically related to the use of security cameras, the Board has held that the future use of surveillance cameras is a mandatory subject of bargaining. Colgate-Palmolive Co., 323 NLRB 515 (1997). The fact that the Employer had a past practice of using the cameras does not obviate the Employer’s duty to bargain over the manner in which it utilizes the cameras in the future. Id. at 516. Further, a general refusal to provide information pertaining to surveillance cameras violates Section 8(a)(1) and (5). *See* National Steel Corp., 335 NLRB 747, 748 (2001). “[A]n employer may not simply refuse to comply with an ambiguous or overbroad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.” Id. at 748 (quoting Keauhou Beach Hotel, 298 NLRB 702 (1990)). An employer must timely respond to an information request even where it believes it has a basis to not provide the information. Public Service Company of New Mexico, 364 NLRN No. 86 at 6 (August 22, 2016).

The cameras in Colgate-Palmolive Co. and National Steel Corp. were hidden. Here, at least some of the cameras are in plain sight. (Tr. 189) However, whether or not the cameras are hidden is not relevant to the final determination. In Colgate-Palmolive Co., the Board reasoned that the use of the cameras was germane to the working environment in the same way that drug

tests, polygraph testing, and physical examinations are, as all represent methods to ascertain whether someone has engaged in misconduct. 323 NLRB at 515. This is true whether the cameras are hidden or not. Thus, the Employer's obligation to provide information related to the cameras is no different than that at issue in National Steel Corp.

Here the Union requested information on cameras in order to formulate bargaining proposals on how the cameras would be used in the future. The information was relevant to a mandatory subject of bargaining. As such, Roemer violated Section 8(a)(1) and(5) by failing to respond in any manner to the Union's information request.

IX. Credibility of witnesses

Counsel for the General Counsel urges that her witnesses be credited over Roemer's witnesses. "[T]he ultimate choice between conflicting testimony . . . rests on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility." Northridge Knitting Mills, 223 NLRB 230, 235 (1976).

Roemer's agents often offered conflicting testimony. For instance, O'Toole testified that the decision to terminate Haas was made during a meeting of his management team but offered little specifics regarding that meeting. (Tr. 69-70) Shinkovich testified that she believed a leadership meeting occurred but she could not recall the date, what was discussed, or that any decision was made regarding termination. (Tr. 84) Shinkovich then readily admitted that she had previously testified that she did not play any role in the decision to terminate Haas. (Tr. 86) A Judge may properly discredit a witness where their answers are vague, implausible, inconsistent, and confusing. *See* Weather Tec Corp., 238 NLRB 1535, 1554-55 (1978).

Fraley offered conflicting testimony that lacked inherent probability. Fraley testified that, on September 14, 2017, she went to O'Toole and stated she felt that Haas should be disciplined for insubordination. However, this assertion is rendered implausible by the weight of the evidence. It is clear that Roemer's policy, as set forth in emails and a meeting summary, was to send employees accused of insubordination home immediately. (GC 50-52) It is doubtful that Fraley, the individual who directly supervises all the production employees, would not only fail to immediately discipline an employee she felt was insubordinate, but would allow the issue to remain unaddressed during the week long period she was present in the plant before her vacation. When confronted with the implausibility of her claim, Fraley changed her testimony claiming that she had not raised the issue of insubordination with O'Toole. A witness is properly discredited where her testimony is inconsistent and contradicted by records. E.S. Sutton Realty Co., 336 NLRB 405, 405-07 (2001).

Fraley did not corroborate O'Toole's story that there was manager's meeting to discuss Haas' possible termination. She instead testified that O'Toole approached her regarding Haas and she recommended he be terminated. However, in her previous affidavit, Fraley testified that she did not play any role in making the determination to terminate Haas. Fraley's argument that the discrepancy between her trial testimony and her previous testimony resulted from her not making the final decision to terminate Haas is disingenuous. A witness' credibility is suspect when there is a substantial variation between an affidavit and testimony. Kern's Bakeries, Inc., 227 NLRB 1329, 1329 at fn.1, 1330 at fn. 2 (1997).

In many cases, Roemer offered no witness to counter the testimony of Counsel for the General Counsel's witnesses. Roemer failed to offer any rebuttal to testimony offered regarding O'Toole's August 2016 meeting with Haas, to his January 2017 meeting with Hrabowy and

other employees, to his June 2017 meeting with Merrick, or to his July 2017 meeting with all employees. This was so despite there being other supervisors present at these meetings. Roemer offered none of its own witness testimony on the parties' bargaining, the Union's information request, or Roemer's implementation and rescission of the six percent wage increase. When a party fails to call currently employed supervisors or agents who are reasonably assumed to be favorably disposed toward the party, it is appropriate for the Judge to draw an adverse interest regarding the facts in question. See Villa Maria Nursing Center, 335 NLRB 1345, 1345 at fn. 1, 1355 (2001). A Judge may discredit an employer's witnesses where its counsel fails to question the witnesses on significant matters. "The Union", 251 NLRB 1030, 1038 (1980).

Hrabowy and Merrick are both current employees. As such, their testimony is given against their interest in continued employment with Roemer and is worthy of particular weight. Flexsteel Industries, Inc. 316 NLRB 745 (1995). Further, both Hrabowy and Merrick were direct in answering questions on cross.

Arroyo was likewise forthright in his testimony, offering clear and unambiguous answers.

Finally, Bruce Haas testified openly about his past discipline problems, consistently testified that he passed out his No Open Shop stickers in mid to late September, and was quick to admit he had no evidence that anyone from management saw him pass out the stickers. Overall, his testimony was clear and inherently probable. Roemer attacks Haas' credibility on the basis that he testified on cross that during the third week of September 2016 O'Toole told him he knew Haas had handed out the stickers. While Roemer attacks this testimony¹⁰, it offered no

¹⁰ During the hearing, Roemer made a motion that the ALJ require the Regional Director to refer Haas to the Agency's Division of Operations for consideration of whether he should be referred to the Department of Justice for suspected perjury. As noted by the ALJ, the case handling manual to which Roemer cited suggests best practices by the Region, but is not binding on the ALJ. Counsel for the General Counsel continues to oppose Roemer's motion, as there is no current basis to assert Haas perjured himself. Haas offered testimony on cross that was subject to impeachment. The credibility of that testimony will be weighed by the ALJ. However, the testimony was un-rebutted. Roemer's argument that Mr. Haas committed perjury is not based on its own witnesses' contradicting the

witness as rebuttal. Clearly, if Roemer believed the assertion was untrue, it could have offered O'Toole to deny the claim. Roemer did not do so. However, even if the Judge chooses to discredit Haas' testimony on this matter, the Judge should credit the remainder of his testimony. Nothing is more common than for a judge to believe some, but not all, of the testimony. Daikichi Sushi, 335 NLRB 622, 623 (2001); Edwards Transportation Co., 187 NLRB 3 (1970).

X. Remedy

Counsel for the General Counsel urges that the allegations in the Second Consolidated Complaint are supported by the record evidence and Roemer has violated the Act as alleged. Counsel for the General Counsel respectfully requests an Order requiring that Roemer cease and desist from the following:

- (1) Refusing to bargain with the Union as the exclusive bargaining representative of its employees in the Unit, by implementing wage increase without providing the Union notice and an opportunity to bargain, and at a time when no impasse in bargaining with the Union has occurred.
- (2) Refusing to bargain with the Union as the exclusive bargaining representative of its employees in the Unit by rescinding wage increases without providing the Union notice and an opportunity to bargain, and at a time when no impasse in bargaining with the Union has occurred.
- (3) Refusing to bargain collectively with the Union by directly dealing with bargaining unit employees regarding ongoing contract negotiations.

testimony but entirely on assumptions that, since Mr. Haas had not previously testified to the statement in his affidavit and his testimony was uncorroborated, Mr. Haas must have intentionally lied. While a variance between an affidavit and hearing testimony draws a witness' credibility into question, it will not necessarily serve to impeach the witness' credibility where the action described is not denied. C.P. & W. Printing Ink Co., 238 NLRB 1483, 1483, 1485 at fn. 10 (1978). Roemer is certainly entitled to attack Haas' credibility, but it has an insufficient basis to assert that Haas perjured himself. Roemer's allegation that Counsel for the General Counsel's failure to ask Haas questions about this testimony on redirect supports its assertion that Haas committed perjury is misplaced. Counsel for the General Counsel is free to develop her trial strategy and question her witnesses accordingly.

- (4) Refusing to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective bargaining representative of employees in the Unit.
- (5) Rescinding wage increases because the Union files charges on behalf of bargaining unit employees with the National Labor Relations Board.
- (6) Suspending, discharging, or otherwise discriminating employees because they assist the Union and engage in concerted activities.
- (7) Coercively telling employees that the Respondent has hired a union busting attorney.
- (8) Threatening employees with plant closure unless the Union agrees to the Respondent's bargaining proposals and/or unless the Union is eliminated.
- (9) Threatening employees with the elimination of a bonus if the Union pursues higher bonuses through bargaining.
- (10) Blaming the Union for the Respondent's unlawful rescission of a wage increase.
- (11) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Counsel for the General Counsel also request that Roemer be ordered to take the following affirmative actions necessary to effectuate the policies of the Act:

- (1) Before implementing any changes in wages, hours or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All production and maintenance employees of the Company except those individuals occupying watchman, confidential clerical, salaried or supervisory positions of assistant foreman level or above.

- (2) Before implementing any changes in wages, hours or other terms and conditions of employment during contract negotiations, notify and bargain in good faith with the Union until such time as an agreement or an overall impasse in negotiations is reached.
- (3) Provide the Union with the information regarding Respondent's security cameras, as first requested in the Union's May 8, 2017 written request.
- (4) To the extent Respondent has not already done so, reinstate the May 19, 2017 pay increase given to bargaining unit employees and rescind that raise only upon the Union's request.
- (5) Make employees whole for any loss of earnings and other benefits suffered as a result of the July 14, 2017 unilateral rescission of its wage increase, including payment of interest and compensation for any adverse tax consequences of receiving lump-sum backpay awards.
- (6) File with the Regional Director for Region 8 a report allocating the backpay awards to the appropriate calendar years for each employee.
- (7) Offer Bruce Haas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (8) Remove from Respondent's files any reference to the September 20, 2016 suspension and October 11, 2016 discharge of Bruce Haas and, thereafter, notify him in writing that this was done and that the suspension and discharge will not be used against him in any way.
- (9) Make Bruce Haas whole for any loss of pay he may have suffered by reason of the discrimination against him.
- (10) Compensate Bruce Haas for adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director allocating the backpay award to the appropriate calendar quarters.

(11) Make Bruce Haas whole for any additional loss of pay caused by Respondent's failure, if any, to reinstate him in accordance with the provisions of this Order, within 14 days of this Order, by payment to him of the respective amount that he would have earned if properly reinstated, from the 15th day after the date of this Order to the date of a proper offer of reinstatement, less his net earnings during such period, said amounts to be computed on a quarterly basis.

(12) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(13) Within 14 days after service by the Region, post at its facility in Masury, Ohio copies of Notice to Employees. Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, by email, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(14) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Counsel for the General Counsel requests any and all other relief as may be just and proper to remedy the alleged unfair labor practices.

Respectfully submitted,

/s/ Kelly Freeman

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Proof of Service

I hereby assert that copies of the foregoing Brief of Counsel for the General Counsel to Administrative Law Judge Sharon Steckler were served by electronic mail this 31st day of May 2018 to the following:

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