

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

GENERAL DIE CASTERS, INC.	:		
	:	Case Nos.	8-CA-37932
and	:		8-CA-38277
	:		8-CA-38278
TEAMSTERS LOCAL 24 a/w	:		8-CA-38306
INTERNATIONAL BROTHERHOOD	:		8-CA-38358
OF TEAMSTERS	:		8-CA-38390
	:		8-CA-38464
	:		8-CA-38523
	:		8-CA-38546
	:		8-CA-38549
	:		8-CA-38568
	:		8-CA-38600
	:		8-CA-38623
	:		8-CA-38707
	:		8-CA-38916
	:		8-CA-39165

**RESPONDENT GENERAL DIE CASTERS, INC.'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE CARISSIMI'S DECISION
AND BRIEF IN SUPPORT**

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RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE JUDGE CARISSIMI'S DECISION

Exception I – Respondent opposes Judge Carissimi credibility resolutions throughout his Decision. Respondent will address the particular credibility resolutions in its supporting brief attached hereto.

Exception II – Judge Carissimi erred in finding Respondent unilaterally implemented a wage freeze from February 2009 thru December 2009 and, therefore, violated Sections 8(a)(5) and (1) of the Act.

Exception III – Judge Carissimi erred in finding Respondent made a unilateral change with respect to the time period employees receive a merit raise, if any, and therefore, violated Sections 8(a)(5) and (1) of the Act.

Exception IV – Judge Carissimi erred in finding Respondent violated Sections 8(a)(5) and (1) of the Act when it laid off employees at Twinsburg on or about March 9, 2009, and implemented one (1) day shutdowns at the Twinsburg facility on March 5 and April 5, 2009 and the Peninsula facility on April 10, 2009.

Exception V – Judge Carissimi erred in finding Respondent unilaterally expanded its work rule on defacement/destruction of property and, therefore, Kevin Maze's discharge violated Sections 8(a)(5) and (1) of the Act.

Exception VI – Judge Carissimi erred in finding Respondent had not established that it would have discharged Kevin Maze in the absence of his union activities and, therefore, violated Sections 8(a)(3) and (1) of the Act.

Respondent satisfied the Wright Line analysis in proving by a preponderance of the evidence that it would have terminated Kevin Maze notwithstanding his union activity.

Exception VII – Judge Carissimi erred in finding Respondent unilaterally recalled three die cast operators without giving notice and opportunity to bargain to the union and, therefore, violated Sections 8(a)(5) and (1) of the Act. These employer actions were not a subject of General Counsel's Complaint and should be completely struck from the decision and record.

Exception VIII – Judge Carissimi erred in finding Respondent was obligated to bargain with the union regarding the manner in which health insurance coverage for the three recalled employees was to be implemented and, therefore, violated Sections 8(a)(5) and (1) of the Act. These employer actions were not a subject of General Counsel's Complaint and should be completely struck from the decision and record.

Exception IX – Judge Carissimi erred in finding Respondent unilaterally implemented its proposal on recalling employees on September 10, 2009 without reaching a proper impasse and, therefore, violated Sections 8(a)(5) and (1) of the Act. Contrary to findings otherwise, the union did engage in tactics designed to delay bargaining.

Exception X – Judge Carissimi erred in finding Respondent unilaterally reinstated the use of temporary employees while unit employees were still laid off promulgated without giving notice and opportunity to bargain to the union and, therefore, violated Sections 8(a)(5) and (1) of the Act.

Exception XI – Judge Carissimi erred in finding Respondent had not established that it consistently applied its disciplinary rules regarding a threatening statement made by one employee to another and, therefore, Willie Smith's termination violated Sections 8(a)(3) and (1) of the Act.

Respondent satisfied the Wright Line analysis in proving by a preponderance of the evidence that it consistently applied its disciplinary rules regarding a threatening statement made by one employee to another. Judge Carissimi disregarded uncontroverted testimony concerning the discharge of an employee due to threatening statements and harassment of another employee.

Exception XII – Judge Carissimi erred in finding Respondent violated Sections 8(a)(3) and (1) of the Act by refusing to pay Emil Stewart for attending an OSHA meeting.

Exception XIII – Judge Carissimi erred in finding Respondent did not produce the names of the non-unit employees laid off during the April and May 2009 layoffs and, therefore, violated Sections 8(a)(5) and (1) of the Act.

Respondent produced said names to union in correspondence dated August 24, 2009. See, Respondent's Exhibit No. 50 at p. 08540 & Tr. pp. 1999-2000.

Exception XIV – Judge Carissimi erred in finding Dan Owens is a supervisor within Section 2(11) of the Act and an agent of the Respondent within Section 2(13) of the Act and, therefore, Respondent, through Dan Owens violated Section 8(a)(1) of the Act by soliciting employees to sign a decertification petition.

Exception XV – Judge Carissimi erred in finding Dan Owens told employee Chuck Smith that Jim Mathias (owner) would be more willing to address issues (such as wages) with employees if the union no longer represented employees and, therefore, violated Section 8(a)(1) of the Act.

Exception XVI – Judge Carissimi erred in finding Respondent, through Chuck Long, threatened employees with plant closure and job loss and, therefore, violated Sections 8(a)(1) of the Act.

Exception XVII – Judge Carissimi erred in finding Respondent encouraged employees to decertify the union and sponsored the effort to do so through its April 15 and May 21, 2010 Negotiation Updates and, therefore, violated Section 8(a)(1) of the Act.

Exception XVIII – Judge Carissimi erred in finding Respondent's September 17, 2010 request for Jerome Ivery to meet with Ron Mason did not occur in a context free from employer hostility to the union and, therefore violated Section 8(a)(1) of the Act.

Exception XIX – Judge Carissimi erred in finding Respondent, through Chuck Long impliedly threatened Jerome Ivery with retaliation if he did agree to Respondents Request to meet with Ron Mason and, therefore, violated Section 8(a)(1) of the Act.

Exception XX – Judge Carissimi erred in finding Respondent asked Jerome Ivery questions concerning his subjective state of mind with respect to certain events during the September 20, 2010 meeting and, therefore, violated Section 8(a)(1) of the Act.

Exception XXI – Judge Carissimi erred in finding Respondent’s September 20, 2010 meeting with Jerome Ivery did not occur in a context free from employer hostility to union organization and, therefore violated Section 8(a)(1) of the Act.

Exception XXII – Judge Carissimi Erred By Refusing To Consolidate This Matter Together With the Issues Contained In *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011).

I. STATEMENT OF THE CASE

General Die Casters, Inc (“GDC,” “Company” or “Respondent”) is engaged in the manufacture of aluminum die castings. The Company is comprised of two facilities, Peninsula and Twinsburg. The facilities are located approximately twelve (12) miles apart. Teamsters Local No. 24 (“charging party” or “union”) engaged in an organizing drive in late 2007/early 2008. Subsequently, the union filed an election petition and a March 14, 2008 election ensued. On August 28, 2008 the charging party was certified as the bargaining representative for employees comprising the following unit:

All full-time and regular part-time production and maintenance employees, including all cast set-up employees, cast operators, re-melt employees, trim set-up and stock employees, trim and utility process technicians, tool room employees, quality assurance employees, truck drivers, janitorial employees, machine operators, sanders/blasters, shippers, safety coordinators, and all shift leads employed by the Employer at its facilities located at 2150 Highland Road, Twinsburg, Ohio and 6212 Akron Peninsula Road, Peninsula, Ohio but excluding all office clerical employees, professional employees, and all guards and supervisors as defined by the Act.

The first bargaining session was held on October 13, 2008. From the outset of negotiations, the union engaged in a systematic negotiation ploy encompassed by threatening and intimidating behavior. The Company’s October 8, 2009 Amended Charges filed against the union in Case Nos. 8-CB-11183 and 11184 illustrates just a small portion of the menacing behavior it has had to endure throughout the negotiations. (Joint Exhibits [“Jt. Ex.”] 5 & 8.) At the time of the hearing, the parties had participated in nearly sixty-five (65) bargaining sessions. Travis Bornstein (“Bornstein”) the President of the union has been the principal spokesperson for the union throughout the negotiations. Rick Kepler (“Kepler”) is a representative of Teamsters Joint Council 41 and began attending negotiations in April 2009 and filled in during certain meetings in Bornstein’s absence. Ron Mason (“Mason”), the Company’s attorney, has been its

lead negotiator throughout. Lastly, in December 2009, a decertification petition was filed in Case 8-RD-2178. (General Counsel's ["G.C."] Ex. 84.) Said petition is currently blocked by the present proceeding.

This consolidated case was tried before Administrative Law Judge Mark Carissimi in Cleveland, Ohio, on October 18-19, November 8-10, 15, 17-19 and December 15-16, 2010. The second amended consolidated Complaint alleged numerous violations of 8(a)(1), (3) and (5) of the Act spanning two and one half years. Specifically, the alleged 8(a)(3) and (1) violations at issue in this appeal are as follows: the September 4, 2009 termination of Kevin Maze; the October 9, 2009 suspension and subsequent October 17, 2009 termination of Willie Smith; and the November 10, 2009 withholding of wages from Emil Stewart for time spent at an OSHA meeting as a union representative. (Decision p. 2.)

The alleged 8(a)(5) and (1) violations at issue in this appeal through the implementation of the presumed unilateral changes are as follows: a January 2009 change to the employee evaluation procedure altering the time period as to when employees receive a wage increase, if any at all; a January 2009 wage freeze; administering one day shutdowns on March 5 and April 10, 2009; administering a March 2009 layoff at its Twinsburg facility; on April 3, 2009 expanded its work rule on defacement and destruction of company property; on April 6, 2009 promulgated a new work rule which required all machine operators to rotate working among the various die casting machines; on June 15, 2009 recalled three (3) employees to its Peninsula facility; on June 25, 2009 required the three (3) bargaining unit employees recalled to the Peninsula facility to reimburse it for certain health care insurance costs; on September 8, 2009 implemented its proposal on recall rights and procedure; on September 15, 2009, resumed third shift operations at its Peninsula facility and recalled approximately ten (10) employees; since

about September 15, 2009 secured the services of employees from employment agencies to work in bargaining unit positions; and refused to provide information to the union, specifically, the names and titles of any non-unit personnel who were laid off during the April/May 2009 layoffs. (Decision pp. 2-3.)

Lastly, the alleged 8(a)(1) violations at issue in this appeal are as follows: [I]n April and May 2010 Dan Owens solicited employees to sign a decertification petition and coercively informed employees that the Company would be more willing to negotiate with employees over wages if they did not have union representation; in April and May 2010 Chuck Long threatened employees with unspecified reprisals, plant closure and/or sale of the plant if the union continued to represent the employees; on April 15 and May 21, 2010 Jim Mathias solicited employees to support the decertification effort and informed employees that the Company supported and encouraged that effort; on September 17, 2010 Doug Hicks, Chuck Long and Brian Lennon coercively requested that Jerome Ivery meet with Ron Mason; on September 20, 2010 Chuck Long impliedly threatened Jerome Ivery with retaliation if he did not meet with Ron Mason; and on September 20, 2010 Ron Mason coercively interrogated an employee about his current views of particular unfair labor practice charges compared to his views at the time he filed the charges. (Decision p. 3.)

II. FACTS

A. Wage Freeze/Evaluations

General Die did initiate a wage freeze in 2009. (Tr. p. 2078.) Jim Mathias¹ made the decision in February 2009. (Id.) His decision was based upon the economy being in the middle of a collapse. (Id.) Specifically, in or about late February/early March 2009 General Die customers began to pull orders, cancel order deliveries and shift orders out anywhere from three

¹ Jim Mathias is the CEO of General Die. (Tr. p. 2077.) He has held this position for the past eleven (11) years. (Id.)

(3) to six (6) months. (Tr. p. 2079.) In fact, within a two week period the Company had lost approximately forty percent of all its ongoing customer orders for delivery. (Id.) Essentially, the decision not to give raises at this particular point in time was based upon both business sense and common sense. (Id.)

This was not the first time General Die has implemented a wage freeze. (Id.) For instance, during the 1995 layoff, the employees who were not laid off did not receive wage increases. (Tr. p. 2080.) This lasted for a period of six (6) to seven (7) months. Additionally, due to the 2000 presidential election and the uncertainty as to who was going to be President, General Die experienced a decrease in business. (Id.) During this time period customers did not order; customers cut their orders; and customers deferred delivery of their orders. Because of these events, no increases were given for a period of three (3) to four (4) months. (Id.) Later, in July of 2007 the Company suffered from a catastrophic flood at its Peninsula plant and subsequently was shut down for approximately one (1) week. (Tr. pp. 2080-2081.) Consequently after that calamity, no increases were given for approximately seven (7) months. (Tr. p. 2018.)

B. March 5 and April 10 2009 One Day Shutdowns

General Die implemented two (2) one-day shutdowns at its Twinsburg facility in or about March and April 2009. (Tr. p. 2083.) These shutdowns were due to a multitude of issues. (Id.) For instance, during this time frame the Company had lost nearly forty percent of its ongoing customer orders. Moreover, General Die was in the midst of losing a half dozen die casting machining jobs from a customer who had unfortunately decided to take the business to a competitor. (Id.) The Company had literally run out of work at its Twinsburg facility. (Id.)

Accordingly, General Die declared one-day shutdowns and offered the employees the option of taking a paid vacation day or a day off without pay. (Id.)

General Die has implemented shutdowns ever since Jim Mathias has been at the Company. (Tr. p. 2085.) Usually the shutdowns occur in the first week of July for an entire week, the end of July and the beginning of August. (Tr. p. 2084.) If General Die customers have not placed any orders or if the Company simply does not have anything to make or ship, a shutdown day will be declared. (Tr. p. 2085.) For instance, Jim Mathias recalled at least two (2) Good Friday's that were not listed on the Company's Holiday schedule but nonetheless were declared shutdown days due to lack of orders. (Tr. p. 2084.) Additionally, towards the end of December, the Company will have partial shutdowns and/or add days in order to extend the Christmas and/or New Year's Holiday. (Id.) Moreover, General Die's Holiday schedules clearly state that shutdowns will be determined at a later date. (Id. & Respondent's ["R"] Ex. 80.)

All the shutdowns referenced above were not related to annual maintenance shutdowns. (Tr. p. 2085.) The Company attempts to shut down the Peninsula plant once per year for a week in order to clean the sand filtration system as this plant does not have public water. (Id.) However, the annual shutdown doesn't always occur at a scheduled time. (Id.)

C. **March 9, 2009 Layoff and Subsequent Implementation September 10, 2009 of Recall Proposal**

1. Background

The specific bargaining sessions immediately preceding the layoff and recall cannot be examined apart from the other negotiation sessions. The bargaining sessions must be scrutinized in their totality. If the parties are going to engage in meaningful bargaining, each side must be willing to enter into negotiations with the intent to bargain in good faith in order to reach an agreement. The evidence establishes a pattern of conduct by the Union that indicates otherwise.

The Company's lead negotiator was subjected to the following verbal abuse and cursing throughout the course of negotiations: a "rat," a "fat pig," a "piece of shit," a "little bitch," a "union buster," a "piece of bitch shit," a "fat piece of shit," a "fat ass" a "dipshit," a "shithead," a "bitch ass" a "thin skinned sissy," "flapping your fat lips with a bunch of bullshit," a "lying piece of shit," "his fat ass mouth is shit," a "dickhead," an "asshole," a "fat bitch," a "fuck you," a "shut the fuck up you fat pig," a "fucking pig," a "racist pig," a "fat fucking pig," a "racist mother fucker piece of shit," a "we're done fucking with you," and a "union busting consultant." (Jt. Ex. 6, R. Ex. 178, pp. 00527-00529, R. Ex. 180, pp. 00034 & 00036-00037, R. Ex. 182, p. 401, R. Ex. 185, p. 418, R. Ex. 188, p. 427, R. Ex. 189, pp. 432-433, R. Ex. 192, pp. 448-450, & R. Ex. 193, pp.452, 454 & 456.) In an attempt to curb this behavior the Company was forced to take breaks and/or end the meetings early. For example, the Company took breaks and/or terminated the meetings early, on the following dates: April 15, 2009, May 21, 2009, June 3, 2009, June 10, 2009, June 11, 2009, June 18, 2009, July 13, 2009, July 23, 2009 and August 5, 2009. (R. Ex. 178, 180, 182, 185, 188-189 and 192-193.)

Further, in order to negotiate in good faith, the parties must agree to meet at reasonable times and places. Again, the Company was faced in these negotiations with conduct by the union that was intentionally designed to thwart the negotiation process. From the outset of negotiations through September 2009, the union refused to meet at reasonable times to bargain for a contract. Specific examples are as follows: On October 13, 2008 the Union would only agree to meet for one hour and since that date the Union has generally only agreed to meet for one and one-half hours per bargaining session, (R. Ex. 158); in late April 2009 the Union unilaterally suspended negotiations and subsequently canceled bargaining sessions previously scheduled for April 28 and 29, 2009. The union did so without notifying the Company. The

Company learned of the union's unlawful action through the Federal Mediator (R. Ex. 9-12); on June 12, 2009 the union canceled negotiations thirty (30) minutes prior to the 3:30 p.m. start time. The union never properly notified the Company's lead negotiator nor any of its committee members despite its knowledge that Company's lead negotiator travels from out of town. The Company's bargaining committee sat and waited for the union's arrival (R. Ex. 25 & 186); on August 18, 2009, the Union unilaterally suspended negotiations for a second time. Again, the union did so only thirty (30) minutes prior to the 3:30 p.m. start time. The union never properly notified the Company's lead negotiator nor any of its committee members despite its knowledge that Company's lead negotiator travels from out of town. Essentially, the Union threatened to unilaterally indefinitely suspend negotiations without any claim that the parties had obtained a lawfully declared impasse (R. Ex. 43-46); on August 21, 2009 the union informed the Company that there would be no further negotiations without the presence a Federal Mediator (R. Ex. 47); on August 23, 2009 the Union officially canceled previously scheduled negotiations set for August 25 and 27, 2009 when it proposed bargaining sessions for September 2 and 8, 2009 based solely on the Federal Mediator's presence. Simply put, the union was unlawfully refusing to bargain without the presence of Federal Mediator, (G.C. Ex. 138); and on September 8, 2010 the union's bargaining committee snuck out of negotiations early advising the Company that it had no authority to bargain without the presence of the union's President, Bornstein. (G.C. Ex. 114.) The union engaged in said behavior even after having been notified on September 4, 2009 by the Company that work orders were increasing and that the union's unlawful cancellation of the August 25 and 27, 2009 meetings had only heightened the sense of urgency. (R. Ex. 51, G.C. Ex. 136, G.C. Ex. 82.)

These are just some examples of the unreasonable bargaining tactics the Company was faced with when attempting to bargain over a layoff necessitated by the economic conditions that existed in March of 2009 and a subsequent recall procedure some six (6) months later. Accordingly, on January 29, 2010 the Regional Director for Region 8 found that the union violated Section 8(b)(3) of the Act by failing to meet at reasonable times and places and by conditioning bargaining on the presence of a federal mediator. Specifically, the Regional Director found that the union engaged in the following behavior in violation of the Act:

- Throughout negotiations, starting on October 13, 2008 and continuing until the most recently set dates of September 2 and 8, 2009, the Union has refused to meet at reasonable times to bargain for a contract. On October 13, 2008, the Union would only agree to meet for one hour and since that date the Union has generally only agreed to meet for one and one-half hours per bargaining date;
- Without contacting the Company, the Union unilaterally suspended negotiations and canceled negotiation dates in April 2009;
- On June 12, 2009, knowing that the lead negotiator travels from out of town, waited and then the Union canceled negotiations 30 minutes before bargaining was to start and never properly notified the lead negotiator nor any of the Company's committee members and allowed the Company to show up to negotiations and wait on the Union to arrive at negotiations. The Union was able to notify everyone on its committee because no Union committee person ever showed for these negotiations;
- On August 18, 2009, the Union unilaterally canceled negotiations with only 30 minutes notice knowing that the Company's lead counsel was traveling to negotiations and his arrival would be just about the time the Union canceled the meeting;
- On August 21, 2009, the Union canceled previously scheduled negotiations set for August 25 and 27, 2009, over the objection of the Company;
- On August 21, 2009, the Union unlawfully threatened to attend no future negotiations unless a Federal Mediator was present;
- On August 23, 2009, the Union carried out its threat of August 21, 2009, by officially canceling negotiations scheduled without a Federal Mediator on August

25 and 27, 2009, and offering only two dates on September 2 and 8, 2009, when Federal Mediators will be present; and

- Since September 8, 2009, to date, the parties have yet to meet again in bargaining and have had no real contact with each other except through the Federal Mediator who is still trying to meet with the parties.

(Jt. Ex. 5-6 & 8-9.) The union ultimately settled the case. (Jt. Ex. 10-13.)

2. Layoff

In February of 2009, the economy was in the middle of a collapse. (Tr. p. 2078.) The Company did not start to feel the effects until mid to late February, early March, 2009. (Tr. p. 2078.) It was at this time that customers began to pull orders, cancel orders, and/or shift orders out anywhere from three (3) to six (6) months. (Tr. pp. 1951 & 2079.) The drop in orders was across the board. (Tr. pp. 1950-1951.) One customer in particular dropped their order from 60,000 parts a month to 5,000 parts month. (Tr. p. 1950.) Accordingly, on March 5, 2009, just after 11:00 a.m., the Company sent a letter to the union's legal counsel (following previous instructions by union President Bornstein to send all correspondence to its legal counsel), notifying them economic conditions necessitated a reduction in force and outlining a procedure that the Company used in 1995 when laying off employees at both Twinsburg and Peninsula. (Tr. pp. 1950-1951 & G.C. Ex. 85.) The parties were scheduled to meet later that day for a bargaining session.

During the March 5, 2009 meeting, the Company submitted a copy of the March 5, 2009 letter to Bornstein because the union's counsel did not send a copy to him. (Tr. pp. 1236-1238 & 1950.) The Company also submitted a copy of the attachment to the letter. (G.C. Ex. 81.) In doing so, Mason explained to the Union that there had been a sudden downturn in orders (Tr. 1235 & 1950.) Mason also reiterated that the Company already had an established procedure for layoffs which was noted in the Handbook and used during the 1995 layoff. (Tr. pp. 1951-1952,

R. Ex. 174, p. 00489 & G.C. 2, p. 17.) During the meeting Bornstein admitted the following with respect to the economy:

You don't have to tell me how bad the economy is. We all know.

I certainly understand a layoff with the economy. I understand. A layoff is a layoff.

Everyone that I have talked to says it will be 12 to 18 months before the economy begins to turn around. You and I both know there is not a snowball's chance in hell that these people will be back in 60 days.

(R. Ex. 174, pp. 00490-00491 & 00493.)

In response to the Company's proposal, the Union proposed at first that the layoff be based upon company-wide seniority as set forth in its current proposal, Article 19. (R. Ex. 174, pp. 00489-00490.) The Company rejected this proposal because it had a past practice of using departmental seniority and it did not want to have to train individuals who would be transferring into different departments. (Tr. p. 1952 & R. Ex. 174, pp. 00491 & 00494-00495.) Next, the Union proposed to agree to departmental seniority, but only if certain departments were combined so as to increase the size of the departments and the Company accepted its five (5) year recall rights provision. (Tr. p. 1953 & R. Ex. pp. 00495-00496.) Consequently, the Company's bargaining committee caucused with "higher ups." (Tr. p. 1953 & R. Ex. pp. 00496-00497.) The union's proposal was rejected because the Company had no interest in combining departments and the union's proposal still failed to address the training issue that would occur once employees began bumping into different departments that required different skill sets. (Id.) At this point in time, the Union's position reverted back to company-wide seniority and its position never changed throughout the time of the subsequent rounds of layoffs the Company

was forced to endure in March, April and May, 2009. (Tr. pp. 1952-1953.) The parties stayed well after the normal stopping time of 5:00 p.m. in an effort to reach an agreement on a modified layoff procedure. (Tr. pp. 1954-1955.) Unfortunately, no such agreement was reached. (Tr. pp. 1953.) The Company never declared impasse. (Tr. p. 1953.) Rather, it simply used the procedure it already had in place. (Id.)

Soon after the Twinsburg layoffs, the Company implemented a layoff at the Peninsula plant. Additionally, to a second round of layoffs at each plant approximately one (1) month later in late April and early May. (Tr. p. 1960.) The Company used the same layoff procedure for all of the layoffs. (Id.) Rather than bargain over the subsequent layoffs, the union unilaterally cancelled meetings and submitted information requests while asserting that the Company could not implement any more layoffs without its consent. (Tr. pp. 1960-1962, G.C. Ex. 116, R. Ex. 9-12, G.C. Ex. 57, R. Ex. 14, R. Ex. 175-179 & G.C. Ex. 99-100.)

3. Recall

The Company's Handbook and past practice dictates that laid off employees lose their recall rights after 60 days. (G.C. Ex. 85 & 2, p. 17.) Accordingly, on June 11, 2009 the Company submitted a proposal changing the recall procedure. (Tr. p. 1962 & R. Ex. G.C. 104.) The union did not respond to the Company's proposal during this meeting. (R. Ex. 185.) The parties were scheduled to meet the very next day, June 12, 2009 but the union cancelled just prior to the meeting's 3:30 p.m. start date. (R. Ex. 25-26 & 186.)

By July of 2009, the Company's vendors were increasing their orders and the Company needed to recall workers. (Tr. p. 1969-1970.) Even the employees recognized the fact that work was "building up" and, as such the Company was going to have to recall workers in the near future. (Tr. p. 1503.) Nevertheless, the parties still had not reached an agreement on a recall

procedure. (Id.) On July 23, 2009 the Company resubmitted its June 11, proposal. (G.C. 111.) Again, the union did not respond to this proposal. (R. Ex. 192.)

The next bargaining session was August 5, 2009. (Tr. p. 1970) During this meeting Mason inquired whether the union had a response to the Company's proposed recall procedure. (Id. & R. Ex.193, p. 452-453.) Ultimately the union never responded to the Company's proposal on a recall procure. Accordingly, at the end of the meeting Mason declared impasse with respect to the recall procedure. (Tr. p. 1971 & R. Ex. 193, p. 456.) Notwithstanding, this did not resolve the issue with respect to employees losing their recall rights after 60 days as noted in the Handbook. (Tr. p. 1971.) The parties were scheduled to meet three more times during the month of August; the 18th, the 25th and the 27th. (R. Ex. 192, p. 450.) However, rather than negotiate the length of recall rights for those employees who remained on layoff, the union unilaterally suspended negotiations for the remainder of the month of August giving notice of same to Mason by letter on August 18, 2009. (Tr. p. 1972 & R. Ex. 43.)² The Company responded to the union's letter on August 19, 2009. (R. 44.) Near the end of the letter the Company stressed the importance of coming to an agreement with respect the length of recall rights due to the fact that employees who were still on layoff had already lost their recall rights as noted in the Handbook. (Id.) Specifically, the relevant portion of the letter stated as follows:

In negotiations we were to have had yesterday, we had hoped to try and reach an agreement with you on the time period of recall from layoff before loss of seniority. As of right now, everyone who is on layoff has under the Company's policy lost their recall rights because they have been laid off more than 60 days. Your last proposal was a one year recall rights. We had hoped to yesterday reach some sort of middle ground because we are expecting to need workers in September. We had hoped to recall some of the laid off workers under our new recall procedure. Without your presence to negotiate this time period, you have abandoned those people on layoff that could otherwise be recalled.

² These cancellations were ultimately part of the settlement the Union reached with the NLRB in response to charges filed by the Company. (Jt. Ex. 5-6 & 8-13.)

Therefore, we are once again declaring an emergency and requesting that you advise us in writing that you will in fact attend negotiations currently scheduled on August 25 and 27, 2009 in order to work out the time period for those people on layoff before their seniority rights are cut off. To that end, we propose to extend the recall rights of all employees on layoff from the current 60 days to 5 months from date of layoff under our new recall procedure.

(Id.)

Nonetheless, the union refused to meet and bargain unless a federal mediator was present. (R. Ex. 45-47 & G.C. 138.) The union's intention was to avoid a meeting face to face in an effort to prevent the Company from ever declaring impasse. (Tr. pp. 1128-1129, 1974-1975, & G.C. Ex. 27.) The parties did have a negotiation session on September 2, 2009, but they did not meet face to face as the Federal Mediator met with both sides separately. (Tr. p. 1977-1978 & R. 194.) As of September 2, 2009, the union was proposing recall rights for a period of up to one year. (G.C. Ex. 112.) The Company increased its August 19, 2009 proposal of five (5) months to six (6) months. (G.C. 113). The Federal Mediator notified the Company that the union would respond at the next meeting. (R. 194.)

The Company sent a letter to the union on September 4, 2010 stressing the importance to reach an agreement on the recall rights of the laid off employees. (Tr. pp. 1978-1980 & R. Ex. 51.) The Company also expressed its displeasure with union's use of the mediator to "shuttle" back and forth between the parties. (Id.) The letter states as follows:

Dear Mr. Bornstein:

I am writing this letter to you to explain the necessity of reaching an agreement at our next meeting with respect to the recall of employees who are laid off.

Because you unlawfully canceled negotiations on August 25 and 27, 2009, you have pushed back further than we had hoped the time period in order to reach an agreement for the return of workers to be recalled from layoff. This delay in negotiations caused by the Union is now reaching the breaking point and I want to explain why.

The simple fact is that the Peninsula facility has fallen behind in production as we receive new orders. We have worked overtime on weekends in order to try to keep up with the increase in orders, but we cannot. The plain and simple fact is we need to either hire new workers or recall some workers who were laid off.

I realize the game you are playing. Just like when we had the layoff and you would not meet or agree to a layoff procedure, you have once again gone back to the same tactic on the recall. However, there is a big difference between the two and I want to make sure you understand that difference.

On a layoff, we have more people than work. Failing to lay off people when we have no work costs the Company money and I am sure it was your intent to cost the Company as much money as possible as you tried to avoid an agreement on layoff.

However, on recall, the stakes are much higher. Now we have customers who are ordering and expecting their parts to be quality made and delivered in a timely manner. The failure of the Company to meet the expectations of these customers could result not only in lost sales, but in lost customers who could at any time take their business elsewhere if they believe that the Company cannot fulfill its orders on time. As a direct result, a loss of customers could not only mean a need for fewer people, but depending upon the amount of work lost, could result in future substantial layoffs from the current workforce. Thus, by your unlawful delays you place in jeopardy not only those who we want to recall, but the current workforce as well.

Therefore, if you want us to recall workers as opposed to hiring new workers, then it is very important that we try to reach an agreement at our next meeting on September 8, 2009. In this respect, I must note that the stall and delay tactics you used at our meeting on September 2, 2009, makes it clear that you are just using the same tactics as before. The simple fact that you used the Federal Mediator to run back and forth for the first 45 minutes of a meeting that only lasted for an hour and one-half, asking questions about what happened in the 1995 layoff 14 years before, clearly shows you have no desire to reach an agreement on a recall in 2009. In fact, I was not even presented with your already prepared before the meeting written proposal until 4:15 PM and was then asked to respond in writing, which we did before 5:00 PM.

I will not agree in the next meeting to such "shuttle" activity as I declared an emergency back on August 19, 2009, so we could get the issue of seniority on who is eligible for recall resolved. We are prepared to meet earlier than 3:30 PM on September 8, 2009, if that will in any way help us reach an agreement by 5:00 PM on this date. Given your actions so far, it would appear to us that you simply do not want to reach an agreement on the issue, and just want to file another unfair labor practice charge.

At this point in time it would appear we are only two issues apart for an agreement to bring people back to work. One issue is under the recall procedure where we modified our unilaterally implemented procedure in response to your new proposal on September 2, 2009. That issue now before us is do we follow the layoff procedure and recall by department seniority or, as the Union proposed, by plant wide seniority. The second issue is the length of time a person can be on layoff before he loses his seniority rights. The current handbook is 60 days. Under the current handbook, everyone laid off to date have lost their rights to be recalled. In response to your proposal for one year, we initially raised the time period in my letter to you on August 19, 2009, to 5 months. Your proposal on September 2, 2009, did not move on that issue. I again countered on September 2, 2009, with a 6 month proposal which is three times the current time period set forth in the handbook. I am hopeful that you will realize the importance of an agreement on this issue and would like an agreement to our proposal on September 8, 2009.

(R. 51.) The union asserts that Bornstein was out of town and unable to receive any correspondence for a significant period of time and, as such, did not see this September 4, 2010 letter until Friday, September 11, 2009. (Tr. 1406-1407). However, no such notice was ever given to the Company. (Tr. pp. 1406 & 1992-1993.) Nor did Bornstein instruct anyone in his office to forward him facsimiles that may be sent to him in his absence. (Tr. pp. 1406-1407.)

Halfway thru the September 8, 2009 meeting the union responded to the Company's proposal. (Tr. p. 1478 & G.C. Ex 125.) However, the proposal was not time specific as to the length of the recall rights. (G.C. Ex. 125 & R. Ex. 195, p. 458.) The union was proposing an interim rolling agreement to be renegotiated each time it expired. (R. Ex. 195 p. 460.) In response, the Company verbally proposed a last and final offer extending the recall rights from six (6) to seven (7) months. (Id & Tr. pp. 1984-1986.) Instead of responding to the Company's proposal, the union exited the bargaining session unannounced and had the Federal Mediator hand deliver a note which indicated that the interim agreement would be discussed at the next session which would allow Bornstein to be in attendance. (Tr. p. 1987, G.C. Ex. 114 & R. Ex. 195, p. 460.) A letter was sent to the Union dated September 10, 2009 and attached to it was a

verbal proposal reduced to writing and sent to the Union as an attachment to the letter (Tr. pp. 1980-1990; G.C. 82.)

Kepler testified the union was trying to get the employer to nine (9) months with respect to the recall rights. (Tr. p. 1479). Yet on September 8, 2009 Kepler sent a letter to Jim Mathias and Tom Lennon stating the following:

Your hired union-buster's last offer on September 8, was for seven months recall rights in an interim basis. The Teamsters will need to see the exact dates of when employees were let go, **before we can give a counter offer, if one is needed.** (Emphasis added.)

(G.C. Ex. 123.) Despite the fact that Kepler snuck out of the meeting early, he further added:

If your hired union-buster needs to exceed his 'set-in-stone' time frame of ending negotiations at 5:00 p.m., we are open to that discussion, in order to help you return your trained and able bodied laid off workforce.

Id. The union had already been provided with this information numerous times and the dates of layoffs were discussed across the bargaining table. (Tr. pp. 1154-1156, G.C. Ex. 20-23, 52-55, 57, R. Ex. 23-24, R. 174-176) Moreover, the personnel file of each laid off employee was requested by and submitted to the union and said files contained notice of layoff letters. (R. Ex. 29.) For examples of the notice of recall letters see, G.C. Ex. 30, 68-73 & 129.

Consequently, the Mason sent a letter to Bornstein on September 10, 2009 declaring impasse. (G.C. Ex. 82.) The letter states as follows:

Dear Mr. Bornstein:

I must admit to my constant amazement at your Union's total lack of respect for the negotiation process.

The simple fact is that we have been trying for some time to negotiate with your Union both a recall procedure as well as a determination as to the rights of those on layoff to be recalled. On August 5, 2009, after attempts to negotiate a recall procedure failed, the Company unilaterally implemented a recall procedure. In response, you unlawfully withdrew from the negotiation process.

Given as a fact that the current Company policy set forth in the handbook has a 60 day time period to be recalled from layoff, and currently, ALL people on layoff no longer have any recall rights, I sought to bring you back to the table by declaring an emergency and requesting negotiations over a specific time period for seniority rights so that some of those on lay off could be recalled to work. I proposed that the recall rights be extended to 5 months so that those most senior on lay off could be recalled.

Instead of keeping the previously scheduled negotiations, you cancelled those dates and added a new unfair labor practice by requiring as a condition to further negotiations, that a Federal Mediator must be present. You then offered us two dates on September 2 and 8, 2009, to get this done. Although we objected to these unlawful acts, we did agree to meet for those dates in the hopes of getting an agreement on the seniority cut off time period so that we may recall workers from lay off.

The September 2, 2009 meeting did not result in any agreement. On September 4, 2009, I again wrote you and advised you that the time period for these negotiations had drug on for so long that the delay in reaching an agreement was placing the Company at a breaking point where we needed to get an agreement at the next meeting on September 8, 2009.

In response, you once again failed to show at this meeting on September 8, 2009, and instead, sent people to attend who had no real authority to negotiate an agreement with the Company. At this meeting, I submitted to your committee a verbal last and final offer on the seniority cut off along with changes we agreed to make to the recall procedure on September 2, 2009. I advised your Committee that I wanted a response from them.

Your Committee requested a caucus with the Federal Mediator. Your Committee then left the meeting room before 5:00 PM sneaking out without telling us they were leaving. Your Committee submitted to us via the Federal Mediator a piece of paper that in essence stated they had no authority to agree to our proposal.

Further, in some lame attempt to imply that the Union needed more information to evaluate the recall issue, your Union wrote AFTER this meeting was over and asked for information regarding the names of the employees laid off and the dates of hire and layoff. Incredible [sic], you already have asked for and we have already provided you with this same information.

As a result of this inability on our part to reach an agreement, I am declaring another impasse and we will unilaterally implement out last and final verbal offer on both the recall language we changed on September 2, 2009, as well as the seniority rights for recall. I have attached for you a copy of the changes we gave your Committee verbally and I have also highlighted that part of the document

that we have implemented. You may not care, but I am sure that anyone recalled will be happy to come back to work.

We are prepared to meet and bargain with the Union for a contract with or without the Federal Mediator. Please advise me if you will meet for any further negotiations.

(Id.)

D. Work Rule On Defacement/Destruction Of Company Property

General Die removed *all* stickers from the lockers sometime in fall 2008, whether it was NASCAR stickers, Teamster stickers or any type of stickers that may have been on the lockers. (Tr. pp. 1796-1797.) The Company removed the stickers from the lockers because there were not supposed to be any stickers on company property. (Tr. p. 1799.) When Brian Lennon³ removed the stickers he held a meeting with each shift and instructed the employees that placing stickers on company property was considered to be destruction or damage to company property. (Tr. pp. 1799-1800.) Several employees corroborated Brian Lennon's testimony.

For instance, Dennis Lemon, testified Brian Lennon removed all stickers from the employees' lockers sometime in 2008. (Tr. pp. 1552-1553.) He indicated that no more stickers of any kind were to be posted on company property and those who did could face disciplinary action. (Tr. pp. 1553-1554.) Ed Dickerhoof, who was hired on November 11, 2008 testified shortly after his hire date all the stickers were removed from the lockers. (Tr. p. 1574.) Furthermore, Brian Lennon stated employees could be disciplined if they were to put stickers on Company property. (Tr. p. 1575.) Daniel Pietrocini testified that the Company removed all personal stickers, whether it be NASCAR or union stickers, from the employees' lockers sometime in 2008. (Tr. pp. 1603-1604.) During this time Brian Lennon held a meeting with

³ Brian Lennon is the Plant Manager of the Peninsula plant. (Tr. p. 1757.) He has held this position for the past nine (9) years. (Id.) He oversees the entire operation of the plant, including the quality, maintenance and tool room personnel, in addition to the scheduling of production. (Id.)

respect to putting stickers on company property. (Tr. p. 1604.) He stated that stickers were considered defacement of company property and, as such, employees could be disciplined for it. (Id.) This meeting was held during the second shift. (Tr. p. 1608.) However, the company did a meeting for each shift. (Id.) Robert Collins testified that stickers were removed from the lockers sometime in November of 2008. (Tr. pp. 1650-1651.) Once the stickers were removed, he understood it to mean that no more stickers were to be placed on Company property. (Tr. p. 1651.) Moreover, Management conducted a meeting with the first and second shift employees with respect to the stickers. (Tr. pp.1651 & 1654-1655.)

Likewise, Dave Bradley testified that there were stickers (bumper stickers, sports stickers, NASCAR stickers) on the lockers prior to the March 2008 union election. (Tr. p. 1661.) All of these stickers were removed in 2008 sometime after the union election. (Id.) Around this same time period, Brian Lennon held a meeting in the cafeteria and indicated that stickers were defacement of company property. (Tr. pp. 1662-1663.) He was simply reiterating what was already in the Handbook. (Id.) He also said that company disciplinary actions would be followed if anyone were caught placing stickers on company property. (Tr. p. 1663.) Lastly, Jeffrey Miktuk testified that there were stickers (NASCAR stickers and union stickers) on the lockers in the locker room. (Id.) All of these stickers were removed just before the presidential election. (Tr. p. 1670.) Around this same time period, Brian Lennon held a meeting with both the first and second shift. (Id.) The meeting would have been before second shift and after first shift. (Id.) He indicated that the stickers were defacing company property and that this has always been the rule. (Id.) Brian Lennon also stated disciplinary action would ensue if anyone were caught placing stickers on company property. (Tr. p. 1671.)

Nevertheless, Teamster stickers were still being placed on company property throughout the plant, after the lockers had been cleaned of any and all stickers. (Tr. pp. 1794, 1551-1556, 1576, 1604-1605, 1651, 1663-1664 & 1671.) There were literally hundreds of these stickers throughout the plant. (Tr. p. 1796.) General Die was removing Teamster stickers on a daily basis, most of them being removed by Brian Lennon. (Tr. p. 1814.) Consequently, Brian Lennon posted a memorandum dated April 3, 2009 explaining to the employees yet again that putting stickers on company property is destruction and damage of company property and, subsequently, could result in discipline. (Tr. pp. 1794-1795 & G.C. Ex. 16.) The April 3, 2009 memorandum was not a new policy; it was a reminder of existing company policy. (Tr. p. 1795 & G.C. Ex. 2, pp. 00020-00021.)

In posting the memorandum, Brian Lennon wanted to make it clear to everyone putting stickers up that the practice needed to stop. (Tr. p. 1794.) Essentially he was trying to warn whoever was doing this to please stop because it was against company policy and, if you keep doing it, you will be disciplined. (Tr. pp. 1794-1795.) Brian Lennon hoped that whoever was doing this would finally get the point and stop. (Tr. p. 1795.) Employees notified Brian Lennon that Maze was responsible for putting up the Teamster stickers throughout the plant. (Tr. pp. 1795-1796.)

E. Discharge of Kevin Maze

When Doug Hicks⁴ was hired at General Die, hourly employees and supervisors notified him of rumors circulating around the plant that Maze was posting Local 24 stickers all over Company equipment and property. (Tr. pp. 2050-2051.) Notwithstanding, Maze was treated no differently than any other employee. (Tr. p. 2051.)

⁴ Doug Hicks is the Human Resources Manager at GDC. (Tr. p. 2130.) He oversees all personnel functions. (Id.) He has been with General Die since June 14, 2009. (Id.)

The Company uses a progressive disciplinary policy. (Tr. p. 2153.) Maze was issued a written warning on August 19, 2008 for not wearing a face shield or head protection. (Tr. pp. 2152-2153 & R. Ex. 148.) On May 15, 2009 Maze was issued a verbal written warning for attendance. (Tr. p. 2153 & G.C. Ex. 39.) On June 3, 2009 Maze was issued a written warning for a safety violation. (Tr. p. 2154 & R. Ex. 148.) On July 16, 2009 Maze was issued a final written warning with a three (3) day suspension due to a safety violation. (Tr. p. 2157 & R. Ex. 149.) At this point, Maze had reached the end of the line with respect to the Company's progressive disciplinary policy. (Tr. pp. 2157-2158.) The next step after a suspension or probation is termination. (Tr. p. 2158.) On September 4, 2009 Maze was disciplined due to a violation of General Die's Workplace Conduct and Discipline Policy and subsequently terminated. (Tr. pp. 2158-2159 & R. Ex. 150.) Specifically, Maze posted Teamster stickers on the coffee machine and several other pieces of company equipment. (R. Ex. 150.) Maze also received a Notice of Termination dated September 4, 2009. (Tr. p. 2159 & G.C. 36.)

Even if Maze had not already been on suspension with termination being the next step, he would have been discharged for putting stickers on Company property. (Tr. p. 2159.) GDC's policy against defacement of Company property calls for termination. (Id.) Moreover, Maze would have been fired if he was not on the union's bargaining committee and engaged in protected activity. (Id.)

F. June 3, 2009 Recall/Health Insurance

Jason Sallaz ("Sallaz"), Jason Black ("Black") and Sam Tomsello ("Tomsello") were recalled in the middle of June. (Tr. p. 2178.) In order to avoid a gap in insurance they were provided the option of paying for the full month of June rather than waiting till the next month.

(Id.) If they chose health insurance for the month their employee contribution rate would be deducted from their paycheck. (Id.)

General Die pays its insurance on a pre-funded basis. (Id.) Accordingly, if Sallaz, Tomsello and Black did not pay for the full month of June they would have experienced a gap in coverage and had to wait until the beginning of July to get back on the Company's plan. (Id.)

G. Temporary Employees

General Die has historically used temporary employees. (Tr. p. 1800.) The Company used temporary employees before the union and continued to use temporary employees after union was elected. (Id.) General Die did not use temporary employees during the layoff save for one exception, a temporary employee who was hired in late 2009 to work in the Quality Department at the Peninsula plant. (Tr. pp. 1800-1801 & 2050-2051.) Even then, this temporary employee was hired only after the Q/A person on layoff could not work the required shift and a determination had been made that no one else in the bargaining unit was qualified. (Tr. pp. 2050-2051 & 2181-2183.) General Die did not use temporary employees to perform trim cast work while employees were on layoff in August/September 2009. (Tr. pp.1802 & 1812.) Moreover, no trimmers were recalled in August/September 2009. (Tr. p. 1802.) In fact, the Company did not resume its past practice of using temporary workers until January of 2010, when the recall rights had expired. (Tr. pp. 1801 & 1813.) At that time, the Company hired three (3) die casters. (Tr. p. 1802.) The Company did consider rehiring former employees but there were no die casters who were still on lay off at that time.

H. Discharge of Willie Smith

Willie Smith ("Smith") threatened Dan Owens in October 2009. (Tr. pp. 1736-1737.) The first threat took place in the sanding department. (Id.) Dan Owens was on his way to the

restroom. (Tr. 1737.) Before entering the restroom he engaged in a conversation with Smith; just normal chitchat. (Id.) However, upon exiting the restroom Smith called Dan Owens over to him. (Tr. pp. 1737-1738.) Specifically, Dan Owens testified as follows:

A. On my way out of the restroom, is when he called me -- at me and said that he heard something he did not like. And I said, "What did you hear?" And he said, "I heard you were passing a Petition to Decertify the Union." And I told him, at that time, I did not know what he was talking about, but I did sign one.

Q. After you informed Mr. Smith that you had signed a Petition, did he say anything in response to you at that time?

A. Well, I had started to walk away. And then he said, "That's not healthy." And I stopped and I said -- I turned around and I said, "What?" And he said, "That's not healthy. Me and my union brothers will mess you up."

Q. And what, if anything, did you say in response to that?

A. I told him that he knows my stance, and why wouldn't I sign a Petition.

(Id.) This testimony is consistent with written statement Dan Owens memorialized on the very same day of the incident. (Tr. pp. 1739-1740 & R. Ex. 145.) Dan Owens had yet another conversation with Smith that day. (Tr. p. 1739.) After Dan Owens had reported the threat to Tom Lennon he approached Smith, telling him that someone had heard Smith threaten him and reported the incident to Tom Lennon. (Id.) Dan Owens acted in this manner because Smith had just threatened him and he didn't want Smith "coming after [him]" for reporting the incident to management. (Id.)

Smith again threatened Dan Owens the very next morning. (Tr. p. 1740.) The conversation took place at the supply cage. (Id.) Smith told Dan Owens that anything that is said between them is to stay between them and that Smith didn't have to remind him of the last person that he killed that did not heed this warning. (Id.) Dan Owens reported the incident to

Tom Lennon and prepared a written statement memorializing the incident. (Tr. pp.1740-1741 & R. Ex. 144.)

Consequently, Doug Hicks conducted an investigation. (Tr. p. 2163.) As part of his investigation, he interviewed Dan Owens, Smith and Jay Quarterman, per Willie Smith's request. (Id.) Smith alleged that Jay Quarterman was involved in the conversation. (Id.) He also reviewed video footage. The video footage confirmed that what Dan Owens and Jay Quarterman were saying was accurate and what Smith was saying was anything but. (Tr. p. 2164.) For instance, Dan Owens alleged that Smith approached him at the cage and made threats against him. (Id.) Accordingly, Doug Hicks asked Smith if he threatened Dan Owens at the cage and Smith denied that he was even at the cage. (Tr. p. 2165.) The video footage showed Smith was indeed at the cage as Dan Owens had previously alleged. (Id.) Likewise, Dan Owens alleged that Willie Smith flagged him down as he was walking through the sanding area. (Id.) Smith alleged Dan approached him and that Jay Quarterman was involved in that conversation. (Id.) Video footage confirmed that Smith did flag Dan Owens down. (Id.) The video footage also showed that Jay Quarterman was on his tow motor and, thus, not engaged in the conversation. (Id.) The video footage was not supporting what Smith was telling Doug Hicks. (Id.)

Based upon this investigation, Doug Hicks determined Smith threatened Dan Owens. (Tr. p. 2169.) The evidence did not support Smith's story. (Id.) Smith not only denied having threatened Dan Owens, he denied having even talked to Dan Owens at those times and locations. (Tr. p. 2171.) Per Smith's request, Doug Hicks interviewed Jay Quarterman and when he did, Jay Quarterman stated that he did not know anything and he did not hear anything. (Id.) Moreover, the video footage confirmed the times and places that Dan Owens had alleged these conversations took place. (Tr. p. 2172.) Conversely, the video footage discounted Smith's story.

(Tr. pp. 2172-2173.) Accordingly, Doug Hicks determined that Smith was not credible with respect to his denial and he was subsequently discharged. (Tr. pp. 2173-2174.)

The threats to do bodily harm to another employee at GDC are subject to immediate termination due to the dangerous work environment. (Tr. p. 2174.) The foundry contains open vats of 1300 degree aluminum alloy with several furnaces throughout the plant. (Id.) Accordingly, Smith would have been terminated regardless of his union activity. (Id.)

I. OSHA Meeting Attended By Emil Stewart

General Die does not pay its employees for union work performed on Company time. (Tr. p. 1776.) In the summer of 2009 the union filed a complaint with OSHA which precipitated a plant audit performed by OSHA. (Tr. p. 1770.) Brian Lennon participated in the audit along with Dan Owens and Mark Albright ("Albright"). (Id.) At the time of the hearing, Albright was the process technician on the first shift and he was also a union representative. (Id.) The Company did not pay Albright for time spent touring the plant with OSHA. (Id.) The Company had a follow up meeting with OSHA on or about November 10, 2009 in order to review their audit findings. (Tr. pp. 1772 & 1774). Brian Lennon asked Emil Stewart ("Stewart"), another of the union's designated representatives on the first shift, if he wanted to attend the meeting in Albright's absence. (Tr. p. 1773.) Stewart was not paid for time spent in the meeting nor did he ask beforehand whether he would be paid. (Tr. p. 1775.) Stewart is also on the union's bargaining committee and the Company does not pay Stewart for time spent on that committee. (Tr. p. 1776.)

J. Requests for Production

On April 22, 2009 the union requested the names of employees, managers, supervisors, or clerical workers who were laid off in order to determine whether GDC should have submitted

a WARN Notice. (Tr. p. 1998 & R. Ex. 9.) The Company agreed that this information was relevant for WARN purposes and, as such, on June 9, 2009 submitted the number of those employees laid off, but not the names. (Tr. pp. 1998-1999 & R. Ex. 24.) The Company believed this information was more than sufficient to establish whether a WARN notice was required. (Tr. p. 1999.) In response the union asserted that it needed the actual names in order to decipher whether the number submitted to them was in fact a “real number.” (Id. & G.C. 122.) The Company provided the actual names of said employees on August 24, 2009. (R. 50, p. 08540.)

K. Dan Owens Holds No Supervisory Authority

Dan Owens is the safety coordinator for General Die. (Tr. pp. 1726-1727.) He has held this position for the past 15 years. (Tr. p. 1727.) He is responsible for OSHA compliance issues, training and plant audits. (Id.) Although he is safety coordinator for both plants, he spends the majority of his time at the Peninsula plant. (Id.) Lastly, Dan Owens works the first shift. (Id.)

He does not have the authority and independent discretion to discipline employees. (Tr. p. 1731.) The only thing he does do (on an irregular basis) is to sometimes verbally notify an employee that they are not following the safety rules. (Tr. p. 101.) Even if he reports a safety violation to a supervisor, the discretion to administer disciplinary action against a particular employee remains with the supervisors and/or managers. (Tr. p. 106.)

Dan Owens does conduct training relating to OSHA required subjects such as personal protection equipment and lock out/tag out. (Tr. pp. 1731-1732.) He obtains the materials he uses for training from OSHA’s website. (Tr. p. 1732.) During any given training session, Dan Owens instructed the employees that they would be disciplined if they violated a specific safety rule. (Tr. p. 1733.) Nevertheless, Dan Owens did not instruct the employees that it would be him who would be administering the discipline for said violation of rules. (Id.)

The position that Dan Owens holds is specifically stated as part of the bargaining unit in the certification quoted in the Complaint. Further, there is no record of any NLRB case where the union sought a unit clarification to remove Owens from the bargaining unit. Finally, in all of the union proposals submitted to date during negotiations, the union has never proposed removing Dan Owens from the bargaining unit.

L. Dan Owens's Conversation with Chuck Smith

Employee Chuck Smith ("Smith") testified on direct examination that Chuck Long approached him in late April 2010 and told him that Jim Mathias would be more willing to negotiate raises with the employees if the union were not involved. (Tr. pp. 812& 814.) However, Smith later altered his story and claimed it was Dan Owens, not Chuck Long, who had made these statements to him.

Nonetheless, Dan Owens never told any employees that Jim Mathias would be willing to negotiate raises if the union was not around. (Tr. p. 1744.) Likewise, Chuck Long never informed employees that Jim Mathias would be more willing to negotiate with the employees if the union was no longer around. (Tr. p. 1913.)

M. Chuck Long's Conversation With Dave Smerk

Chuck Long did have a conversation with Dave Smerk ("Smerk") regarding plant closure. (Tr. p. 1909.) The conversation took place outside the tool room just before you go into the foundry. (Id.) As Chuck Long was walking through this area Smerk inquired as to what was going on with the union. (Tr. p. 1910.) Smerk then stated that he didn't know what the guys were thinking because if the union is successful into getting into General Die, Jim Mathias will just shut the place down. (Id.) Chuck Long responded that he did not know what was going to happen and that it is not his call. (Id.) Smerk then repeated his assertion that Jim Mathias was

going to shut the place down and no one will have any jobs. (Id.) Chuck Long again stated that he had no idea what was going to happen. During this conversation Smerk also asked Chuck Long what the surveyor stakes were for. (Tr. p. 1911.) Chuck Long indicated that he had no idea what they were for. (Id.)

N. Chuck Long's Alleged Conversation with Chuck Smith

Chuck Long did speak to employees regarding the April 15, 2010 and May 21, 2010 Negotiation Updates. Nevertheless, he never told employees that Jim Mathias was getting mad over the amount of money he was spending on his lawyer. (Tr. p. 1913.) He never told employees he feared their job was in danger. (Id.) Lastly, he never told employees that he feared Jim Mathias would shut down the plant. (Id.)

O. Negotiation Updates

Jim Mathias authored negotiation updates dated April 15, 2010 and May 21, 2010. (G.C. Ex. 14(b) & 15.) The updates were posted by the time clock and/or the "notice board," a glass case located near the supervisor's office. (Tr. pp. 688, 782, 785.)

P. September 17, 2010 Meeting with Jerome Ivery

In or about spring 2010, Ivery informed Brian Lennon that he no longer supported the union. (Tr. p. 1765.) On a near daily basis Ivery would tell Brian Lennon that he was tired of the union, he was tired of all the bickering and fighting and that the union was not accomplishing anything. (Tr. pp. 1765 & 1806.) Furthermore, Ivery told Brian Lennon that he felt bad about what he had done. (Tr. pp. 1765-1766 & 1806.) Ivery also stated that he could not get the money back that he cost the Company but that he was going to work hard from here on out. (Tr. p. 1766.) In response to these conversations Brian Lennon would tell Ivery that all he asks of any employee is that they come to work every day, do a good job and, if they do that, he is

happy. (Id.) These conversations took place throughout the foundry. (Id.) As it turns out, Ivery was having similar conversations with Chuck Long and Doug Hicks indicating that some of the statements he had made previously were not true and that he felt bad about it. (Tr. 1767 & 1806.)

In or about February/March 2010, Ivery informed Chuck Long that he no longer supported the union. (Tr. pp. 1901-1902.) For quite some time after that Ivery confided in Chuck Long and told him that he had regretted some of the things that had happened and felt bad about some of the things that had happened. (Tr. p. 1903.) He repeatedly told Chuck Long that some of the things he had said to the NLRB weren't true. (Id.)

In July and August 2010 Doug Hicks had four (4) or five (5) conversations with Ivery regarding his NLRB affidavits. (Tr. pp. 2133-2134.) One of the conversations took place in the entrance way between the cafeteria and the supply cage. (Tr. p. 2133.) One of the conversations took place in the Quality Assurance holding area. (Id.) The remaining conversations took place on the foundry floor when Ivery flagged him down. (Id.) Ivery told him that negotiations were a waste of time and that is why he wasn't going anymore. (Id.) During all of the conversations Ivery stated that his NLRB affidavits were false and inaccurate and that he realized he was not being mistreated and/or unfairly treated. (Tr. pp. 2134-2135.) Ivery had been having similar conversations with Chuck Long and Brian Lennon. (Tr. pp. 2135-2136.) Ivery told them he falsified his affidavits. (Tr. p. 2139.)

Accordingly, Brian Lennon, Chuck Long and Doug Hicks thought it would be wise if Ivery talked to the Company's attorney, Ron Mason. (Tr. pp. 1767, 1806 & 2140.) They decided to hold a meeting with Ivery in Doug Hick's office to inquire whether Ivery would speak with Mason. (Id.) The meeting was on September 17, 2010. (Tr. pp. 2135 & 2140.) Doug

Hicks recorded the meeting from beginning to end. (Tr. p. 2140.) He reviewed the transcript of the meeting and it accurately reflects what was said. (Tr. pp. 2140-2141.) The transcript of the meeting is as follows:

BL: Brian Lennon
CL: Chuck Long
DH: Doug Hicks
JI: Jerome Ivery

Jerome entering the room.

BL: Hey Jerome.

CL: Come on in.

Laughing

BL: Don't worry

Laughing.

JI: Can I at least get my steak first?

Laughter

DH: Yeah, we got you a to go box.

Laughter

JI: With who all is in here, man, I mean it didn't look too good.

DH: Hey, have a seat.

JI: I'm all right.

DH: No, have a seat. Come on have a seat. It's all good.

BL: No worries sir. You're not in trouble. We promise.

DH: I just want to talk to you.

Laughter

DH: Don't worry the cameras are off.

JJ: OK man

DH: So how is it going?

JJ: I'm stra-- I'm straight?

DH: Alright I'll tell you what we asked you in here for. And I'll be straight forward to you about it. I would like you to meet with Ron Mason. Um, he's got some questions he would like to ask you. And, um you can pick the day, if you want it and we will do it during the day – um, aah off site. We will pay you for the day as if you were here working. Um, and are you willing to do that?

JJ: Uhhhh, aaaaah

BL: Nobody will know about it.

DH: Right

BL: Just we'll play it off and just put you up on the calendar as a vacation day.

JJ: But what about that trial? I mean what if, what if it come up at that trial? I got a – just like I was I was telling (inaudible) I got that subpoena.

DH: Yeah. Um, that's when it would probably surface. Along with the others. But until then, I mean you won't be the first to have sat in front of Ron Mason. But nobody knows who all has done that. And we've kept that secret, unless they have told people.

JJ: Man, I don't even want to go talk to Susan. Maaaaan.

BL: I will tell you what. I know it is a tough position Jerome, but you know, you know you said a couple of times how you want this to be over with and so you – you're in a position where you can really help end this. And, I mean you see what's going on out there. We're getting busy, business is good. And we need to keep things positive and get the focus back on, on business and growing again. And you know, get you know all this you know bullshit that has been going on, you know uh, I, you've been doing an outstanding job uh you know. You know, you've been helping Chuck out doing a great job. We, we, uh, we know that you have been supporting the company and we appreciate that. And you know, we all, we all you know want to move on and get back to business. And uh and you know you're, you are definitely in a unique position to be able to, to be able to do some things to you know make that happen to move this along and to uh you know, get us, get us past this. So I know it's a, is a tough thing to do. Um, I'm sure that you are hesitant, but um, you know, if, if you mean what you say about you know wanting to get, wanting to move on, wanting this to be over you are definitely in a position to help, help do that so....

DH: If you agree to meet with us, uh, you know, you don't have to answer. If he asks you certain questions, you don't have to answer them if you choose not to. And at any time when you are meeting with us that you feel you are done, you just let us know and we will end it at that point.

JJ: Oh, Ok. I got a question. But, if uh, like I said really like I've been saying I'm really getting tired of all this shit you know what I'm saying. But um, you know say like if I do meet with Mason like I said, you said it's going to come out on the stand. But, you know isn't that going to kind of put me in a spot up on the stand or whatever, you know what I'm saying? You know...

DH: Well, you're subpoenaed so you or anybody sitting up on that stand it is going to be put on the spot. Because you are going to be sworn in, to tell the truth. Um, you know, regardless.

CL: Man, I don't if maybe what you're asking is, is there any legal problems or anything with you meeting with him or anything like that or are you just worried about people knowing that you met with him?

JJ: Well, well I don't care about the people. I'm just saying as far as you know like, you know like, that, you know like statements that I made earlier with, with, with you know, with Susan. Remember.....

CL: Mmmm hmmm.

JJ: ...that affidavit. That, you know. That kind of stuff. Like well, you said this but you know which, which, which, which side are. Before you said this, now you are saying this. I mean that's going to kind of like put me in kind of a little bit of trouble, isn't it?

BL: Well.

DH: I can't answer that. I can't answer that, because I don't know?

JJ: Because any thing I say. Like I said, I mean like I told Chuck. There are things that I did and said in the past....

DH: I know but since you have been subpoenaed. They are going to put you on the stand and ask you about those things. So you are still going to be in a position where, ok, you weren't so truthful about the stuff you know with Teamsters so are you going to stick with that story or are you going to tell the truth you know and discredit that story. You are still going to be put in that same position. Regardless.

CL: At some point in time.

DH: Yeah.

JJ: Right, ok, right. But what I am saying is what I said on, what I said in the affidavit and what they are going to ask me on the stand, or whatever. I mean. You know cause like I said, some of the stuff like I said, honestly, I mean you know, it wasn't true. You know what I am saying. Like I said I was kind of – that is going to kind of like put me into a spot far as perjury or something, isn't it?

DH: I can't answer that. I can't answer that. I mean when, when, when you know when you take an affidavit you know you are sworn that the statements are true and accurate to the best of your ability or recollection at that time. You know. I mean I, I don't know. I don't know what Ron can do for you on that. You know. I, I don't. I can find out - I can find out his thoughts on that. But I think in the end it is going to come out anyways when you are up on, on the stand. Regardless.

JJ: OK. Look, can, can I think about it?

DH: Yep. Absolutely.

JJ: Can I think about it?

CL: Yeah.

DH: Absolutely.

CL: And I think one big important thing to remember I think with the whole thing is what I said are not going to be forced to answer anything. You know what I mean. As far as if you do meet with him and he has a question if it is something that you want to write it down or think about it or something and answer later or something like that or whatever, you know, that kind of thing. I mean, obviously you are not obligated to do any, do anything. I mean it's not that your, you know, this is, this is all voluntarily from your end. You know what I am saying. So, um, one thing you know if he has a question that you're just not comfortable with answering then, like Doug said, you know, you just say hey, you know I don't really know if I want to get into that, and you know, whatever, think about it or whatever until a later date or something. You know you can always do that, so...

JJ: What...

CL: Go ahead.

JJ: When did he uh, when did he want to meet?

DH: All based on your schedule. You tell me when and we will make the arrangements, uh as soon as possible is, is what he would like to do. You know,

we can get private facilities at the airport. We can go somewhere to a restaurant. You know, we can go to Medina if that makes you feel better. Where ever...

JJ: I, I ain't hanging out in no Medina.

DH: ...you want to meet.

Laughter

DH: I am just telling you. You know, we are leaving that flexibility up to you. Whatever, wherever you are comfortable meeting with, you know.

BL: Nobody, Nobody will know, Jerome. Just like Doug said other, other people have done the same thing and nobody uh, to my knowledge, nobody knows about that. So it's a, it will be kept a secret.

JJ: Yeah, uh, let me uh.....maaan.

DH: Take the weekend and let me know Monday.

JJ: I really don't even want to deal with none of this crap. Man.

CL: Oh, I know.

BL: Yeah, that situation you were referring to, you're you're in that situation whether you talk to Ron or not, so, and you know talking to Ron I don't know if that will make.....

DH: I don't know....

BL: anything better or...

DH: I, I think the bottom line is gonna be you are gonna be, gonna be to be sworn in, you know, during the hearing and you are either going to have to hold true to misstatements or you are going to have retract and tell the truth anyways.

CL: You know, one good thing might be that he is, he's a lawyer. You could sit down and ask him some questions. Right?

DH: Absolutely.

CL: I mean you could ask him about some things that you are unsure of. Like you know hey this is, this is where I am at. This is the kind of things that happened in the past. Here's my concerns. What do you think. I mean and I don't know how you know as far as the privilege is concerned with him being a lawyer and that kind of stuff how that all plays out. I mean you know. As far as,

I mean you can ask him some questions though. I mean hey, here's my concerns about what we're, what's going on.

DH: Despite popular belief Ron is really a nice guy.

Laughter

Unknown speaker: I don't believe that.

DH: Take the weekend. Drink about it. Whatever you need to do.

CL: Don't do that. He doesn't drink.

Laughter

JJ: I might have to.

DH: I know it's a little bit of pressure. But uh, you know.....

BL: It's, it's important, Jerome. We've all been here a long time. We've all worked really hard. We have all put a lot of work into this place and made it one of the best die cast shops in the world. You know, and uh we want to keep going in that direction, you know. So we want to we want to make this, want to make this a good place. But, its important, you know I'm not going to lie to you we obviously certainly want you to do it, but um, you know it's your, it's your decision but it's, it's an opportunity for you to definitely make a difference in all this. So...

JJ: Alright.

DH: Alright sir. Alright. Let me know on Monday.

JJ: Alright.

DH: Alright, thanks man.

JJ: So you want to talk about my reviews while we're here....

Laughter

DH: After Monday.

Laughter

See, R. Ex. 19 & 20⁵.

⁵ R. Ex. 20 is the audio recording of the meeting.

Q. September 20, 2010 Meeting with Jerome Ivery

Doug Hicks arranged a meeting with Ron Mason, Aaron Tulencik⁶, Ivery and himself on September 20, 2010. (Tr. pp. 2141-2142.) Doug Hicks set this meeting up as a result of the September 17, 2010 meeting between himself, Chuck Long, Brian Lennon and Ivery. (Tr. p. 2141.) The meeting took place in a conference room at the Akron Fulton Airport. (Tr. p. 2015.) Just as Ron Mason began reading to Ivery his Johnnie Poultry Rights, Ivery interrupted him. (Tr. p. 2116.) Ivery stated that he wanted to apologize to him face to face for the inappropriate actions of the union's bargaining committee. (Id.) Ron Mason told Ivery there was no reason to apologize, as it was Bornstein and mostly Kepler who engaged in that conduct, but nonetheless accepted his apology. (Tr. p. 2017.) Ron Mason then resumed reading Ivery his *Johnnie's Poultry Rights*. (Id.) Ivery then reviewed his rights and signed them. (Id.)

Before taking his statement Ron Mason told Jerome that this was not the first time that he had encountered a witness who had recanted their affidavit. (Tr. p. 2018.) Ron Mason then told Ivery there are several things the Region could do: (1) they may only call him to introduce his earlier affidavits into evidence; (2) they could decide to subpoena him and ask him why is what was in his earlier affidavit different than his new affidavit, or (3) the region may decide not to even call him as a witness.. (Tr. p. 2020.) Ron then instructed Ivery that he would call Ms. Fernandez and let her know that General Die now had conflicting affidavits and that it would be up to Region 8 as to what to do. (Id.)

At that point in time Ron Mason began to ask Ivery questions. (Id.) He would ask questions, Ivery would respond, and he would write the answers. (Tr. p. 2017.) As Ivery was giving the affidavit he was confused about the dates. (Tr. p. 2021.) Consequently, Mason

⁶ Aaron Tulencik is an attorney employed with Mason Law Firm. (Tr. pp. 2109-2110.) He has been employed with the firm since August 2007. (Tr. p. 2110.) He has been a member of the Ohio bar since November 2000. (Id.)

suggested that Ivery should review his earlier affidavits in order to determine the accuracy of the dates. (Id.) He specifically told Ivery that he could not ask for a copy of his affidavit. (Id.) Ivery indicated that he would go home and review his earlier affidavits and he also volunteered to give Mason his affidavits. (Id.) Mason told Ivery he could just give them to Hicks and Hicks would see that Mason got them. (Id.) Once the statement was completed, Ivery reviewed his statement. (Tr. p. 2022.) After Ivery had reviewed his statement, Aaron Tulencik swore his affidavit and took Ivery's oath. (Tr. p. 2023.)

After he had concluded the statement, Ivery inquired as to what was going to happen with the Petition being circulated by Dan Owens. (Tr. p. 2022.) Mason told Ivery that it did not matter because there was already a Petition on file. (Id.) Mason further stated that the Company cannot prevent employees from circulating Petitions. (Id.) Ivery responded by putting his hands up in the air and saying "not me." Mason laughed in response. (Id.) The parties then discussed martial arts as Ivery is a black belt and Mason had taken karate lessons. (Tr. p. 2023.) Next, Ivery indicated that there was a rumor circulating around the plant that the union was going to pull out after the trial due to a lack of support. (Tr. p. 2024.) Mason told Ivery that the Company had heard the same rumor from Dennis Ormsby who had engaged in a conversation with Kepler, but that General Die had no personal knowledge with respect to that. (Id.) He instructed Ivery to Call Dennis Ormsby if he wanted to know more. (Tr. p. 2025.)

Additionally, Mason told Ivery that at the negotiation session immediately prior to this meeting Travis Bornstein, the union's president, laid down some union hats on the Company's bargaining table. (Tr. p. 2024.) Bornstein told General Die that he could no longer get any employees to wear hats and that Mason's strategy was working as he had scared the shit out of the employees. (Id.) Bornstein also indicated that the union's organizing drive was dying. (Id.)

Bornstein did not tell General Die's bargaining committee that the union was leaving after the trial nor did anyone at the meeting tell Ivery that Bornstein had announced the union was leaving General Die after the trial. (Tr. pp. 2025-2026.)

Mason also informed Ivery that he represents General Die and cannot represent Ivery. (Tr. 2026.) Subsequently, Mason explained to Ivery that he thought he should retain legal counsel given his conflicting affidavits and the fact that he did not want to meet with Ms. Fernandez. (Id.) Furthermore, Mason told Ivery that it was his legal right to have an attorney and that this attorney would stand between Ivery and the NLRB. (Id.) Mason told Ivery that he would have lawyer contact Ivery and then Ivery could decide whether he wanted legal representation. (Id.)

After Ivery left the meeting, Tulencik reviewed the NLRB Complaint and confirmed that the dates Ivery had given were incorrect. (Tr. p. 2027.) Consequently Hicks called Ivery and handed the phone to Mason. (Id.) Mason notified Ivery that the dates were not accurate and that he needed to review his affidavits in order to confirm the dates. (Id.) Mason then told Ivery to give his affidavits to Hicks. (Id.) This conversation took place within minutes of Ivery leaving the meeting and lasted no more than a minute. (Id.)

III. LAW AND ARGUMENT

A. Exception I – Judge Carissimi Erred In His Credibility Findings

The Company has excepted to some of Judge Carissimi's credibility findings. The Board's long established policy is not to overrule an administrative law judge's credibility findings unless the clear preponderance of all the evidence establishes that those findings are incorrect. *See, Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d (3d Cir.

1951). The Company believes that the totality of the record unmistakably establishes that Judge Carissimi's credibility findings are erroneous.

For instance, Jerome Ivery, the witness whose factual allegations were the basis for several paragraphs of the Complaint, was caught on an audio recording admitting that various statements he provided to Region 8 in his NLRB affidavits were not true and that he was concerned about perjuring himself. (R. Ex. 19, pp. 3-4.) Yet, just about the only Ivery testimony Judge Carissimi discredited was Ivery's testimony denying that he ever made such statements. (Decision p. 71.) Ivery's testimony spanned nearly two hundred (200) pages of transcript. Just as all witnesses presented by General Counsel, Ivery's testimony was rooted from the statements contained in the same NLRB Affidavits he admitted were less than truthful. Notwithstanding, Judge Carissimi credited Ivery's testimony to the detriment of the Company time and time again. The clear preponderance of the evidence plainly established that Ivery was anything but credible.

This is but one example. The Company will address further credibility issues in particular detail under the appropriate Sections set forth below.

B. Exception II – Judge Carissimi Erred in Finding Respondent Violated Sections 8(a)(5) and (1) of the Act When It Unilaterally Implemented a Wage Freeze From February 2009 Thru December 2009

Consistent with past practice, the Company implemented a wage freeze in 2009. The Company did not negotiate over wage freeze because it is a past practice that has always been done. (Tr. p. 2082.) Jim Mathias, CEO of General Die testified to three (3) different instances when the Company had in fact implemented a wage freeze; the 1995 layoff, the 2000 Presidential election, and the 2007 flood. The Company was losing orders at a frighteningly rapid pace. Accordingly, the decision was made to refrain from giving wages. Specifically, Jim Mathias testified as follows:

At a time when the economy was in a freefall, a near complete, not complete, but a near global financial meltdown, and businesses dropping by the wayside, and orders dropping like a rock in a bottomless ocean, when we lose nearly 40 percent of our orders, we had to do something. And at that point, the decision was we would hold firm where we were at, batten down the hatches and move forward.

(Tr. p. 2079.)

Moreover, per the Employee Handbook, which is a part of the current terms and conditions of employment, wage increases are 100% discretionary. (Tr. p. 2078 & G.C. 2, p. 00012.) They are determined at different intervals and Jim Mathias has the final determination as to the amount of the increase. (Tr. p. 2078.) Witnesses called by General Counsel agreed.

Arthur Brown ("Brown") a former employee who worked at the Company's Twinsburg facility testified that the Company had frozen wages in the past, prior to the union organizing campaign. (Tr. pp. 334 & 364-365.) At this time, the employee evaluations were pushed back just as the Company did in 2009. (Tr. p. 365.) Moreover, raises are given at the discretion of the employer. (Tr. pp. 365-366.)

Leonard Redd ("Redd"), a tow motor operator on the first shift in the Peninsula plant testified that there have been several years when he has been evaluated, received an above average evaluation but has not received a raise. (Tr. pp. 834 & 839.) It is up to the Company as to whether raises are given. (Tr. p. 849.) Redd has been with the Company for nearly 32 years. (Tr. p. 834.) Dennis Ormsby testified that between 2000 and 2009, the Company would give evaluations whenever it wanted. He went two (2) years without one. (Tr. p. 497.)

Lastly, in his May 13, 2009 Affidavit, Albright stated the following: "Regardless of what your rating was on the evaluation, it did not mean that you were going to get a wage increase and that is the way it has been done for years." (Tr. p. 1105.)

C. Exception III – Judge Carissimi Erred in Finding Respondent Violated Sections 8(a)(5) and (1) of the Act When It Made A Unilateral Change With Respect to the Time Period Employees Receive A Merit Raise

See argument set forth above in Section B.

D. Exception IV – Judge Carissimi Erred in Finding Respondent Violated Sections 8(A)(5) And (1) Of The Act When It Laid Off Employees at Twinsburg on/or About March 9, 2009, And Implemented One (1) Day Shutdowns at the Twinsburg Facility on March 5 and the Peninsula Facility and Twinsburg facility on April 10, 2009

Jim Mathias, CEO of General Die testified that the Company has implemented shutdowns ever since he has been there. (Tr. p. 2085.) If General Die customers have not placed any orders or the Company simply does not have anything to make or ship a shutdown day will be declared. (Id.) For instance, he recalled at least two (2) Good Friday's that were not listed on General Die's Holiday schedule but nonetheless were declared shutdown days due to lack of orders. (Tr. p. 2084.) Moreover the Company's Holiday schedules clearly state that shutdowns will be determined at a later date. (Id. & R. Ex. 80.) The Company's business is such that they have to adapt to customer demands whether it be more orders or less orders. General Die is a "job shop." (Tr. pp. 2087-2088.) Jim Mathias testified as follows:

Q Now, can you tell me what is a job shop?

A. A job shop is a manufacturing plant that we produce products for a specific customer using that customer's die cast dies.

We are only allowed to sell to that specific customer. I cannot make a part and go sell at the Wal-Mart, and sell it to Lowe's, I sell it to the OEM⁷. And that is the only person I am allowed to sell it to.

They then give us ongoing orders, either annual blankets, or spot orders. They then reserve the right to make changes to all their schedules.

When they make changes, we then adapt to the job. If we have to make 500 and it has to be due in 45 days, then we'll adapt to that. If it has to be six weeks, it'll be six weeks. And that's what a job shop is.

⁷ OEM stands for Original Equipment Manufacturer (Tr. p. 2088.)

(Tr. p. 2087.)

General Die did not negotiate with the union over the 2009 shutdowns at the Twinsburg facility because shutdowns are past practice; it's something the Company has always done. (Tr. p. 2086.) More importantly his testimony was not rebutted and is consistent with the Company Handbook which expressly states as follows: "*In situations where the Company must shut down for lack of work, at the discretion of the plant manager, employees may be permitted to split vacation time to cover days not paid.*" (G.C. Ex. 2, p. 00018, emphasis added.)

With respect to the 2009 layoffs, the Company used the same procedure it had for the 1995 layoff. This procedure was sent to the union's counsel. The Company used this same procedure for the two (2) Peninsula layoffs and the second Twinsburg layoff. Nevertheless, General Counsel contends that only the March 6, 2009 Twinsburg layoff is unlawful.

E. Exception V – Judge Carissimi Erred in Finding Respondent Unilaterally Expanded Its Work Rule on Defacement/Destruction Of Property and, Therefore, Kevin Maze's Discharge Violated Sections 8(A)(5) And (1) Of The Act

The Company did not unilaterally expand its work rule regarding the Defacement/Destruction of Company property as Brian Lennon's April 3, 2009 memorandum was not a new rule. He was merely delineating examples of what has always been considered a violation of the long-standing policy. The examples were intended to aid employees in understanding the existing policy and in no way supplement that policy. He wanted to make it clear to whoever was putting stickers up that the needed to stop. (Tr. p. 1794.) Essentially he was trying to warn whoever was doing this to please stop because it's against company policy and, if you keep doing it, you will be disciplined. (Tr. pp. 1794-1795.) Brian Lennon hoped that whoever was doing this would finally get the point and stop. (Tr. p. 1795.)

A unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial and significant change." *The Toledo Blade Co., Inc.*, 343 NLRB 385, 387 (2004). Here, destruction or damage to Company property has always been subject to termination as noted in the Handbook. (G.C. Ex. 2, pp. 14-15.) The April 3, 2009 Memorandum did not change that. (G.C. Ex. 16.) Additionally, the cases cited by Judge Carissimi are distinguishable. (Decision p. 25.) In *Toledo Blade*, the Respondent issued a 2002 letter which changed both the scope of the discipline and the method of discipline to be applied, i.e. all employees on a shift are now subject to discipline for an error rather than the single person in charge of the unit where the error occurred, and the discipline handed out is to be determined on a case-by-case basis rather than a progressive disciplinary system. *Id.* at 388. Subsequently an increased number of unit employees were now subject to discipline when an error occurs and the Respondent's option of discipline is no longer constrained by a step specific progressive disciplinary policy. *Id.* Consequently said changes had a material, substantial and significant impact on the employees' terms and conditions of employment. *Id.* Here, destruction or damage to Company property is still subject to discipline up to and including termination.

In *United Cerebral Palsy of New York*, the Respondent distributed an employee Handbook containing provisions that differed from the term and conditions set forth in the parties' collective bargaining agreements. 347 NLRB 603, 603 (2006). The introductory section of the Handbook stated as follows:

This handbook supersedes all previous UCP/NYC Employee Handbooks, management memoranda and practices that may have been issued on subjects covered in the Handbook or in effect at UCP/NYC and is intended to incorporate individual policies that will be issued in the future. In case of a conflict among individual UCP/NYC policies, the Agency's most recently issued policy will control.

Id. Furthermore, the Handbook outlined a complete set of work rules which differed from those in the collective bargaining agreement. Id. Specifically, the Handbook unilaterally changed the vacation policy, the holiday schedule, the procedures utilized to make schedule changes, the provisions on promotions and transfers, the provisions governing involuntary transfers, the just cause provision in the disciplinary policy, the provisions of the grievance procedure, the absentee policy and a provision in the Handbook also reserved the right to make future changes without notice. Id. at 606-608.

Likewise, in *Behnke, Inc.*, the Respondent had an unwritten work rule requiring employees who are absent due to illness to provide a medical certificate upon their return. 313 NLRB 1132, 1139 (1994). However, the Respondent attempted to implement a separate rule pertaining to sick days on the weekends. Id. at 1139. Said rule required employees to have their illness verified by a doctor at a Hospital if and when they called in sick on the weekends. Id. Nonetheless the evidence established that the rule was nonexistent and simply used as a pretext to terminate a union supporter. Id. at 1138. Here, the Company has always had a rule on destruction/damage to Company property as noted in the Handbook.

In *Robbins Door & Sash Co., Inc.*, the Employer posted a Warning Notice with respect to a progressive disciplinary procedure that would be implemented if any employee were found to be engaged in a work slowdown. 260 NLRB 659, 659 (1982). The procedure called for a week's suspension for the first offense and termination for a second offense. (Id.) However, the expired contract already set forth a procedure for suspensions and discharges and the posted warning implemented a different procedure. (Id.) Again, General Die's Handbook calls for discipline up to and including termination for destruction/damage to Company property. The April 3, 2009 memorandum did not change that.

Notably, Judge Carissimi found that “Bornstein credibly testified that since the union was selected as the bargaining representative in March 2008, until after the April 3, 2009, memo had been posted in the plant, the Respondent never gave the union notice and opportunity to bargain about its expanded work rule regarding defacement on company property.” (Decision p. 23.) Nonetheless, no citation was made to the transcript. On rebuttal, Bornstein testified that the union had no knowledge that the Company considered the destruction of Company property to apply to stickers until Maze was terminated. (Tr. p. 2209.) Maze was terminated in September 2009. (Id.) However, Bornstein received a May 29, 2009 letter from Mason attaching the April 3, 2009 memorandum of which Bornstein claims to have no knowledge. (Id. & R. 22.) Additionally, the April 15, 2009 bargaining notes indicate that the union was inquiring about work rules on stickers and cell phones. (R. Ex. 178, p. 00534.) The union’s notes indicate that the Company did not “produce the memos that they hung (we requested.)” (G.C. 22, p. 2.) The preponderance of the evidence plainly establishes that Bornstein is not credible.

Likewise, Judge Carissimi credited Maze’s general denial that he placed hundreds of stickers throughout the plant. (Decision p. 24) Yet, Maze admitted on cross examination that he placed stickers throughout the plant from the time the union won the vote (March 2008) to the time he was terminated on September 4, 2009. (Tr. pp. 633 &-637.) One former employee testified that Maze put stickers all over the plant. (Tr. 519.) Albright testified that third shift employees were putting stickers “everywhere.” (Tr. p. 1103.) Third shift employees testified that it was Maze posting the stickers. See, *infra*. Maze also testified that he never saw the April 3, 2009 memorandum prior to his termination. (Tr. p. 627.) Again, this testimony simply isn’t plausible.

For instance, Tomsello, a witness called on behalf of General Counsel, testified that the memorandum was posted by the time clock and also inside the glass [window] of Brian Lennon's office. (Tr. p. 721.) Furthermore, he saw the memorandum around the time it was dated. (Id.) Maze testified to having seen a different notice posted by the time clock regarding shutdowns. (Tr. pp. 618-619.) Maze would have us believe that he clocked in and out on a daily basis for nearly five months without ever having seen the April 3, 2009 memorandum. It simply is not conceivable. Moreover, Maze was in attendance at the April 15, 2009 bargaining session noted above where the union requested copies of the memorandums. The preponderance of the evidence establishes that Maze's testimony is not plausible and, as such, not credible. Lastly, and more importantly, Maze knew he would get fired if he ever got caught putting stickers on Company property. He told third shift employees in the locker room that if he ever got caught he would be fired. (Tr. p. 1578, 1879.) Another third shift employee instructed Maze to stop putting stickers on Company property because he was going to get fired. (Tr. 1557.) Maze simply chuckled and admitted termination was possible if caught. (Tr. pp. 1557-1558.)

The April 3, 2009 memorandum was not a new rule. Several employees testified as such. For example, Dennis Lemon testified that Brian Lennon's April 3, 2009 memorandum, which indicated that putting stickers on company property is destruction and damage of company property, was not a new rule because when Brian Lennon cleaned off the lockers he instructed us not to put stickers on Company property. (Tr. pp. 1560-1561 & G.C. Ex. 16.) Ed Dickerhoof testified that he did not consider Brian Lennon's April 3, 2009 memorandum to be a new rule, as it was merely a continuation of the existing rule in the Handbook. (Tr. pp. 1576-1577, G.C. Ex. 16 & G.C. 2, pp. 14-15.) Likewise, Daniel Pietrocini testified that he did not consider Brian Lennon's April 3, 2009 memorandum to be a new rule because it was addressed by Brian

Lennon when the stickers were removed in 2008. (Tr. pp. 1606-1607.) Furthermore, after Brian Lennon had removed the stickers from the lockers in 2008, he instructed employees that this was destruction of company property and, as such, employees could face discipline. (Tr. p. 1604-1605.) Robert Collins testified that he did not consider Brian Lennon's April 3, 2009 memorandum to be a new rule; because it was his understanding that once all of the stickers had been removed from lockers no more were stickers of any kind were to be posted anywhere. (Tr. p. 1652 & G.C. Ex. 16.) Dave Bradley testified that he did not consider Brian Lennon's April 3, 2009 memorandum to be a new rule, but simply a reminder of the existing rule. (Tr. p. 1664, G.C. Ex. 16 & G.C. Ex. 2, pp. 14-15.) Lastly, Jeffrey Miktuk testified that he did not consider Brian Lennon's April 3, 2009 memorandum to be a new rule because this rule is already in the Handbook. (Tr. pp. 1671-1672, G.C. 16 & G.C. 2, pp. 00020-00021.)

Additionally, after having cleaned off the locker of any and all stickers, the Company held shift meetings in November 2008 instructing the employees that stickers were not to be placed upon Company property. (Tr. pp. 1574-1575, 1604, 1608, 1651, 1654-1655, 1662-1663, 1670-1671 & 1799-1800.) Indeed, Judge Carissimi found the following:

[I]n November 2008, the Respondent removed all the stickers from employee lockers and other places in the plant. At that same time, [Brian] Lennon and other supervisors advised at least some of the employees that stickers should not be placed on the Respondent's property and that discipline could be imposed if it were.

(Decision p. 25.) Still, Judge Carissimi held that because the Company did not notify the union of its November 2008 removal of stickers and subsequent shift meetings warning its employees that discipline would ensue if stickers were placed on Company property, the union did not have "clear and unequivocal notice" of the violation. (Decision p. 25, citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004)).

The burden of showing a complaint is time barred is on the party raising Section 10(b) as an affirmative defense. (Id.) Importantly, the burden is met by demonstrating the filing party had actual or constructive knowledge of the alleged unfair labor practice more than six (6) months prior to the filing of the charge. (Id.) Moreover, such knowledge can be imputed where the conduct in question was “open and obvious” to provide clear notice. Id. Likewise, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence. (Id.)

Here the conduct was certainly “open and obvious” to provide notice. Judge Carissimi plainly stated in his decision that prior to the election in March 2008 there was a “longstanding history of employees posting stickers of various kinds throughout the Company’s facilities including locker rooms, toolboxes, towmotors and machines” and “[w]hen the union campaign started in the beginning of 2008, some employees, including Kevin Maze, placed union stickers on employee lockers, toolboxes and machines. At times, such stickers were also posted on the walls and ceilings in such areas as the quality assurance and tool rooms.” (Decision p. 22.) Judge Carissimi further found that “at least until November 2008, stickers of various types were regularly posted on lockers and in other areas in the [Company’s] facilities.” (Decision p. 25.) Thus, when the Company suddenly “removed all of the stickers from employee lockers and other places in the plant,” subsequently altering a “longstanding history,” while simultaneously instructing its employees that stickers should not be placed on its property and that discipline would ensue if stickers were placed on its property, said change was both open and obvious. Moreover, Bornstein even warned Maze during a union meeting to be careful and not to get caught or he would get fired. (Tr. p. 1559.) Accordingly, the union was on notice as early as November 2008 of an unlawful implementation of a unilaterally changed work rule and, as such,

General Counsel's Complaint allegation with respect to Maze is subsequently time barred by Section 10(b) of the Act.

F. **Exception VI – Judge Carissimi Erred in Finding Respondent Had Not Established That It Would Have Discharged Kevin Maze In The Absence of His Union Activities And, Therefore, Violated Sections 8(A)(3) And (1) Of The Act**

Because the charging party has alleged Maze was discriminated against due to his union activities, General Counsel must establish a causal nexus between GDC's decision to terminate him and his protected activities. See, *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1991), cert denied 455 U.S. 989 (1982). Accordingly, General Counsel must make a prima facie showing sufficient to support the inference that their protected conduct was a motivating reason for their termination. *Id.* at 901-902. If General Counsel is successful, the Company is permitted to rebut the presumption by producing evidence of a legitimate and sufficient business reason for the discharge, that is, Maze would have been terminated regardless of their participation in protected Section 7 activities. *Id.* at 905-906. The burden of persuasion does not shift to the Company. *Id.* at 905. The Company need only produce evidence that the same action would have taken place even in the absence of the protected conduct. *Id.* Put another way, an employer in a Section 8(a)(3) discharge case only has a duty to produce evidence to balance, not outweigh, the evidence produced by General Counsel. *Id.* Thus, the burden of persuasion remains with General Counsel at all times to prove by a preponderance of the evidence that anti-union animus motivated the discharge. *Id.* at 906-907. The General Counsel failed to meet this burden. In fact, the Company had already terminated Maze's employment once before. (Decision p. 23.)

Maze was lawfully terminated on September 4, 2009. He was already on a final written warning with a three day suspension. Any further violation of Company policy would result in termination. By affixing stickers to company property Maze was clearly violating the

Company's Work Place Conduct and Discipline Policy set forth in the Handbook. (G.C. Ex. 2, pp. 14-15.) Specifically Maze was in violation of the following:

- Destruction or damage of property belonging to the Company, or its employees, customers, or visitors
- Stealing, misappropriating, or intentionally damaging property belonging to the Company, or any of its employees, customers, or visitors

(G.C. Ex. 2, p. 15.) The Company simply followed its progressive discipline policy. Moreover, Maze had been terminated once before. (Tr. p. 596). The Company did not discriminate against Maze back then and it was not doing so now. Maze admitted to putting stickers up from 2008 up until the time he was terminated. (Tr. pp. 632-633, & 637.) No other employees were terminated for placing stickers on Company property because no one else got caught. Moreover, several third shift employees testified that once Maze had been terminated stickers were no longer affixed to Company property. (Tr. pp. 1577, 1652-1653, 1664-1665 & 1673-1674.)

In *The Timken Co. and United Steelworkers of America*, 1997 NLRB LEXIS 174 (Region 8), enforced 331 NLRB 744 (2000), Respondent tolerated the wearing of union insignia attached to employees' work clothes and stickers attached to employees' personal property during working time and in work areas but refused to allow union stickers to be placed on its personal property including open-faced sides of cubby holes and walls of the facility. General Die Casters maintains a similar policy.

General Die Casters, like *Timken*, has the right to prohibit stickers from being stuck to its personal property. Therefore, Maze's discipline for affixing union stickers to company property is warranted. Since General Die Casters followed its policy regarding defacement or destruction of personal property and does not prohibit employees from conveying their support for the union

on their personal property and clothing, disciplining Maze for placing stickers on Respondent's personal property was proper.

G. Exception VII – Judge Carissimi Erred in Finding Respondent Unilaterally Recalled Three Die Cast Operators Without Giving Notice And Opportunity To Bargain To The Union And, Therefore, Violated Sections 8(A)(5) And (1) Of The Act. These Employer Actions Were Not A Subject Of General Counsel's Complaint And Should Be Completely Struck From The Decision And Record

The Company was simply following the layoff and recall procedure that is set forth in its Handbook. With respect to the recall procedure, the handbook states: "Recall from a layoff will be based on the same criteria, returning the senior most employees first." (G.C. Ex. 2, p. 17.)

The union even indicated that it did not take issue with the recall procedure that the Company used to recall the three die cast operators. In his August 10, 2009 affidavit, Kepler stated: We would not have a problem with the employer if they recalled in the order of how the employees were laid off in March and May, 2009. But it is my impression that the employer is trying to get around doing it that way." (Tr. pp. 1506-1507.) Kepler also admitted that the three die cast operators (Tomsello, Black and Sallaz) were recalled in the order they were laid off. (Tr. p. 1507.)

1. Tomsello, Black and Sallaz's Layoff Was Never Ruled Unlawful

Judge Carissimi misidentified the Respondent's layoffs and recalls in the 2009 timeframe for purposes of finding the Respondent violated Section 8(a)(5) and (1) of the Act. (Decision, p. 31.) The ALJ's reasoning for finding the violations was as follows:

In the instant case, it would be an anomaly to permit the Respondent to unilaterally recall employees when it must bargain about their layoff. Accordingly, I find that by failing to give the Union notice and an opportunity to bargain regarding the recall of the three die cast operators the Respondent violated *Section 8 (a)(5) and (1) of the Act.*

Decision, p. 30.

However, it was never ruled that the Company had to bargain about the subsequent layoffs. The only layoff that was ruled unlawful was the March 9, 2009 Twinsburg layoff, the only layoff at issue in this Complaint. As such, considering the procedure used to lay the employees off was never ruled unlawful, the procedure used to recall them cannot be ruled unlawful. Respondent had four actual layoffs across both of its plants in 2009. The first layoff was at the Twinsburg plant around March 9, 2009. General Counsel issued a complaint on this layoff for failure to bargain in 8-CA-38306, made a part of the Second Amended Consolidated Complaint issued October 1, 2010 at Paragraph 1(G) **First Layoff**. The second layoff was at the Peninsula plant around March 16, 2009. The Union filed an Unfair Labor Practice based upon this layoff. The charge was integrated into 8-CA-3806. **Second Layoff**. The Regional Director withdrew the portion of the charge regarding the Second Layoff. The third layoff occurred around April 28, 2009 at the Twinsburg plant. **Third Layoff**. The Union filed an Unfair Labor Practice based upon this layoff. The charge was contained in 8-CA-38324. The fourth layoff occurred around May 1, 2009 at the Peninsula plant. **Fourth Layoff**. The Union filed an Unfair Labor Practice based upon this layoff. The charge was integrated into 8-CA-38324. On July 30, 2009, the Regional Director withdrew all charges in 8-CA-38324.

There are three employees at issue regarding this recall and subject of Paragraphs 12(K) and 12(M) of General Counsel's complaint. The employees are Sam Tomsello, Jason Black and Jason Sallaz. (G.C. Ex. 129 and Decision, p. 29.) **All three of these employees were laid off in the Fourth Layoff – not a subject of General Counsel's complaint.**

Respondent's attorney and lead negotiator Ron Mason testified at hearing regarding the layoffs:

Q. Did there come a point in time when there was another layoff?

A. Yes.

Q. And what procedure did you follow for that layoff?

A. The same procedure we followed for the earlier layoff in March. Uh -- the layoff being the the -- uh, 21st, 22nd, sometime like that, for Twinsburg, and May 1 for Peninsula.

Q. And is it your testimony that you used the same procedure for both of those?

A. We used the exact same procedure.

Q. Okay. Can you tell me what the response of the union was between the time period of March 6th, 2009 layoff and the last layoff of May 1st, 2009?

A. Uh -- basically the response that we got was what I called delayed bargaining. From the standpoint that the union suddenly inundated us with requests for information.

The union was taking the position, throughout this time period, that we could not unilaterally, you know, lay off employees unless we had the agreement of the union.

That, you know, we couldn't do any layoffs until the union had looked at all of the documents that we had given them.

And it was just, you know, trying as best they can -- uh, to inundate us with lots of requests for documents, and asserting that we couldn't do anything --

MS. FERNANDEZ: Your Honor, at this point I would object. The April/May layoffs are not part of the complaint.

So I don't know the helpfulness or relevancy of a perceived inundation of documents relevant to that layoff.

JUDGE CARISSIMI: Well, I'll permit some leeway with bargaining. But I'll -- I'll ask you, Mr. Mason, I mean your opinion about what the union's approach was, keep to yourself.

You can tell me about the facts. I don't really care about your opinion.

THE WITNESS: Okay.

DIRECT EXAMINATION (CONT'D)

BY MR. TULENCIK:

Q. Can you tell me whether or not the union filed unfair labor practice charges with respect to the layoffs in Peninsula and Twinsburg?

A. Yeah. The union filed unfair labor practice charges over all of the layoffs.

Q. And do you recall what happened with respect to those charges?

A. Uh --

MS. FERNANDEZ: Objection. What's in the complaint is in the complaint.

JUDGE CARISSIMI: Sustained.

Transcript, pp. 1960-1962.

As counsel for General Counsel pointed out in the above: "What's in the complaint is in the complaint." (Tr. p. 1962.) Simply put, the ALJ has exceeded his authority to issue a decision on Paragraphs 12(K) and 12(M) of General Counsel's Second Amended Consolidated Complaint issued October 1, 2010 as the layoffs of Sam Tomsello, Jason Black and Jason Sallaz were never

at issue in any Complaint.⁸ The three employees in question were not a part of the layoff that was ruled unlawful. These employees were laid off in May and neither that layoff, nor the procedure that was used to implement the layoff has been ruled unlawful. Accordingly, Judge Carissimi erred in ruling that Employer could not unilaterally recall employees that were not even involved in the layoff which is at issue in this case.

Respondent's position is that there were no violations of the Act by the Respondent based upon the recall of Sam Tomsello, Jason Black and Jason Sallaz back to work as the allegations contained in the General Counsel's complaint are not relevant to their layoff and subsequent recall. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed and/or relevant portions of the findings against the Respondent struck from the decision.

H. **Exception VIII – Judge Carissimi Erred in Finding Respondent Was Obligated To Bargain With The Union Regarding The Manner In Which Health Insurance Coverage For The Three Recalled Employees Was To Be Implemented And, Therefore Violated Sections 8(A)(5) And (1) Of The Act These Employer Actions Were Not A Subject Of General Counsel's Complaint And Should Be Completely Struck From The Decision And Record**

The Company did not demand that these employees reimburse the Company for their health care. What the Company did do is offer these men the opportunity close a gap in their insurance coverage that currently existed. If they voluntarily chose to do so, they were required pay their monthly contribution rate for the month of June just as all General Die employees were required to do. These men were on layoff and their health insurance had stopped. They were being recalled to work in the middle of a month. There was no insurance in place for these men to "reimburse" yet that is exactly what Judge Carissimi has found. The men were simply given

⁸ The May, 2009 layoffs of Sam Tomsello, Jason Black and Jason Sallaz were not subject to this Complaint. Seemingly, General Counsel should have named employees subject to the March 9, 2009 layoff, but failed to do so.

the option to choose when they wanted their insurance to start. As stated above, the Company's health insurance premiums are paid in advance. Should the employees so elected, they could have not paid the insurance premium and would have fallen out of coverage voluntarily.

As with the previous Exception VII, Respondent's position is that there were no violations of the Act by the Respondent based upon the insurance premium payments of Sam Tomsello, Jason Black and Jason Sallaz as they returned back to work as the allegations contained in the General Counsel's complaint are not relevant to their layoff and subsequent recall. Health insurance for all General Die employees was in place based upon its yearly contract. The Company had no flexibility in requiring the pre-determined monthly contributions – there was no monthly premium proration. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed and/or relevant portions of the findings against the Respondent struck from the decision.

I. **Exception IX– Judge Carissimi Erred in Finding Respondent Unilaterally Implemented Its Proposal On Recalling Employees On September 10, 2009 Without Reaching A Proper Impasse And, Therefore, Violated Sections 8(A)(5) And (1) Of The Act**

Judge Carissimi erroneously concluded that General Die committed serious, un-remedied unfair labor practice charges and, as such, implemented its September 10, 2009 recall proposal regarding the recall of employees without reaching a valid impasse in violation of Section 8(a)(5) and (1) of the Act. (Decision p. 36.) Conversely, the Company contends that the implementation was lawful because the union engaged in nothing more than tactics calculated to delay bargaining.

Judge Carissimi reasoned that General Die did not meet its burden of establishing that a valid recall existed because General Die's committed a series of unilateral changes in violation of the Act which substantially increased friction at the bargaining table. (Decision pp. 38-39.)

In doing so, Carissimi concluded that the Company “prematurely” declared impasse on a recall procedure on August 5, 2009. (Decision p. 39.) **Notably, the Complaint does not allege that the Company’s August 5, 2009 implementation violated the Act.** Nonetheless, Carissimi used this to establish that General Die had caused friction at the bargaining table and that the union was justified in suspending the remaining negotiation sessions scheduled for August and subsequently refusing to bargain without the presence of a federal mediator. (Id.) Judge Carissimi also concluded that General Die’s prior unfair labor practices “moved the baseline on the issue of recall rights and made it more difficult for the parties to reach an agreement. (Id.)

Consequently, Judge Carissimi stated as follows:

Under the circumstances of this case, I cannot agree with the Respondent's argument that it was privileged to unilaterally implement its September 8, 2009 final offer regarding the recall of employees on September 10, 2009, because time was of the essence and the Union was attempting to avoid reaching an agreement. In *RBE Electronics*, supra, the Board indicated that when an employer is confronted with an economic exigency compelling prompt action, it can satisfy its bargaining by providing adequate notice and an opportunity to bargain over the issue. While the bargaining must be in good faith, it need not be protracted. Under these conditions the employer can act unilaterally regarding the subject if the parties reach a valid impasse. Id. at 82.

In the instant case, the Respondent first identified a need to recall employees in Mason's August 19 letter to Bornstein wherein he indicated that the Respondent expected to need additional employees "in September". I find that the Respondent did have a need to recall employees in September and was therefore justified in seeking expedited bargaining over this issue. The problem for the Respondent, however is that it cannot establish that a valid impasse existed prior to its implementation of its final offer on September 10. **As I have noted above, the Union's suspension of bargaining from August 5, 2009 through September 2, 2009 was because of the Respondent's series of unfair labor practices and Mason's August 5 premature declaration of impasse and threat to implement a unilateral procedure to recall employees. While the Union's conduct in refusing to meet during the remainder of August, obviously made reaching an agreement somewhat more difficult, as I have noted earlier, this action was precipitated by the Respondent's unlawful conduct.** (Emphasis added.)

(Decision p. 40.) Judge Carissimi's reasoning wholly disregards the Regional Director's January 29, 2010 finding that the union violated Section 8(b)(3) of the Act by failing to meet at reasonable times and places and by conditioning bargaining on the presence of a federal mediator for the very specific dates and times that Judge Carissimi now seeks to shift to the Respondent as to blame for the Union's absence in order to justify his decision that Respondent could not legally implement the proposal. Specifically, the Regional Director found that the union engaged in the following behavior in violation of the Act:

- Throughout negotiations, starting on October 13, 2008 and continuing until the most recently set dates of September 2 and 8, 2009, the Union has refused to meet at reasonable times to bargain for a contract. **On October 13, 2008, the Union would only agree to meet for one hour and since that date the Union has generally only agreed to meet for one and one-half hours per bargaining date.**
- Without contacting the Company, the Union unilaterally suspended negotiations and canceled negotiation dates in April 2009;
- On June 12, 2009, knowing that the lead negotiator travels from out of town, waited and then the Union canceled negotiations 30 minutes before bargaining was to start and never properly notified the lead negotiator nor any of the Company's committee members and allowed the Company to show up to negotiations and wait on the Union to arrive at negotiations. The Union was able to notify everyone on its committee because no Union committee person ever showed for these negotiations.
- **On August 18, 2009, the Union unilaterally canceled negotiations with only 30 minutes notice knowing that the Company's lead counsel was traveling to negotiations and his arrival would be just about the time the Union canceled the meeting.**
- **On August 21, 2009, the Union canceled previously scheduled negotiations set for August 25 and 27, 2009, over the objection of the Company.**
- **On August 21, 2009, the Union unlawfully threatened to attend no future negotiations unless a Federal Mediator was present.**
- **On August 23, 2009, the Union carried out its threat of August 21, 2009, by officially canceling negotiations scheduled without a Federal Mediator on August 25 and 27, 2009, and offering only two dates on September 2 and 8, 2009, when Federal Mediators will be present.**

- **Since September 8, 2009, to date, the parties have yet to meet again in bargaining and have had no real contact with each other except through the Federal Mediator who is still trying to meet with the parties.**

(Emphasis added.) (Jt. Ex. 5-6 & 8-9.) The union ultimately settled the case. (Jt. 10-13.) Judge Carissimi notes that the Company declared impasse only after two meetings. (Decision p. 40). Yet, the union cancelled three meetings in violation of the Act, and during the two dates the parties did meet the union violated the Act due to its refusal to bargain without the presence of Federal Mediator and its refusal to meet for more than one and one half (1 ½) hours. The preponderance of the evidence shows that the union was engaged in stall tactics in an effort to avoid reaching an agreement on recall rights.

For instance, halfway thru the September 8, 2009 meeting the union responded to the Company's proposal. (Tr. p. 1478 & G.C. Ex 125.) However, the proposal was not time specific as to the length of the recall rights. (G.C. Ex. 125 & R. Ex. 195, p. 458.) The union was proposing an interim rolling agreement to be renegotiated each time it expired. (R. Ex. 195 p. 460.) This proposal was regressive in nature. In response, the Company verbally proposed a last and final extending the recall rights from six (6) to seven (7) months. (Id & Tr. pp. 1984-1986.) Instead of responding to the Company's proposal the union exited the bargaining session unannounced and had the Federal Mediator hand deliver a note which indicated that the interim agreement would be discussed at the next session which would allow Bornstein to be in attendance. (Tr. p. 1987, G.C. Ex. 114 & R. Ex. 195, p. 460.) This same day, Kepler sent a letter to Jim Mathias and Tom Lennon stating the following:

Your hired union-buster's last offer on September 8, was for seven months recall rights in an interim basis. The Teamsters will need to see the exact dates of when employees were let go, **before we can give a counter offer, if one is needed.** (Emphasis added.)

The union had already been provided with this information numerous times and the dates of layoffs were discussed across the bargaining table. (Tr. pp. 1154-1156, G.C. Ex. 20-23, 52-55, 57, R. Ex. 23-24, R. 174-176) Moreover, the personnel file of each laid off employee was requested by and submitted to the union and said files contained notice of layoff letters. (R. Ex. 29.) For examples of the notice of recall letters see, G.C. Ex. 30, 68-73 & 129.

Accordingly, the Company's September 10, 2009 declaration of impasse was lawful as the union was engaged in tactics designed to delay bargaining. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) and *RBE Electronics of S.D.*, 326 NLRB 80, 81 (1995).

J. Exception X – Judge Carissimi Erred in Finding Respondent Unilaterally Reinstated The Use Of Temporary Employees While Unit Employees Were Still Laid Off Promulgated Without Giving Notice And Opportunity To Bargain To The Union And, Therefore, Violated Sections 8(A)(5) And (1) Of The Act

General Die has historically used temporary employees. (Tr. p. 1800). The Company used temporary employees before the union and continued to use temporary employees after union was elected. (Id.) The Company did not use temporary employees during the layoff save for one exception, a temporary employee who was hired in late 2009 to work in the Quality Department at the Peninsula plant. (Tr. pp. 1800-1801 & 2050-2051.) Even then, this temporary employee was hired only after the Q/A person on layoff could not work the required shift and a determination had been made that no one else in the bargaining unit was qualified. (Tr. p. 2050-2051 & 2181-2183.)

Contrary to arguments otherwise, General Die did not use temporary employees to perform trim cast work while employees were on layoff in August/September 2009. (Tr. pp.1802 & 1812.) Moreover, no trimmers were recalled in August/September 2009. (Tr. p. 1802.) In fact, General Die did not resume its past practice of using temporary workers until

January of 2010, when the recall rights had expired. (Tr. pp. 1801 & 1813.) At that time, the Company hired three (3) die casters. (Tr. p. 1802.) The Company did consider rehiring former employees but there were no die casters who were still on lay off at that time. Even the witnesses presented by General Counsel readily admit the Company's historic practice of using temporary employees. For example, Tomsello testified that the company used temporary employees before the union and used temporary employees prior to the layoff. (Tr. p. 753.)

Save for one instance, the Company did not use temporary employees until after the seven month recall rights had expired. The Company also issued rehire letters in an attempt to hire former employees who had lost their recall rights. (G.C. Ex. 59.)

During the entire time of the layoff, not a single employee lost a single hour of work for any job he was qualified to perform. There is simply no evidence to support the ALJ's finding.

K. Exception XI – Judge Carissimi Erred in Finding Respondent Had Not Established That It Consistently Applied Its Disciplinary Rules Regarding A Threatening Statement Made By One Employee To Another And, Therefore, Willie Smith's Termination Violated Sections 8(A)(3) And (1) Of The Act

Because the charging party has alleged Smith was discriminated against due to his union activities, General Counsel must establish a causal nexus between the Company's decision to terminate him and his protected activities as noted above in Section III., F.

Smith was treated no different than any other employee at General Die. Brian Lennon testified that another employee had been terminated for threatening an employee. (Tr. pp. 77-79.) This testimony was not rebutted by General Counsel and therefore is undisputed. More importantly, as Judge Carissimi noted, Smith was not credible on this issue. (Decision p. 48.) Smith was not credible on the stand nor was he credible when being interviewed by Doug Hicks. He denied being in the locations that the video footage showed him to be.

Notwithstanding, Carissimi found that Smith's discharge violated Section 8(a)(3) and (1) of the Act because the Company had applied its disciplinary rules in a disparate fashion to Smith as opposed to the manner in which they were applied another employee accused of making threats, Michael D. Williams. (Decision p. 50.) In doing so, Judge Carissimi credited the testimony of a union supporter, Dennis Ormsby, who was lawfully discharged on February 22, 2010. (Decision p. 49 & Tr. pp. 457-459 & 498-499.) Ormsby claimed to have been threatened by Williams in 2007. (Tr. pp. 480-481.) However, his testimony was not corroborated.

Contrary to allegations otherwise Ormsby was not threatened by Michael D. Williams. Jim Mathias specifically asked Ormsby if he had been threatened and Ormsby said no. (Tr. p. 2099.) Furthermore, he told both Ormsby and Williams that if anyone is making direct threats on anyone they will be terminated. (Tr. p. 2100.) However, Judge Carissimi disregarded Jim Mathias's testimony because he felt that he was simply attempting to bolster the Company's defense. (Decision p. 49). That argument can be made for any witness who testified on behalf of the charging party. Witnesses testify in order to strengthen and/or reinforce their party's case. Such a comment should be disregarded. The preponderance of the evidence establishes that Ormsby is not a credible witness. This is bolstered by the fact that he testified at the Hearing that statements in his July 19, 2010 Affidavit were lies despite the fact that on cross examination he acknowledged he was under oath, he reviewed the statement, he signed the statement and that the statements were correct. (Tr. p. 512 & p. 529.) The disparity between his affidavit and his testimony plainly establish that he is not a credible witness.

Equally important, Jude Carissimi completely disregarded Brian Lennon's testimony that another employee had been terminated for threatening an employee. (Tr. pp. 77-79.) His

decision is silent with respect to this unrebutted and, therefore undisputed evidence. Specifically

Lennon testified as follows:

Q. Okay. And with regard to Willie Smith, he was also terminated. I don't think I have the exact date in mind, but I think it was around October of '09. Does that sound right to you?

A. That sounds about right.

Q. Right. Okay. And he was terminated for allegedly threatening a co-worker Dan Owens; is that correct?

A. That's correct.

Q. Okay. And there was no other reasons why he was terminated.

A. No.

Q. Is that right? Have any employees, to your knowledge, in the past been disciplined or discharged for threatening a co-worker?

A. Yes. I know that we've disciplined employees for that reason, and I --

Q. Disciplined?

A. -- I --

Q. Do you happen to know who they are, off the top of your head, or how long ago it was?

A. I'm not really sure.

Q. But they weren't discharged?

A. I -- I believe we did discharge somebody. Again, I don't have the details in my head.

Q. Okay. Now, I asked for those files and they weren't produced. Are -- are those files in existence?

A. Yes.

Q. Well, is there a reason why they weren't produced to me?

A. I don't know.

MS. FERNANDEZ: Well, at this time, Your Honor, I would -- I would ask that that portion of the subpoena also be honored.

And that I can get you a paragraph number, but that'd be produced, as well.

JUDGE CARISSIMI: Well, let's go off the record.
(Off the record.)

JUDGE CARISSIMI: On the record.

Ms. Fernandez, have you received answers to your questions about production of documents under the subpoena?

MS. FERNANDEZ: Yes. My -- it's my understanding that they produced a file from Tommy Randow.

Now, Tommy Randow was not the person disciplined, they're telling me Carl Wolfe was. I do have a personnel file for Carl Wolfe, I believe.

(Tr. 77-79.) There is no record evidence to the contrary.

Therefore, the Company presented to the General Counsel evidence that Carl Wolfe was also terminated for threatening an employee. Judge Carissimi determined that Smith was not credible, that he in fact, did threaten Dan Owens and the discharge of Mr. Smith should stand.

L. **Exception XII – Judge Carissimi Erred in Finding Respondent Violated Sections 8(A)(3) And (1) Of The Act By Refusing To Pay Emil Stewart For Attending An OSHA Meeting**

From the very beginning of negotiations the Company has taken the position that the men will not be paid for union work on Company time. (Tr. pp. 1776 & 1936-1939.) Even witnesses called by General Counsel have admitted the same. (Tr. p. 1089 [Albright].) Stewart was treated no differently than any other employee. In fact, Albright was not paid for an OSHA plant inspection just as Stewart was not paid for the OSHA meeting. (Tr. p. 1939 & G.C. Ex 1(ee).) Inexplicably, Region 8 dismissed the charge as it referred to Albright but upheld the charge as it referred to Stewart. (Tr. p. 1771 & 1772.) The only party treating the employees in an inconsistent manner is Region 8. On Cross Examination Stewart admitted the following:

Q. That's the way it always happens to me. You, first of all, testified that you had attended most of the negotiations from the beginning; correct?

A. Correct.

Q. And in those negotiations the Union's made proposals with respect to the stewards and/or the Union's representatives at the Company doing union work on behalf of the Union that they should be paid; correct?

A. Correct.

Q. And the Company's consistently taken the position in those negotiations that it would not pay for any employees who were representing the Union while on Company time; correct?

A. Correct.

(Tr. pp. 944-955.) Additionally, Albright testified that he and Stewart participated in a safety walk through on July 13, 2009 as union representatives and, subsequently were not paid by the Company for that time. (Tr. pp. 1113-1114.) A few weeks later, Albright participated in a plant inspection conducted by OSHA and, consistent with past practice, was not paid by the Company for that time. (Tr. pp. 1114-1115 & G.C. Ex. 1(eee).) Stewart testified that he did not realize Albright did not get paid for the OSHA walk around until after he did not get paid for the OSHA meeting. (Tr. pp 952-953.) However, the charge referenced above was filed at the same time. (G.C. Ex. 1(eee).) Moreover, Albright's February 3, 2009 bargaining notes indicate that Ron Mason informed the union's bargaining committee that if the union thinks we are paying the men for union business they are wrong." (Tr. pp. 1123-1124.) Stewart was present at this meeting.

Nevertheless, Judge Carissimi stated that Brian Lennon "instructed" Stewart to attend the meeting. (Decision p. 50.) Judge Carissimi further stated that Stewart was "assigned" to perform a specific task and that Stewart was given a "work assignment" to attend the meeting. (Id. at p. 50.) As such, Judge Carissimi concluded:

I find that Respondent's position of refusing to pay employees who voluntarily conduct union business during work time, such as negotiating in collective-bargaining negotiations, is not a legitimate business, justification to refuse to pay Stewart for performing an assigned task.

(Decision p. 51.) The phrase "work assignment" and the words "instructed" and "assigned" are nowhere in the record with respect to Lennon and Stewart's testimony on this point. (Tr. pp. 940-941 & 1770-1776.) On Direct Examination Stewart testified as follows:

Q. All right. Did you speak to him at that point in time?

A. Yes. He asked me if I wanted to attend the meeting – the meeting with OSHA.

Q. Okay.

A. Because they needed a representative from the Union there.

Q. Did he say that?

A. Yes, he said that.

(Tr. pp. 940-941 & 1770-1776.)

Stewart was NEVER "instructed" or "assigned" to attend the OSHA meeting. He was "asked" if he wanted to attend. In an attempt to award Stewart the pay for the time, Judge Carissimi changes the testimony of Stewart to fit the theory of the case. Stewart knew he was not going to get paid. More importantly, the Company did not discriminate against Stewart in withholding his pay. Unlike Region 8, the Company treated Stewart the same as it had all other employees with respect not getting paid to perform work on behalf of the union during Company time.

Judge Carissimi also ruled Stewart was treated differently because Brian Lennon and Dan Owens were paid to attend to the meeting. (Decision p. 51.) Judge Carissimi used this argument to find that "assigning a pro-union employee to attend a meeting and failing to pay him for attending, when other participants are not paid, is inherently destructive of Section 7 rights

within the meaning of the Supreme Court's decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Again, Stewart was not "assigned" to go to the OSHA meeting. Plant manager, Brian Lennon is on salary. Secondly, as the Company's Safety Coordinator, many of Owens's responsibilities obviously include dealing with any matters related to OSHA. (Tr. p. 2180 & G.C. Ex. 5.) It is part of Owens' normal job duties and to not pay Owens for doing his normal job would have been unlawful as Owens has a right not to support the union. Attending OSHA meetings and participating in any plant inspections would necessarily fall within his normal job duties. (Tr. pp. 1726-1727 & 2180.) For example, Owens and Lennon participated in the walk through with Albright. (Tr. p. 1770.) Owens and Lennon were paid, Albright was not. (Tr. pp. 1770-1771 & G.C. Ex. 5) Even Carissimi acknowledged that that Owens has "important responsibilities regarding safety in both plants." (Decision p. 64.) More importantly, the case law cited by Judge Carissimi deals with the discriminatory treatment of employees who were on strike and/or locked out. *Great Dane Trailers, supra* and *International Paper Co.*, 319 NLRB 1253 (1995). Accordingly, they are inapposite to this allegation.

M. Exception XIII – Judge Carissimi Erred in Finding Respondent Did Not Produce The Names Of The Non-Unit Employees Laid Off During The April And May 2009 Layoffs And, Therefore, Violated Sections 8(A)(5) And (1) Of The Act

Contrary to Judge Carissimi's finding on this issue, the Company did provided the names of the non-unit employees laid off during the April and May 2009 layoffs. On April 22, Kepler submitted a written request for information requesting, inter alia, names and titles of non bargaining unit employees who were laid off in April of 2009. (R. Ex. 9 & Decision p. 53.) Kepler sent another letter on May 6, 2009 requesting that the Company provided a "Complete list, including addresses of all laid-off employees, including any managerial employees at both the Twinsburg and Peninsula worksites." (R. Ex. 14 & Decision p. 53.) The letter also requested

“the total number of employees (including non-bargaining unit) of laid-off employees” so that the union could determine if the Company had complied with the requirements of the WARN Act in relation to the layoffs. (Id.)

The Company responded on June 9, 2009 noting that six individuals who were not members of the bargaining unit had been laid off. (R. Ex. 24 & Decision p. 53.) On July 9, 2009 the Company sent another letter to the union indicating that the Company had not provided the specific names of the non-unit personnel who had been laid off because the Company did not believe that information was relevant to collective bargaining. (R. Ex. 29 & Decision p. 54.)

However, Mason testified that at a subsequent bargaining session a union representative stated that the union needed the names on the non-unit personnel that were laid off in order to verify whether the total number given to the union by the employer was accurate. (Tr. pp. 1998-1999 & Decision p. 54.) Subsequent to this explanation, the Company did in fact give the union names of the non-unit personnel who had been laid off. Mason testified that the requested information was set forth in letter from his then associate, Matt Austin to the union. (Tr. pp. 1998-1999.) Said letter is was dated August 24, 2009. (R. Ex. 50, p. 08540.) Nevertheless, Judge Carissimi found that the Company “did not, in fact, provide the names of the non-unit personnel who had been laid off by the union.” (Decision p. 54.) Judge Carissimi relied “on the fact that the record contains no letter from Austin submitting that information to the union and the Respondent’s other submissions regarding requested information were always accompanied with such a letter. Without objective evidence establishing that the names of the nonunit individuals laid off were submitted, I believe Mason’s recollection on this point was faulty.” (Id.)

As evidenced by the August 24, 2009 letter, Judge Carissimi's memory was in fact faulty and he was erroneous in his ruling. (R. Ex. 50, p. 08540.)

N. **Exception XIV – Judge Carissimi Erred in Finding Dan Owens Is A Supervisor Within Section 2(11) Of The Act And An Agent Of The Respondent Within Section 2(13) Of The Act And, Therefore, Respondent, Through Dan Owens Violated Section 8(A)(1) Of The Act By Soliciting Employees To Sign A Decertification Petition**

The Act defines the term “supervisor” in § 2(11), which states:

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

See, 29 U.S.C. § 152(11).

The definition is meant to be narrow. As Judge Posner has noted:

[T]he first of the two clauses of § 2(11) gives the definition of ‘supervisor’ an initial appearance that turns out to be deceptively broad. If it stood alone, the first clause would make ‘supervisors’ of, among others, anyone responsible for ‘supervision in the elementary sense of directing another's work. . . .’ The first clause does not stand alone, however, and the second clause -- the portion following the ‘if’ -- imposes a significant qualification. It limits the definition of ‘supervisor’ to people whose direction of the work of others, etc., is not ‘merely routine.’ **In adding this limitation, Congress intended to withhold § 2(11) supervisory status from ‘straw bosses,’ ‘leadmen,’ and other low-level employees having modest supervisory authority.** (Emphasis added). (Internal citations omitted).

See, *Highland Superstores, Inc., v. NLRB*, 927 F.2d 918, 920-921 (6th Cir. 1991), citing *NLRB v. Res-Care*, 705 F.2d 1461, 1465-1466 (7th Cir. 1983).

The United States Supreme Court noted that § 2(11) necessarily sets forth a three part test for determining supervisory status. See, *NLRB v. Kentucky River Community Care* (2001), 532 U.S. at 712. An employee is a supervisor if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or

clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. *Id.* at 712-713. Lastly, the burden of proving supervisory status lies with the party asserting that such status exists and said status must be proved by a preponderance of the evidence. *See, Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). The General Counsel failed to meet its burden.

In *Croft Metals*, the Board followed the standard it set forth in *Oakwood Healthcare Center Inc.*,⁹ to determine that the lead men were not supervisors under § 2(11) of the Act. *Id.* In doing so, the Board noted the following definition term “independent judgment” as it is used in § 2(11) of the Act. *Id.* The Board stated:

[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. [A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement. On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that [t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the routine or clerical. (Internal quotations and citations omitted).

Id.

Owens is not a § 2(11) supervisor. Contrary to Judge Carissimi’s findings (Decision p. 66), Owens does not discipline employees. He simply notifies supervisors and/or managers of employee safety rule violations via a *Notice of Violation of Safety Rules and Procedures* (“Safety Notice”). Sometimes he will verbally notify an employee that they are not following the safety rules. In any event, verbal reprimands given by Owens are not “disciplinary” and alone are not enough to impute Section 2(11) supervisory status upon an employee. *See, Beverly Enterprises*

⁹ 2006 NLRB LEXIS 448 (2006).

v. *NLRB*, 148 F.3d 1042, 1046 (8th Cir. 1998) (LPN charge nurses were not Section 2(11) supervisors where their disciplinary authority consisted solely of the power to verbally reprimand); *see also*, *Crittenden Hosp.*, 328 NLRB 879 (1999) (RN's did not have Section 2(11) disciplinary authority even though they were required to point out and correct deficiencies of the nurse's aides). Notably, Judge Carissimi chose to ignore these cases in his Decision. Additionally, the discretion to administer disciplinary action against a particular employee for a safety violation remains with the supervisors and/or managers. As such, the Safety Notices are independently reviewed before any discipline should happen to be administered. (Tr. pp. 829-830 & 866-867.)

When Owens fills out a Safety Notice, he only fills out the date, the employee's name and their shift. The remaining portion is to be filled out by the supervisor and the employee. Owens testified to the following:

JUDGE CARISSIMI: I have a question about it, Mr. Owens. So, who wrote out what's on there? There's printing on there, is that your printing?

THE WITNESS: On this specific one, I wrote this.

JUDGE CARISSIMI: Okay.

THE WITNESS: And I gave this to the supervisor.

JUDGE CARISSIMI: And who was the supervisor?

THE WITNESS: Oh, at this time, on third shift, I -- I don't know if it was, at the time, Brian Ohler or not.

JUDGE CARISSIMI: Okay. But now this is after you -- you gave Mr. [Sallaz] a copy of this, is that correct?

THE WITNESS: I didn't, no.

JUDGE CARISSIMI: So you wrote this out, and then what did you do with it after you did it?

THE WITNESS: I gave it to the supervisor.

JUDGE CARISSIMI: Okay. And when you gave it to the supervisor Mr. [Sallaz's] signature wasn't on there? Do you see, down at the bottom, his signature?

THE WITNESS: No, his -- his signature was not on there.

JUDGE CARISSIMI: Okay. So you prepared it and gave it to the supervisor?

THE WITNESS: I prepared it and handed it off to the supervisor.

JUDGE CARISSIMI: All right. And when you gave it to the supervisor did you say anything to him about what you thought he should do with it?

THE WITNESS: No. That's up to them to take the corrective action.

JUDGE CARISSIMI: All right. Thank you.

Q. So they issued her a warning with nothing on it, as far as verbal warning? I mean this is -- there was no -- when they relied on it or used it from you there was nothing on there as to corrective action?

A When I gave this out, what's filled out is up to the date, employee and the shift time. That's when I hand it off to a supervisor. On -- on these occasions, the supervisor told me that he gave her a verbal warning, but he didn't fill it out, he should have; and then I did, to what he didn't put down there.

JUDGE CARISSIMI: So -- all right. So Mr. Owens, when you -- when you filled this out initially you have indicated that your handwriting goes down to shift time first, right?

THE WITNESS: Correct.

JUDGE CARISSIMI: All right. And you give it to the supervisor at that time, is that right?

THE WITNESS: Right.

JUDGE CARISSIMI: When you got it back, where the line says, "Correction Action Taken," first there's a "Yes/No" and the "Yes" is circled. Now who circled that?

THE WITNESS: I circled them.

JUDGE CARISSIMI: All right. And --

THE WITNESS: Because that's what -- when I came back --

JUDGE CARISSIMI: Let me -- let me -- listen to the question. And you circled that after you got it back from the supervisor?

THE WITNESS: Yes.

JUDGE CARISSIMI: Now, how about where it says, "Verbal Warning," who wrote that?

THE WITNESS: On this one, that was me.

JUDGE CARISSIMI: And when did you write that?

THE WITNESS: After I got it back and I circled the "Yes," and I asked the supervisor, "What was the warning," and he said, "A verbal."

JUDGE CARISSIMI: All right. Thank you. Ms. Fernandez, you may continue.

(Tr. pp. 104 -106 & 110-112.) Carissimi did not credit Owens's testimony regarding his authority to issue discipline. (Decision pp. 63-65). Carissimi even stated that Owens tended to "downplay" his authority. Nonetheless his testimony above is supported by the evidence. The Safety Notices plainly state:

NOTE TO SUPERVISOR/FOREMAN: The following employee/employees were found to be in violation of Safety Rules and/or procedures. It is your responsibility to inform each employee by the end of their next shift and date and sign this form.

(G.C. Ex. 40 & 48-49). Owens is not down playing his authority. Rather, Carissimi is overstating his authority. Owens does not decide whether the employee shall be issued a verbal warning, as opposed to a written warning or a suspension. In other words, Owens' Safety Notices are merely reportorial. Accordingly, Owens does not possess Section 2(11) authority to discipline. *See, Ten Broeck Commons*, 320 NLRB 806 (1996) (LPN's did not have Section 2(11) disciplinary authority where disciplinary reports were independently reviewed by management

before any disciplinary action, if any, was taken); *see also, Passavant Health Center*, 284 NLRB 887 (1987) (nurses did not have Section 2(11) disciplinary authority where Director of Nursing decides if further disciplinary action is warranted only after the nursing office conducts and independent investigation, interviewing those involved in the particular incident or those who have information pertaining to the incident); and *Vencor Hospital – Los Angeles*, 328 NLRB 1136 (1999) (nurses did not have Section 2(11) disciplinary authority where evidence indicated that once a certain point in the progressive disciplinary policy is reached, the employee's file is independently reviewed by management before steps 5-7 could ever be implemented).

Judge Carissimi also relied heavily on the fact that the Company uses a progressive disciplinary system and that verbal warnings are necessarily the first step in that process. (Decision p. 66.) Nonetheless, the Handbook specifically states that “[d]isciplinary action may include one or more of the following and may occur in any order.” (G. C. Ex. 3, p. 16.) The Handbook further states that “[t]he Company may implement the above disciplinary actions in any order depending on the level of severity.” (Id.) Accordingly, General Die employees do not automatically receive increasingly severe punishment for rule infractions based on the class of infractions committed and the employee's disciplinary record. *See, Bryant Health Center*, 2008 NLRB LEXIS 265 (2008), *citing Bon Harbor Nursing & Rehabilitation Center* 348 NLRB 1062 (2006).

General Counsel presented no evidence that Owens has the discretion to issue written warnings and/or suspension. More importantly, the fact that General Counsel provided no evidence indicating the appropriate level of discipline for any previously recorded discipline, establishes the fact that the Safety Notices are not a basis for future disciplinary action. *Ken-Crest Services*, 335 NLRB 777, 778 (2001) (no supervisory status where employee only issued

verbal warnings and no written warnings were placed in evidence that even referred back to the previous verbal's issued by employee in question.) It is well established that the issuance of oral or written warnings that do not affect job status or tenure is insufficient to confer supervisory authority. *Lakeview Health Center*, 308 NLRB 75 (1992).

Carissimi also relied on testimony from Ivery and Smith that Owens issued verbal and written warnings to them respectively and to Jim Pruney. (Decision pp. 63-66.) Nevertheless, the record is void of any 2008 safety violations that were issued to Ivery for failure to wear safety glasses and/or a 2009 written warning issued to Smith for failure to wear a safety helmet. The record is also void of any sort of warning issued to Pruney. Moreover, the record is void of any further discipline that references back to these alleged violations. Accordingly, their testimony is doubtful. Nevertheless, Carissimi repeatedly credited their testimony. (Decision p. 63-66.) First, Ivery was a less than credible witness throughout this case in addition to a subsequent case heard by Judge Carissimi.¹⁰ He acknowledges on tape that information contained in his NLRB Affidavits is not true. With respect to the supposed Smith discipline, General Counsel did not admit into evidence any such written warning.

More importantly, General Counsel subpoenaed documents which disclose Owens has the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline employees, responsibly direct the,, adjust grievances and/or that possesses the authority to effectively recommend such actions. Any and all documents responsive to that request were turned over to Region 8. Yet, only three (3) Safety Notices are in the record, none of which have anything to do with Ivery or Smith. General Counsel failed in meeting its burden to establish that Owens is a Section 2(11) supervisor.

¹⁰ See, *General Die Casters, Inc.* 2011 NLRB LEXIS 200 (2011).

Lastly, Carissimi relies on G.C. Ex. 9, an accident analysis report in an effort to establish that Owens can effectively recommend discipline. (Decision p. 65-66.) In his report, Owens indicated that a Violation of Safety Rules should be considered. Brian Lennon stated that discipline was issued to Ormsby and “part” of what he considered was Owens’s accident analysis report. Judge Carissimi cites to *Progressive Transportation Services, Inc.*, 340 NLRB 1044 (2003) and *Venture Industries*, 327 NLRB 918, 919-920 (1999) in support of his proposition that Owens effectively recommends discipline. However, these cases are distinguishable. For instance, in *Progressive Transportation* the employee in question was a “deck lead supervisor” overseeing the work of four (4) dispatchers. 340 NLRB at 1044. The deck lead supervisor was overseen by the Operations Manager. (Id.) The record showed that the deck lead supervisor recommended discipline to the Operations Manager. (Id. at 1045.) The thirty three (33) disciplinary notices in the record signed by the deck lead supervisor established that said her supervisor follows her recommendations. (Id.) Additionally, there were instances where warning notices signed by the deck lead supervisor were referenced in later disciplinary action imposed against the same employee. (Id. at 1044.)

In *Venture Industries* it was *undisputed* that the line and department supervisors had the authority to issue oral or written reprimands to employees. 327 NLRB at 919. When supervisors decided to issue a reprimand, they would discuss it with the employee, have the employee sign it, and then send it off to the human resource department. Id. It was also *undisputed* that the Employer had a progressive disciplinary system and, pursuant to that system the department and line supervisors had the authority to recommend suspension. Id. Such recommendations were followed approximately 75 percent of the time.

Here we have only three (3) Safety Notices, none of which are referenced in later disciplinary actions, and a single accident report that was precipitated by an employee's carelessness, rather than Owens's using independent discretion to initiate the disciplinary process.

Additionally, Owens is not an agent of the Company. Owens was not asked by anybody from the Company to initiate the circulation of a decertification petition. As such, neither Owens nor anyone else who circulated a decertification petition was promised any benefit from the Company if they would circulate a decertification petition. Likewise, none were threatened and/or coerced by the Company to circulate a decertification petition. Each man decided to do this on his own accord.

The Board applies the common law principles of agency in determining whether attribute an employee's conduct to the employer. See, *SKC Electric, Inc.* 350 NLRB 857, 862 (2007). Specifically, the Board stated:

Agency status may be established, inter alia, under the doctrine of apparent authority, when the principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to do the acts in question. [E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct [the manifestation] is likely to create such belief. (internal citations and quotations omitted, brackets included in original.)

Id. at 862. Here, there is no evidence that would suggest such a manifestation has occurred. Owens is a Safety Coordinator who conducts OSHA required training. Nevertheless, that fact alone does not make him an agent of the Company. The Union added Dan Owens position of safety Coordinator to the bargaining unit in the election and the Union proposed that Dan Owens position be included in the recognition clause during bargaining and the Union never made any proposals to have Owens Safety Coordinator's position removed from the bargaining unit.

O. Exception XV – Judge Carissimi Erred in Finding Dan Owens Told Employee Chuck Smith That Jim Mathias Would Be More Willing To Address Issues (Such As Wages) With Employees If The Union No Longer Represented Employees And, Therefore, Violated Section 8(A)(1) Of The Act

Judge Carissimi erred in finding that Owens’s statement to Smith that Jim Mathias would be more willing to address issues such as wages with employees if the employees abandoned the union violated Section 8(a)(1) of Act. (Decision p. 58.) There is no question that if Owens is found not to be a supervisor that such a statement would not be in violation of the Act. However, Owens’s credibly denied making such statements. (Tr. p. 1744.) General Counsel chose not to cross examine him on this issue. Conversely, Smith’s testimony was inconsistent. Smith testified on direct that Chuck Long approached him in late April 2010 and told him that Jim Mathias would be more willing to negotiate raises with the employees if the union were not involved. (Tr. pp. 812 & 814.) However, Smith altered his story on cross examination and claimed it was Dan Owens, not Chuck Long, who had made these statements to him. (Tr. p. 829.) Smith was unsure in his accusations and his testimony was not corroborated by any other witnesses. Accordingly his testimony should not have been credited.

P. Exception XVI – Judge Carissimi Erred in Finding Respondent, Through Chuck Long, Threatened Employees With Plant Closure And Job Loss And, Therefore, Violated Sections 8(A)(1) Of The Act

Judge Carissimi erred in finding that Long threatened employees with plant closure and job loss in violation of Section 8(a)(1) of the Act. It is simply not plausible Chuck Long would initiate conversation with Smerk for the sole purpose of threatening plant closure and job loss. Smerk admitted on cross examination that the only reason he was testifying was because he had been threatened by General Counsel. Specifically, he testified as follows:

Q. Is it not true that you told Mary Smith, Doug Hicks and Brian Lynn on Friday that Ms. Fernandez told you that if you did not appear that she would send a Sheriff out and he would bring you to the hearing?

A. Yes.

Q. And she told you that on Thursday --

A. Uh --

Q. -- last week?

A. I'm not exactly sure if it was Thursday.

Q. Okay. Did you believe that the Sheriff was going to come and put you in handcuffs and bring you down here today?

A. That's why I'm here.

Q. That's why you're here?

A. Yes, sir.

(Tr. p. 122-123.) Accordingly, his testimony was given under duress and cannot be credited.

Chuck Long did speak to employees regarding the April 15, 2010 and May 21, 2010 Negotiation Updates. Nevertheless, he never told employees that Jim Mathias was getting mad over the amount of money he was spending on his lawyer. (Tr. p. 1913.) He never told employees he feared their job was in danger. (Id.) Lastly, he never told employees that he feared Jim Mathias would shut down the plant. (Id.) As noted above, Smith's testimony cannot be credited. It was not corroborated and his testimony on direct examination was inconsistent with his testimony on direct examination.

Q. **Exception XVII– Judge Carissimi Erred in Finding Respondent Encouraged Employees To Decertify The Union And Sponsored The Effort To Do So Through Its April 15 And May 21, 2010 Negotiation Updates And, Therefore, Violated Section 8(A)(1) Of The Act**

It is an undisputed fact that there is currently pending a lawfully filed decertification petition. This petition was filed long before the April 15 and May 21, 2010 letters to the employees. The simple fact is that once the decertification petition was filed, General Die had

fundamental free speech rights under Section 8(c) of the Act with respect to the Union. These letters sent out post decertification petition were lawful and Judge Carissimi's decision finding these letters to be unlawful denies general Die its free speech rights. General Die has every right to encourage support for the employees who want the Union decertified under Section 8(c) of the Act. In the end, finding these communications to be unlawful sets a precedent that denies a Company a right to tell the employees who filed a decertification petition that the Company agrees and supports their position.

Furthermore, the Company is entitled to communicate with its employees concerning its position in collective-bargaining negotiations and the direction of those negotiations. The Board believes this to also be a fundamental right protected by 8(c) of the Act. See, *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985). Section 8(c) states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Id., citing the Act.

The Board further stated:

An employer is not required to watch passively as a union conducts "public" negotiations through one-sided distributions which denigrate the employer, raise expectations, and engender fear that the employer's position is sinister or unfair. Furthermore, we believe that free and open discussion by all parties to the collective-bargaining process affords the best chance for successful conclusion of negotiations and creates the most favorable climate for successful bargaining. Indeed, employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties' positions as to those issues. We believe employees are full capable of evaluating the relative merits of those positions for themselves. As in *United Technologies*, [274 NLRB No. 87 (Feb. 28, 1985)], there is nothing in the Respondent's communications here which indicates an effort by the Respondent to bargain directly with the employees or an invitation to them to abandon their representative to achieve better terms directly from the Respondent. Indeed, all the Respondent's substantive proposals were submitted to the Union prior to their disclosure to the employees. Moreover, the

Respondent acknowledged to Union's rightful role as the statutory representative by urging the employees to discuss the course of negotiations with their union representatives and to attend and participate in the ratification vote.

Id. at 1074.

Even misstatements of law and/or the union's proposal do not violate the Act. For instance, an employer's statement to employees that they must join a union, although clearly a violation of the law, is not a violation of the Act. *Manor Healthcare Corp.*, 1995 NLRB LEXIS 1060, *28, (1995), citing *Daniel Construction Co.*, NLRB 1276 (1981). The Board reasoned that such a statement is not coercive within the meaning of the Act when it "... contained no express threat that the employer by its own action would impose dire consequences, such as discharge, on the employees and no implicit threat to the employees' rights." Id., at 28-29, citing *Daniel Construction Co.*

In his opinion, Judge Carissimi favorably cited *Armored Transport*, 339 NLRB 374 (2003) in finding that Respondent's negotiation updates which expressed support for decertification of the union were a violation of Section 8(a)(1) of the Act. (Decision p. 69.) The reliance upon the *Armored Transport, Inc.* case is misplaced. In *Armored Transport*, the employer attempted to directly force a vote by union membership by handing out flyers containing a non-bargained-for last proposal and encouraging members to force a ratification vote. Id. at 375-376. Mathias' actions were in complete opposite – he identified the Teamster's failure to bargain based upon behavior. (Exhibits R. Ex. 14(b) and R. Ex. 15.)

There are many Sixth Circuit cases finding employer misconduct. However, such conduct was far more substantial than the action in this matter. *Ctr. Constr. Co. v. NLRB*, 482 F.3d 425 (6th Cir. 2007) Employee statement that unionization would cause loss of three or four jobs (out of 20) was intended to mislead. Id. at 440; *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651

(6th Cir. 2005) Employer threatened its truck drivers with layoffs in one on one meetings. Id. at 660; *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292 (6th Dist. 1988) Employer threatened plant closure. Id. at 1298.

In this case, the bargaining updates were sent to employees and posted to show the outrageous conduct and failure of the Teamsters to bargain in good faith – which was entirely reasonable and valid, given the previous Board finding that the Teamsters were, in fact, bargaining in bad faith. These updates contained no threats to employees. Likewise, the updates promised no benefits and the April 15, 2010 (Exhibit 14(b)) update clearly shows the Respondent was going to continue bargaining for a contract. The updates provided no decertification information – not even ministerial information which is allowed by law.

In fact, Judge Carissimi cited to a case which outlines general employer prohibitions to direct communication with employees in *Process Supply Incorporated*, 300 NLRB 756 (1990) (Decision p. 70.) In *Process Supply, Inc.*, the Board outlined prohibited communication with employees regarding decertification.

The Board stated:

Although an employer may answer specific inquires regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such a petition where the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes planting the seed for the circulation and filing of a petition, providing assistance in its wording, typing or filing with the Board, and knowingly permitting its circulation no work time.

Id. at 758.

It would appear that the ALJ has discounted that a valid decertification petition was already filed in this matter. Further, Judge Carissimi would seek to completely muzzle the Respondent's right to communicate with its employees in contravention of the *Process Supply, Inc.* case. Here, two decertification petitions were already circulating. There is no finding that the

Respondent provided any assistance, typed, filed or suggested wording for any decertification petition. Therefore, the support to employees made by the Respondent was completely appropriate and legal. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed.

R. Exception XVIII– Judge Carissimi Erred in Finding Respondent’s September 17, 2010 Request For Jerome Ivery To Meet With Ron Mason Did Not Occur In A Context Free From Employer Hostility To The Union And, Therefore Violated Section 8(A)(1) Of The Act

Judge Carissimi found that the September 17, 2010 meeting of supervisors Douglas Hicks, Chuck Long and Brian Lennon to ask Jerome Ivery whether he would meet with Respondent’s attorney Ron Mason was a violation of Section 8(a)(1). Previously, Jerome Ivery had approached Douglas Hicks to discuss the Union and ongoing unfair labor practice investigations. (Decision p. 71.) The September 17th meeting was recorded and is contained *supra.* at pp. 40-44 and at Respondent’s Exhibit R. Ex. 19 (Actual recording at Exhibit R. Ex. 20). Judge Carissimi’s opinion found the September 17th meeting was “of itself” coercive, and outside the bounds and application of the *Johnnie’s Poultry* decision. The ALJ improperly applies the *Johnnie’s Poultry* standard for the meeting between Hicks, Long and Lennon with Ivery so that Respondent **cannot even inquire** whether Ivery would or would not meet with the Company’s attorney. The ALJ’s decision would effectively cut off any ability of the Company to even ask if an employee would agree to be questioned. The record is overwhelming that Ivery was given multiple assurances against reprisal if he did not meet with Mason. The ALJ cites favorably to the interpretation of *Johnnie’s Poultry* assurances in *Freeman Decorating Co.*, 336 NLRB 1 (2001). In *Freeman Decorating*, the Board overturned the lower ALJ decision finding no violation of 8(a)(1) for telephone interviews by a company attorney of witnesses subpoenaed for hearing where no assurances against reprisals were not given. *Id.* at 64-66. The Board stated:

[A]n employer interrogating an employee witness in preparation for a Board hearing must give explicit assurance against reprisal for refusing to answer or for the substance of any answer given. We established this requirement to ensure that employers' legitimate interest in obtaining relevant evidence will not encroach on employees' rights to protection under Section 7.

Id. at 65.

In this instance, Ivery was given clear assurances of no reprisals should he decide not to meet with Mason. Additionally, Judge Carissimi would seem to attempt to impute anti-union animus upon the Respondent simply because complaints had been issued against it for alleged violations of 8(a)(5), (3) and (1). Like *Freeman Decorating*, it is for the very reason that Respondent was preparing for trial of this matter that Ron Mason wanted to question Ivery. Ivery told Respondent's management that the affidavits given to General Counsel were "inaccurate." This situation made it incumbent that Ivery be interviewed if he agreed. In the end, the ALJ's factual determination found that Ivery agreed to meet with Mason – even after being allowed to consider whether he wanted to do so over a weekend. (Decision p. 73.)

Respondent's position is that there were no violations of the Act by the Respondent by interaction of its management with Ivery on September 17, 2010. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed.

S. **Exception XIX – Judge Carissimi Erred in Finding Respondent, Through Chuck Long, Impliedly Threatened Jerome Ivery With Retaliation If He Did Agree To Respondents Request To Meet With Ron Mason And, Therefore, Violated Section 8(A)(1) Of The Act**

Brian Lennon certainly encouraged Ivery to speak to Mr. Mason. (Tr. p. 1769.) Nonetheless, Brian Lennon told Ivery that it was ultimately his decision whether to speak with Mr. Mason if he decided not to do so that was fine. Regarding the fact that it was ultimately Ivery's decision to meet with Mr. Mason, Brian Lennon stated the following:

It's, it's important, Jerome. We've all been here a long time. We've all worked really hard. We have all put a lot of work into this place and made it one of the best die cast shops in the world. You know, and uh we want to keep going in that direction, you know. So we want to we want to make this, want to make this a good place. But, its important, you know I'm not going to lie to you we obviously certainly want you to do it, but um, you know it's your, it's your decision but it's, it's an opportunity for you to definitely make a difference in all this. So...

(R. 19, p. 6.)

Likewise, Chuck Long told Ivery during the meeting that it was strictly Ivery's decision on whether he ultimately wanted to meet with Mr. Mason. (Tr. pp. 1905-1906.) He stressed that this was purely voluntary on Ivery's part and that there would be no repercussions should he decide not to meet with Mr. Mason. (Id.) Regarding the fact that it was ultimately Ivery's decision to meet with Mr. Mason, Chuck Long stated the following:

And I think one big important thing to remember I think with the whole thing is what I said are not going to be forced to answer anything. You know what I mean. As far as if you do meet with him and he has a question if it is something that you want to write it down or think about it or something and answer later or something like that or whatever, you know, that kind of thing. I mean, obviously you are not obligated to do any, do anything. I mean it's not that your, you know, this is, this is all voluntarily from your end. You know what I am saying. So, um, one thing you know if he has a question that you're just not comfortable with answering then, like Doug said, you know, you just say hey, you know I don't really know if I want to get into that, and you know, whatever, think about it or whatever until a later date or something. You know you can always do that, so...

(R. 19, p. 4.)

None of Ivery's testimony can be credited with respect to the September 17, 2010 meeting and the circumstances/events surrounding said meeting. Simply put, his testimony was not credible. For instance, Ivery testified that Doug Hicks told him that the Company wanted him to do a favor and meet with General Die's attorney. (Tr. pp. 147-148.) Furthermore, on cross-examination Ivery insisted that Doug Hicks used the phrase "do me a favor." (Tr. pp. 265-266.)

Ivery even stated that it was a "lie" to state otherwise. (Tr. p. 266.) Specifically, the testimony is as follows:

Q. And, in fact, Mr. Hicks did not use the words "do me a favor," rather, he simply asked you to meet with Ron Mason.

A. No. That's a lie. He told –

Q. That's a lie.

A. That's a lie. When I sat down, Doug told me, he said the Company need -- needed me to do them a favor. And I said, well, what's the favor? And that's when he told me that the Company would want me to talk to you.

(Tr. p. 265-266.) However, the recorded transcript of the meeting clearly denotes that Doug Hicks never used the phrase "do me a favor." Doug Hicks stated the following:

Alright I'll tell you what we asked you in here for. And I'll be straight forward to you about it. I would like you to meet with Ron Mason. Um, he's got some questions he would like to ask you. And, um you can pick the day, if you want it and we will do it during the day – um, aah off site. We will pay you for the day as if you were here working. Um, and are you willing to do that?

(R.19, p. 2.)

Moreover, Ivery testified that he could not recall ever telling Chuck Long prior to the September 17, 2010 meeting that the statements he gave to Ms. Susan Fernandez were not true.

Q. Now, in fact, before that meeting, you went to Chuck Long on more than one occasion before that meeting on September 17, 2010, you told him that the statements that you gave Ms. Fernandez were not true, did you not?

A. No. I -- I think I told Chuck that, you know, the only thing that I told -- the only difference between my -- my statement that I gave to Susan and gave you was that maybe I, you know, I could have handled things a whole lot different, you know. You know, maybe some of the things that I, you know, that I said, you know, didn't take place as far as, you know, as far as being discriminated, when I looked back at it, you know. When I look back at it now, to back then.

Q Okay. So it's your testimony that you never said the words that those statements were not true to Chuck Long?

A. I -- I -- I don't recall that, no.

(Tr. pp. 254-255.) Furthermore, Ivery could not recall telling Doug Hicks, Brian Lennon and Chuck Long during this meeting that his statements to Susan were not true.

Q. Okay. Now, when you had the meeting with Mr. Lennon, Mr. Hicks, and Mr. Long, isn't it a fact that you told them in that meeting that the statements that you gave to Ms. Fernandez were untrue?

A. I -- I don't know. I don't recall saying that.

(Tr. p. 259). Ivery also denied telling Doug Hicks, Chuck Long and Brian Lennon that he was concerned about perjury.

Q. Did you tell Mr. Long, Mr. Hicks, and Mr. Lennon that you were concerned about the fact that you committed perjury with respect to those statements that were untrue?

A. **No.** I -- what I -- what I said was that, you know, if I talk -- if I talk to you -- no, what if what if, you know, I say something that's going to -- that's going to not line up to what -- what I was saying to Susan, that's when Chuck Long told me that, well, you can talk to him about attorney/client privilege. That's what I basically pretty much remember. (Emphasis added.)

(Tr. p. 261.) The transcript from September 17, 2010 meeting clearly establishes that Ivery did in fact tell Chuck Long prior to the meeting that his statements to Ms. Susan Fernandez were not true, that he did in fact tell all three of them during the meeting that his statements to Ms. Fernandez were not true and that he was in fact concerned about perjury.

Additionally, Ivery could not recall stating that he did not want to meet with Susan Fernandez.

Q. And then also in this meeting did you not tell them that you did not want to meet with Ms. Fernandez and you just wanted it all to go away?

A. **No, I don't recall that.** I told -- I told them, I said, you know, I'm really - I -- I'm really tired of this. Yeah, I pretty much said I -- I want this all to go away. But I don't remember saying I don't want to talk to Fernandez. (Emphasis added.)

(Tr. p. 262.)

Again, the transcript from the September 17, 2010 meeting states otherwise: Lastly Ivery could not recall Doug Hicks telling him that he had been subpoenaed and, consequently, would have to tell the truth.

Q. Do you remember Mr. Hicks telling you that you've been subpoenaed, that you're going to have to testify and tell the truth?

A. Well, no.

Q. Okay.

A. No, no, no. No. Well, let's get this straight. He already had a subpoena from Susan. I didn't -- I did not receive a subpoena from you, **so he didn't say nothing about the subpoena from Susan yet**, because I already know I had one from him. I haven't received the one from you.

Q. You had received the one from Susan, though, had you not?

A. Yes.

(Emphasis added). (Tr. pp. 262-263.)

Once again Ivery's testimony with respect to the meeting is very disparate with what actually transpired at the meeting. In reference to Ivery being subpoenaed, the exchange between Doug Hicks and Ivery was as follows:

JJ: Oh, Ok. I got a question. But, if uh, like I said really like I've been saying I'm really getting tired of all this shit you know what I'm saying. But um, you know say like if I do meet with Mason like I said, you said it's going to come out on the stand. But, you know isn't that going to kind of put me in a spot up on the stand or whatever, you know what I'm saying? You know...

DH: Well, you're subpoenaed so you or anybody sitting up on that stand it is going to be put on the spot. Because you are going to be sworn in, to tell the truth. Um, you know, regardless.

JJ: Because any thing I say. Like I said, I mean like I told Chuck. There are things that I did and said in the past....

DH: I know but since you have been subpoenaed. They are going to put you on the stand and ask you about those things. So you are still going to be in a position where, ok, you weren't so truthful about the stuff you know with Teamsters so are

you going to stick with that story or are you going to tell the truth you know and discredit that story. You are still going to be put in that same position. Regardless.

JJ: Right, ok, right. But what I am saying is what I said on, what I said in the affidavit and what they are going to ask me on the stand, or whatever. I mean. You know cause like I said, some of the stuff like I said, honestly, I mean you know, it wasn't true. You know what I am saying. Like I said I was kind of – that is going to kind of like put me into a spot far as perjury or something, isn't it?

(R. 19, pp. 2-3.)

After the September 17, 2010 meeting, Ivery took the weekend to consider meeting with Mr. Mason. On Monday, September 20, 2010, Ivery asked Chuck Long whether Long would hold it against him if he did not meet with Mason. The factual record is conflicting about the next statements. Ivery testified that while Long told him he would not hold Ivery not meeting with Mason against him that others might. Long testified that, as on the previous Friday, he would not hold Ivery's refusal to meet with Mr. Mason against Ivery.¹¹ Ivery's testimony on this issue is as follows:

Q. When you returned to work on September 20th did you speak to anyone in management about the topic of discussion?

A. Yeah. Uh -- I talked to Chuck Long.

Q. And did you approach him?

A. Yeah.

Q. About what time of day was that?

A. It was in the morning. It was about nine o'clock.

¹¹ It is important to note that Judge Carissimi has found Jerome Ivery's testimony far less compelling and truthful in the recently published decision: *General Die Casters, Inc., Cases 8-CA-39211 et al.*, JD-39-11 (July 11, 2011). This case deals with Ivery's complaints and testimony from the first hearings of the present case through March 2011 and is very insightful on Ivery's continued lack of credibility.

Q. Did you -- and what did you say?

A. I -- uh, I went into Chuck's office, and told him, I said -- uh, you know, what we discussed Friday, I said, "You said if I didn't want to do it you weren't going to hold it against me."

And he said, "No. No, I wouldn't hold it against you personally. But I don't know -- I don't know what other people would do, you know."

Q. Did he say what he meant by that?

A. No. Huh-uh.

Q. What did you say then?

A. I told him -- I told him I would -- you know, I would go ahead and talk to Ron.

(Tr. p. 153.)

Chuck Long testified about the Monday meeting as well. Long did not say that he "implicitly" warned or threatened Ivery as the ALJ found. Rather, Long testified as follows:

Q. Did there come a point in time after the meeting when Jerome informed you that he would agree to meet with Mr. Mason?

A. Yeah. The following Monday after that weekend, he -- he came to me and -- and -- and agreed to meet with Mr. Mason.

Q. Can you tell me whether or not during this conversation Jerome asked you if you would hold it against him if he did not meet with Mr. Mason?

A. Yes, he did. Yeah. He asked me that.

And, you know, I told him, I says, you know -- you know, basically, there -- this isn't going to affect anything outside -- you know, all it is, we would like you to meet with him.

If you -- if you decide not to, you know, it's totally your call, you know, it's not something we, you know, we would hold against you.

All -- I told him, basically, all I was concerned about was is, you know, his work, his attitude while he's at work, working with other people, getting the job done, keeping our customers happy.

(Tr. pp. 1906-1907.)

From a review of either Ivery or Long testimony, there is no express or implicit threat to Jerome Ivery that can be reasonably construed. The ALJ's decision attempts to build in a "threat" by Long prior to Ivery's meeting with Mason and valid consent to be interviewed pursuant to legitimate *Johnnie's Poultry* assurances. September 20, 2010, R. Ex. 115 and September 22, 2010, R. Ex. 116. As in Section T, Exception XXI, the *Freeman Decorating*, would dictate that the "bright line" of a threat against Ivery is not met by the ALJ's finding some amorphous "impliedly threatening Ivery with retaliation." (Decision p. 76.) Simply put, no threat is present.

Respondent's position is that there were no violations of the Act by the Respondent on account of Ivery's solicitation of Long on September 20, 2010 prior to meeting with Ron Mason. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed.

T. Exception XX – Judge Carissimi Erred in Finding Respondent asked Jerome Ivery Questions Concerning His Subjective State Of Mind With Respect To Certain Events During The September 20, 2010 Meeting And, Therefore, Violated Section 8(A)(1) Of The Act

Judge Carissimi found that questioning Ivery about his definition of "onerous" included subjective questioning about his protect activities. In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board set forth its policy of permitting employer's to conduct employee interviews in order to ascertain facts necessary for the preparation of its defense against charges issued. This long

established policy requires that the employer must communicate the purpose of the interview and assure the employee that no reprisals will take place. Additionally, the employer must obtain the employee's participation on a voluntary basis and the questioning must occur in a context free from employer hostility to union organization. Finally, the questioning must not be coercive in nature and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, or elicit in rights of the employee. GDC's Counsel followed the steps set forth above and Ivery admitted as such in his testimony when he testified that he did not feel threatened or intimidated in this meeting. Moreover, Counsel was simply exercising its right to prepare for trial. Counsel sought to meet with Ivery due to the fact that Ivery informed members of management on more than one occasion that the statements he gave to Ms. Susan Fernandez in his Board Affidavits were not true. Frankly, Ivery's inconsistent positions on his work assignments and notice to Company managers that he had given inconsistent statement to General Counsel made it all the more important that he be interviewed in an attempt to separate the truth from fiction in Ivery's claims.

In this instance, Mason was not asking for subjective feelings in regard to the pending Charges, rather, he questioned Ivery about the pending charge as follows:

- “7. (A) On about March 21, 2008, Respondent assigned more onerous job duties to its employee Jerome Ivery.**
- (B) Respondent engaged in the conduct described above in paragraph 7(A) because the named employee of Respondent formed, joined, and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.”**

Emphasis added.

Paragraph 7 from second amended consolidated Complaint dated October 1, 2010.

Ivery's September 20, 2010 affidavit is responsive to the allegations listed above. Exhibit R. Ex. 115. However, Ivery's accuracy regarding event dates was inaccurate requiring another statement be taken on September 22, 2010.¹² Ivery's statements are answers to questions based upon the pending charges. The investigation of this matter was hampered by Ivery's constantly changing positions. If subjectivity exists, it is in the drafting of the Complaint by General Counsel. It would be wholly unfair to the Respondent to be found barred from the ability to question its employees regarding the express allegations of General Counsel's complaint involving the definition of "onerous" particularly when the Affiant's position on the issue **is the sole reason upon which the Complaint was issued** constantly changes.

It is vital to note that Judge Carissimi considered these very issues of Ivery's alleged onerous job duties in *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011) earlier this year and **completely dismissed General Counsel's charges** which dealt with Ivery's credibility, finding Ivery's testimony to be completely non-persuasive.

Respondent's position is that there were no violations of the Act by the Respondent based upon the questioning of Jerome Ivery after having been given *Johnnie's Poultry* assurances and having acknowledged same. Ivery's affidavit was responsive to the allegations contained in the General Counsel's complaint. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed.

¹² The September 22, 2010 Ivery interview does not seem to be at issue in Judge Carissimi's decision. To the extent it is considered at issue, the Respondent incorporates the argument above to require the Board to dismiss such a finding as well.

U. **Exception XXI – Judge Carissimi Erred in Finding Respondent’s September 20, 2010 Meeting With Jerome Ivery Did Not Occur In A Context Free From Employer Hostility To Union Organization And, Therefore Violated Section 8(A)(1) Of The Act**

Respondent’s managers asked Jerome Ivery if he would meet with the lead negotiator and attorney for the Respondent, Ron Mason. This request was made to investigate the facts surrounding a Complaint issued by General Counsel alleging that “On about March 21, 2008, Respondent assigned more onerous job duties to its employee Jerome Ivery.” On September 20, 2010 Ivery met Mason, his colleague Aaron Tulencik and the Douglas Hicks at the Akron Fulton Airport. Ivery was given *Johnnie’s Poultry* assurances before the interview which he acknowledged as part of an affidavit. R. 115. The substance of the affidavit as a result of the interview was that as of September 20, 2010, Ivery’s job duties were not more onerous after March 21, 2008 as contained in his affidavit previously taken by General Counsel.

In *Dayton Typographic Serv. v. NLRB*, 778 F.2d 1188 (6th Cir. 1985), the Sixth Circuit Court of Appeals attempted to identify elements supporting a valid employee interview pursuant to *Johnnie’s Poultry* assurances. The Court stated: “In assessing the coercive nature of an interrogation, the NLRB must consider ‘the background, the nature of the information sought, the questioner’s identity, and the place and method of interrogation.’” *Id.* at 1194.

In this particular instance, Ivery had been given assurances of non-retaliation by Respondent’s management and given time over a weekend to consider whether he would cooperate. The meeting place was far offsite at the Akron Fulton Airport, away from plant, employees and managers except for Hicks. As evidenced by his affidavit, Ivery responded to the issues as outlined in Paragraph 7 from second amended consolidated Complaint dated October 1, 2010. The questioner’s identity was known to Ivery – Mason was known as the lead negotiator for Respondent. Judge Carissimi credited the “mutually corroborative manner” of testimony

given by Mason, Tulencik and Hicks regarding the meeting. (Decision, p. 73, Footnote 35.) It was their testimonies that established that Ivery volunteered information to Mason. In fact, Ivery volunteered to give a copy of his previous affidavit taken by General Counsel to Mason and postulated upon future negotiation outcomes. Importantly, Mason directed Ivery back to another union supporter (Dennis Ormsby) if Ivery wanted to know about the union position (Tr. p. 2119.)

Based upon the foregoing, the record more than confirms Respondent has met all obligations while interviewing Ivery pursuant to *Dayton Typographic Serv.* The evidence is overwhelming that Ivery had time to consider cooperating with Respondent. Mason was considerate of appearance for Ivery by meeting off plant site. Mason conducted a valid, legitimate interview and, because of Ivery's recantation of his previous General Counsel affidavit, suggested Ivery seek independent representation should the varying statements be an issue with the government. Accordingly, the finding of the ALJ should be overruled and the pertinent portions of the Complaint against the Respondent dismissed.

V. **Exception XXII – Judge Carissimi Erred By Refusing To Consolidate This Matter Together With the Issues Contained In *General Die Casters, Inc.*, Cases 8-CA-39211 et al., JD-39-11 (July 11, 2011)**

On January 6, 2011, counsel for the acting General Counsel filed a Motion with the ALJ to reopen the Record and to consolidate Case Nos. 8-CA-39211, 8-CA-39228, 8-CA-39252, 8-CA-39256, 8-CA-39266, and 8-CA-39272 in this matter. Judge Carissimi partially granted General Counsel's Motion and reopened the matter to allow additional exhibits. (Tr. pp. 2221-2220. The ALJ denied the Motion To Consolidate. Prior to filing, Respondent's counsel agreed to the filing. As stated by General Counsel in the Motion, dissonant factual findings could occur. Judge Carissimi had the authority to consolidate the matters. *See generally, Vemco, Inc.*, 304 NLRB 911 (1991) and *Axton Candy & Tobacco Co.*, 241 NLRB 1034 (1979).

Based upon the decision now issued in *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011), it is clear that the issues of credibility regarding Jerome Ivery and Leonard Redd would have decided in favor of the Respondent. Many of General Counsel's allegations in this matter were based upon the disingenuous faulty testimony of both employees. In the cases including 8-CA-39211 *et al.*, all credibility issues were resolved in favor of General Die. It was found, based upon General Die's own recorded meeting that certain of Ivery's Weingarten rights had been violated – based upon audio evidence. Likewise, all of Leonard Redd's testimony was found to be not credible.

It is the position of the Respondent that should Judge Carissimi have granted the Motion to consolidate, this further, true evidence presented in 8-CA-39211 *et al.*, would have been completely persuasive to the Judge, and by necessity, have resulted in findings for the Respondent on the allegations based upon the affidavits of Ivery and Redd.

Accordingly, the Respondent petitions the Board to order the custodian of the case record of *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011) cause the Record to be transmitted to the Board and for its Record to be included and considered in the Board's review of the credibility issues of Jerome Ivery and Leonard Redd.

IV. CONCLUSION

For the reasons outlined above and in accordance with the evidence, Respondent did violate Section 8(a)(1), (3) and 5 of the Act. Accordingly, the Respondent respectfully requests that the Board find contrary to Administrative Law Judge Carissimi's rulings, findings, conclusions and the recommended Order with respect to the issues raised on exception. Additionally, the Respondent requests the Board to order the custodian of the case record of *General Die Casters, Inc.*, Cases 8-CA-39211 *et al.*, JD-39-11 (July 11, 2011) cause the Record to be transmitted to the Board and for such Record to be included and considered in the Board's review of the credibility issues of Jerome Ivery and Leonard Redd.

Dated at Dublin, Ohio on this 15th day of July, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 15, 2011, an electronic original of Respondent General Die Casters, Inc.'s Exception and Brief in Support was transmitted to the Board, Division of Judges via the National Labor Relations Board electronic filing system, and further, that copies of the foregoing Exceptions and Brief in Support were transmitted to the following individuals by electronic mail or first class U.S. mail as indicated:

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