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

Grede II, LLC
Cases: 11-CA-022980, 11-CA-022984,
11-CA-022997, 11-CA-066972,
and 11-RC-006748

ACTING GENERAL COUNSEL'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Shannon R. Meares
Counsel for Acting General Counsel

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UNITED STATES OF AMERICA
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GREDE II, LLC

and

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

Cases 11-CA-022980
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11-CA-022997
11-CA-066972
11-RC-006748

To the Honorable, the Members of the
National Labor Relations Board
Franklin Court Building
1099 14th Street, NW
Washington, DC 20570-0001

ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for Acting General Counsel herein files the below exceptions to the decision of Administrative Law Judge George Carson II in the following respects:

1. To the Judge's finding that Cabadas' statement to employees that the unfair labor practice charges were "personal" was simply "a statement of how he felt" and not a threat of unspecified reprisal. (JD 12, lines 46-50)

2. To the Judge's finding that Cabadas did not threaten employees with discipline when he directed that they "better not be passing out anything or talking about the Union or else." (JD 13, lines 32-44)

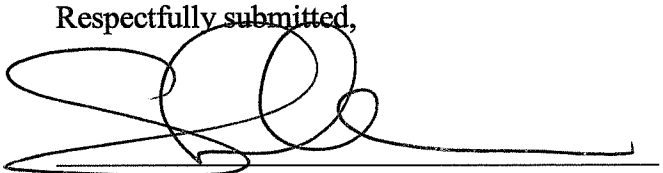
3. To the Judge's finding that Respondent violated Section 8(a)(1) – not Section 8(a)(3) – of the Act when it remedied employees' grievances. (JD 12, lines 29-30)

4. To the Judge's recommended Order which inadvertently failed to order that Respondent: (a) cease-and-desist from disciplining employees because of their union activities; (b) remove any reference to Walter Morrison's unlawful discipline from its files; (c) notify Morrison once the discipline has been removed; and (d) assure him that the discipline will not be used against him. (JD 34, lines 28-30)

5. To the Judge's decision to deny Acting General Counsel's request for a bargaining order, broad cease and desist order, and notice reading remedies. (JD 30, lines 38-40)

Dated at Winston-Salem, North Carolina, on the 14th day of June 2012.

Respectfully submitted,



Shannon R. Meares
Counsel for Acting General Counsel
National Labor Relations Board
Region 10, Subregion 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467

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

I. INTRODUCTION

On April 19, 2012, Administrative Law Judge George Carson II issued a decision partially dismissing the Amended Consolidated Complaint in Grede II, LLC, Cases 11-CA-022980, 11-CA-022984, 11-CA-022997, 11-CA-066972, and 11-RC-006748. These cases involve numerous Section 8(a)(1) and (3) allegations arising from Respondent's unlawful response to the Union's campaign at its Biscoe, North Carolina facility. Even though the Judge found that Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act, he erred by failing to find other violations of the Act notwithstanding current Board law. More specifically, the Judge failed to find that: (1) Respondent threatened employees with unspecified reprisals; (2) Respondent threatened employees with discipline; and (3) when Respondent

unlawfully remedied employees' grievances it violated Section 8(a)(3), not 8(a)(1), of the Act. In addition, although the Judge found that on August 2, 2011, the Respondent unlawfully disciplined known union adherent Walter Morrison II, in violation of Section 8(a)(3) of the Act, the Judge inadvertently failed to fully remedy the unlawful conduct.[1] In this regard, the Judge's order does not mandate that Respondent: (a) cease-and-deist from disciplining employees because of their union activities; (b) remove from its files the August 2 disciplinary action issued to Morrison; (c) notify Morrison that the discipline has been removed; and (d) assure him that it will not be used against him.

Although the Judge's decision to dismiss the above violations and the inadvertent error in his order are both significant, arguably the Judge's most patent error was his failure to grant a bargaining order remedy, a broad cease-and-desist order, and a notice reading remedy. In this regard, notwithstanding his finding that Acting General Counsel properly authenticated 200 out of 313 union authorization cards, thereby demonstrating that the Union enjoyed majority status on December 22, 2010, the Judge held that the Union's overwhelming loss – 204 to 86 – could have been attributed to the Respondent's lawful campaign. Despite finding that Respondent committed the hallmark violation of threatening employees with plant closure, the Judge, nevertheless, disregarded Board precedent and found significant the absence of other hallmark violations such as the discharge of union adherents and the grant of wage increases. The Judge also noted the size of the unit, disregarding other significant factors examined by the Board such as the Respondent's swift response to the campaign, the wide-dissemination of the threat of plant closure, the clear loss of majority status, and that the unfair labor practices were committed by high-ranking company officials. The Judge further found that the Respondent's overall conduct

[1] All dates are in 2011, unless otherwise noted.

was not sufficiently coercive to justify a bargaining order remedy. Other than stating that traditional remedies are sufficient to remedy the Respondent's conduct, the Judge offered no rationale for his decision not to grant a broad cease-and-desist order and a notice reading remedy. As set out more fully below, the Judge's decision, in part, represents a serious departure from both Board policy and precedent and, therefore, it must be partially reversed.

II. STATEMENT OF THE CASE

The relevant credited facts span the period of November 29, 2010, the date employees first contacted the Union, through August 2, the date employee Morrison was unlawfully disciplined. In making his findings of facts, the Judge credited the testimony of key witnesses for Acting General Counsel. Below is an overview of Respondent's operations and the initial organizing campaign, followed by a brief synopsis of the numerous violations, both pre- and post-election, found by the Judge.

A. Respondent's Operations and the Initiation of the Union's Organizing Campaign

The Respondent owns a foundry in the small southern town of Biscoe, North Carolina, where it produces metal components for automobiles and trucks.[2] (JD 2, lines 5-7, 21) Biscoe is located in Montgomery County; Respondent is the largest employer in the county. (JD 2, lines 21-23). In January 2010, Richard Cabadas became the General Manager at the foundry. (JD 2, lines 23-24) Despite Cabadas' efforts to improve life at the foundry, employees remained dissatisfied with their wages and working environment. (JD 2, lines 24-26)

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[2] References herein to the Judge's decision will be designated JD, followed by the page and relevant line numbers. References herein to the transcript from the underlying hearing will be designated TR; to the Acting General Counsel's exhibits as GC; and to the Respondent's exhibits as R, followed in each case by the page or exhibit number.

In late November 2010, ten employees reached out to the Union seeking representation. (JD 2, lines 31-32) Union organizer Randy Rigsby told the group that the first step in seeking representation involved obtaining signed union authorization cards from fellow employees. (JD 2, lines 33-34) Thereafter, the employees obtained over 200 signed union authorization cards which were hand-delivered, on December 22, 2010, with the representation petition to the Regional office. (JD 2, lines 34-35; TR 463, 1013-1014) On that date, there were 313 employees in the bargaining unit; thus, the Union had an approximate 64% showing of interest before the Respondent's unfair labor practices. (JD 2, lines 44) Respondent was unaware of the employees' organizing efforts until it received the petition. (JD 2, lines 43-44) The foundry was closed for the holidays between December 22, 2010, and January 3.

B. Respondent's Pre-Election and Election-Day Unfair Labor Practices

The employees returned from holiday shut down on January 4; thereafter, Respondent waged an unlawful campaign designed to thwart union support. Among the many unfair labor practices alleged, the Judge found that Respondent committed numerous violations of the Act during the 4-week period immediately preceding the election. In this regard, the Judge found that Respondent violated Section 8(a)(1) of the Act when Cabadas, during January 4 and 5 employee meetings, announced that although he planned to implement certain unspecified benefits, he could no longer do so because the Union filed a petition. (JD 7, lines 37-38) The Judge also found that Respondent committed a hallmark violation, via corporate hired labor consultants Shade Zebib and Martin Nystrom, when it threatened plant closure during captive audience meetings with employees. (JD 9, lines 33-34) Likewise, Respondent, by Nystrom, threatened that the foundry would relocate to Mexico if the Union won the election. (JD 10, lines 23-24) The Judge determined that during these same captive audience meetings

Respondent, by Zebib, threatened employees that if the Union won the election there would be fewer overtime opportunities. (JD 17, lines 1-3) The Judge also concluded that Respondent violated Section 8(a)(1) of the Act when Zebib threatened employees with futility by informing them that even if the Union won the election, Respondent would not bargain. (JD 11, lines 5-8) The Judge further determined that Respondent, by Cabadas, violated Section 8(a)(1) of the Act by soliciting and promising to remedy employee grievances. (JD 12, lines 29-30) The Judge's finding was predicated on the "unprecedented unresponsiveness of Cabadas" to employee complaints. (JD 11, lines 46-47; JD 12, lines 5-7) The Judge also found that Respondent, by Cabadas, unlawfully prohibited employees from talking about the Union during work time and in work areas and, likewise, selectively enforced its solicitation and distribution policies. (JD 13, lines 38-40; JD 19, lines 9-10) Similarly, the Judge determined that, on the day of the election, Respondent, by Cabadas, unlawfully denied employees access to the facility while off the clock, in violation of Section 8(a)(1) of the Act. (JD 17, lines 28-29)

In regard to Respondent's rules, the Judge found that Respondent maintained unlawful handbook rules. Specifically, the Judge determined that Respondent maintained overly broad solicitation and distribution policies and a rule asking employees to report the union activities of their fellow coworkers. (JD 19, lines 12-14, 31-33)

C. Respondent's Post-Election Unfair Labor Practices

Despite its overwhelming election-day victory, Respondent continued its crusade to deter union support. In this regard, the Judge found that, during an early morning employee meeting on February 10, Cabadas announced that Respondent was immediately implementing a 2.5% raise, a $250 cash bonus and an $80 boot allowance. (JD 5, lines 44-46) Thereafter, Cabadas learned that the Union filed objections. (JD 5, line 48) Later that same day, Cabadas held

meetings with employees and informed them that Respondent could no longer go forward with the promised benefits because the Union filed objections. (JD 5, lines 48-50) The Judge found that Respondent violated the Act when Cabadas announced and then rescinded promised benefits, while simultaneously attributing the rescission to the Union's decision to file objections. (JD 7, lines 40-43) The Judge ordered that Respondent make the employees whole for the loss of benefits. (JD 32, lines 25-33)

The Judge also determined that after the election, Respondent, by Supervisor Bruce Fields, Foundry Engineer Trevor Beach, and Supervisor Davis Sutts, more closely monitored the movements and activities of the pro-union employees. (JD 14, lines 41-43; JD 15, lines 40-44) Likewise, the Judge held that Respondent, by Cabadas, violated the Act when it prohibited employees from wearing shirts in support of the Union or the Company and prohibited employees from taking breaks in the spectrometer lab, the suspected hotbed of union activity. (JD 18, lines 9-10, 38-41)

Finally, the Judge held that Respondent violated Section 8(a)(3) of the Act when, on August 2, it disciplined known union supporter Morrison. (JD 26, lines 3-4) The Respondent employs a progressive disciplinary procedure. (JD 28, lines 44-45) The Judge determined that because the August 2 disciplinary action was unlawful, insofar as Morrison was terminated pursuant to a progressive disciplinary procedure that included the discipline, Morrison was unlawfully terminated in violation of Section 8(a)(3) of the Act. (JD 28, lines 44-49)

III. ANALYSIS OF THE JUDGE'S DECISION

Even though the Judge found numerous pre- and post-election unfair labor practices, his decision, nevertheless, fails in five fundamental respects. First, the Judge erred by failing to find that Respondent violated Section 8(a)(1) of the Act by threatening employees with unspecified

reprisals. Second, the Judge erred by failing to find that Respondent unlawfully threatened employees with discipline in violation of Section 8(a)(1) of the Act. Third, the Judge erred by failing to find that Respondent violated Section 8(a)(3) of the Act, within days of the election, when Cabadas remedied employee grievances, an allegation akin to a grant of benefits. Fourth, the Judge erred by inadvertently failing to fully remedy the unlawful disciplinary action against union supporter Morrison. Finally, as noted above, the Judge committed his most significant error when he failed to grant a bargaining order remedy, broad cease-and-desist order and a notice reading remedy. This brief will address each of these errors in turn, first providing a detailed discussion of the relevant credited facts and the Judge's rationale, and then setting forth the proper legal analysis of the credited facts.

A. The Judge erred by failing to find that Respondent threatened employees with unspecified reprisals because of their union activities in violation of Section 8(a)(1) of the Act.

1. Credited Facts

It is undisputed that, on February 10, General Manager Cabadas held a meeting with employees and announced that he was giving the employees a 2.5% raise, a $250 bonus and an $80 boot allowance. (JD 5, lines 44-46) At that time, Cabadas was unaware that objections had been filed. Thereafter, upon learning about the Union's objections, Cabadas held subsequent meetings with employees, during which he announced that because the Union filed objections he could no longer move forward with changes in benefits. (JD 5, lines 48-50) Cabadas' announcement was also reinforced through a written notice distributed to employees that same afternoon. (JD 6, lines 1-5; GC 13) Following the meeting, Cabadas had a brief conversation with union adherents Delbert Capel and Gregory Clarke about the announcement. (JD 12, lines 43-45; TR 412-413, 642-643) During the conversation, Capel told Cabadas that it seemed like

things were "getting personal." (JD 12, lines 45-46; TR 413) Cabadas responded that, "The election wasn't personal, but these charges are." (JD 12, lines 46-47; TR 413, 568, 643) Clarke told Cabadas that he still could have gone forward with the raise. (TR 568-569)

2. The Judge's Rationale

The Judge found that Cabadas' assertion that the charges were "personal" did not rise to the level of a violation. More specifically, the Judge reasoned that Cabadas was simply stating how he felt. (JD 12, line 49) The Judge, therefore, found that there was no threat of unspecified reprisal and dismissed the allegation.

3. Legal Analysis

Contrary to the Judge's findings, Cabadas' assertion that the charges were "personal" was a threat of unspecified reprisal in violation of Section 8(a)(1) of the Act. The Board has long held that an employer violates the Act when it makes statements to employees that can be reasonably interpreted to coerce or restrain employees in the exercise of their Section 7 rights. *The Continental Group,* 353 NLRB 348, 350 (2008). The Boards looks at the "totality of circumstances" when distinguishing between employer statements protected under Section 8(c) of the Act and statements that tend to restrain or coerce employees. *Sawgrass Auto Mall,* 353 NLRB 436, 437 (2008). An employer's implication that supporting a union is equivalent to disloyalty may violate the Act based on the overall context of the statement. *Id.* The Board's decision in *Sawgrass* is squarely on point. In *Sawgrass,* the Board held that the employer made an unlawful threat of reprisal when a manager told an employee that voting for the union would be perceived as a "personal attack" against him. *Id.* at 437-438. In making this finding, the Board examined the overall context in which the statement was made, including the employer's

prior unlawful interrogation, impression of surveillance, discharge of a known union adherent and declaration that it would not rehire an employee because of his union activities. *Id.*

Here, Cabadas told the employees that the Union's conduct – filing charges – was a personal attack against him. The overall context in which the statement was made is even more coercive than that observed in *Sawgrass.* Specifically, Cabadas' statement was addressed to the most avid, known union supporters and was on the tail end of numerous violations of the Act, including the unlawfully announced and rescinded withholding of benefits attributed to the Union's petition, threats of plant closure and futility, threat to relocate the foundry operations to Mexico, the solicitation, promise to remedy and remedying of grievances, prohibition against employees talking about the Union while working, and Respondent's selective enforcement of its solicitation and distribution policies. Notably, just minutes prior to the conversation, Cabadas unlawfully rescinded changes to employees' benefits, attributing his decision to the Union's objections.

The perceived retaliatory nature of Cabadas' statement is evidenced by Clarke's response. In this regard, Clarke told Cabadas that he could have gone forward with the raises, thus linking the employees' failure to get raises to Cabadas being offended by the Union's charges. Although Capel opened the door by making a remark that it appeared "things were getting personal," Cabadas could have quickly slammed the door shut by assuring the men that it was not personal. Instead, Cabadas used Capel's remark as a chance to inform the employees that: (1) he was personally offended by the charges; (2) he resented the filing of the charges; and (3) there was potential for even more fallout due to their union activities. The Judge, therefore, erred in failing to find that, on or about February 10, Respondent threatened employees with unspecified reprisals in violation of Section 8(a)(1) of the Act.

B. The Judge erred by failing to find that Respondent threatened employees with discipline in violation of Section 8(a)(1) of the Act.

1. Credited Facts

On January 29, employee Samuel Ingram was speaking with several employees on the work floor. (JD 13, lines 23-24; TR 718-719) At the time, Ingram had a copy of a petition circulated by the anti-union employees seeking to cancel the upcoming election. (JD 13, lines 24-25) As Ingram talked with employees, Cabadas approached, singled out Ingram and asked him if he was passing out anything. (JD 13, lines 25-26; TR 718) Ingram said no and explained that he was showing the employees the petition that had been passed around by the anti-union employees. (JD 13, lines 26-27; TR 718) Cabadas told Ingram that he had "better not be passing out anything or talking about the Union or else." (JD 13, lines 27-28; TR 718) Ingram asked Cabadas whether he was trying to threaten him. (JD 13, lines 28-29; TR 718) Cabadas turned and walked away. (JD 13, line 29; TR 718)

2. The Judge's Rationale

The Judge determined that Cabadas did not threaten Ingram with discipline. In this regard, the Judge found that because "Cabadas did not specify what he meant by 'or else'" and no discipline resulted from the encounter, that the "ambiguous 'or else' comment did not threaten discipline." (JD 13, lines 42-45) The Judge, therefore, dismissed the allegation.

3. Legal Analysis

Cabadas' statement to Ingram that he better not be passing out anything about the Union or talking about the Union 'or else' was an unlawful threat of discipline in violation Section of 8(a)(1) of the Act. Ingram was on the clock working at the time of Cabadas' statement. Under these circumstances, the phrase "or else" was not ambiguous, as the message to Ingram was that

if his conduct continued, discipline would result. Under facts similar to those here, the Board found a violation. In this regard, in *Varo, Inc.,* 172 NLRB 2062, 2066-2067 (1968), a supervisor told an employee that it was against company policy for the employee to pass out union cards during breaks, and the supervisor directed the employee to "stop or else." *Id.* at 2066. Despite the absence of specified discipline, the ALJ, affirmed by the Board, found that the supervisor unlawfully threatened employees with discharge for violating its unlawful solicitation rules. *Id.* at 2067.

The totality of circumstances here, particularly Cabadas' concomitant mandate to Ingram that he not distribute union literature or talk about the Union, are identical to those observed in *Varo.* Similar to the supervisor in *Varo,* Cabadas did not specify exactly what form of discipline would result; nevertheless, the implication was there. The only reasonable inference an employee could draw is that some form of adverse employment action – whether it be a written warning or discharge – would result if the conduct continued. The coercive nature of Cabadas' message is further evidenced in Ingram's response as Ingram immediately asked Cabadas if he was threatening him. Rather than assure Ingram that he was not threatening him, Cabadas validated the threat by remaining silent. Finally, the Judge's reliance on the absence of subsequent formal discipline is misplaced, as the allegation was plead as an 8(a)(1) threat to take action, not the action itself.

C. The Judge erred by failing to find that Respondent violated Section 8(a)(3) of the Act when it remedied employee grievances.

1. Credited Facts

During the captive audience meetings in early to mid-January, employees complained to Cabadas about the lack of accessibility and communication with supervisors. (JD 12, lines 9-10;

TR 33-34) Cabadas had been aware of holes in his supervisory structure since 2010, but had taken no action to address the issue until after employee complaints during the organizing campaign. (JD 12, lines 10-12) In this regard on January 24 and 30, days before the election, Respondent posted openings for a number of supervisor positions on all shifts and opened the potential promotional opportunities to all unit employees. (JD 12, lines 12-15; GC 3)

2. The Judge's Rationale

Based on the above facts, the Judge found that, in conjunction with unlawfully soliciting and promising to remedy grievances, Respondent unlawfully remedied employee grievances in order to discourage their union support. (JD 12, lines 29-30) The Judge concluded that the conduct violated Section 8(a)(1) of the Act. (JD 12, line 30) Notwithstanding that, at the hearing, the Judge granted Counsel for Acting General Counsel's motion to amend the Amended Consolidate Complaint to include the allegation that Respondent remedied employee grievances in violation of Section 8(a)(3) of the Act, the Judge proffered no explanation for his alternative conclusion. (TR 929-930, 932-934; GC 45)

3. Legal Analysis

It is well-established that in the absence of a prior practice, an employer's solicitation of grievances during an organizing campaign, accompanied by an expressed or implied promise to remedy such grievances, violates the Act. *Sikorsky Support Services,* 356 NLRB No. 144, slip op. at 7-8 (2011), citing *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284-285; *Maple Grove Healthcare Center,* 330 NLRB 775, 775 (2000); *Capital EMI Music,* 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994). This notion arises from "the compelling inference that an employer is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise that the combined program of inquiry and correction will

make union representation unnecessary." *Evergreen America Corp.,* 348 NLRB 178, 215 (2006), quoting *Reliance Electric Co.,* 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972); see also *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999) (employer unlawfully solicited employee grievances and impliedly remedied them when supervisor asked employees their concerns and promised to take action, despite the absence of evidence that grievances were actually remedied). When an employer takes the promise a step further and actually remedies the solicited grievances, what was once a mere 8(a)(1) violation, now also becomes an 8(a)(3) violation as the employer has now acted on the employee complaints. In this regard, the Board has found that granting benefits in response to unlawfully solicited employee grievances reinforces in the minds of employees that the benefits were granted in order to discourage their union support and, therefore, violates Section 8(a)(3) of the Act. *Evergreen,* 348 NLRB at 180, citing *Overnite Transportation,* 329 NLRB 990, 993 (1999) (granting benefits in response to unlawfully solicited grievances violates Section 8(a)(3) of the Act).

The Judge erred by finding that the remedying of employee grievances violated only Section 8(a)(1) of the Act, as the Respondent's conduct affected employees' terms and conditions of employment and, therefore, also violated Section 8(a)(3) of the Act. In this regard, when Cabadas posted supervisory positions within the weeks preceding the election, he sent a message to employees that they did not need a union to resolve their grievances or improve their benefits. The posting of supervisory positions was a material and substantial benefit to the employees because it not only addressed their concerns regarding access to supervision, but it also created promotional opportunities. *Evergreen,* 348 NLRB at 180 (a new policy increasing the promotional opportunities for employees, created in response to unlawfully solicited grievances, is a significant and material change in conditions of employment and, therefore,

violates Section 8(a)(3) of the Act). The Respondent, therefore, violated Section 8(a)(3) of the Act when it posted supervisory positions in response to its unlawful solicitation of employees' grievances.

D. The Judge erred by failing to fully remedy the unlawful discipline issued to Morrison.

1. Credited Facts

The Judge found that, on August 2, Morrison was disciplined because of his union activities. (JD 26, lines 3-4) The Judge found that when the Respondent issued discipline to Morrison, for allegedly leaving work early, it did not conduct a thorough investigation of the events surrounding his departure, thus demonstrating a discriminatory motive. (JD 25 lines 19-52; JD 26, lines 1-2) Insofar as the August 2 unlawful discipline resulted in Morrison's termination under the Respondent's progressive disciplinary procedure, the Judge concluded that Morrison was subsequently unlawfully discharged. (JD 28, lines 45-49)

2. The Judge's Decision

The Judge ordered that Respondent cease-and-desist from "Discharging employees because of their union activities" and offer Morrison reinstatement to his former position and that Morrison be made whole for any loss of earnings and benefits that he may have suffered as a result of his discharge. (JD 34, lines 3, 21-26) The Judge also ordered that any reference to Morrison's discharge be removed from Respondent's files, that Morrison be notified of the removal and that he also be assured that the discharge will not be used against him. (JD 34, lines 28-30)

3. Legal Analysis

Despite finding that Respondent disciplined and later terminated Morrison, in violation of Section 8(a)(3), the Judge inadvertently failed to order that Respondent cease-and-desist from disciplining employees because of their union activities. Section (o) of the Judge's order should, therefore, be corrected to direct Respondent to cease-and-desist from "Disciplining and discharging employees because of their union activities." See *Relco Locomotives Inc.,* 358 NLRB No. 37, slip op. at 30 (2012).

In addition, the Judge inadvertently failed to order that Respondent fully remedy the unlawful discipline of Morrison. In this regard, the Judge only ordered that any references to Morrison's discharge be removed, failing to address the unlawful discipline. Indeed, a full and proper remedy for the unlawful discipline of Morrison requires that Respondent: (1) remove from its files, any reference to Morrison's August 2 discipline; (2) notify Morrison, in writing, within three days that the discipline has been removed; and (3) assure him that the discipline will not be used against him. See *Relco Locomotives,* 358 NLRB No. 37, slip op. at 28 (2012).

E. The Judge erred by failing to grant a bargaining order, a broad cease-and-desist order, and a notice reading remedy.

As noted above, the Judge found that prior to the election Respondent committed numerous violations of the Act. However, it was Respondent's widely-disseminated threat of plant closure – via its distribution of the local newspaper that contained an article threatening that the plant might close to avoid the Union – the week before the election that justifies the need for the extraordinary remedy of a *Gissel* bargaining order and the additional special remedies. To fully understand the impact of the threat of plant closure, below is a detailed discussion of the strong union support pre-dating the distribution of the newspapers, the actual distribution of the newspapers, and the marked decline in union support post-dating the distribution.

1. Credited Facts

a. The union campaign flourished before the distribution of the newspapers.

During the weeks before and after the Union filed the petition, the Union campaign flourished as support was contagious. After the initial organizing meeting, the Union held several organizing meetings at least once a week or every other week through early to mid-January and, on average, about 25-50 employees attended each meeting from the various shifts. (TR 226, 469-474, 890) In addition to the scheduled meetings, the Union also held impromptu meetings at the Hardees and the McDonalds restaurants located close to the plant, both before and after shifts and during employee break periods. (TR 469, 889) On average, approximately 5-10 employees would attend the impromptu meetings and union cards were even solicited and signed by employees during these meetings. (TR 464, 782, 889)

The strong support for the Union was further shown by the number of employees openly displaying union paraphernalia. (TR 394, 553, 844) In this regard, in early January, the Union began distributing union t-shirts and hard hat stickers that employees immediately displayed. (TR 463-464, 477-478) There were designated "shirt days" when employees would show their solidarity by wearing their union shirts. (TR 144, 394, 844) The demand for union shirts was so high that at one point the Union ran out of shirts. (TR 844) During the campaign, employees complained to union organizer Rigsby that they did not have anything visible to show their support, due to the cold weather; subsequently, Rigsby ordered "do-rags," with the union insignia, for employees to wear on their heads.[3] (TR 464)

During this same time, there was a small group of employees opposing the union efforts,

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[3] Do-rags are also known as bandanas.

led by maintenance employee Gary Campbell, leadperson Steve Gesme (the son of a supervisor) and leadperson Roy Karshener.[4] (TR 553, 844, 1051) In this regard, Campbell and Gesme were openly distributing "No Union" stickers. (TR 37, 844) The stickers were given to the supply room clerk to distribute upon request. (TR 844) Employees were requesting stickers; however, instead of wearing the sticker in its original form, they were cutting off the "No" so that the sticker simply read "Union." (TR 844, 848)

In or around mid-January, Gesme, along with Karshener, also started an employee petition seeking to cancel the union vote. (TR 939-940, 1104) Karshener and Gesme walked through the plant with the petition on a clipboard, openly approaching employees in their work areas, asking them to sign the petition. (TR 395, 423-424, 553-555, 614-615, 639, 845, 941-942) Karshener asked vocal union adherent Darriel Patterson if he wanted to sign the petition; Patterson said no. (TR 845) Patterson asked Karshener if he was getting ready to send the petition. (TR 845) Karshener said no; he did not have enough signatures. (TR 845) Patterson questioned how he did not have enough signatures, when the petition had already been passed around on second and third shifts. (TR 846) Karshener confirmed again that he did not have enough signatures. (TR 846) Patterson glanced at the petition and saw the heading; there were no employee signatures on the page. (TR 846)

Around this same time, Patterson also had a conversation with Gesme about the petition to cancel the election. (TR 847) Gesme told Patterson that he was concerned that the company was going to lose and the Union would win the election. (TR 847) He then started asking Patterson questions about the Union and told him he was upset because employees were cutting of the "No" portion of his stickers and putting the "Union" portion on their hard hats. (TR 848)

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[4] Leadpersons are not Section 2(11) supervisors.

Needless to say, despite Karshener's and Gesme's unfettered solicitation, the petition to cancel the election could not gain momentum because employee support was strong. (TR 251, 553, 555)

b. On January 26, a week before the election, Respondent distributed the local weekly newspaper to employees which contained an article projecting that the plant might close if the Union won the election.

In mid-January, Cabadas received a telephone call from Judy Stevens, the Economic Development Director for the Montgomery County Economic Development Committee (MCEDC), during which she asked if he would be willing to speak to the local newspaper, The Montgomery Herald, regarding the union campaign.[5] (TR 40-41) Respondent was a member of the MCEDC and Stevens' father had worked at the plant; thus, Stevens was well-acquainted with Respondent and many of its employees. (TR 39-40) Cabadas agreed to be interviewed; thereafter, he met with reporter Tammy Dunn.[6] (JD 7, line 52; TR 41-43) Following the interview, Dunn informed Cabadas that the next edition of the newspaper would run Wednesday, January 26; the newspaper is published weekly. (JD 8, line 1; TR 41, 44) After the interview, Dunn sent a draft of the article to Cabadas for his review. (JD 8, line 1-2; TR 44)

On January 25, Cabadas contacted Dunn and ordered 300 copies of the newspaper. (JD 8, line 2) He purchased such a large number to ensure that each voter had access to their own copy of the newspaper. (TR 44-45) Respondent's purchase and distribution of the newspapers was unprecedented. (TR 45, 398, 716, 850)

The morning of January 26, the newspapers were delivered to the facility. (TR 46) The

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[5] The MCEDC is a very small group of businessmen and women in Montgomery County, North Carolina, who collaborate together to maintain business in the county. (TR 39)
[6] Dunn never contacted the Union to schedule an interview. (TR 465)

article appeared on the front page of the newspaper and the headline read "Grede: Workers to Vote on Union." (GC 4) The article stated that a union vote was set for February 2. (GC 4) It then stated, "The fallout is anyone's guess, but local officials fear the county's largest employer might close their doors rather than go union." (GC 4) Later in the article, various county officials, including Stevens and Mayor of Biscoe Jimmy Blake voiced their concerns about the potential unionization of the plant. (GC 4) Stevens stated that, "it would be a major blow to the county's economy if Grede should close the Biscoe facility," further citing the high unemployment rate in the county. (GC 4) Mayor Blake said that he did not want anything to jeopardize the plant. (GC 4) This was the only article published about the union campaign prior to the vote.[7] (TR 47)

Cabadas placed 100 newspapers on tables in the employee breakroom.[8] (JD 8, lines 2-5; TR 397-398, 558-559, 716; GC 44) In addition, Shade took an unspecified number of newspapers with him for distribution at the captive audience meetings. (JD 8, lines 5-9; TR 1378) There is only one breakroom at the plant, and it is open to all employees on each shift. (TR 46, 337) Employees receive a 15-minute and 30-minute break during their shifts and are also allowed to visit the breakroom throughout their shifts to get a drink or snack. (TR 49, 397, 498, 559, 850) Before the union campaign, Respondent told employees not to bring newspapers to the breakroom for fear that they would extend their breaks. (TR 558, 591, 601)

Although some employees took a copy of the newspaper, others chose to read the newspaper while in the breakroom. (TR 398-399, 558, 560, 641, 716, 849-851, 885) The stack of newspapers in the breakroom diminished as the day progressed. (TR 397) Some copies

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[7] The week after the election, the newspaper published another article announcing the Union's "sound defeat." (GC 27)

[8] Cabadas testified he placed the other 200 newspapers in the human resources office. (JD 8, line 7)

stayed in the breakroom throughout the entire day and any copies remaining were discarded at the end of the day.[9] (TR 49, GC 44) Cabadas did not count the actual number of newspapers that remained in the breakroom before discarding them. (TR 49)

c. Employee support for the Union immediately diminished after the Respondent's distribution of the newspapers.

The impact of the newspaper distribution, a mere seven days before the election, was immediate and severe, and destroyed employee support. (TR 254, 268, 561, 851) In this regard, following the distribution of the newspapers, employees expressed fear that the plant might close if the Union won the election. (TR 282-285, 602) Some of the men commented to each other that their wives were afraid that they might lose their jobs if the Union was voted in. (TR 254-255, 851) Then-employee Stutts told union supporter Patterson that he was worried about his family because he did not have enough education to go somewhere and make the same amount of money.[10] (TR 851)

Likewise, employees stopped wearing their union shirts and do-rags, and removed their stickers from their hard hats. (TR 268, 399, 465, 561, 641-642, 717, 851) Employee attendance at the union meetings held on January 31 drastically decreased to less than ten employees. (TR 466, 603, 890, 893-894) Of the few employees who attended, most were part of the original ten who spearheaded the union efforts. (TR 466, 599, 894)

Finally, the decline in union support was most apparent in employees' willingness to sign the petition seeking to cancel the election. In this regard, after the newspaper article, Karshener

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[9] Cabadas testified that the 200 newspapers placed in the human resources office were discarded two days later; however, that does not account for the copies that were distributed to employees during the captive audience meetings. (JD 8, lines 7-10)

[10] Stutts has since been promoted to supervisor and, at hearing, he testified on behalf of Respondent.

and Gesme resurrected their efforts to stop the election. (TR 400, 561, 851-852) Patterson spoke with Gesme on the work floor, and Gesme told him that he now felt better about the campaign and that Respondent could win. (TR 852) Patterson told Gesme that the Union would have to lose over 100 supporters. (TR 852) Gesme told Patterson that Patterson would be surprised. (TR 852) On January 28, the petition, consisting of approximately 195 signatures, was faxed by Karshener to the Union using a fax machine at the Town of Biscoe municipal buildings, located less than a half-mile down the street from the plant. (TR 466-467, 946; GC 22)

2. The Judge's Rationale

Even though the Judge found that Respondent unlawfully threatened employees with plant closure via its mass distribution of the newspapers – a clear hallmark violation – he concluded that traditional remedies, including a second election, were sufficient to remedy the Respondent's conduct, thereby denying the requested bargaining order, broad cease-and-desist order, and notice reading remedies. (JD 30, lines 38-40; JD 35, lines 15-18) The Judge proffered no specific rationale for his decision to deny the request for a broad cease-and-desist order and notice reading remedies; however, he did explain his decision to deny the requested bargaining order. In this regard, the Judge reasoned that a bargaining order was inappropriate because the only hallmark violation was a threat of plant closure; there were no pre-election 8(a)(3) violations such as the grant of raises or discharge of union supporters. (JD 29, lines 31-35) He also noted that while the Respondent adopted the threat of plant closure in the newspaper, the threat itself was not made by a management official and the Union countered the threat with handbills. (JD 29, lines 39-42). In regard to the dissemination of the threat of plant

closure, the Judge commented that the newspaper was only distributed in English, noting that a significant number of the employees are Hispanic. (JD 30, lines30-33)

The Judge also relied on the large size of the unit. (JD 29, lines 44-47). In addition, the Judge considered that the union authorization cards were all signed "before the debate began" and that if 45 employees changed their minds based on the Respondent's lawful conduct, the Union would have lost its majority status. (JD 30, lines 1-2) Likewise, the Judge found that the record lacked objective evidence demonstrating that the Union's loss of support resulted from the unfair labor practices, as opposed to the Respondent's lawful campaign. (JD 30, lines 24-30) Finally, the Judge found that the conduct here was less egregious than that observed in *Times Wire & Cable Co.,* 280 NLRB 19 (1986), a case in which the Board declined to grant a bargaining order remedy. (JD 30, lines 37-38)

3. Legal Analysis

A bargaining order remedy is imperative here as Respondent engaged in a myriad of egregious unfair labor practices that directly impacted and destroyed the majority status enjoyed by the Union, making a fair second election unlikely. Likewise a broad cease-and-desist order is necessary because Respondent continued to commit some of its most egregious conduct even after it won the election, including its withholding of a raise, bonus and boot allowance, close monitoring of known union adherents and subsequent discipline and discharge of known union supporter Morrison. Finally, a notice reading remedy is appropriate given the flagrant violations. Below is a detailed discussion of: (1) the relevant factors considered by the Board when examining the appropriateness of the extraordinary bargaining order remedy and the application of those factors to the facts presented here; (2) the Judge's flawed analysis of the appropriateness

of a bargaining order remedy; and (3) the need for both a broad cease-and-desist order and a notice reading remedy.

a. A *Gissel* bargaining order remedy is not only appropriate, but necessary to remedy Respondent's pervasive unlawful conduct.

The standards for granting a bargaining order were first set out in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614-615 (1969). There, the Supreme Court held that in appropriate cases, the Board may disregard the normal election process for certifying a union and may rely on authorization cards establishing a Union's majority support to order an employer which has engaged in sufficiently serious and pervasive unfair labor practices to recognize and bargain with the Union without an election. *Id.*

A *Gissel* bargaining order is appropriate in two types of cases: (1) Category I cases, those where "exceptional" "outrageous" and "pervasive" unfair labor practices have occurred and the coercive impact of the unlawful conduct "cannot be eliminated by the application of traditional remedies;" and (2) Category II cases, those where the unfair labor practices are less extraordinary, but nevertheless had a tendency to undermine employee support and make a fair second election impractical. *Gissel,* 395 U.S. at 614-615*; Evergreen,* 348 NLRB at 180. When examining the appropriateness of a bargaining order, the Board considers a multitude of factors, including: (1) the presence of hallmark violations; (2) the wide dissemination of the violations; (3) the identity of those individuals who committed the violations; (4) the size of the unit; (5) the timing of the violations; (6) direct evidence of impact on the union's majority status; (7) the likelihood violations will recur; and (8) changed circumstances. See *Evergreen,* 348 NLRB at 180-182.

Here, the Judge correctly found that, on December 22, 2010, the Union enjoyed majority status. (JD 29, lines 1-14) Thus, the inquiry turns to whether the facts here justify a bargaining

order remedy. When examined under the above factors, Respondent's pervasive conduct clearly demonstrates that a bargaining order is not only appropriate, but it is, more importantly, vital to enforce the policies and purposes of the Act. The likelihood of conducting a fair second election is slight, given the Respondent's pre- and post-election conduct. Below is a discussion of the relevant factors.

(1) Respondent committed hallmark violations.

Respondent committed hallmark violations, including threats of plant closure and a pre-election grant of benefits. The Board has long held that threats of plant closure are "particularly coercive because of their tendency to destroy election conditions, and to persist for longer periods of time than other unfair labor practices." *Evergreen,* 348 NLRB at 180; *Cardinal Home Products,* 338 NLRB 1004, 1011 (2003). Similarly, the grant of benefits has a "particularly long-lasting effect on employees and [is] difficult to remedy by traditional means not only because of [the benefits] significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." *Evergreen,* 348 NLRB at 180, citing *Gerig's Dump Trucking,* 320 NLRB 1017, 1018 (1996).

Even though in most bargaining order cases, the employer has either terminated or disciplined known union adherents prior to the election, the Board has granted a bargaining order even in the absence of such violations. See *Evergreen,* supra; *So-Lo Foods, Inc.,* 303 NLRB 749, 750 at fn.5 (1991), enfd. 985 F. 2d 123 (4th Cir. 1992) (bargaining order granted and enforced by Fourth Circuit based on employer's threat of plant closure and other numerous pervasive 8(a)(1) violations, including, but not limited to, promise/grant of benefits, surveillance, impression of surveillance, threats of discharge, and interrogation); *Hedstrom Company,* 223

NLRB 1409, 1410-1412 (1976) (Board granted bargaining order in the absence of 8(a)(3) violations).

Here, similar to the employers in *Evergreen* and *So-Lo Foods,* Respondent committed pre-election hallmark violations. In this regard, the Judge found that Respondent made numerous threats of plant closure during captive audience meetings. (JD 9, lines 29-34) Likewise, the Judge found that Respondent threatened to move its Biscoe operations to Mexico, which is synonymous with a threat of plant closure or, at the very least, implicates plant closure and job loss. (JD 10; lines 23-24) Respondent's persistent theme of plant closure climaxed seven days before the election when it purchased and distributed the local newspaper which contained an article projecting that the plant might close to avoid the Union. The chilling effect of the newspaper article is evident in the immediate decline in union support and the Union's subsequent loss of the election.

Although threats of plant closure are always considered one of the most heinous violations of the Act, the threats here are particularly egregious given the context in which they were made. In this regard, Biscoe is a small southern close-knit community; Montgomery County has approximately 25,000 to 30,000 residents. (TR 38) The Respondent is the largest employer in the Town of Biscoe and one of the largest in Montgomery County and, therefore, provides a significant tax base for the community. (TR 39) Thus, as candidly admitted by General Manager Cabadas, the closing of the plant would have a significant impact on the community. (TR 50) It is presumed that this is the very reason that the Mayor, Economic Development Director for the County, and the local weekly newspaper weighed in on the projected results of unionization. The election and its impact were undisputedly the talk of the town, and it was important to Cabadas that employees hear what was being discussed in the

community-at-large. (TR 45, 1379, 1428) The Respondent's calculated and unprecedented distribution of the newspaper article a week before the election had an immediate chilling effect on the employees' union support and sent a resounding message to employees that the upcoming vote was not about selecting a collective-bargaining representative, but, instead, it was about keeping jobs in the local community.

In addition to the unlawful Section 8(a)(1) threats of plant closure, Respondent also remedied employee grievances in violation of Section 8(a)(3) of the Act. In this regard, as discussed above, the Judge found that Respondent posted openings for supervisor positions days before the vote, in response to Cabadas' unlawful solicitation of grievances. (JD 12, lines 9–30) As the Supreme Court stated in *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also from which future benefits must flow and which may dry up if not obliged.

Thus, while Respondent was cautious and did not unlawfully discipline or terminate employees, it, nonetheless, committed an egregious 8(a)(3) violation – a grant of benefits – by creating new supervisor positions in response to employee complaints about the lack of supervisor accessibility and communication.

(2) Respondent's hallmark violations were widely-disseminated to bargaining unit employees.

The wide-dissemination of Respondent's hallmark violations further supports the issuance of a bargaining order remedy. See *Evergreen,* 348 NLRB at 180; *Cogburn Healthcare Center,* 335 NLRB 1397, 1399 (2001), reversed on other grounds, 437 F.3d 1266 (D.C. Cir. 2006). More specifically, Respondent's threat of plant closure was orally disseminated to employees not only during the mandatory captive audience meetings, but it was also reaffirmed

in black and white when Respondent distributed over 100 copies of the newspaper article in the breakroom. (JD 8, lines 1-9) Employees were observed reading the newspapers in the breakroom and were similarly observed taking copies of the newspapers. (TR 398-399, 558, 560, 641, 716, 849-851, 885) While Respondent asserts that many of the newspapers were discarded, there is no definitive evidence to establish exactly how many newspapers were discarded at the end of the day because Cabadas did not count the remaining papers. (TR 49) In any event, the fact that the newspapers were discarded does not establish that the article was not read.

It is also significant to note that labor consultant Zebib took copies of the newspapers with him to the captive audience meetings, which were attended by English and Spanish-speaking employees alike. (TR 1378) While Zebib testified that many of the Spanish-speaking employees could not read the article, the record demonstrates that there were bilingual labor consultants, available to translate. (TR 1363) Furthermore, there is no evidence that Respondent normally communicates written notices, including its handbook, to employees in Spanish. Whatever methods the employees use to read other notices regularly posted or distributed by Respondent, such as its February 10 notice to employees announcing the withholding of a raise, they could have used to read the article. (GC 13) In conclusion, it would simply be naïve to conclude that the content of the article was not discussed among English and Spanish-speaking employees alike, considering Respondent's unprecedented placement of over 100 copies of the newspaper in the one and only employee breakroom and its admitted distribution of the newspapers during mandatory captive audience meetings.

Respondent's remedying of employee grievances was also widely-disseminated and directly impacted all bargaining unit employees. In this regard, the postings were openly

displayed for all unit employees to view. (TR 35, 129-130; GC 3) In addition, the creation of the supervisor positions directly impacted the bargaining unit employees as it created potential promotional opportunities for all qualified applicants. The fact that the promotional opportunities were not awarded until after the election is of no consequence, as employees were clearly placed on notice of the openings, created in response to their complaints, prior to the vote.

(3) Respondent's unfair labor practices were committed by high-ranking officials, including the top onsite company official.

The coercive nature of Respondent's conduct is exacerbated by the fact that almost *all* (emphasis added) of the unfair labor practices were committed by high-ranking corporate officials. *Milum Textile Services Co.,* 357 NLRB No. 169, slip op. at 12 (2011); *Evergreen,* 348 NLRB at 181, citing *Concrete Form Wails, Inc.,* 346 NLRB 831, 837-838 (2006) (Board held that the coercive and long-lasting impact of unlawful conduct "magnified by the fact that many of the violations were committed by high-ranking management officials, a point that has consistently been emphasized by the Board as supporting the issuance of a bargaining order.") In this regard, before the election, Cabadas, the highest-ranking onsite management official, announced the withholding of raises and other benefits because of the Union's petition, solicited, promised to remedy and remedied grievances, threatened employees with plant closure via his admitted distribution of the newspapers, threatened employees with discipline, prohibited employees from talking about the Union, selectively enforced Respondent's overly broad solicitation and distribution policies, and prohibited off-duty employee access the day of the election. Cabadas' unlawful conduct continued after the election when he, again, announced the withholding of a raise and benefits, withheld a raise and benefits, threatened employees with

unspecified reprisals, prohibited employees from wearing shirts reflecting their support for the Union or Company, and prohibited employees from taking breaks in the spectrometer lab.

Likewise, the hired labor consultants, Zebib and Nystrom, who told employees that they were hired by corporate, threatened employees with plant closure, relocation of the plant to Mexico, futility, and the loss of overtime. (TR 28, 1360) The substantial involvement by these top-level officials further cemented Respondent's anti-union message to employees that is "unlikely to be forgotten." *Evergreen,* 348 NLRB at 181, quoting *Consec Security,* 325 NLRB 453, 455 (1998), enfd. mem. 185 F.3d 862 (3rd Cir. 1999)

(4) A bargaining order is appropriate notwithstanding the large size of the unit.

A bargaining order remedy is appropriate here despite the large size of the unit. Although the Board has held that unfair labor practices committed in a large unit tend to be more diluted and easily dissipated, it does not rely solely on the number of employees to either grant or a deny a bargaining order. *Phillips Industries, Inc.,* 295 NLRB 717, 718-719 (1989). In this regard, the Board has denied a bargaining order remedy even in a small unit, based on the absent of other contributing considerations. See *Desert Aggregates,* 340 NLRB 289, 294-295 (2003) (the Board held that traditional remedies were adequate to address the employer's violations in a small unit of 11 employees); *Aqua Cool,* 332 NLRB 95, 97 (2000) (a bargaining order remedy unwarranted in a unit of eight employees when there was a single threat of plant closure); Cf. *Hedstrom,* 223 NLRB at 1410-1412 (Board reversed ALJ and issued a bargaining order remedy in unit of 249 employees).

Here, even though the unit is large, the other factors considered by the Board justify the need for a bargaining order remedy. In this regard, there were numerous unfair labor practices, committed by high-ranking company officials, both before and after the election. Cf. *Phillips*

Industries, 295 NLRB at 718-719. (Board declined to issue a bargaining order remedy citing the large size of the unit and that the unfair labor practices were committed by first-line supervisors, as opposed to top level management). Furthermore, as will be discussed below, Respondent's reaction to the campaign was quick and immediate, as all of the pre-election unfair labor practices were committed in the brief 4-week period immediately preceding the election, and the unlawful conduct continued months after the election.

(5) Respondent's response to the union campaign was immediate and swift.

Respondent's response to the union campaign was immediate and swift further justifying a bargaining order. See *Cogburn,* 335 NLRB at 1400 (employer's quick retaliation against union supporters during 3-month period between filing of petition and election supported bargaining order remedy); *In re Debbiey Reynolds Hotel, Inc.,* 332 NLRB 466, 467 (2000) (employer's drastic, immediate and persistent measures to thwart employees' union support buttressed bargaining order remedy); *Baker of Paris, Inc.,* 288 NLRB 991, 992 (1988), enfd. 929 F. 2d 1427 (9th Cir. 1991) (the effect of unfair labor practices is magnified when the violations occur as soon as the employer knows about the union campaign). Respondent was completely unaware of the union campaign until it received the petition sometime on or around December 22, 2010. (JD 2, lines 43-44) The plant was shut down from December 23, 2010 through January 3. (JD 2, lines 46-47) Upon employees' return to work, on January 4 and 5, Cabadas immediately announced the withholding of a raise and other benefits. (JD 5, lines 1-28) Thereafter, employees were required to attend a series of captive audience meetings, during which they were threatened with adverse consequences – such as plant closure, relocation of the plant, futility and loss of overtime – if they selected the Union. (TR 33) Respondent was relentless as, even on the

day of the election, Cabadas unlawfully denied access to the facility to employees while off the clock.

(6) Respondent's unfair labor practices destroyed the Union's majority status.

The effect of Respondent's conduct is evident in the election results. At the hearing, 200 authorization cards were properly authenticated, thus establishing that the Union enjoyed majority status as of December 22, 2010. However, a mere six weeks later, including a 2-week shutdown, the union support essentially flipped and the Union lost the vote 204 to 86. The Union went from a strong majority – 64% – to a weak minority – 27% – in a matter of 45 days.

The impact of Respondent's unfair labor practices is also observed in the Union's overwhelming loss of support after the distribution of the newspaper article. In this regard, as discussed above, the record is replete with evidence that employees stopped wearing their union shirts and stickers, stopped visiting with the union organizers at the Hardees and McDonalds close to the plant, and stopped attending union meetings.

In addition, the petition to cancel the election, that once lacked support, was now overwhelmingly supported by employees, as reflected by the approximate 195 signatures appearing on the petition. (GC 22) Anti-union employees Gesme and Karshener both attempted to minimize the effect of the newspaper article on the support of their petition by asserting that a majority of the signatures were collected before the distribution of the article.[11] (TR 940, 945, 1107) Nevertheless, they both admit that it was important to them to cancel the election as quickly as possible. (TR 941, 945, 954, 1113) Thus, if the petition had the support they claim it

[11] The Judge's decision is silent regarding the anti-union petition. The Judge did not specifically credit or discredit Karshener, Gesme or Patterson regarding their conversations about the support for the petition to cancel the election. Nevertheless, given that the Judge specifically credited Patterson's testimony over Respondent's witnesses, Counsel

had, it would have been faxed back in mid-January when they allegedly collected a majority of the signatures. Furthermore, Patterson's testimony that it was not until after the distribution of the newspapers that Gesme expressed, for the first time, that he thought the Respondent would "*now*" [emphasis added] win the election is unrefuted. (TR 852)

(7) It is likely that Respondent will continue to commit unfair labor practices.

Respondent's proclivity to commit unfair labor practices in order to thwart union support further demonstrates the need for a bargaining order remedy. In this regard, Respondent's conduct did not stop at the election. Instead, it continued its course of obstructing union support by announcing and withholding a raise and other benefits, prohibiting employees from wearing shirts in support of the Union or Company, threatening unspecified reprisals, more closely monitoring known union supporters, and disciplining and terminating the employment of Morrison.[12] In addition, even during the months after the election, Respondent continued to blame the Union for its inability to make any changes. (GC 46)

(8) Changed circumstances do not militate against a bargaining order remedy.

Respondent argued that changed circumstances, specifically employee turnover, counters the need for a bargaining order remedy. Changed circumstances are irrelevant to the analysis, as the Board has long held that it evaluates the appropriateness of a bargaining order remedy based

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for Acting General Counsel submits that the account of Patterson accurately reflects the specifics of these conversations.

[12] At the hearing, Counsel for Acting General Counsel filed a motion seeking to consolidate *Grede II, LLC,* Case 11-CA-071297, with the instant matters, which alleges that Respondent unlawfully terminated Stacy Ewings in violation of Section 8(a)(3) of the Act. The Judge denied the motion; Counsel for Acting General Counsel filed a special appeal to the Board. (GC 45) On February 22, 2012, the Board denied the appeal. Thereafter, on April 12, 2012, a separate hearing was held before Judge Carson. On May 31, 2012, the Judge issued his decision finding that, on October 7, Respondent terminated union supporter Stacy Ewings in violation of Section 8(a)(3) of the Act.

on the time that the unfair labor practices occurred. *Milum Textile,* 357 NLRB No. 179 slip op. at 12; *Evergreen*, 348 NLRB at 181-182; *Parts Depot, Inc.*, 332 NLRB 670, 676 (2000). Nevertheless, as many circuit courts, including the Fourth Circuit, examine changed circumstances when evaluating whether to enforce a bargaining order remedy, this section will briefly address the Respondent's arguments regarding turnover.

Here, there is no passage of time issue, as the unfair labor practices began a little over a year and a half ago and continued as recently as October 29. There has been no turnover in the main bad-actor corporate official – Cabadas – as he still holds his position as the highest-ranking official on site. While labor consultants Zebib and Nystrom are no longer at the facility, presumably employees realize that their absence is merely because they served their purpose.

Respondent's main contention is that a bargaining order remedy is inappropriate because of employee turnover, as it would impose a union on employees who were not present in the bargaining unit at or around the time of the election. In support of its contention, Respondent argues that, today, there are 372 bargaining unit employees; only 204 employees are from the original excelsior list. (R 12) Thus, Respondent asserts that only 55% of the current employees were part of the original bargaining unit, thus militating against a bargaining order remedy. (R 12) Even by Respondent's account, a majority of the bargaining unit employees – over 50% – are still present, thus putting the Union at a significant disadvantage right out the gate.

Nevertheless, Respondent's calculations are deceptive, as it includes new hires. The Board has long held that, "[n]ew employees are presumed to support a union to the same extent as employees in the employee complement." See *TCB Systems, Inc.,* 355 NLRB No. 162 slip op. at 28 (2010), citing *Christopher Street Corp.,* 286 NLRB 253, 254 at fn. 2 (1987). Thus, the relevant calculation is that 204 employees of the original 313 eligible voters are still present –

65% of the original bargaining unit – and they are, therefore, aware of Respondent's unfair labor practices.

As noted above, there has been an approximate 35% turnover in the bargaining unit employees, a rate of turnover that is approaching the highest figure – 40% – observed by the Fourth Circuit in *Overnite Transportation Co. v. NLRB,* 280 F.3d 417, 438 (4th Cir. 2002) (en banc), a case in which the Court declined to enforce a bargaining order remedy. It is critical to note, however, that the facts in *Overnite* are readily distinguishable from those presented herein. Specifically, in *Overnite*, the court determined that a remedial bargaining order was inappropriate not only because of the employee turnover, but also because: (1) most of the executives involved in the unfair labor practices were no longer employed by the employer; (2) five years had passed since the unlawful conduct; (3) the employer had remedied some of the unfair labor practices through settlements and took affirmative steps to avoid future unlawful conduct; and (4) there was evidence that fair re-run elections were conducted at several sites that had been similarly influenced by the employer's unfair labor practices. None of these above-cited additional factors are present here.

Employee dissatisfaction with overall working conditions is often reflected in high turnover rates. That same dissatisfaction is what often motivates employees to seek union representation in the workplace. To allow employers with a history of employee turnover, such as Respondent, to rely on turnover to avoid a bargaining order would be a miscarriage of justice as it sends a message that these employers can commit numerous egregious unfair labor practices during a union campaign and, in the end, the consequences will be minimal because their turnover rate will shield them from a potential bargaining order remedy. In this regard, as the

Court aptly stated in *Chromalloy Mining and Minerals v. NLRB,* 520 F.2d 1120, 1132 -1133 (5th Cir. 1980)

> If we required that a continuing majority support unionization, then an employer with a rapid turnover rate could commit unfair labor practices freely, knowing that substantial number of new employees would be working the time the Board held a hearing and that the Board's only remedy would be to issue a cease and desist order and call a new election. The employer could then commit more unfair labor practices during that campaign, and the Board would have to hold a third election. The employer could thus avoid any bargaining obligation indefinitely, and the union would assume the role of Sisyphus, condemned in Hades continually to roll a stone up the hill, only to find that it slide down again before reaching the top.

The Court's insight is especially true here given that Respondent does not have unclean hands as it unlawfully terminated at least one eligible voter.

b. The Judge's analysis of the appropriateness of a bargaining order remedy is flawed.

The Judge's analysis of the bargaining order remedy is erroneous for six reasons. First, the Judge found that the lack of discharges and/or grant of wage increases before the election significant, noting that the only hallmark violation was the threat of plant closure. (JD 29, lines 31-35) The Judge's finding is erroneous because the lack of employee discharges, discipline or pre-election grant of wage increases is not dispositive on the issue. As noted above, in *So-Lo Foods,* the Board granted, and the Fourth Circuit enforced, a bargaining order remedy despite the fact that the only hallmark violation was a threat of plant closure. See *So-Lo Foods,* supra. Here, there are numerous threats of plant closure, both oral and written, coupled with non-hallmark violations that not only outnumber those observed in *So-Lo Foods*, but are also far more pervasive, thus further substantiating the need for a bargaining order remedy. Likewise, although the Respondent did not grant a wage increase before the election, it did grant the benefit of newly created supervisory positions in response to unlawfully solicited employee complaints,

a clear violation of Section 8(a)(3) of the Act. Therefore, the overall conduct of Respondent is considerably more flagrant than that observed in *So-Lo Foods.*

Second, notwithstanding his finding that the content of the newspaper article was adopted by Respondent, the Judge emphasized that the threat of plant closure in the newspaper was "not made by a management official," and that the Union countered the newspaper distribution with its own literature. (JD 29, lines 38-42) The Judge's emphasis on these two facts is specious. In this regard, whether the words were actually written or spoken by agents of the Respondent is irrelevant because, as the Judge found, Respondent ratified and adopted the contents of the article when it purchased and distributed an unprecedented number of newspapers a week before the election. (JD 8, lines 36-44) See *Marathon LeTorneau Company,* 208 NLRB 213 (1974), enfd. mem. 498 F.2d 1400 (5th Cir. 1974). Respondent's adoption and failure to disavow the contents of the newspaper was akin to a verbal announcement, played over and over again, in the breakroom and in captive audience meetings that if the Union came in the plant might close. The Judge further erred by according any weight to the Union's subsequent literature, as the Union has no control over employees' terms and conditions of employment and, therefore, its propaganda does not carry nearly the same weight or have the same impact as Respondent's.

Third, in regard to the dissemination of the hallmark violations, the Judge noted that there are a significant number of Hispanic employees and that the article was only published in English. (JD 30, lines 30-33) As discussed above, the absence of a written translated version of the article is irrelevant. In this regard, the Judge presumes that the Hispanic employees cannot read English or, in the alternative, ask a fellow employee to read the article to them, or that such a drastic pronouncement would not be readily disseminated to all employees. Even the one Hispanic witness who required an interpreter at the hearing read the article aloud, on the record,

and, thereafter, testified that he understood the article to indicate that the plant would close if the Union won the election. (JD 10, line 12; TR 282-285) Again, there is no evidence that Respondent regularly communicates its notices and policies, including its handbook setting forth workplace rules, in English and Spanish. Instead, there are three supervisors who help translate for those employees who do not read or otherwise are not fluent in English. (JD 3, lines 10-14) In addition, there were bilingual labor consultants translating at the same captive audience meetings during which Zebib distributed the newspapers. (TR 1363) A review of the 200 authenticated union cards demonstrates that many of these cards were completed by Hispanic employees, thus indicating their initial strong support. It is, therefore, clear that whether they read the article or someone translated it for them, the Hispanic employees received the same message of plant closure as other employees and, given their significant number in the workforce, they too were greatly impacted by the threat.

Fourth, the Judge's finding that a bargaining order remedy is inappropriate based on the large size of the unit is also erroneous. As detailed above, even though the Board does consider the size of the unit, it also considers the presence of other factors such as the involvement of high-ranking officials, the lack of turnover among the bad actors, the employer's swift response, clear impact on the Union's majority status and the employer's post-election violations of the Act, all of which are present here. The Judge cites *Jewish Home for the Elderly of Fairfield County,* 343 NLRB 1069, 1121 (2004) in which the ALJ denied a bargaining order remedy due to, among other things, the size of the unit. The Judge's reliance on *Jewish Home* is misplaced. In this regard, in *Jewish Home,* the ALJ not only considered the size of the unit, but also the fact that the unlawful conduct in issue only "affected a handful of employees." *Jewish Home,* 343 NLRB at 1121. Here, the threat of plant closure and grant of benefits was widely-disseminated

and impacted the entire unit. Furthermore, in *Jewish Home,* the ALJ found it significant that there was only one post-election unfair labor practice; to the contrary, here we have numerous post-election violations, including the discipline and discharge of a known union adherent and announcement and actual withholding of increased benefits, along with other 8(a)(1) violations. *Id.* at 1122. In *Jewish Home,* the ALJ also considered that many of the bad actors were gone; here, Cabadas remains as the top onsite official. *Id.*

More importantly, although the ALJ in *Jewish Home* denied the bargaining order, he recommended special remedies, including a notice reading, an *Excelsior* list to be updated every 6 months until a fair election was certified by the Board, and a broad cease-and-desist order, to dissipate the unlawful threats and conduct of the employer. *Id.* at 1123. Here, despite the pervasive unfair labor practices pre-dating and post-dating the election, the Judge failed to award any special remedies, as an alternative to a bargaining order remedy, including the broad cease-and-desist order and notice reading remedy requested by Acting General Counsel. It is also imperative to note that although, in *Jewish Home,* the Board agreed with the ALJ that special remedies were sufficient to remedy the unlawful conduct, it specifically declined to adopt his entire rationale; it is, therefore, unclear what weight the Board gave to the large size of the unit. *Id.* at 1069.

Fifth, the Judge found that there was insufficient objective evidence to establish that the dissipation in union support was actually caused by the unfair labor practices, as opposed to Respondent's lawful campaign. (JD 30, lines 26-29) In this regard, the Judge found that the union cards were signed "before the debate began" and that even if the Union lost the support of just 45 employees due to Respondent's lawful campaign it would have lost the election. (JD 30, lines 30-35) The Judge's finding is troubling as it appears to imply that in order to get a

bargaining order remedy, Acting General Counsel must demonstrate the specific unfair labor practice that caused the dissipation of support. Although there was a marked decrease in support following the distribution of the newspapers, it would be nearly impossible to demonstrate which specific violation caused any given employee to stop supporting the Union. That is the very reason the Board employs an objectives standard when evaluating the coercive and restraining nature of 8(a)(1) statements. It is pure speculation to theorize that 45 employees voted no because of Respondent's Section 8(c) statements. This is especially true given that Respondent's unlawful conduct was so inextricably intertwined with its lawful conduct; the two simply cannot be separated. When Respondent chose to engage in a course of unlawful campaign tactics, it acted at its own peril and, therefore, it should not reap the benefits of its unlawful conduct by now asserting that it was its lawful campaign that caused the decline in support.

In addition, the Judge's argument that the union cards were solicited and majority support obtained "before the debate began" is untenable. In this regard, the Union either enjoyed majority status or it did not. Likewise, the union cards are either valid or they are not. Here, the record shows that the Union enjoyed majority status on December 22, 2010, as evidenced by the properly authenticated and valid union cards. Under the Judge's theory, a union could never get a bargaining order remedy if it relied on union cards solicited prior to the employer's knowledge of the campaign to establish its majority status. Moreover, the Judge's theory makes two flawed presumptions. First, it presumes that an individual cannot support a cause based on his/her own personal convictions and desires without full knowledge and consideration of opposing factors. Second, it presumes that the employees here actually changed their minds based on the Respondent's lawful propaganda. Finally, contrary to the Judge's assertion, there was no "debate;" specifically, there was no regulated discussion between the parties regarding the pros

and cons of unionization. Instead, there was an onslaught of threats and other unfair labor practices committed by Respondent to persuade employees that unionization would result in adverse consequences.

The Judge cites *Washington Fruit and Produce Company,* 343 NLRB 1215, 1279 (2004) in support of his "before the debate began" theory. However, there, the ALJ noted that many of the union cards were originally solicited seven to nine months before the election. *Washington Fruit,* 343 NLRB at 1279. The ALJ further speculated whether the delay in the election process, specifically, the delayed filing of the petition, contributed "to the cooling of the employees' ardor." *Id.* Nevertheless, although he declined to issue a bargaining order, the Judge found that the union enjoyed majority status despite his speculations regarding the decline in employee support. *Id.*

Here, unlike that observed in *Washington Fruit,* the overall campaign process was swift. The Union first met with employees on November 29, 2010, less than a month later, on December 22, 2010, the petition was filed, and six weeks later, on February 2, employees voted. There was no delay that could "cool" employee support; instead, the employee support was cooled and extinguished by Respondent's unlawful conduct.

Finally, the Judge's reliance on *Times Wire* is misplaced. The facts and conduct here are readily distinguishable from those observed in *Times Wire.* In this regard, in *Times Wire,* the Board declined to impose a bargaining order because the employer's conduct did not dissipate the union's majority status. *Times Wire,* 280 NLRB at 19-20. Rather, despite a large number of pre-election unfair labor practices, the union won a first election. *Id.* at 20. Subsequent to the employer's objections, a second election was conducted and only one unfair labor practice – the withholding of a wage increase attributed to the union – occurred in the interim. *Id.* The union

lost the second election. *Id.* The Board found that the sole intervening violation was insufficient to justify a bargaining order considering the union's initial win in spite of the employer's numerous unfair labor practices pre-dating the first election. *Id.*

Here, the Judge found numerous violations of the Act prior to the election, including the hallmark violation of threats of plant closure. Unlike in *Times Wire,* the support for the Union dissipated after Respondent's pre-election unfair labor practices and before the election. The dissipation of union support resulting from the unfair labor practices is not only evident in the immediate reaction of employees to the newspaper article, as evidenced by employees' decision to stop wearing union shirts/stickers and the drastic decline in attendance at union meetings the week before the election, but, also, in the election results. Thus, unlike the union in *Times Wire,* the Union never won an election; therefore, the record evidence demonstrates that Respondent's pre-election unfair labor practices clearly dissipated the Union's majority support.

c. The Judge erred by failing to issue a broad cease-and-desist order and by failing to require that Respondent read the notice to employees.

Although specifically plead by the Acting General Counsel, the Judge erred by failing to grant a broad cease-and-desist order and a notice reading remedy. The Judge's decision is silent regarding his rationale for denying the requested remedies, other than his indication that traditional remedies are sufficient to remedy the Respondent's unlawful conduct. (JD 30, lines 38-40) Counsel for Acting General Counsel submits that a broad cease-and-desist order and a notice reading remedy are both proper and necessary due to Respondent's severe conduct.

(1) A broad cease-and-desist order is appropriate.

The Judge erred by failing to grant a broad cease-and-desist order. A broad cease-and-desist order is appropriate here because of the Respondent's complete disregard for the

protections of the Act. The Board has held that pervasive and egregious unfair labor practices may warrant a broad cease-and-desist order requiring that an employer cease-and-desist from committing the specific violations and from violating the Act in any other manner. *Ampersand Publishing, LLC,* 357 NLRB No. 51, slip op. at 12 (2011), citing *Hickmott Foods,* 242 NLRB 1357 (1979); *Fieldcrest Cannon,* 318 NLRB 470, 473 (1995), enfd. 97 F.3d 65, 74 (4th Cir. 1996).

Here, the Respondent's conduct, as detailed above, was both widespread and egregious and, therefore, warrants a broad cease-and-desist order. Not only did the Respondent engage in pre-election unlawful threats, but it showed disdain for employees' Section 7 right to organize, and it continued to engage in unfair labor practices long after the election.

(2) A notice reading remedy is appropriate.

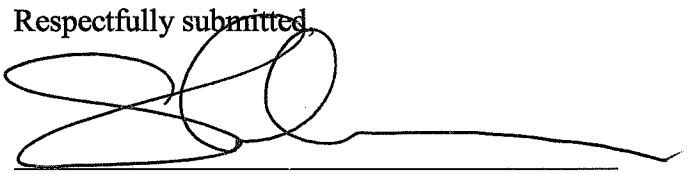
A notice reading remedy requiring that the notice be read, both in English and Spanish, by a responsible official of Respondent or a Board agent is warranted. The Board has found that public notice reading is appropriate when the Respondent's unfair labor practices are serious and widespread so that employees "will fully perceive that the respondent and its managers are bound by the requirements of the Act." *Ampersand Publishing,* supra, citing *Federated Logistics & Operations,* 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920, 929-930 (D.C. Cir, 2005). Counsel for Acting General Counsel respectfully recommends that the notice be read in English by Cabadas, as the highest-ranking official at the plant and main perpetrator of the unlawful conduct, and that it be read in Spanish by a Board agent. A Board agent and a Union agent should be present to monitor the reading. See *Texas Super Foods, Inc.,* 303 NLRB 209, 220 (1991).

IV. CONCLUSION

In conclusion, the Judge erred by failing to find that Respondent threatened employees with unspecified reprisals and discipline and by failing to find that Respondent violated Section 8(a)(3) of the Act when it remedied employees' grievances. The Judge also inadvertently failed to properly remedy the unlawful discipline and discharge of Morrison. Although these errors are significant, the Judge committed his most patent error when he failed to order the proper "punishment to fit the crime." In this regard, his failure to grant a bargaining order remedy and other requested special remedies is a deviation from Board precedent and is counterintuitive to the purposes and policies of the Act. Counsel for the Acting General Counsel respectfully submits that the decision of the Judge should be reversed, in part, and that an Order issue finding that: (1) Respondent violated Section 8(a)(1) of the Act when it threatened employees with unspecified reprisals; (2) Respondent violated Section 8(a)(1) of the Act when it threatened employees with discipline; (3) Respondent violated Section 8(a)(3) of the Act when it remedied employee grievances; (4) the Judge's order failed to fully remedy the unlawful discipline of Morrison; and (5) the appropriate relief includes a bargaining order, broad cease-and-desist order, and a notice reading remedy.

Dated at Winston-Salem, North Carolina, on the 14th day of June 2012.

Respectfully submitted,



Shannon R. Meares
Counsel for Acting General Counsel
National Labor Relations Board
Region 10, Subregion 11
4035 University Parkway, Suite 200
P. O. Box 11467
Winston-Salem, North Carolina 27116-1467

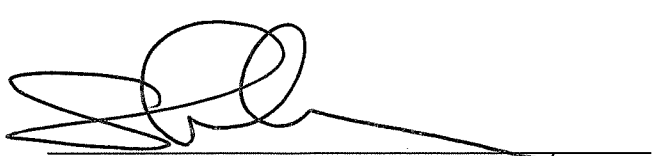
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Acting General Counsel's Exceptions and Brief in Support of Exceptions** have this date been served by **Electronic Mail** upon the following parties:

John C. Cashen, Esq.
Jonathan Young, Esq.
Counsel for Grede II, LLC
Bodman PLC
201 W. Big Beaver Rd., Suite 500
Troy, Michigan 48084
E-Mail: jcashen@bodmanlaw.com and jyoung@bodmanlaw.com

Brad Manzolillo, Esq.
Counsel for the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC
Five Gateway Center, Room 913
Pittsburgh, PA 15222
E-Mail: bmanzolillo@usw.org

Dated at Winston-Salem, North Carolina, on the 14th day of June 2012.



Shannon R. Meares
Counsel for Acting General Counsel