

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

PRINT FULFILLMENT SERVICES LLC

and

GRAPHIC COMMUNICATIONS CONFERENCE OF
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS
DISTRICT COUNCIL 3, LOUISVILLE, LOCAL 619-M

Cases 9-CA-068069
9-CA-068849
9-CA-069188
9-CA-070706
9-CA-072457

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF IN SUPPORT OF
THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. STATEMENT OF THE CASE:

As a preliminary matter, the Board is hereby notified that on August 2, 2012, the U.S. District Court for the Western District of Kentucky entered an opinion and order granting, in part, the Acting General Counsel's petition for injunctive relief pursuant to Section 10(j) of the Act. *Muffley v. Print Fulfillment*, 3:12-CV-00080-CRS.

Accordingly, pursuant to Section 102.94 of the Board's Rules and Regulations, expedited treatment of these matters by the Board is requested. These cases are before the Board on the Respondent's exceptions and Counsel for the Acting General Counsel's limited cross-exceptions ^{1/} to the decision of Administrative Law Judge Paul Buxbaum, which issued on June 27, 2012.

Respondent excepts to virtually all of the Administrative Law Judge's findings of fact and conclusions of law regarding its extensive violations of the Act. The Judge found, and the record evidence shows, that Respondent violated Section 8(a)(1) of the

^{1/} / The Acting General Counsel's limited cross-exceptions and supporting brief are filed as separate documents this same date.

Act by threatening employees with various adverse consequences if they selected the Union as their collective bargaining representative; telling employees that selection of the Union was futile; suggesting that an employee could not be given a raise because of the Union proceedings; and implying that employees would be written up for being late, absent, or making mistakes because the Union had asked for documentation of discipline given to employees. Based on ample record evidence, the Judge also found Respondent violated Section 8(a)(3) of the Act by granting a pay increase to an employee to discourage support for the Union; devising a plan to avoid the hire of a suspected Union sympathizer; sending an employee home without pay before his regular shift ended; issuing a written warning to an employee; and discriminatorily selecting a union supporter for layoff. Respondent also violated Section 8(a)(3) and (5) of the Act by distributing and implementing new work rules for unit employees and instituting a policy of sending employees home when its presses were inoperable. Finally, the Judge found that Respondent violated Section 8(a)(5) of the Act by announcing a layoff and failing to bargain over the selection criteria and effects of the layoff with the Union; selecting and subsequently laying off employees Jonathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks; and engaging in an unwarranted delay and refusal to provide the Union with requested information, including productivity information, relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the press department bargaining unit (Unit).

II. ISSUES

Respondent's exceptions frame the following issues:

1. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) of the Act by threatening unspecified reprisals in expressing "disappointment" regarding employee

Richard Woosley's participation in pro-union literature; threatening employees in a group meeting and threatening an employee separately that it would be futile to select the Union as their collective-bargaining representative. (Exception 2)

2. Whether, as found by the ALJ, Respondent, violated Section 8(a)(1) of the Act by threatening to send employee Johnathan Bishop home if he did not sign an acknowledgment for newly-implemented work rules. (Exception 3)

3. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) of the Act by threatening employee Richard Woosley that all employees would be written up for being late, absent, or making mistakes because of the Union's request for disciplinary documentation. (Exception 4)

4. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) of the Act by telling employee Travis Dykstra that he could not be given a raise because of the Union proceedings. (Exception 15)

5. Whether, as found by the ALJ, the allegation that Respondent violated Section 8(a)(1) and (3) of the Act by granting a wage increase to employee Benjamin Timberlake to discourage employees' support for the Union is not time-barred. (Exception 5)

6. Whether, as found by the ALJ, the allegation that Respondent violated Section 8(a)(1) and (3) of the Act by hiring William Lincoln through a temporary service rather than as its own employee is not time-barred. (Exception 6)

7. Whether, as found by the ALJ, Respondent violated Section 8(a)(1), (3) and (5) of the Act by distributing and implementing new work rules for unit employees titled "Responsibility Press Operators." (Exception 7)

8. Whether, as found by the ALJ, Respondent violated Section 8(a)(1)(3) and (5) of the Act by instituting a policy of sending employees home when presses are inoperable and by sending employee Nicklaus Recktenwald home in conformity with this policy. (Exceptions 8, 11)

9. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to employee Richard Woosley for production errors. (Exception 9)

10. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) and (3) of the Act, by *announcing* the decision to lay off Johnathan Bishop. (Exception 10)

11. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) and (5) of the Act by failing to timely provide and refusing to provide the Union with requested information, including productivity data, relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the press department bargaining unit (Unit). (Exceptions 12, 14)

12. Whether, as found by the ALJ, Respondent violated Section 8(a)(1) and (5) of the Act by failing to bargain with the Union over the selection criteria for the lay off and the effects of the lay off. (Exception 13)

13. Whether, as found by the ALJ, the appropriate remedy for Respondent's failure to bargain over the selection for lay off and effects of the lay off of employees Johnathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks, is a make whole remedy, rather than a limited *Transmarine* remedy applied to situations in which the work is permanently eliminated through closure or non-discriminatory transfer of the work. *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). (Exception 1)

III. FACTS:^{2/}

Respondent provides "web-to-print fulfillment services" at its Louisville, Kentucky facility. (G.C. Ex. 89) Brett Heap is Respondent's President, CEO, General Manager and Managing Member. (G.C. Ex. 89, Tr. 909) Paul Barnum is Executive Assistant to Heap and is the highest ranking member of management who is regularly present at the facility, although he travels frequently on business for Respondent, including to California and Europe. (Tr. 909, 1305) At the time the salient events in this matter commenced, Respondent's Production Manager was William Morrison and its Press Room and Quality Control Manager was Scott Percy, both of whom reported to Barnum. (Tr. 220)

A. Brett Heap and the Union Campaign:

Respondent resisted the Union's organizing efforts from its nascent stages and that resistance continued unabated after the Union won the representation election. In late August 2011, either the day of or the day after the filing of the representation petition, press operator Dale Gartland had a telephone conversation with Pressroom and

^{2/} References to the transcript will be designated as (Tr. __); references to Acting General Counsel's Exhibits will be designated as (G.C. __); references to Respondent's Exhibits will be designated as (Resp. Ex. __); and references to the decision of the Administrative Law Judge will be designated as (ALJD p. __I. __).

Quality Control Manager Percy in which he said to Gartland, “Did you hear these guys are trying to start a Union?” Gartland replied that he had heard something to that effect and Percy responded, “Are those guys crazy? Brett (Heap) will get rid of them all.” (Tr. 744, 746)

Percy summarized his conversations with Heap and other managers of Respondent in this manner: “Brett wanted to get rid of the people in the Union at the time, he wasn’t happy. We talked about it on occasions. And the . . . names that were brought up was the people in the Union, the . . . supporters that had the stickers, and everything . . .” (Tr. 251) Percy summarized further: “. . . On numerous occasions and when I talked to him and we all talked together, not just him, but the management, yeah, we wanted to get the people in the Union out.” (Tr. 251)

B. The Nuts and Bolts of Resisting the Union: By Hook or by Crook

Respondent blatantly sought to influence the election by packing the bargaining unit with “no” votes, buying a vote through granting a pay raise, telling pro-union employees that they could not have a raise because of the Union proceedings, keeping a newly hired employee out of the unit by diverting him to employment through a temporary service when Respondent thought he was a likely “yes” vote, and telling employees that if they voted the Union in and their press was inoperable, they would not be permitted to keep working as had been permitted in the past. (G.C. Exs. 44, 56, 76; Tr. 780)

On more than one occasion, Production Manager Morrison told employees that Heap would never sign a contract with the Union. Thus, within a week before the October 28, election Morrison threatened a group of employees, “If I know Brett like I

think I do, he's not going to sign a contract." (Tr. 949) Employee Paris Bradford further testified that Morrison told employees, "[Respondent] would never sign a contract, we'd be out on strike...and if we crossed the picket line, we'd have to pay a big healthy fine." (Tr. 948) Morrison's own testimony confirms that he threatened employees during one of the pre-election meetings that Brett Heap would never sign a contract. After an interminable pause to the question of whether he had made such a statement, Morrison conceded, "I *may* have said that." (Tr. 1077)

Morrison also told employees that they might win the battle, but that they would lose the war. (Tr. 731; G.C. Ex. 50) Morrison conceded that this meant that the employees might vote, or had already voted, the Union in to represent them, but that Heap would never agree to a contract. (Tr. 1068) Thus, Robert Starks testified that on October 28 in the morning before the vote, Morrison threatened employees in a group meeting that, "If you guys think you're going to win a battle by voting in a union, you're not going to win the war." (Tr. 731) Press operator Recktenwald testified similarly that in one of the last group meetings before the election Morrison told employees, "You all may win this battle, but you won't win the whole thing." (Tr. 774)

Morrison made the same threat in an email to an employee shortly after the vote and results were known. (G.C. Ex. 50) Thus, Morrison wrote anti-Union press operator James Swartz in part, "Remember the old saying, 'You may have won the battle but you haven't won the war.' Things will be OK for the 105 operators I assure you." (G.C. Ex. 50) Morrison conceded that this statement meant that the employees, "may have gotten [the Union] in, but they may never get a contract." (Tr. 1068) The 105 Operators,

Jason Logsdon, Jason Gilby, and Swartz were known by Morrison to be opposed to the Union. (Tr. 1067)

Morrison asked press operator Murray the day before the election how he thought the vote would go the following day and Murray told him he thought it would be close, though he secretly believed the Union had enough votes to carry the election. (Tr. 938, 942) Morrison then threatened Murray regarding Brett Heap's opposition to the Union by stating that, "... You know how Brett is. He's not going to sign a deal with them. He's not going to work with them." (Tr. 942)

Morrison also approached Operator Richard Woosley just before the election in connection with Woosley's participation in the "Talking Heads" campaign literature distributed before the election. (G.C. Ex. 7; Tr. 858-859) Morrison walked up to Woosley at the beginning of his shift on the day of the election with a copy of the literature folded in his hand. (Tr. 858) He told Woosley that he had been debating whether he would say anything to him about it, but then pointed to Woosley's picture and said, "I'm disappointed." (Tr. 858-859, 1000) Woosley was taken aback and said that for all Morrison knew, he had not authorized the photo and comments attributed to him. (Tr. 859) Woosley did not tell Morrison he supported the Union because, "I'm scared they'll make my life a living hell at work." (Tr. 897)

C. Executive Assistant Paul Barnum Plays a Role:

Morrison was not the only one of Respondent's managers engaged in skullduggery in the weeks leading up to the representation election. Barnum was involved in interviewing digital press operator William Lincoln. (Tr. 1659, 1662; G.C. Ex. 44) Barnum, like Morrison, interrogated Lincoln about his Union sentiments,

support, and background during the interview. (G.C. Ex. 44; Tr.1660-1661, 1670)

Barnum wrote the following about the Union and his decision regarding hiring Lincoln:

“Lincoln also advised that he has been a union member, including the Teamsters, and would have no problem with it being required as a condition of employment. My overall impression it (sic) that he would probably vote for the union all else being equal, although he strikes me as an intelligent individual who might be convinced otherwise. *Nonetheless, based on his statements, I would probably not bring him on as a permanent employee at this time.*” (G.C. Ex. 44) (Emphasis added)

“Ultimately, Lincoln gives us all the options except a management vote on the Union. . . . Negatives are his previous attitude, which I hope has changed, and the Union issue. I would therefore recommend that if we hire him now, it be temp to hire.” (G.C. Ex. 44) (Emphasis added)

Lincoln began his employment at Respondent through a temporary service a few days later. (Tr. 1672-1673) However, he continued to push for Respondent to put him on its payroll and to pay him the higher hourly wage that had been promised to him during the interview process. On one occasion just after the December 16 layoff, Lincoln stopped Morrison as he walked through the digital press and asked if he was safe and if Respondent was still going to hire him because it looked like Respondent was getting rid of everybody. Morrison replied that he would like to hire Lincoln, but that, “Brett Heap would sooner move the [Respondent] . . . uproot [Respondent] and move it to Memphis, or wherever the FedEx hub is in Tennessee than to deal with the Union here in Kentucky.” Morrison asked Lincoln to “be patient and ride the wave out . . .” (Tr. 1674, 1675)

D. Wage Increases – Buying Votes and Blaming the Union:

On at least one occasion before the election Respondent retained an employee by giving that employee a raise for the purpose of obtaining a “yes” vote. Morrison granted a dollar hourly increase to employee Ben Timberlake for the purpose of causing

Timberlake to remain in Respondent's employ and giving Respondent a vote against the Union. (Tr. 1036; G.C. Ex. 78) On September 16, Morrison wrote the following to HR Manager Dale Miller:

“Ben Timberlake will not be leaving us just so you are aware. We offered to match the offer he received which is \$11 per hour but he will have some additional responsibly (sic). Ben will also be a feeder op on the 74G which he has done in the pasted. (Sic) *As you can imagine this is related to the union stuff.* . . . Dale, when can his increase go into effect?” (G.C. Exs. 51, 78) (Emphasis added)

Morrison told Timberlake via email that he was welcome to the link for anti-union websites and, “I hope I can count on your vote.” (G.C. Ex. 56)

In contrast, known Union supporter Travis Dykstra also made a request for a pay raise just after the representation election on November 3. Dykstra told them that if Respondent could grant him a long overdue raise, he would not have to take a second job. Percy told Dykstra, “[We can't] give you a raise because of the Union proceedings.” (Tr. 688)

E. Retaliation For Selecting Union Representation

On the day before the election, employees were told that the policy of permitting employees to continue working when their presses were inoperable was about to change if the Union was voted in. Employee Recktenwald testified that after discussing the work he and Teague would perform, “Then he told us that if the Union was voted in tomorrow, that we would have to go home if our press was down, and that there would be no work for us to do.” (Tr. 780, 815)

Morrison denies linking implementation of this new policy to the Union. (Tr. 995-996) However, he admits that he had concluded that Respondent needed to come up with a plan to keep from having too many employees in the facility when their

presses were down. (Tr. 997) Moreover, he implemented his unannounced plan to rotate employees to be sent home when their presses were down following the representation election. (Tr. 998)

Pearcy confirms that both he and Morrison threatened Recktenwald that if an employee's press was down he would be sent home. (Tr. 324, 328) Percy states that he believes he was the manager who sent Recktenwald home on October 31, the first work day following the election. (Tr. 324) Percy conceded that prior to the representation election if an employee's press was inoperable employees would normally be kept at the facility to perform work. As he stated, "Normally, they'd do something," and, "before (the election) we'd try to find something to do." (Tr. 325) Percy admitted that he had never sent employees home before the election when their presses were inoperable. (Tr. 328, 330)

F. The Election Postmortem – Policy and Rule Changes:

On Monday, October 31, the first work day following the election, Press Room Manager Percy conducted a meeting in the afternoon for the first and second shift press room employees. At these meetings, Percy distributed a paper entitled "Responsibility Press Operators" to each employee and announced that these rules were in effect and read each of the rules aloud. (G.C. Ex. 2; Tr. 76, 312-313) Employees testified that a number of the rules are tasks that the employees performed at the time the document was issued, others had been performed in the past but on a substantially less frequent basis, others had been required by Respondent in the past but the requirement had not been continuous or enforced, and others were entirely new rules. (G.C. Ex. 2; Tr. 89-90, 114, 307, 672-678) Percy testified that he and another management employee began working on the

rules in September following the representation hearing. After the rules were issued, Percy told Operator Dale Gartland that he had been working on some of the rules for awhile, but that other rules had been added later and some of the rules had been in the works, “before the shit hit the fan,” an obvious reference to the Union being selected to represent the employees. (Tr. 754, 756)

When the third shift press room employees arrived to begin their shift, Percy and Production Manager William Morrison conducted a meeting for them regarding the rules. (Tr. 78, 838, 312-316) Known Union supporter and Press Operator Jonathan Bishop asked Morrison if he had talked to the employees’ Union representative and bargained over the rules that were being issued to the press operators. (Tr. 78, 786) Morrison responded, “No, why should [I] do that? You’re not really union yet . . . because you don’t have a contract.” (Tr. 78-79, 839) Percy concurred. (Tr. 87-88)

The 23 enumerated rules culminated with a signature line preceded by the following statement: “All rules and responsibilities need to be followed by all press operators and press helpers. Failure to follow these procedures will incur (sic) disciplinary action up to and including termination.” (G.C. Ex. 2) Bishop told Morrison that he preferred not to sign the rules at all, but that he would sign under protest. (Tr. 79-81, 839) Morrison threatened that if Bishop did not want to sign the rules he could go home. (Tr. 81, 787, 839) Roederer described Morrison as “agitated,” and that Morrison told Bishop, “if you didn’t want to sign the rules, you could just leave.” (Tr. 839) Recktenwald testified similarly that Morrison told Bishop, “If you don’t sign the sheet, then you just need to go home.” (Tr. 787) Percy credibly testified that his co-supervisor threatened Bishop, “sign it or go home.” (Tr. 314)

Morrison asked Bishop why he was signing the rules under protest and Bishop replied because the rules had not been bargained with the Union, and while he would abide by the rules for the time being, they needed to be bargained. (Tr. 79) Bishop then signed the rules under protest. (Tr. 81, 83, 840)

G. New Rules – Responsibility Press Operators – Unilateral Changes:

The record testimony discloses that some of the rules were entirely new and changed the character of particular tasks by imposing timing and frequency constraints, or constituted the revival of dormant and unenforced policies. In sum, the rules promulgated by Respondent on October 31, contained substantial changes to the working conditions of the press operators and press assistants. The Responsibility Press Operators rules added an hour to an hour and a half to the non-production time that operators experienced each shift. (Tr. 114) Rule 1 created an entirely new scheme for documenting tasks; (Tr. 89-90, 664) there was more frequent checking of ring bearer heights (Rules 11 and 16); more frequent stirring of coating (Rule 12); more frequent cleaning of dry cleaning wheels (Rule 17); more frequent adjusting, tightening and cleaning of “Super Blues” (Rule 18); more frequent measuring and adjusting of ink form blanket stripes (Rule 20); and more frequent performance of anilox deep cleaning (Rule 21). (G.C. Ex. 2; Tr. 103-106, 110-113, 672-673, 676-678)

Rule 5 eliminated the established past practice of permitting employees to listen to music on iPods and prohibited pressroom employees from listening to music. (Tr. 95-96, 289-291, 668; GC 2) Rule 6 changed the past practice of allowing press operators able to leave their presses during imaging or plate hanging by prohibiting employees

from leaving their press at any time, for any reason. (Tr. 96-98, 166-167, 172-173; G.C. Ex. 2)

Rules 3 and 4 restricted the flexibility press operators had previously enjoyed with respect to clocking in and out by imposing specific time limits and eliminating their ability to request that a manager clock them in if they forgot their timecards. (G.C. Ex. 2; Tr. 90-94, 665-668) Rules 13, 14, and 15 altered what press operators were required to do once a job was complete. (Tr. 674-675)

H. Sent Home When Presses Are Inoperable – Recktenwald Singled Out:

Following the October 31, third shift meeting on the new work rules, Morrison and Press Room Manager Percy pulled Recktenwald off to the side to speak with him. (Tr. 789) Percy told Recktenwald that since his press was down that Respondent did not have any work for him to do that day and that he just needed to go home. (Tr. 789) Recktenwald asked if he could just continue doing what he had been doing before the election when his press was inoperable, such as working around the pressroom, or maybe work in another part of the facility. Percy replied that they drew his name out of a hat and it was his turn to go home. (Tr. 790) Recktenwald went home, and was not paid for his shift that day other than for the brief time he was at the meeting conducted over the announcement and implementation of the new rules. (Tr. 791)

I. Stricter Enforcement of Rules – Woosley Singled Out:

On November 3, a written warning was issued to Richard Woosley purportedly for productivity errors that had occurred during his shift on November 2. (GC 9; Tr. 865, 869-870) At the time the warning was issued, Press Manager Percy told Woosley that, “. . . we were going to start writing up, that we were going to start having documentation,

and that everybody's going to have to start doing their job, pay more attention. I said we were doing the paperwork for the Union." (Tr. 340, 870) Percy explained to Woosley that he was disciplined because, "This is something that [we] have to do now because [we] received a letter from the Union demanding that [we] keep records of any disciplinary actions." (Tr. 872) The only letter from the Union pertaining to disciplinary records was its information request of November 1. (G.C. Ex. 12) Woosley testified that Percy told him additionally, "He said I could write it down that I'm the first person to be written up, and that that's what they've got to do from now because they received a letter from the Union to keep documentation of any disciplinary action." (Tr. 873-874, 879) Percy told Woosley that employees are "going to be written up if you're late, if you're absent." (Tr. 875)

J. The Union's Information Requests of November 1 and December 12:

On November 1, Staff Representative Israel Castro, who services the Union on behalf of the Union's District Council 3, sent a letter to Respondent by certified mail demanding that it cease from unilaterally implementing the work rules that had been imposed on employees under threat of discipline. Included in this mailing were two letter style requests for information, one of which pertained to personnel policies, discipline and job descriptions while the other concerned health insurance benefits. (Tr. 382, G.C. Ex. 12) On November 22, following the issuance of the Certification of Representative on November 7, the Union renewed its information and bargaining requests by letter sent certified mail. (Tr. 390; G.C. Ex. 15) Respondent's response to the November 1, information requests, received by the Union on December 5, addressed most of the Union's first information request but provided almost no information responsive to the

Union's second letter pertaining to health insurance benefit issues. (Tr. 397, 452, G.C. Ex. 17)

Castro testified that the Union met with Respondent on December 12, for the purpose of bargaining over the effects of a layoff slated for December 16, and which Respondent had informed the Union of by letter dated December 9. During this meeting Castro went through each item of the November 1, information requests to which it still needed a response. The Union at that time also requested productivity information that Respondent claimed to have utilized in determining whom to lay off. (Tr. 465-466)

Additional information responsive to the Union's November 1 requests was received from Respondent on January 14 or 15, 2012, 2½ months after the Union's initial request. (Tr. 481; G.C. Ex. 32) The Union still had not received all of the information it had requested.

Other than some missing claims information, all of the information from the November 1 requests had been substantially provided to the Union by January 21, with the noted supplemental information in early February. (Tr. 510) In the case of the productivity information requested on December 12, and renewed on December 13, Respondent clearly had the information readily available, but it consciously chose not to provide this information to the Union. Except for the instant unfair labor practice proceeding, even today the Union would not have the summary data pages that were made available by Respondent pursuant to subpoena. (G.C. Exs. 83, 84, 85, 86) Raw data supporting those summary pages has never been provided to the Union.

K. The December 16, Layoff:

Respondent met with the Union on December 9, and announced orally and in a letter provided to the Union representatives on that date, that effective December 16, it was going to conduct a layoff based primarily on employee productivity. (Tr. 1427, 1581; G.C. Ex. 26) Barnum told Castro, Bishop, and Dykstra on December 9, that Respondent had reviewed the productivity of the employees and the employees listed in the letter were determined to be the least productive employees based on productivity data that Respondent had compiled over the past year. (Tr. 1583)

Respondent had been aware for weeks that it was planning a layoff, but presented it to the Union on December 9, as a fait accompli. (Tr. 252, 1581; G.C. Ex. 26) Union Representative Castro immediately requested Respondent bargain over the layoff decision and its effects. (Tr. 1433, 1434, 1584) The layoff was to include Unit employees Johnathan Bishop, Nicklaus Recktenwald, Robert Starks and William Wellman. (G.C. Ex. 26)

As detailed above, on December 12, and again on the 13th, the Union requested productivity figures for all the employees in order to assess Respondent's selection decisions. (Tr. 1592; G.C. Ex. 18) Although Respondent agreed to provide the information, to date it has never done so. (Tr. 1593-1594, 1614; G.C. Ex. 18) Respondent told Castro in the December 12, meeting that the productivity data consisted of a lot of information, but that they would be able to start compiling it and would give it to him. (Tr. 1593-1594)

During the meeting on December 12, the Union presented a proposal titled Memorandum of Agreement which in part proposed that layoffs of unit employees be conducted by employee seniority, but only after all temporary employees were laid off.

(G.C. Ex. 65) The Union also briefly proposed that operators be allowed to bump into lower paying positions and indicated to Respondent that it would be open to discussing the rate of pay that operators who bumped down would receive. (Tr. 1591) Respondent rejected the Union's proposal in its entirety and no agreement was reached. A meeting was scheduled for December 14, but it was canceled by Respondent because it still had not provided the productivity information. (G.C. Ex. 18) However, Respondent, through Attorney Woods, did notify the Union that it had made a "mistake" with respect to Bishop's productivity and offered to lay off employee Robert Roederer instead. (Tr. 1610) Castro testified that Woods told him that in compiling the productivity data Respondent realized that Bishop was not "...one of the least productive employees." (Tr. 1610) Bishop, upon learning that Roederer would be laid off, volunteered to be laid off in place of Roederer because Roederer has a wife and child, and Bishop is single. (Tr. 1466)

On December 16, employees Bishop, Recktenwald, Starks and Wellman were laid off. Bishop and Recktenwald were known union adherents. (Tr. 261) Bishop testified in the representation hearing, was the Union steward, and had appeared in union campaign literature. (G.C. Exs. 4, 7, 77) Recktenwald was known by Respondent's managers to be a union supporter. (G.C. Ex. 1(c); Tr. 261) Recktenwald had been unlawfully sent home for a day, and in this regard on November 14, he was the only named 8(a)(3) discriminatee in the amended charge to the lead case. (G.C. Ex. 1(c)) Additionally, as detailed below, a former supervisor, Pressroom Manager Percy, testified at the administrative hearing that Respondent's owner, Brett Heap, issued instructions that

union supporters be targeted for termination, which logically encompasses layoff. (Tr. 233, 239-240, 243-245, 247, 251, 275)

Respondent's "discovery" on December 14, of a mistake regarding Bishop's selection was untrue. (Tr. 1610) In fact, Respondent knew at least as early as December 7, that Bishop was not one of the lowest producers. (G.C. Ex. 60)

On the day after the election, Respondent's supervisors in an email exchange intimated both that they knew a layoff was planned and that Bishop would be targeted for layoff. (G.C. Ex. 41) Morrison angered by remarks Bishop had written on his Facebook page, wrote of Bishop: "Now I wish we weren't giving him what he apparently wants. See his Facebook comments below. This young man is a jackass." (G.C. Ex. 41) Percy replied: "He is going to get less hours and be the 1st to go when we start cutting back so he thinks he is getting something but actually he is setting himself up to fail." (G.C. Ex. 41)

Percy testified that the December 16 layoff was discussed amongst Respondent's management for three or four weeks preceding the lay off date. (Tr. 252) When particular employees were being discussed in connection with their selection for layoff, Percy, Barnum, and Morrison discussed the fact that Heap would not be pleased with the identities of all the employees who were slated for layoff. (Tr. 246) (Tr. 257)

Percy had no knowledge as to the criteria utilized in prior layoffs. (Tr. 263-264)

Barnum, Morrison, and Percy all commented on whom Heap wanted to be laid off. (Tr. 257-258, 263) They remarked that, "the exact people when [Percy] was there that [Heap] had thought would be laid off wouldn't be the ideal list." (Tr. 257-258)

Barnum remarked, "Brett's not going to be happy about the list . . ." (Tr. 263) Percy stated that Heap wanted to see Murray and some of the other staunch union supporters laid off, but Heap was aware that Respondent had to have some kind of basis to justify their selection. (Tr. 258) Ultimately, according to Percy, "The people that got laid off were not the ideal people that it you could go and pick out from Brett's standpoint and who we had talked about that you would like to see gone." (Tr. 258, 262) The "ideal" people that Heap wanted gone, were, "Matt Murray was one. Dale Gartland was one. John Bishop was one. At the - - at the time, those three probably led the forefront. Bob Starks was one, definitely." (Tr. 258) "Those four would have been the four people in the forefront that [Heap] would have probably liked to not have been there." (Tr. 258)

Regarding the selection of Johnathan Bishop for layoff, Percy testified that, "The bottom tier of the people were right there together, so you could go either way on that. They were all on a relatively narrow band of production difference. So attitude, or performance, or perceived attitude . . . and getting along, doing the other things that go along, other than the production could have been used." (Tr. 260) Percy was asked if being a union supporter could qualify as attitude. He replied, "It could." (Tr. 260)

IV. LEGAL ANALYSIS:

- A. The record fully supports the Judge's findings that Respondent violated Section 8(a)(1) of the Act by threatening an employee with fewer work opportunities if the Union was selected to represent employees, threatening unspecified reprisal by expressing "disappointment" on an employee's participation in pro-union literature, threatening employees in a group meeting and threatening an employee separately that it would be futile to select the Union as their collective-bargaining representative, threatening to send an employee home if the employee did not sign an acknowledgment for newly-implemented work rules, telling an employee that the employee could not be given a raise because of the Union proceedings, and threatening an employee that all employees would be**

written up for being late, absent, or making mistakes because of the Union's request for disciplinary documentation. (Exceptions 2, 3, 4)

The Board recently provided a useful summary of its analytical standard for assessment of employer's statements that are alleged to constitute unlawful threats: "An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a "totality of circumstances" standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activity, and employer statements protected by Section 8(c)." [Citations and certain internal punctuation omitted.] *Empire State Weeklies*, 354 NLRB No. 91, slip op. at p. 3 (2009); see also *Correctional Medical Services, Inc.*, 356 NLRB No. 48, slip op. at p. 4 (2010). The Board has also observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003) [Footnote omitted.] Finally, in considering whether communications from an employer to its employees violate the Act, the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006). [Citation and internal quotation marks omitted.] ; *A.D. Conner, Inc., Gas City, Ltd., et al*, 357 NLRB No. 154 (Dec. 28, 2011).

Morrison's repeated statements to employees to the effect that the Union might win the battle, but would not win the war, and, more directly, that Brett Heap would never sign a contract are clearly threats that it was futile for employees to select the

Union as their collective-bargaining representative. See, e.g., *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993), see also, *In re Wake Electric Membership Corp.*, 338 NLRB 298, 323 (2002); *Equipment Trucking Co., Inc.*, 336 NLRB 277, 283 (2001) (company unlawfully threatened futility when it told employees that the company would never negotiate a contract) Indeed, the Board has repeatedly held that, “An employer’s threat that it would be futile for employees to select a union as their bargaining representative because the employer would never sign an agreement with that union violates Section 8(a)(1) of the Act.” *Baby Watson Cheesecake, Inc.*, 320 NLRB 779, 785 (1996); citing, *Wellstream Corp.*, 313 NLRB 698 (1994).

The Judge found that Morrison’s statement to Woosley that he was disappointed to find his picture on a piece of Union literature just before the election clearly conveyed to Woosley, in the context of Respondent’s other unlawful statements and conduct, a threat of unspecified reprisal. The Board has held similar statements in such a context to constitute a veiled threat of reprisal. See, *Ferguson Williams, Inc.*, 322 NLRB 699 (1996); *In re Seabreeze Health Care Center, Inc.*, 331 NLRB 1131, 1133 (2000), see also, *Alladin Gaming, LLC*, 345 NLRB 585, 659 (2005).

In contrast, Respondent contends that Morrison’s statement was a non-threatening statement protected under Section 8(c) of the Act and cites two cases in support of its position: *Collavino Bros.*, 222 NLRB 889, 891 (1976) and *Aztec Chemicals*, 218 NLRB 116, 117 (1975). Both are factually distinguishable. In *Collavino Bros.*, the project manager on a job site expressed disappointment to an employee following a work shutdown because the employee had gone directly to a union business representative rather than lodging a complaint with the shop steward per standard protocol. The

employee was later laid off. A foreman who was present for the conversation credibly testified as to his opinion that the statement was not a threat, and the ALJ found that the statement was not connected to the layoff. In *Aztec Chemicals* the Board reversed an ALJ's finding that a foreman unlawfully interrogated an employee. During the conversation, the foreman told the employee that he was very disappointed in him. Here the Judge carefully assessed the surrounding circumstances of Morrison's statement and determined that it constituted a threat in violation of Section 8(a)(1).

Regarding Respondent's conduct in blaming the Union for the withholding of a wage increase, it is well-established as a general rule that an employer must grant benefits as it would if the union were not in the picture. An exception is created for employers whose practice of granting benefits, in this case wage increases, is haphazard. In such instances, an employer violates Section 8(a)(1) of the Act when it seeks to place the onus for the delay in the wage increase on the union. See, *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69 (1993), *SNE Enterprises, Inc.*, 347 NLRB 472 (2006). Thus, in the instant matter when Respondent placed the blame for withholding a raise from Dykstra on the "union proceedings" it violated the Act.

Morrison's statement to Recktenwald that, "if the Union was voted in tomorrow, that we would have to go home if our press was down, and that there would be no work for us to do," constitutes a clear threat of retaliation if employees select the Union to represent them. (Tr. 780) It has long been held that Section 8(a)(1) of the Act is violated when an employer threatens employees with reduced work, and consequently pay, for selecting a union to represent them. See, e.g., *General Electric Co.*, 321 NLRB 662 (1996). In this instance, Respondent carried out its threat at the very first opportunity

following the vote, thus giving credence to Recktenwald's testimony regarding this threat.

The threat by Morrison to Bishop that he must sign the "Responsibility Press Operators" document or go home clearly constituted an unlawful threat to suspend Bishop for the balance of the shift if he did not sign off on the document acknowledging that he could be disciplined, even discharged, for violating any of the unilaterally implemented rules contained in the document. It is well-settled that threats to discipline employees for violations of a rule established by a unilateral change violate Section 8(a)(1) of the Act. See, *United States Postal Service and American Postal Workers Union National*, 341 NLRB 684, 687 (2004); *Advanced Installations, Inc.*, 257 NLRB 845 (1981).

Finally, it is noted that Respondent's threat to discipline employees more stringently for purported violations of its policies clearly constitutes retaliation, not only for the employees selecting the Union to represent them, but also for the Union's exercise of rights on behalf of employees in requesting relevant and necessary information. Threats to more strictly enforce rules in retaliation for employees selecting Union representation have long been held to violate the Act. See, e.g., *Westwood Health Care Center*, 330 NLRB 935, 967 (2000); *In re Mid-Mountain Foods, Inc.*, 332 NLRB 229, 232 (2000).

B. Respondent violated Section 8(a)(3) of the Act by granting a pay increase to employee Benjamin Timberlake to discourage employees' support for the Union. (Exception 5)

It is established Board law that granting a pay raise to an employee for the purpose of discouraging the employee's support for a union violates Section 8(a)(1) and

(3) of the Act. See, *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986); *In re Clock Electric, Inc.*, 338 NLRB 806, 816-817 (2003). Here, as found by the ALJ, Respondent clearly linked the wage increase for Timberlake to his favorable vote in the representation election and at the same time gave him new duties assisting on the 74G press that would arguably place him within the bargaining unit. (G.C. Exs. 51, 78) A series of later email exchanges, culminating on the day before the election, establish that Respondent sent Timberlake links to anti-union videos, that Morrison advised, "I hope I can count on your vote," followed by Timberlake asking for a copy of his paystub from the preceding week, and Morrison replying, "Have you received your increase yet? Just want to be sure you got that as promised." (G.C. Ex. 56)

Respondent asserts that this allegation is barred by Section 10(b) of the Act. The Judge properly found that this allegation was timely filed. Quoting *Vallow Floor Coverings*, 335 NLRB 20, 20 (2001), the Judge noted, "The Board has consistently held that the 10(b) period does not commence until the charging party has clear and unequivocal notice of the violation." ALJD p.33, l. 5-8. The Judge further concluded that the Union exercised due diligence by making an information request which in part sought employees' rates of pay, date of last wage increase and amount of increase. ALJD, p. 33, l. 27-33. Having received this information from Respondent in early December, the Union's charge covering this matter filed on April 6, 2012, was therefore, timely.

Even if the allegation was not found to be timely filed, it is closely related to timely filed charges and therefore the Judge properly found Respondent's conduct violates the Act. This allegation and that discussed below involving the refusal to hire William Lincoln both arise out of Respondent's overarching plan to resist unionization

before and following the representation election. Thus, both the pay increase granted to Timberlake and the refusal to hire Lincoln are closely related to timely filed allegations, and therefore are not time-barred by Section 10(b) of the Act.

The Board has long utilized a three-prong test established in *Redd-I, Inc.*, 290 NLRB 1115 (1988) for determining whether untimely filed allegations are “closely related” to timely allegations. *Redd-I*, supra, 290 NLRB at 1118. Under *Redd-I* the Board:

1. Considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge;

2. Considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charges; and

3. “May look” at whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I*, supra, 290 NLRB at 1118.

In *The Carney Hospital*, 350 NLRB 627 (2007), the Board overruled, in relevant part, the interpretation of the second *Redd-I* factor announced in *Ross Stores, Inc.*, 329 NLRB 573 (1999), and determined that the mere occurrence of the alleged violations during or in response to the same organizing campaign is insufficient to meet the second prong of *Redd-I*. However, the Board specifically formulated this new test regarding the second factor: “But where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity, we will find that the second prong of the *Redd-I* test has been satisfied. *Carney Hospital*, supra, 350 NLRB at 630.

In *Carney Hospital*, the Board found that untimely 8(a)(1) allegations and the timely charged suspension did not involve similar conduct. Additionally, the Board found that there was no indication that the incidents were part of a chain or progression of events. *Carney Hospital*, supra, at 631. Conversely, here the allegations involving the grant of a pay increase to Timberlake and the refusal to hire Lincoln are “closely related” to timely filed charges within the meaning of *Carney Hospital*.

Thus, unlike the factual situation in *Carney Hospital*, here the evidence establishes that both the timely filed allegations and the untimely allegations are part of an overall scheme to undermine union activity. The testimony of Percy in this matter regarding the directives of Heap, establishes that Heap orchestrated a plan to defeat the Union organizing campaign by eliminating Union supporters from the Unit and adding those employees whom it was believed would not be supportive of the Union. This scheme continued unabated following the Union’s election victory. Percy’s testimony is buttressed by multiple emails that reflect the outlines of this plan. Additionally, the testimony of Morrison and Barnum, and their own words in some of these emails, reinforce the nature of Respondent’s plan. Yes, Respondent’s conduct in both the timely and untimely allegations occurred in the context of the same organizing campaign, but the scope of the Employer’s overall unlawful plan here is so profound that this otherwise untimely conduct must be found to be “closely related.” See, *Carney Hospital*, supra, at 630.

Here, the timely and untimely filed allegations arise from the same sequence of events as both arise in the context, not only of a campaign, but centered on the representation election and Respondent’s plan to pack the Unit with, as Barnum so

eloquently put it, “Management vote[s] on the Union.” (G.C. Ex. 44) Moreover, the timely filed allegations involve the same legal theory as there are multiple timely allegations involving Section 8(a)(3) of the Act. In addition, the employees in the timely filed allegations are impacted by the untimely allegations. Thus, if Lincoln had been hired on to Respondent’s payroll as is alleged would have occurred, but for Respondent’s unlawful motive to keep him out of the Unit, this fact may have impacted whom Respondent determined to select for layoff. By the same token, the grant of a pay increase to Timberlake is related to employees involved in the timely filed charges as employee Travis Dykstra, a union supporter, was denied an increase and such denial was blamed on the Union in violation of Section 8(a)(1) of the Act. The allegation involving Timberlake is, thus, the other side of the same coin. Accordingly, it is respectfully submitted that the allegations involving the grant of a pay increase to Timberlake and the refusal to hire Lincoln are at a minimum closely related to timely filed allegations and, as found by the ALJ, are not barred by Section 10(b) of the Act.

C. Respondent violated Section 8(a)(3) of the Act by refusing to hire William Lincoln into a position as an employee of Respondent, rather than hiring him through a temporary service.(Exception 6)

An employer’s refusal to hire an employee because of that employees’ support for a union is a fundamental violation of Section 8(a)(3) of the Act. *Western Plant Services, Inc.*, 322 NLRB 183, 193 (1996). It is equally unlawful for an employer to refuse to convert temporary employees to permanent status in retaliation for an employee’s actual or perceived support for a labor organization. See, *Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1224 (2004)(Burden under *Wright Line* met, but majority finds respondent proved a meritorious rebuttal – Member Liebman dissents from that conclusion); see also,

Pacific Diesel Parts, Inc., 203 NLRB 820, 828 (1973)(Burden under *Wright Line* met, but respondent establishes temporary employee not interested in long-term employment.)

Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982), the Acting General Counsel bears the burden of proving by a preponderance of the evidence that the employee was engaged in protected activity, the employer had knowledge of that activity, and animus against protected conduct was a motivating factor in the adverse employment action. The burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *North Carolina License Plate Agency #18*, 346 NLRB 293, (2006) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). The record establishes that Respondent did not hire Lincoln as one of its employees because Barnum believed he would support the Union. (GC 44) Morrison was prepared to hire Lincoln on a permanent basis and told him as much, subject to approval from his superior, Barnum. (Tr. 1661) Both Morrison and Barnum interrogated Lincoln regarding his sentiments vis-à-vis unions and they inquired regarding his experience with unions. (Tr. 1661, 1670-1671) Based on this unlawful (though unalleged) interrogation of an applicant's union sentiments, Barnum concluded that it was best to employ Lincoln through a temporary service so that he would not be a potential "yes" vote for the Union. Thus, the record establishes activity, knowledge obtained via interrogation, and animus in Barnum's own words. Moreover, there is timing in connection with the representation election and ample evidence of general union animus. Respondent continued to refuse to hire Lincoln onto its payroll in December and in January 2012, when it blamed the Union for its refusal to hire him. (Tr. 1674-1675, 1678-1680) It

failed to rebut the prima facie showing of a violation by offering any cogent explanation for its refusal to hire Lincoln as its employee or to explain away the clear unlawful intent expressed by Barnum. (GC 44)

Respondent asserts that this allegation is barred by Section 10(b) of the Act. That argument fails for several reasons. First, it should be pointed out that only the initial refusal to hire Lincoln falls outside of the 10(b) period. On several occasions within 10(b) period, Respondent refused to hire Lincoln and has blamed the Union for its refusal. Moreover, the record evidence requires that an inference be drawn that Respondent continues to exclude perceived Union supporters from the bargaining unit and to hire instead, employees whom Respondent may hope to be votes against the Union in the event that a decertification petition is filed or merely that the Union loses its support over time. Second, as discussed at length in the prior section, the allegation that Respondent unlawfully refused to hire Lincoln in violation of Section 8(a)(1) and (3) of the Act is closely related to several timely filed charges, including allegations of the discriminatory layoff of Union supporters in violation of Section 8(a)(1) and (3) of the Act. *Carney Hospital*, supra.

D. Respondent violated Section 8(a)(3) of the Act by sending employee Nicklaus Recktenwald home without pay before his regular shift ended. (Exceptions 8,11)

Respondent had previously permitted employees to stay at work and perform other job functions when their presses were down. Following the election, however, Respondent unilaterally changed its policy, and enforced the new policy of sending pressroom employees home in a discriminatory manner, singling out known union supporters. Recktenwald was a union supporter. He talked to coworkers about joining

the union and signed an authorization card early in the campaign. (Tr. 770-772, G.C. Ex. 22)

Moreover, Respondent knew that Recktenwald was a union supporter: Percy and Morrison had correctly concluded so prior to the election. (Tr. 225) Accordingly, the first two prongs of the test set forth in *Wright Line*, supra, have been met. Further, Respondent's animus against the Union and its supporters has been amply demonstrated. From Managing Member Heap down to Production Manager Morrison, Respondent repeatedly expressed its determination to defeat the Union and avenge itself against employees who supported unionization. Thus, the third prong of the *Wright Line* test is well-established.

The record presents direct evidence that Respondent retaliated against Recktenwald for his union support after the union election by sending him home and not allowing him to work his regularly scheduled shift. Immediately before the election Morrison made it clear to pressroom employees Recktenwald and Teague that, if the Union were voted in, they would no longer be permitted to stay at work and earn their pay if their presses were down. (Tr. 780, 815) Percy's testimony shows this was a change in policy: "if there wasn't any machine to run, we were setting a precedent that the operators would trade off and be going home." (Tr. 325) Percy was unabashedly clear as to why Respondent was changing its policy: he explained that the decision was spurred by budget concerns "and the Union. . . [e]specially after the election, it came to a forefront, you know." (Tr. 326) Following the election in support of representation by the Union on October 28, 2011, Percy made good on Morrison's threat when he forced Recktenwald to go home at the start of his shift.

Testimony from Recktenwald, Percy, and other pressroom employees clearly establishes that the past practice had been to allow employees to stay and work on other tasks when their presses were down. (Tr. 122, 328, 330) Recktenwald testified that his press had been down the entire week before the election, but that he had worked in other parts of the plant, or had helped out by cleaning up, performing maintenance, and doing “odd jobs” around the press room to get his hours. (Tr. 782-783) Moreover, temporary press employee Dale Glover had been given the option of going home or staying at work *the very next day after Recktenwald had been sent home involuntarily.* (Tr. 792-797) Manager Javier Ortiz was unable to give Recktenwald a reason why Respondent did not find work for him to do the previous day. (Tr. 793)

Respondent did not present any evidence to show it would have sent Recktenwald home on Monday, October 31, 2011, if the Union had not been selected to represent the Unit. Indeed, the evidence indicates Respondent would have continued to allow pressroom employees to remain at work and earn their pay doing other job duties, but for the fact of the Union’s selection.

E. Respondent violated Section 8(a)(3) of the Act by issuing a written warning to employee Richard Woosley for production errors. (Exception9)

On November 3, 2011, Percy issued a written warning to Woosley for a production error that had occurred the previous night. (Tr. 865; G.C. Ex. 9) Woosley had never before received a written warning for a production error. (Tr. 864) During his discussion with Percy about the written warning, Percy explained to Woosley that Respondent would now begin writing employees up because the union had requested documentation for disciplinary actions. (Tr. 872-873) Percy told Woosley that because

of the union, employees would now be written up for everything. (Tr. 875) Percy acknowledged that before the election, he had not written up employees who had committed the same type of production errors for which Woosley received discipline. (Tr. 335) He conceded that the decision to start writing up pressroom employees was a concerted decision made with the input and approval of Production Manager Morrison. (Tr. 337)

Respondent contends that Woosley's written reprimand was for a legitimate reason and cites *Mid-Mountain Foods, Inc.*, 350 NLRB 742 (2007) in support of its argument that the reprimand was not a violation of Section 8(a)(1) and (3) of the Act. Unlike that case, and as observed by the Judge, here the supervisor who issued the written reprimand provided direct evidence of the discriminatory motive underlying the reprimand. (ALJD. P. 42, lines 15-17)

F. Respondent violated Section 8(a)(1), (3) and (5) of the Act by distributing and implementing new work rules for unit employees titled "Responsibility Press Operators," and by instituting a policy of sending employees home when presses are inoperable. (Exceptions 7, 8, 11)

As the Judge found, Respondent retaliated against the bargaining unit by implementing more onerous work rules and policies in violation of Section 8(a)(1) and (3) and of the Act following the representation election. Further, since Respondent failed to bargain with the newly elected Union over these changes, the rules and policies also violated Section 8(a)(1) and (5) of the Act. Respondent excepts to the Judge's conclusion that the implementation of the work rules violated 8(a)(1) and (5) of the Act, but does not except to the Judge's conclusion that the rules also violated Section 8(a)(1) and (3) of the Act. In support of its exception, Respondent argues that the work rules were not a material, substantial, and significant change. Respondent cites to a string of cases for the

proposition that minor changes in work rules are not material, substantial, or significant. R. Brief, p. 20, citing *Berkshire Nursing Home*, 345 NLRB 220 (2005); *Toledo Blade Co.*, 342 NLRB 385 (2004); *Crittenden Hosp.*, 342 NLRB 686 (2004). Here, the ALJ properly credited witness testimony that a majority of the work rules were new to the workplace and that failure to follow the work rules would now carry the consequence of disciplinary action. (ALJD, p. 53, lines 21-28)

The imposition by an employer of more onerous conditions of employment on its employees in retaliation for union activity is violative of Section 8(a)(1) and (3) of the Act. *S & S Screw Machine Co.*, 288 NLRB 235, 239-240 (1988); *Master Slack*, 230 NLRB 1054, 1055-1056 (1977). Respondent's implementation of a new policy, in which pressroom operators would no longer be able to stay at work and perform other duties when their presses were inoperable, is a prima facie violation of Section 8(a)(3).

This change in policy significantly impacted employees, who now could no longer earn their wages if their presses went down. Press operators who had previously felt assured that they would be able to perform some work functions, even when their presses were inoperable, now faced the threat of losing pay. Respondent's position that it implemented this policy change for legitimate reasons not related to the union election is patently unbelievable.

G. Respondent violated Section 8(a)(5) of the Act by failing to timely provide and refusing to provide the Union with requested information relevant and necessary to the Union's performance of its duties as collective-bargaining representative of the press department bargaining unit. (Exception 11)

(a) Respondent's delay in providing requested information to Union was unlawful

Respondent cites to *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993) and *Union Carbide Corp.*, 275 NLRB 197 (1985) to support its argument that its delay in providing information to the Union was not unlawful. As a preliminary matter, Respondent misstates the Board's finding in *Good Life Beverage Co.*: the delay there found not to be unreasonable was 5-1/2 weeks, not months, as Respondent indicates. Furthermore, in reversing the ALJ's conclusion that the delay was unlawful in that case, the Board cited the employer's concerns about confidentiality. No such concern was articulated by Respondent in this case. Respondent also relies on *Union Carbide Corp.*, supra. In that case, the Union demanded health and safety information from an employer engaged in operating nuclear production facilities at Oak Ridge, TN. The requested information was voluminous and technical. The company set in motion studies to answer the Union's questions, and informed the Union of these efforts. The final information was not provided until 10 months after the request. The Board dismissed the allegation. This case is also inapposite, as Respondent here was not asked to compile voluminous, technical information, and, as the ALJ found, many of the requests were for simple, easily accessible items. (ALJD, p. 55, lines 42-44; p. 56, lines 15, 41-43, 46) In assessing whether Respondent had violated the Act by failing to timely respond to the Union's requests for information, the Judge meticulously reviewed each item and reached his conclusion in light of all the surrounding circumstances. Accordingly, his findings should not be disturbed.

The Board holds that any unreasonable delay in furnishing requested information, absent presentation of a valid defense, is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *American Signature, Inc.*, 334 NLRB

880, 885 (2001). The Board evaluates the reasonableness of an employer's delay in supplying information based on “the complexity and extent of the information sought, its availability and the difficulty in retrieving the information.” *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Postal Service*, 308 NLRB 547 (1992); *Comair, Inc.*, 349 NLRB 342, 353 (2007). When the information sought is not complex, nor is there difficulty in obtaining or compiling the information – as is the case in the subject matter – a delay of a couple months or less is unreasonable. See, *Pan American Grain Co.*, 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (delay of 7 weeks violates the Act).

Respondent never supplied the Union with the entire 5 years claims data, nor did it provide the Union with a breakdown of claims usage confined to the bargaining unit; an important component needed to solicit competitive bids for insurance coverage. Respondent’s unexplained delay in providing the requested information, and failure to provide the noted claims data, prejudiced the Union as nearly a quarter of its certification year was gone before the Union could effectively utilize much of this information in connection with bargaining.

(b) Respondent was well-aware of the Union’s request for productivity information

Respondent relies on *Kieft Bros. Inc.*, 355 NLRB No. 19 (2010) in support of its argument that it was not obligated to respond to an information request it never knew was made. The very nature of Respondent’s argument here is absurd: the Judge specifically found that the Union had made an explicit request for the productivity information, and Respondent refused to provide that information until the very end of the hearing. (ALJD,

p. 59, lines 8-11; p. 60, lines 14-17) By contrast, in *Kieft Bros.* it was not established that the employer received the request for information until a later date, but the ALJ found that the employer would be in violation of Section 8(a)(1) and (5) if the employer had not provided the requested information by the date his decision issued

The Union's information request of December 12, renewed the following day, concerned the productivity data utilized in determining selection for layoff. Respondent advised that it would compile the information and provide it. (G.C. Ex. 18; Tr. 466, 1593-1594) It never did. The information requested is presumptively relevant. Timely production of this information would have been of value to the Union in formulating effects bargaining proposals. The failure of Respondent to provide this information presented the Union with a *fait accompli* in terms of bargaining over the selection of whom to lay off and the effects of the layoff. Obviously, having this information in advance of the layoff would have been much more valuable than receiving it after the layoff occurred. Given the fact that the layoff involved here was merely the result of an irregular seasonal downturn, having the information even after the layoff occurred would have value in future circumstances.

H. Respondent violated Section 8(a)(5) of the Act by unilaterally laying off Unit employees Johnathan Bishop, Nicklaus Recktenwald, William Wellman, and Robert Starks without bargaining in good faith with the Union. With respect Johnathan Bishop, Respondent's conduct also violates Section 8(a)(3) of the Act by discriminatorily selecting him for layoff. (Exceptions 10, 13)

The effects of a layoff are a mandatory subject of bargaining, largely without regard to the cause for the layoff. As with decisional bargaining, effects bargaining also requires an employer to provide a union with notice of layoffs before they occur in order to satisfy the employer's duty to bargain over the effects. *Kajima Engineering &*

Construction, 331 NLRB 1604, 1620 (2000); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1021 fn. 8 (1994), *enfd.* 87 F.3d 1363 (D.C. Cir. 1996).

Press Manager Percy testified that the fact of a layoff was known for weeks before the layoff occurred.^{3/} (Tr. 252) Additionally, email records establish that a layoff list was created at the very least several days before the Union was advised that there would be a layoff. (G.C. Ex. 77) Respondent sought to placate the Union by claiming that the layoff was as a result of a typical seasonal slowdown and that employees had been selected for layoff in the same manner as it had selected employees in the past. (G.C. Ex. 26) This was false as Respondent's pattern of layoffs in the past was irregular and there were no established criteria for layoff.

Barnum's email to Heap, in which he attached the Union's proposal, reflects Respondent's complete lack of interest in bargaining over the layoff selection and other effects. Barnum wrote, in part:

“Attached is the Memorandum of Agreement proposed by the Union before we broke for the evening. *Obviously nothing in there we are interested in but we have to go through the motions...* If you can stand to, review their two page proposal and let me know what you think . . .”
(G.C. Ex. 59) (Emphasis added)

Heap never even bothered to respond. (Tr. 1805) In sum, the evidence is overwhelming that Respondent failed and refused to bargain with the Union over the selection of who would be laid off and over the effects of the layoff that occurred on December 16.

Respondent asserts that it had a legitimate business reason for the layoffs and that the layoffs therefore were not in violation of the Act. The Judge concluded that the layoff selection was unlawful only with respect to Bishop. The Acting General Counsel asserts

^{3/} No charge was filed over a failure to bargain over the lay off decision and therefore the issue was never considered.

that the selection of Recktenwald was also discriminatory for the reasons set forth in its brief in support of limited cross-exceptions. Respondent cites several cases for the proposition that an employer does not run afoul of the Act when it can demonstrate it would have laid off employees regardless of their union activity. R. Brief, p. 13, citing *Baptista's Bakery, Inc.*, 352 NLRB 547, 550-551 (2008); *Albert's, Inc.*, 213 NLRB 686, 695-696 (1974); *A.J. Schmidt*, 269 NLRB 579, 588 (1984). The Judge correctly determined that Respondent's selection of Bishop for layoff was unlawful and that Respondent's asserted reason for laying him off was a pretext. This is largely a question of credibility, and it is well-settled that an administrative law judge is entitled to deference with respect to his credibility determinations. The cases cited by Respondent are distinguishable because they all relate to an employer's decision to conduct a layoff, rather than the selection of employees. In this case, the Judge determined that the announcement to layoff Bishop was a violation of Section 8(a)(1) and (3) of the Act based on his conclusions that: (1) Bishop was a vocal union supporter, (2) Respondent harbored rampant anti-union animus, (3) the announcement was itself an adverse employment action (a decision to which Respondent does not appear to except), and (4) Respondent's asserted reason for selecting Bishop was patently false. Bishop was simply not one of the lowest producers using Respondent's own numbers and Respondent knew it prior to the lay off. (G.C. Ex. 60, "Bishop is the only anomaly") Respondent failed to rebut a prima facie showing of a violation.

I. Make whole remedy (Exception 1)

It is respectfully submitted that, as found by the Judge, this matter warrants the imposition of a make-whole remedy rather than the limited *Transmarine Corp.*, 170

NLRB 389 (1968) remedy proposed by Respondent. Acting General Counsel's complaint alleges that Respondent failed to bargain in good faith over the "selection method" used for implementing the layoff as well as other effects of the layoff. Thus, even if Respondent's decision to conduct a layoff is not at issue, the decision to lay off these *particular* employees is. Respondent failed to notify the Union in a timely manner of its decision to lay off these particular employees, and then simply "went through the motions" of meeting with the Union without bargaining in good faith over the selection method or other effects of the layoff. Further Respondent made good faith bargaining impossible by refusing to provide the Union with relevant information concerning the selection criteria used for layoff. In such cases, the Board has consistently rejected any argument for a limited *Transmarine* remedy. See *Eugene Iovine, Inc.*, 353 NLRB No. 36 (2008) (Board affirmed ALJ's rejection of employer's argument that only a *Transmarine* remedy was appropriate because layoffs would have occurred anyway); *Pan American Grain Co.*, 343 NLRB 318 (2004) (rejecting limited *Transmarine* remedy for the failure to bargain over the decision to lay off employees and finding "that the full backpay and reinstatement remedy is appropriate"); *Plastonics, Inc.*, 312 NLRB 1045 (1993) ("The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff."); *Lapeer Foundry*, 289 NLRB 952, 955-956 (1988); *Wilen Mfg.*, 321 NLRB 1094, 1100 (1996). Respondent's citation to *Miami Rivet of Puerto Rico, Inc.*, 318 NLRB 769 (1995), is distinguishable from the facts in this case because the union there did not demand to bargain over the selection of employees for

layoff. Moreover, the circumstances in that case involved a partial plant closure, unlike the situation here.

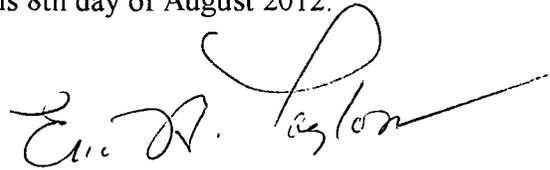
As the Board explained in *Porta-King Building Systems*, 310 NLRB 539-540 (1993), “. . . had the Respondent acted lawfully, it would have provided the Union with an opportunity to bargain *before* changing employee terms of employment. An offer to bargain over layoffs *after* they have occurred is no substitute for such prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. Indeed, in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining, and this policy has been approved by the Supreme Court. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Therefore, we find that the Respondent's offer to bargain about the layoffs after they occurred is insufficient to “undo the effects of [the violation] of the Act,” *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), and does not toll the Respondent's backpay liability. [Board's Emphasis.]

Although here, in contrast to the facts of *Porta-King*, Respondent went through the *motions* of bargaining one week before implementing the layoffs, it clearly failed to bargain in good faith.

V. **CONCLUSION:**

In view of the record evidence and for the reasons discussed above, it is respectfully requested that the Board uphold the decision of the Administrative Law Judge regarding the violations found and hold this Respondent responsible for its flagrant disregard of the law and the fundamental purpose and policies underlying the Act.

Dated at Cincinnati, Ohio this 8th day of August 2012.



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