Sysco Grand Rapids, LLC *and* General Teamsters Union Local No. 406, International Brotherhood of Teamsters. Cases 07–CA–146820, 07–CA–148609, 07–CA–149511, 07–CA–152332, 07–CA–155882, 07–CA–166479 and 07–RC–147973

April 4, 2019

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On March 2, 2017, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1] On April 28 and November 6, 2017, and June 15, 2018, the Respondent also filed motions to reopen the record for the limited purpose of introducing new evidence of changed circumstances since the unfair labor practice hearing. The General Counsel filed oppositions to each motion, the Charging Party filed oppositions to the first and third motions, and the Respondent filed a reply for each motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[4]

In late 2014, the Union commenced an organizing campaign among the Respondent's warehouse and transportation employees. The Respondent conducted an intensive antiunion campaign in response. The judge found that the Respondent committed numerous violations of the National Labor Relations Act (the Act) to deter the employees' organizational efforts. Among other violations, these included threats of loss of wages, benefits, and jobs; threat of plant closure; the discharge of key union supporter George Brewster for conduct that resulted in lesser or no discipline for other employees who acted similarly;[5] and the solicitation of grievances with a responsive grant of benefits.[6] Much of this conduct was perpetrated by high-level management officials, including the Respondent's president and a high-ranking official of the Respondent's corporate parent. The judge's findings of pervasive

[1] On March 9, 2018, the judge issued an erratum correcting the case caption to accurately reflect the name of the Charging Party Union. The Respondent filed a motion to strike the erratum. The Board's Office of the Executive Secretary denied the motion and issued a Corrected Order Transferring Proceeding to the National Labor Relations Board. The Respondent then excepted to the judge's erratum on the same ground as in its motion to strike. Because the Corrected Order did not change the Board's original deadline for filing exceptions to the judge's decision, we reject the Respondent's exception as untimely.

[2] Member Emanuel is recused and took no part in the consideration of this case.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias against it. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[4] We have amended the judge's recommended remedy consistent with our findings herein and to comport with the Board's standard remedial provisions. We shall modify the judge's recommended Order to reflect our direction of a second election and grant of special remedies and to conform to the Board's standard remedial language, and shall substitute a new notice to conform to the Order as modified.

[5] The Respondent excepts to the judge's finding that it knew of Brewster's union activity based on two "straw poll" documents generated from its program monitoring employee support for the Union, which flagged Brewster as a top supporter. The Respondent argues that these documents are privileged as attorney-client communication and as attorney work product, and are inadmissible as hearsay not within the exceptions for admission of a party opponent or as a record of regularly conducted activity. We find it unnecessary to pass on these arguments for the following reasons. First, the Respondent never objected on these grounds to the judge's admission of its December 22, 2014 straw poll, which assigned Brewster the Respondent's highest prounion ranking and denoted him as a "confirmed union committee leader." Second, in a January 2015 captive audience meeting conducted by the Respondent's President Thomas Shaeffer, Brewster was the only employee who spoke up and disagreed with Shaeffer, prompting Shaeffer and the Respondent's labor consultant to disagree with Brewster. Publicly contradicting the president on union matters shows that Respondent, at its highest level, knew that Brewster was a prounion activist.

[6] Chairman Ring notes that the Respondent filed only bare exceptions to the judge's findings that (1) it violated Sec. 8(a)(1) by threatening employees with loss of access to supervisors to discuss working conditions; (2) it predicted that should the Union prevail, the Union would inevitably strike and employees could be permanently replaced by new hires; and (3) it promulgated unlawful no-solicitation rules by telling an employee not to discuss the Union with other employees during working time and instructing an employee not to wear a union cap during work hours. Chairman Ring would disregard these unsupported exceptions pursuant to Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006). Accordingly, he does not pass on the judge's analysis of these findings, including the cases the judge cited therein.

unlawful conduct by the Respondent are supported by substantial evidence as set forth in his thorough decision, and we adopt them in full. We agree with the judge that the Respondent's unfair labor practices warrant a broad cease-and-desist order, requiring the Respondent to refrain from committing the specific violations found and from violating the Act "in any other manner."

The judge also found that the Respondent's unfair labor practices warranted issuance of a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). On December 18, 2014, the Union had obtained authorization cards from a majority of employees in the sought-after unit, and it filed a representation petition on March 11, 2015. Following the Respondent's unlawful antiunion campaign, however, the election results of May 7, 2015, showed the Union's loss by a margin of 71 votes for and 82 votes against. Under these circumstances, the judge found that the possibility of erasing the effects of the unlawful conduct and ensuring a fair rerun election were slight.

Given the severity of the Respondent's unfair labor practices, we would normally consider issuing a remedial bargaining order. However, approximately 4 years have elapsed between the Respondent's unfair labor practices leading up to the election and the issuance of the Board's decision today. Given the long delay, we recognize that a bargaining order would likely be unenforceable. See, e.g., *Cogburn Health Center v. NLRB*, 437 F.3d 1266, 1275 (D.C. Cir. 2006) (5-year delay between unfair labor practices and Board decision in part obviated need for bargaining order); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171–1172 (D.C. Cir. 1998) (4-year delay). Further, the Respondent has adduced evidence showing a 30 percent turnover in the employee complement since December 2014, when the Respondent began to commit its unfair labor practices. This tends to temper the need for a bargaining order. See, e.g., *Novelis Corp. v. NLRB*, 885 F.3d 100, 110–111 (2d Cir. 2018) (one-third employee turnover compels denial of enforcement); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (recognizing importance of turnover). Accordingly, rather than engender further litigation and delay over the propriety of a bargaining order, we find that employees' rights would be better served by proceeding directly to a second election.[7] See *Smithfield Foods*, 347 NLRB 1225, 1232–1233 (2006), review denied 506 F.3d 1078 (D.C. Cir. 2007); *Audubon Regional Medical Center*, 331 NLRB 374, 377–378 (2000); *Cooper Industries*, 328 NLRB 145, 146 (1999), review denied sub nom. *Steelworkers v. NLRB*, 8 Fed. Appx. 610 (9th Cir. 2001); *Comcast Cablevision of Philadelphia*, 328 NLRB 487, 487 (1999).[8]

Nevertheless, although we are not imposing a *Gissel* remedy, we agree with the judge that certain special remedies are warranted in light of the Respondent's extensive and serious unfair labor practices when faced with its employees' union organizational efforts. These additional remedies should serve to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair second election can be held.

Specifically, we shall order the Respondent to have the attached notice read aloud to the employees so that they "will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), review denied 400 F.3d 920, 929–930 (D.C. Cir. 2005). The Board has long held that the "public reading of the notice is an 'effective but moderate way to let in a warming wind of information and, more important, reassurance.'" *United States Service Industries*, 319 NLRB 231, 232 (1995) (quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), enfd. 107 F.3d 923 (D.C. Cir. 1997). Reassurance to employees that their rights under the Act will not be violated by the Respondent is particularly important because it continues to employ its president, Thomas Shaeffer, and Thomas Barnes remains president for Sysco Corporation's Mideast Division with corporate responsibility for the facilities involved herein; both were personally and directly involved in unlawfully threatening the employees. See, e.g., *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice-reading appropriate in part due to participation of high-ranking management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). We shall accordingly order the Respondent, during the time the required notice is posted, to convene the unit employees during working time at its Grand Rapids, Michigan, facility, as well as at its satellite depots in Niles, White Pigeon, Alanson, Kalkaska, Cadillac, and West Branch, Michigan, by shifts, departments, or otherwise, and have Respondent's president Thomas Shaeffer, and Thomas Barnes, president for Sysco Corporation's Mideast Division (or, if they are no longer employed by the Respondent or its corporate parent, by equally high-ranking management officials), in the presence of a Board agent and an agent of the Union if the Region or the Union

[7] Because we have decided not to impose a *Gissel* bargaining order, the Respondent's motions to reopen the record are moot.

[8] We share our colleague's strong commitment that our remedies should do as much as possible to eliminate the lingering effects of the Respondent's unfair labor practices. We simply disagree that in the circumstances of this case, as in comparable cases cited above, a remedial bargaining order is an essential or even advisable means of accomplishing that shared goal as soon as possible.

so desires, read the notice aloud to employees or, at the Respondent's option, permit a Board agent, in the presence of Shaeffer and Barnes, to read the notice to the employees. See *Bozzuto's, Inc.*, 365 NLRB No. 146, slip op. at 5 (2017).

We shall further order additional remedies aimed at securing the Union "an opportunity to participate in [the] restoration and reassurance of employee rights by engaging in further organizational efforts . . . in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980). We shall thus require the Respondent to grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all other places where notices to employees are customarily posted, and shall further order the Respondent to supply the Union, on its request, the names and addresses of its current unit employees. See *Audubon Regional Medical Center*, supra, 331 NLRB at 378. We shall additionally order the Respondent to give notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation. We impose these special access remedies in light of the significant and pervasive nature of the Respondent's unfair labor practices and the need to assure a free and fair second election. See *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.*, supra, 242 NLRB at 1029.

Finally, we amend certain remedies recommended by the judge to conform to our standard remedial language. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee George Brewster, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate George Brewster for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by reducing the hours of employee Jesse Silva, we shall order the Respondent to make him whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. Backpay shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In addition, we shall order the Respondent to compensate George Brewster and Jesse Silva for any adverse tax consequences of receiving a lump-sum backpay award and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 7 allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Sysco Grand Rapids, LLC, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that a strike is inevitable if they choose to be represented by General Teamsters Union Local No. 406, International Brotherhood of Teamsters (the Union).

(b) Threatening employees that the Respondent would lose business if they select the Union as their bargaining representative.

(c) Threatening employees that it would close the facility if they choose to be represented by the Union.

(d) Threatening employees with layoff if employees select the Union as their bargaining representative.

(e) Threatening employees that negotiations will start from scratch if they choose to be represented by the Union.

(f) Threatening employees with a reduction in wages and benefits if they select the Union as their bargaining representative.

(g) Threatening employees with the loss of seniority if they choose to be represented by the Union.

(h) Threatening employees with more onerous working conditions if they select the Union as their bargaining representative.

(i) Threatening employees with loss of access to supervisors to discuss working conditions if they choose to be represented by the Union.

(j) Interrogating employees about their union membership, activities, and sympathies.

(k) Promulgating a rule prohibiting employees from wearing union insignia.

(l) Promulgating a rule instructing employees not to talk to each other about the Union.

(m) Soliciting grievances and promising to remedy them in order to discourage employees from selecting union representation.

(n) Granting increased benefits in the form of safety bonuses in order to discourage employees from selecting union representation.

(o) Creating the impression among employees that their union activities are under surveillance.

(p) Videotaping or photographing employees engaged in union activity.

(q) Reducing the hours of work of employees because of their support for and activities on behalf of the Union.

(r) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(s) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer George Brewster full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make George Brewster and Jesse Silva whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate George Brewster and Jesse Silva for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for George Brewster and Jesse Silva.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of George Brewster, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its facilities in Grand Rapids, Niles, White Pigeon, Alanson, Kalkaska, Cadillac, and West Branch, Michigan, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 9, 2014.

(g) Within 14 days after service by the Region, hold a meeting or meetings during work time, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be publicly read to the employees by Thomas Barnes, president for Sysco Corporation's Mideast Division, and Respondent's president Thomas Shaeffer (or if they are no longer employed by the Respondent or its corporate parent, by equally high-ranking management officials) in the presence of a Board agent and an agent of the Union, if the Union so desires, or, at the Respondent's option, by a Board agent in the presence of Barnes and Shaeffer and, if the Union so desires, the presence of an agent of the Union.

(h) Immediately on request, for a period of 2 years from the date on which the notice is posted or until the Regional Director has issued an appropriate certification following a fair and full election, whichever comes first, grant the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices are customarily posted in its facilities in Grand Rapids, Niles,

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

White Pigeon, Alanson, Kalkaska, Cadillac, and West Branch, Michigan.

(i) Supply the Union, on its request, with the full names and addresses of its current unit employees, updated every 6 months, for a period of 2 years or until a certification after a fair election.

(j) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first, any supervisor or agent of the Respondent convenes any group of employees at the Respondent's facilities in Grand Rapids, Niles, White Pigeon, Alanson, Kalkaska, Cadillac, or West Branch, Michigan, and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such meeting and, on request, give one of them equal time and facilities to address the employees on the question of union representation.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election completed on May 7, 2015, in Case 07–RC–147973 is set aside and that case is severed and remanded to the Regional Director for Region 7 to conduct a second election whenever the Regional Director shall deem appropriate.

Dated, Washington, D.C. April 4, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

The Board is unanimous in finding that the Respondent committed serious and pervasive unfair labor practices during its intensive antiunion campaign to suppress, for the foreseeable future, its employees' desire for union representation. The only remaining question is whether the Board ought to issue a *Gissel*[1] remedial bargaining order to prevent employee free choice from continuing to be stifled by an employer committed to wrongdoing. My colleagues shy away from issuing such an order, citing concerns that it may not be enforced by a reviewing court; instead, they direct a second election accompanied by other additional remedies. But on the merits this case cries out for a bargaining order. When egregious disregard for the law has made the conduct of a fair election unlikely, it is the Board's prerogative—and, indeed, its responsibility—to issue a bargaining order. Such an order is, in the Supreme Court's words "perhaps the only fair way to effectuate employee rights." *Gissel,* 395 U.S. at 612.[2]

I.

In November 2014, three longtime employees of the Respondent—George Brewster, Derrick Farr and Rick Flier—initiated and led an effort to organize a union at their workplace. Less than 2 months later, a majority of unit employees had signed authorization cards indicating their support for representation by Teamsters Local 406. As detailed below, the Respondent, in concert with officials from its corporate headquarters, subsequently initiated a swift, severe, and enduring counterattack to thwart the employees' organizing effort and undermine the Union's majority support. A pervasive campaign of unlawful conduct was perpetrated directly and personally by the Respondent's president and senior managers, and all of it was widely disseminated among the unit employees. In the face of the Respondent's persistent misconduct, the Union—despite previously securing clear majority support among the employees—ended up losing the election.

The Respondent's all-out effort to stop its employees' organizing effort continued even after the employees invoked the Board's processes in response to the Respondent's unlawful actions, as the Respondent made clear that it would continue to use any means necessary, including unlawful action, to crush any future organizing effort.

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

[2] Although I would issue a remedial bargaining order in this case, I certainly agree with my colleagues that other additional remedies are necessary to remedy the Respondent's unlawful conduct before a second election may be held. Specifically, I join my colleagues in ordering a notice reading; granting the Union reasonable access to the Respondent's bulletin boards and all other places where notices to employees are customarily posted; supplying the Union, on its request, the names and addresses of its current unit employees; and ordering the Respondent to give the Union notice of, and equal time and facilities for the Union to respond to, any address made by the Respondent to its employees on the question of union representation. I would additionally order the Respondent, on request, to grant the Union reasonable access to its facilities, in nonwork areas during nonwork time. See *Monfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992).

II.

A half-century ago, the Supreme Court provided guidance to the Board on how to effectively remedy such egregious misconduct. In *Gissel*, the Court declared: "[A] bargaining order is an appropriate and authorized remedy where an employer rejects a card majority while at the same time committing unfair practices that tend to undermine the union's majority and make a fair election an unlikely possibility." 395 U.S. 575, 579 (1969). The present case plainly fits this description.

Even a cursory review of the scope and scale of the Respondent's misconduct demonstrates that a *Gissel* bargaining order is fully warranted here. Upon discovering its employees' organizing effort, the Respondent, joined by its corporate parent,[3] launched an aggressive antiunion campaign that employed a variety of unlawful tactics to counter and ultimately turn back the Union's growing support among unit employees.

In late November 2014, after learning that the Union was nearly halfway toward achieving majority support among the Respondent's employees,[4] the Respondent began making a permanent record of each employee's perceived support for the Union. It created a database of its supervisors' daily observations of each employee's conduct, demeanor, and reactions to conversations with supervisors respecting unionization, and assigned each employee a ranking denoting his or her perceived support for the Union. The database was shared among the Respondent's managers and supervisors, as well as Sysco Corporation Senior Managers Thomas Barnes and Bobby Jordan.[5] The Respondent thereby constructed a permanent record of employees' support for the Union, a record it drew upon to wage its unlawful campaign (and which it could easily resurrect today).

Weeks later, in early December 2014, the Respondent launched a series of mandatory antiunion meetings with employees in which it repeatedly threatened them with wage and benefit losses. Those meetings continued through the Union's filing of a representation petition in March 2015.[6] Significantly, those meetings were conducted by the Respondent's highest-ranking officials, including President Shaeffer, Vice-president of Operations Ted Twyman, and Transportation Manager Todd Yocum, and on at least one occasion with Sysco Corporation Senior Manager Jordan present. Among other things, these senior managers repeatedly threatened employees that any negotiations with the Union would begin with a "blank page," a "clean sheet," a "clean slate," a "blank sheet of paper," or "zero," and that wages could revert to minimum wage or start at nothing and employees could possibly lose everything. The unlawful message repeatedly conveyed was that if the Union was selected, the employees would lose wages and benefits at the start of negotiations, and the Union would be forced to bargain for their reinstatement, which the Respondent could simply refuse to do.

To punctuate the risks to employees, the Respondent also repeatedly threatened employees with job losses, both in the mandatory meetings and in a letter sent to all employees shortly after the election petition was filed. That letter threatened that employees could "lose everything" by being permanently replaced in an economic strike over the demands the Union made at the bargaining table; that the "only way" employees could avoid a strike and losing everything was to vote against the Union; and described collective-bargaining as a "career gamble" in which you "can lose everything" including your job.

And, in fact, the Respondent demonstrated its disregard for employees' livelihoods by unlawfully discharging employee Brewster. Brewster was a 14-year employee of the Respondent, yet the Respondent discharged him for a minor infraction solely because he dared to take a leading role in actively supporting and campaigning for the Union. News of Brewster's abrupt discharge was widely disseminated among employees, and likely had a particularly acute impact on the Respondent's work force, which included many long-tenured employees. The discharge highlighted the risk of union activity to employees, including both those who had long-time career service and those who aspired to gain similar tenure.

At the same time, the Respondent unlawfully solicited grievances and granted benefits to demonstrate to employees that there was no need to risk everything with the Union. A key employee grievance was the loss of safety bonuses, which the Respondent promised to restore and in fact made more favorable to employees, just as the "employees' organizing efforts began to gain steam," as observed by the judge.[7]

Finally, after the Union lost the election, the Respondent continued its unlawful antiunion campaign, and even raised the stakes by threatening employees with plant

[3] The Respondent, Sysco Grand Rapids, is one of 70 individual operating companies of its corporate parent, Sysco Corporation.

[4] The Respondent had been told that the Union had signed authorization from 39 of the 162 employees in the sought-after unit of drivers and warehousemen employed at the Respondent's Grand Rapids, Michigan, facility, and at six satellite depots in Northern Michigan.

[5] Barnes, president for Sysco Corporation's Mideast Division, oversaw 10 operating companies, including Grand Rapids.

[6] The Union established majority status on December 18 with 84 completed and signed cards, which increased to 99 cards by the time the petition was filed. On May 6, 2015, the Union made a demand for recognition based on its card majority, which the Respondent rejected.

[7] As a result, 49 warehouse employees received bonuses—in the form of gift cards ranging from $250 to $500—shortly before the election, and 66 drivers received similar bonuses shortly after the election.

closure.[8] After the election and the Union's filing of unfair labor practice charges, the Respondent held a series of "company update" meetings with its Grand Rapids employees. In those meetings, Sysco Corporation Manager Barnes, with the Respondent's highest-ranking managers at his side, denounced the unfair labor practice charges, declared that he would never let the Union in at the Respondent, and warned employees that the Union had been run out of Sysco's Detroit location. Barnes further warned that the Respondent was an insignificant part of Sysco Corporation, and threatened that he would shut the Respondent down and move its operations if the Union won.

Last, as if the Respondent's already-committed unfair labor practices were not enough to extinguish employees' support for the Union, Barnes unlawfully declared in at least one mandatory meeting that he knew how to get around the Act, even if it meant continuing to violate federal law, and that he had no problem breaking rules under the Act because he had done it before and "always got away with it."

III.

In those circumstances, a *Gissel* remedial bargaining order is plainly warranted on the merits. Unlike my colleagues, I am not persuaded that such an order would be unenforceable. But, even at the risk of nonenforcement, we must stand for the Act, not only because the Board is primarily responsible for effectuating the purposes and policies of the Act, but also because the Board must set national labor policy and cannot effectively do so by reverting to the least protective approach from a patchwork of views among the federal courts of appeals.

A.

The *Gissel* Court wholly embraced the importance of the bargaining order as an indispensable component of national labor policy to secure employee free choice.[9] The remarkable similarity between the unlawful employer campaign in this case and those in *Gissel* serves as a compelling reminder of the continuing value of the bargaining order a half-century after the Court's decision.[10] The Board's responsibility to ensure employees' true representational desires, undistorted by undue employer influences,[11] demands that the Board continue to exercise its authority to issue a bargaining order when necessary. Indeed, the Court instructed that "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, *then such an order should issue*." Id. at 614–615. (Emphasis supplied.).

A remedial bargaining order *should issue* in the present case. The litany of serious and pervasive wrongdoing in this case is precisely the type consistently found by the Board and the courts to warrant such an order. Such unlawful conduct carries a long-lasting effect difficult to remedy by traditional means. *Aldworth Co.*, 338 NLRB 137, 148–150 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *Garvey Marine, Inc.*, 328 NLRB 991, 994 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 23–24 (D.C. Cir. 1982), cert. denied sub nom. *John Cuneo, Inc. v. NLRB*, 459 U.S. 1178 (1983).

The Respondent's threats of plant closure, in particular, are "among the most flagrant forms of interference" with employee rights and likely to have long-term coercive effects that are difficult to dissipate. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995). Accord *Gissel,* above, 395 U.S. at 611 fn. 31

[8] As stated, the Board has adopted the judge's findings that the Respondent committed numerous violations of Sec. 8(a)(1) of the Act before the election: (1) threatening individual employees with job loss; (2) threatening individual employees with loss of wages; (3) threatening employees with the loss of access to supervisors and management if unionization occurred; (4) threatening employees with loss of benefits because the Respondent would more strictly enforce rules if unionization occurred; (5) threatening employees with loss of seniority; (6) threatening more onerous working conditions and discipline; (7) interrogating employees; (8) surveilling employees union activities and giving the impression of surveillance; (9) issuing no-solicitation rules and forbidding the wearing of union insignia. The Respondent also violated Sec. 8(a)(3) of the Act by reducing employee Jesse Silva's work hours shortly after Silva challenged assertions made by president Shaeffer in one of his captive audience employee meetings opposing unionization.

[9] The court recognized that:

> Almost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of Section 8(a)(5) . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes. [Id. at 597; footnote omitted.]

[10] The consolidated cases in *Gissel* involved several employers that, in the face of an authorization card majority, "embarked on, or continued, vigorous antiunion campaigns" that included violations nearly identical to those found in the present case: unlawful threats of discharge, threats of plant closure, promises of benefits, coercive interrogations, creating the appearance of surveillance, and the discharge of leading union supporters. 395 U.S. at 580–582, 588–589. Notably, in *Gissel* one respondent threatened employees that "because of their age" they might not be able to find reemployment if they lost their jobs; the Respondent's many threats here likely touched on the same nerve among the Respondent's long-tenured work force.

[11] 395 U.S. at 611 and 612 fn. 32.

(discussing the high effectiveness of plant closure threats to destroy conditions for a fair rerun election); *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008); *Q-1 Motor Exp., Inc.*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995); *Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004). The impact of threats of closure is even more pronounced where, as here, they are delivered by high-ranking members of the employer's corporate hierarchy. Similarly, the Respondent's repeated threats of wage, benefit, and ultimately job losses surely left an indelible mark on employees' minds. See *Evergreen America*, above, 348 NLRB at 180.

The Respondent's unlawful discharge of Brewster also weighs heavily in favor of granting a *Gissel* bargaining order. The Board and courts have recognized that the unlawful discharges of union adherents are "the most flagrant forms of interference with Section 7 rights and are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity persists." *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992), enfd. 28 F.3d 103 (2d Cir. 1994). Accord *Michael's Painting,* above, 337 NLRB at 861; *NLRB v. Wilhow Corp.,* 666 F.2d 1294, 1304 (10th Cir.1981). The Respondent's discharge of Brewster certainly was "flagrant."

As it was making those threats and discharging Brewster, the Respondent was also unlawfully soliciting and remedying employees' grievances. As the Board has observed, "[u]nlawfully granted benefits have a particularly long-lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." *Gerig's Dump Trucking*, 320 NLRB 1017, 1017–1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998). Here, the Respondent's unlawful grants of benefits, against the backdrop of its other unlawful conduct, effectively sent a message to employees that a union was unnecessary and that the employees had better look to the Respondent if they wanted improved working conditions. See *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964) ("employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if employer is not obliged.").

Further, the Respondent's continuing hostility toward its employees' exercise of their Section 7 rights even after the election is strong evidence that its unlawful conduct will persist in the event of another organizing campaign. See *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999), affd. 267 F.3d 1059 (10th Cir. 2001); *Garney Morris, Inc.*, supra, 313 NLRB at 103 (1993). This likelihood is further heightened here, given the brazenness with which Barnes touted his willingness to violate the law if necessary; again, Barnes made clear that he had no problem breaking rules under the Act because, as he put it, he had done it before and "always got away with it." See *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 331 (D.C. Cir. 1989) (affirming *Gissel* bargaining order where owners "'meant what they said'" about closing the store and "that 'given another opportunity, they would resume a pattern of unlawful conduct.'"); see also *The Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990) (emphasizing the employer's demonstrated commitment to stamping out organizing efforts at any cost).

Last, it bears emphasis that the Respondent's highest-ranking managers were personally and directly involved in the Respondent's unfair labor practices, and that those violations were widely disseminated to and affected all unit employees. As the Board has recognized, "When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." *Consec Security*, 325 NLRB 453, 455 (1998), enfd. mem. 185 F.3d 862 (3d Cir. 1999). *Accord Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 639 (2011), enfd. sub nom. *Matthew Enterprise, Inc. v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012); *Traction Wholesale Center Co.*, 328 NLRB 1058, 1077 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000). Here, moreover, the Respondent's "antiunion message" was so widely disseminated among unit employees, and so directly affected them, that it is even more unlikely to be forgotten any time soon. See, e. g., *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999), affd. 267 F.3d 1059 (10th Cir. 2001) (serious unfair labor practices directly affected the entire bargaining unit); *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000), enfg. 328 NLRB 1114, 1115 (1999) (same); *Power Inc. v. NLRB*, 40 F.3d 409, 423 (D.C. Cir. 1994), enfg. 311 NLRB 599 (1993) (unfair labor practices directly reached nearly every employee in the bargaining unit).

In short, our precedents dictate that a *Gissel* remedial bargaining order is necessary and fully warranted in this case.

III.

At the Respondent's urging, my colleagues nevertheless shy away from imposing such an order, for fear that it may be unenforceable due to changed circumstances and the lapse of time since the violations occurred. I am not

persuaded that either of those concerns justifies withholding one of our most effective remedies in this particular case.

According to the Respondent, a fair rerun election is possible due to changes in its management structure; chiefly, the departure of Vice-President Ted Twyman. My colleagues apparently anticipate this asserted change could impact the Board's prospects for judicial enforcement of a bargaining order, but this concern is misplaced. Apart from Twyman, virtually the entirety of the Respondent's management structure that committed unfair labor practices remains in place. According to the Respondent's submissions to the Board,[12] the Respondent's president, Shaeffer, remains, as does Vice-president Campbell, Transportation Manager Yocum, and Chief Financial Officer Marc Lee. Further, Supervisors Dean Mercer, Joe Quisenberry, Jim Brown, Craig Pung, Ryan Norman, and Michael Scott, all of whom committed unfair labor practices, also remain employed by the Respondent. The single departure identified by the Respondent from its own management team is Twyman.[13] Finally, with respect to members of the Respondent's corporate parent implicated in unlawful conduct, Sysco Corporation's Manager of Employee and Labor Relations Bobby Jordan remains employed.[14] The ongoing presence of these management officials "can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations" and that it is not likely to retreat from its unlawful strategy. *The Salvation Army Residence*, supra, 293 NLRB at945 (1989). Accord *NLRB v. Gerig's Dump Trucking*, supra 137 F.3d at 944 (enforcing bargaining order where no indication that ownership and control of the company had "meaningfully changed").[15]

Likewise, there is no reason to forego a bargaining order based on the Respondent's assertion that it has experienced significant employee turnover, which supposedly has diminished the effects of its unlawful conduct on the current work force. According to the Respondent, only 114 employees from the original unit of 162 employees remain employed in a unit that now numbers 190 employees. But this means 60 percent of the current unit employees were employed at the time the violations occurred, a significant majority. Further, as found by the judge, the unit comprises a "core of steady employees" with long-time experience at the Respondent, including its unlawful conduct,[16] who "will doubtless share this history with newcomers." *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, supra, 363 F.3d at 442 (internal quotation marks omitted) (*Gissel* bargaining order found necessary to remedy unfair labor practices despite employee turnover); *Garvey Marine, Inc. v. NLRB*, supra, 245 F.3d at 819 (enforcing *Gissel* order because lore of the shop "affect[s] the ability of new hires and veteran employees alike to vote their true preferences in a new election"); *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1070 (7th Cir. 1997) (bargaining order enforced where 20 percent of original work force remained); *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir.1978) (enforcing *Gissel* order despite turnover and holding that "[p]ractices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed"); *Amazing Stores, Inc. v. NLRB*, above, 887 F.2d at 330–331 (bargaining order affirmed despite "almost complete turnover of personnel in the bargaining unit").

In my view, then, the "changed circumstances" asserted by the Respondent provide no basis for withholding a bargaining order remedy, either on the merits or out of fear that such an order would not be enforced.

The same holds true for the passage of time since the unfair labor practices occurred, which the Respondent and my colleagues also cite as a reason not to issue a bargaining order. The retention of the Respondent's and Sysco's relevant senior managers and supervisors, along with the

[12] The submissions to reopen the record to show evidence of changed circumstances were supported by affidavits from Amy Campbell, the Respondent's vice-president for human resources. Campbell herself participated in the Respondent's unfair labor practices.

[13] Notably, though, according to the judge, Twyman remains employed by the Sysco organization, having been transferred to Sysco Cincinnati as Director of Operations. He thus remains a part of Sysco's broader management team.

[14] The Respondent averred in its April 2017 submission to the Board that Sysco Corporation Senior Manager Thomas Barnes planned to retire in July 2018, but the Respondent provided no confirmation or even mention of Barnes in its updated submission of June 2018.

[15] This case is thus entirely unlike those in which significant management turnover mitigates the need for a bargaining order. See, e.g., *Novelis Corp. v. NLRB*, 885 F.3d 100,110 (2d Cir. 2018) (departure of former president and two other key managers who made unlawful statements at employee meetings); *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1160 (7th Cir. 1990) (twelve out of thirteen of the managers who perpetrated the unfair labor practices had left the company); *Audubon Regional Medical Center*, 331 NLRB 374, 377–378 (2000) (100 percent turnover in management).

[16] Employees who testified at the hearing indicated their tenure of employment with the Respondent as follows: Richard Flier Jr.—34 years; Josh Meyers—22 years; Derek Farr—14 years; Dean Beard—26 years; Kevin King—23 years; Ned Versluis—17 years; Albert Moore—23 years; Jeff Compton—18 years; Tim Lowing—16 years; Joseph Bombul—21 years; Jesse Silva – 16 years; Anthony Lazarus—20 years; Kyrel Brown—10 years; Kathee Harmon—23 years; Craig Wirtz—14 years; Christopher Sanicki—20 years; James Koepsell—20 years; Dirk Kraai—16 years; Dennis Winter—started in 1981 with intermittent employment thereafter; Harley Vaugn—22 years; Kevin Strautz—17 years; Thomas Holton II—8 years; Anthony Rocco—7 and one-half years; Steven Bolo—4 years; Tyler Case—4 years; Christian Bergsma—2 years; Justin Schlappi—7 months. The Respondent's submission asserting employee turnover confirms the Respondent's continued employment of many long-tenured employees.

steady employment of a core of long-time unit employees who witnessed the unlawful conduct, strongly suggests that the mere passage of time will not have undone the effects of that misconduct. This concern is heightened by Sysco Corporation Manager Barnes' postelection threat to resume unlawful conduct to resist future organizing efforts.

Moreover, less than 3½ years have elapsed between the Respondent's last unfair labor practice—Barnes' threat to employ unlawful tactics in the future if necessary—and the Board's decision today.[17] Although the Board certainly strives to decide cases more quickly, that period is well within the range in which courts have enforced the Board's imposition of a *Gissel* bargaining order. See, e.g., *Garvey Marine, Inc. v. NLRB*, supra, 245 F.3d 819 (4-year lapse between unlawful conduct and Board decision); *NLRB v. Gerig's Dump Trucking*, supra, 137 F.3d at 943 (3½-year lapse); *Evergreen America Corp. v. NLRB*, above, 531 F.3d at 332–333 (4-year lapse). Accord *J.L.M., Inc. v. NLRB,* 31 F.3d 79,85 (2nd Cir. 1994)("the passage of three years is not itself sufficient to indicate that the effects of the Company's ULPs will no longer be felt").[18] For those reasons, I am not persuaded that the passage of time warrants foregoing issuing an otherwise well-justified remedial bargaining order in this case.

IV.

This case began with three employees who rallied with their coworkers to realize their Section 7 right to organize a union. Their hope, their right, was to have the fair election promised to them by the law. Instead, they faced a relentless and determined campaign over a series of months that "succeeded in undermining [the] union's strength and destroying the laboratory conditions necessary for a fair election." *Gissel*, 395 U.S. at 612. In such circumstances, the Supreme Court has recognized that by the time the Board issues its usual remedies and conducts a second election, "[t]he damage will have been done," and so it is here. Id.

The task for the Board now is to decide how best to effectively remedy that damage. It is our job to make this judgment call—the *Gissel* Court made clear that "[i]t is for the Board . . . to make that determination . . . draw[ing] on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." Id. at 612 fn. 32. As my colleagues do, we could order a second election, and hope that additional remedies will provide some element of fairness in the campaign. But I fear that path only rewards the Respondent with further opportunity to undermine employees' faith that they may ever realize their desire for union representation.

I would instead choose to heed the Supreme Court's wisdom that "perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign" by imposing a bargaining order. Id. Otherwise, the Respondent will have made good on its threat that it can break the law, violate employees' rights, and yet prevail in "continu[ing] to delay or disrupt the election processes and put off indefinitely [its] obligation to bargain." Id. at 610–611. We cannot let that threat stand.

Dated, Washington, D.C. April 4, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that a strike is inevitable if you choose to be represented by General Teamsters Union

[17] Six months of that time period were taken up by the parties' efforts to settle this case from January to June 2018. The Board held processing of this case in abeyance during that period.

[18] As the Seventh Circuit has stated, "[i]n cases involving a lapse of three to four years, we have tended to enforce *Gissel* orders." *NLRB v. Gerig's Dump Trucking*, above, 137 F.3d at 943 (finding that time period to be an "ordinary institutional time lapse[ ] inherent in the legal process."); see also *America's Best Quality Coatings Corp. v. NLRB,* 44 F.3d 516, 522 (7th Cir.), *cert. denied*, 515 U.S. 1158 (1995). While the Board should strive for expeditious adjudication, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *NLRB v. J.H. Rutter–Rex Mfg. Co.,* 396 U.S. 258, 265 (1969).

Local No. 406, International Brotherhood of Teamsters (the Union).

WE WILL NOT threaten you that we would lose business if you select the Union as your bargaining representative.

WE WILL NOT threaten you that we would close the facility if you choose to be represented by the Union.

WE WILL NOT threaten you with layoff if you select the Union as your bargaining representative.

WE WILL NOT threaten you that negotiations will start from scratch if you choose to be represented by the Union.

WE WILL NOT threaten you with a reduction in wages and benefits if you select the Union as your bargaining representative.

WE WILL NOT threaten you with the loss of seniority if you choose to be represented by the Union.

WE WILL NOT threaten you with more onerous working conditions if you select the Union as your bargaining representative.

WE WILL NOT threaten you with loss of access to supervisors to discuss working conditions if you choose to be represented by the Union.

WE WILL NOT interrogate you about your union membership, activities, and sympathies.

WE WILL NOT promulgate a rule prohibiting you from wearing union insignia.

WE WILL NOT promulgate a rule instructing you not to talk to each other about the Union.

WE WILL NOT solicit grievances and promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT grant increased benefits in the form of safety bonuses in order to discourage you from selecting union representation.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT videotape or photograph you engaged in union activity.

WE WILL NOT reduce your hours of work because of your support for and activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer George Brewster full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make George Brewster whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make Jesse Silva whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction in his hours of work, plus interest.

WE WILL compensate George Brewster and Jesse Silva for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for George Brewster and Jesse Silva.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of George Brewster, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by Thomas Barnes, president for Sysco Corporation's Mideast Division and our president Thomas Shaeffer (or if they are no longer employed by the Respondent or its corporate parent, by equally high-ranking management officials), in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or by a Board agent in the presence of Barnes and Shaeffer and, if the Union so desires, the presence of an agent of the Union.

SYSCO GRAND RAPIDS, LLC

The Board's decision can be found at www.nlrb.gov/case/07-CA-146820 or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Steven E. Carlson and *Colleen J. Carol, Esqs*., for the General Counsel.

William E. Hester, III, Esq. (The Kullman Firm), of New Orleans, Louisiana, and *Mark A. Carter* and *Kirk M. Wall, Esqs., (Dinsmore & Shohl, LLP),* of Charleston, West Virginia, for the Respondent.

Michael L. Fayette, Esq. (Pinsky, Smith, Fayette & Kennedy, LLP), of Grand Rapids, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. These consolidated cases were tried in Grand Rapids, Michigan, over the course of 14 days between May 24 and October 11, 2016. General Teamsters Union Local No. 406, International Brotherhood of Teamsters (the Union or Petitioner) alleges that Sysco Grand Rapids, LLC (the Company or Respondent) committed numerous unfair labor practices prior to the May 7, 2015, labor representation election at the Company's Grand Rapids area facilities causing the Union to narrowly lose the election by 11 votes out of 153 valid votes cast.[1]

The Union filed numerous unfair labor practices alleging pre and postelection violations of: (1) Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by unlawfully threatening, interrogating, engaging in surveillance and the impression of surveillance, soliciting grievances, awarding gift cards to employees, promising benefits if employees voted against the Union, and telling employees it would be futile to support the Union; Section 8(a)(3) by discharging, transferring and reducing the work hours of employees in retaliation for their support of the Union; and Section 8(a)(5) by failing and refusing, since May 6, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the proposed bargaining unit employees. In addition, the Union sought to set aside the election by filing 35 objections, which substantially mirror the alleged unfair labor practices. Based on the alleged extraordinary nature of the aforementioned unfair labor practices, the General Counsel seeks a remedy including a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a limited liability company, has been engaged in the non-retail sale and distribution of food and related products at its facilities in Alanson, Cadillac, Grand Rapids and West Branch, Michigan, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Michigan. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

1. The Company's business model

The Company is one of approximately 70 operating companies (OPCOs) owned in the United States by Sysco Corporation, the world's largest broad line food distributor. The Company operates throughout most of Michigan outside of the Detroit metropolitan area. Detroit and surrounding locations are serviced by Sysco Detroit. The Company's operations are centrally operated out of the Grand Rapids facility, which also supplies six northern depots. From all of those locations, drivers are assigned routes to deliver Sysco Corporation products to commercial accounts. There are approximately 161 drivers, warehouse, maintenance, sanitation and inventory control employees at all of the Company's facilities.

2. Management

At relevant times during this dispute, the following individuals served as statutory supervisors or agents on behalf of the Company: Thomas C. Barnes, market president for the Sysco Corporation's Mideast Division, which includes Michigan; Luke Jackson, Sysco Corporation's market vice president of operations; Bobby Jordan, Sysco Corporations' manager of employee & labor relations. The Company's Grand Rapids' hierarchy included: Thomas Shaeffer, president; Mark Lee, chief financial officer; Amy Campbell, vice president for human resources; Ted Twyman, vice president of operations; and Todd Yocum, transportation manager. The Company's supervisory staff included Transportation Supervisors Dean Mercer, Joe Quisenberry, Jim Brown, Craig Pung, and Ryan Norman. Mark Szlachchic was employed as warehouse manager. Under his supervision were Warehouse Supervisors Adam Middleton, Ryan Norman and Michael Scott. Christopher Wilfong served as environmental health, safety and security manager. Charlie Stephenson served as a labor relations consultant.

Three of the managers listed above—Twyman, Middleton, and Szlachcic—were no longer employed at the Company's Grand Rapid facility as of September 10, 2016.[3] Twyman, however, remains a high-level official within the Sysco Corporation

[1] All dates are in 2015 unless otherwise indicated.

[2] 29 U.S.C. §§ 151–169.

[3] R. Exhs. 33(a) and 35(a).

organization, having been redeployed to Sysco Cincinnati as Director of Operations on September 9, 2016.

3. Employee workforce

The Grand Rapids warehouse has approximately 74 non-supervisory employees. The Company's transportation department employs a total of approximately 82 food delivery and shuttle drivers. Drivers are not compensated on an hourly basis, but rather, an incentive pay system that is based on quantity delivered and the amount of time spent delivering it. Todd Yocum manages the department.

Approximately 54 drivers are based at the Grand Rapids facility. They are supervised by Quisenberry, Brown and Mercer.[4] Approximately 28 drivers are based out of six depots. Two of the depots—Niles and White Pigeon—employ 11 drivers and are supervised by Quisenberry. The remaining four—Alanson, Kalkaska, Cadillac and West Branch—do not have a formal supervisor. However, Alanson lead driver Kevin Lauer has several responsibilities in addition to serving as a delivery driver. Lauer approves driver vacation schedules and prepares delivery schedules for the Company's northern depots. While required to submit them to the Company's Transportation Department in Grand Rapids for review, they are routinely approved.[5] Lauer is also responsible for interviewing and selecting temporary drivers. In that capacity, he serves as the Company's representative to the employment agency which supplies temporary drivers during the busy summer season. Lauer interviews the drivers sent by the employment agency and decides who to hire. Unlike other drivers, Lauer is provided with a Company laptop and email address.[6]

On December 18, 2014, the Company employed 162 employees who were eligible for labor representation. As of September 10, 2016, 29 of those employees were no longer employed by the Company.[7]

4. Disciplinary policy

The Company's generally progressive disciplinary policy is set forth in its handbook's Rules of Conduct. It enumerates four levels of misconduct, which "are merely *guidelines* to appropriate and possibly disciplinary action. This structure is not intended to restrict or negate the Company's right or ability to depart from the guidelines and to discipline and/or terminate an associate, with or without advance notice, as it deems appropriate given the circumstances." (emphasis in original)

Level A offenses, which include the use of offensive language, start with verbal discipline and proceed through written reprimand, suspension and if there is no improvement, to discharge. Level B offenses, which include insubordination, begin with a written reprimand and proceed to suspension and, if no improvement, to discharge. Level C offenses, which include the "unauthorized use or disclosure of confidential information concerning another associate, a customer or the Company," generally result in a written reprimand plus suspension or discharge. Level D offenses are the most serious in nature and generally result in immediate discharge.[8]

B. The Union Campaign

1. Union organized meetings

Union representatives met with a select number of employees during the summer of 2014. On or about November 1, 2014, union representatives began meeting with the Company's warehouse and transportation employees outside the Company's main facility in Grand Rapids and other locations in Michigan. Union president Terry Hoogerhyde provided supporters with information about the authorization card solicitation process, including an explanation as to the purpose of signing the cards, instructions on what to tell coworkers in soliciting authorization cards, and that by signing the card the employee was authorizing the Union to represent him or her and enable the Union to force an election. Hoogerhyde also provided supporters with the details of the Union's "Detroit collective bargaining agreement."

2. Solicitation of authorization cards

Employees who took leading roles in the solicitation of signature cards included George Brewster, Derrick Farr and Rick Flier. They and other employees would openly discuss the merits of union representation in front of supervisors.[9] Some employees changed their minds, requested the return of their signed authorization cards, and their cards were returned to them.

By December 18, 2014, the Union had obtained completed and signed authorization cards from 84 of the 162 eligible employees for the proposed unit. Between December 18, 2014 and the filing of a representation petition on March 11, the Union obtained an additional 15 signed authorization cards.[10] In

[4] GC Exh. 3–4.

[5] The Company denies the allegation that Lauer, a current employee who was not called to testify, is a Section 2(11) supervisor or Section 2(13) agent.

[6] It is not disputed that Lauer had significantly more supervisory duties than any other lead driver. (Tr. 58–59, 400, 685–687, 797, 980–985, 1021, 1026–1031, 1093–1094, 1375–1378; GC Exh. 42–49, 61.)

[7] The Company notes that the turnover rate during that period for the stipulated unit was 17.9 percent. If one excludes discriminatee George Brewer from that group, the rate drops to 17.3 percent, (R. Exh. 33(a).) It is also undisputed that an additional 14 employees separated from the Company as of November 7—the date of the last alleged unfair labor practice. That would constitute a 26.5 percent turnover rate; excluding Brewster, that rate drops to 26 percent. (R. Exh. 35(a).)

[8] GC Exh. 73 at 55–58.

[9] All of the testimony provided by employees who signed cards, solicited the signing of cards or accepted signed and completed cards from coworkers was credible. While some witnesses were vague regarding the dates of these transactions, there is no evidence that anyone misrepresented the purpose of the cards or pressured a coworker into signing one.

[10] In an amended order, dated August 16, 2016, I authenticated 37 of the 84 cards signed and completed prior to December 18, 2014 pursuant to Federal Rule of Evidence 901(b)(3). The remaining 47 cards were authenticated by the credible and undisputed testimony of the card signers and/or coworkers who solicited or witnessed the card signings. Essentially, the only proffered cards excluded for lack of authentication were those of Scott Hibler and Justin Schlapp. (GC Exhs. 2, 2(a)-(e), 57.) As noted by the General Counsel, four of the names on the Company's list—Ruben Gomez, Jacob Juarez, Tyler Meyers and Robert Venlet—did not sign cards and were terminated prior to December 18, 2014. Notwithstanding my subsequent finding that Kevin Lauer functioned as a statutory supervisor when he issued certain threats to other drivers, there is no evidence that the Union successfully challenged his eligibility to vote

contrast to the additional authorization cards obtained by the Union after December 18, 2014, several employees requested that Hoogerhyde void and/or return their cards. Three employees, in particular—Jason Badder, Joshua Verberg and Chris Sanicki wrote such a request on copies of the Company's January 15th memorandum to employees urging them to instruct the Union to void their cards. Others who followed the Company's suggestion and verbally requested the return or voiding of their cards after the January 15th memorandum included Brad Cole (card signed on September 17, 2014), William Tanis (card signed on February 18), and Luke Yerke (card signed on November 13, 2014).[11]

The front of each card contained an introductory statement at the outset as to its purpose, including a critical portion in bold print, and required the entry of certain information by the card signer:

Authorization for Representation Under the National Labor Relations Act
I, the undersigned employee of
Company _____
Address of Company_____
Authorize the International Brotherhood of Teamsters (or one of its chartered Teamster Local unions) to represent me in negotiations for better wages, hours and working conditions.
(PLEASE PRINT)

Name _____Date_____
Home address _____
City _____ State _____ Zip _____
E-mail: _____ Phone: _____
Job Classification _____
Department _____ Shift _____
Signature _____
This is not a dues deduction card

C. The Company's Initial Response to the Union Campaign

The Company first learned about the Union's plans for an organizing driver at the Grand Rapids facility during the summer of 2014. Soon thereafter, Twyman informed the legal and labor relations departments at Sysco Corporation. They provided him with guidance on how to respond to the Union campaign.[12] On November 21, 2014, Twyman reported to Shaeffer and Campbell that the Union had obtained 38 authorization cards and identified the two employees who were "causing issues."[13]

Beginning the week of the week of November 25, 2014, Twyman began meeting with Company managers and supervisors and presenting the Company's campaign strategy. At that point, the focus was to have supervisors gage the extent of employee support for union representation, identify leaders in the campaign, and listen for complaints.[14] Supervisors were instructed to record and report observations of employee demeanor, conduct and conversations in a shared database with other supervisors on a daily basis.[15]

The Company also began convening periodic employee group meetings where managers presented the Company's position. The first captive audience meeting was on December 8, 2014. Shaeffer spoke to the employees on all of the shifts, explaining the negative impact of unionization, and imploring employees to avoid further organizing efforts.[16]

On December 9, the day after Schaeffer's speech, driver Josh Meyers was approached in his cubicle by his supervisor Quisenberry. Quisenberry said that "if the Union got in, we would go back to minimum wage." Meyers did not respond and walked away.[17]

D. The Company Conducts Frequent Campaign Meetings with Employees

After Shaeffer's December 9 speech, the Company convened mandatory small group meetings every week or every other week starting in late December 2014 and early January 2015. At these meetings, supervisors and managers sought to elicit employees' grievances, discussed ways to address them and sought to assure employees that their concerns would be resolved by "working together." The issues included wages, work hours, job security, and the loss of safety bonuses.[18]

Employees' reactions at these meetings were recorded in a Company database. Observations noted included employee demeanor and reactions to supervisors' statements. The spreadsheet for December 22, 2014, in particular, identified George Brewster as a "confirmed union committee leader."[19]

Beginning January 9, Company managers convened on a weekly basis to discuss the organizing campaign and the Company's response. Charts listing comments by supervisors and managers regarding employee support for the Union, referred to as Straw Polls, were updated periodically.[20]

Straw Poll #1 listed each employee in the potential unit and identified that person as either a likely yes or no vote. Each

in the election. Thus, he is included in the total number of eligible voters as of December 18, 2014. (GC Exh. 59; R. Exh. 33.)

[11] The authorization cards signed by Badder, Verberg and Sanicki were not included among those submitted by the Union as proof of its majority support. (GC Exh. 2(c)-(e); R. Exh. 29, 31–32.)

[12] Twyman testified that he first heard about the Union campaign from Glenn Lenhart, a supervisor, sometime in October or November 2014. (Tr. 119.) His testimony was undermined by supervisor Jim Brown, who conceded that he became aware of an organizing drive during the summer of 2014. (Tr. 769–770.) Even more incredible was Amy Campbell's testimony that she did not become aware of a drive until the representation petition was filed on March 11. (Tr. 905.)

[13] GC Exh. 20.

[14] GC Exh. 16.

[15] GC Exh. 39.

[16] Josh Meyers credibly testified that Shaeffer read from a piece of paper at the Company's mandatory weekly meetings. He said that the status quo is "bull shit" and that with collective bargaining employees would start out at zero. (R. Exh. 16; Tr. 89–91.)

[17] This finding is also based on Meyers' credible testimony, which was not refuted by Quisenberry. (Tr. 85–86, 95, 696.) In addition, the allegation at paragraph 5(a) of the complaint that this conversation took place in "Late" December is deemed amended to conform to the proof that the conversation occurred in early December.

[18] GC Exh. 32, 33.

[19] GC Exh. 39.

[20] GC Exh. 9.

employee was given a number according to his or her perceived union support, with 5 being the strongest level of support and 1 being the weakest. Each entry also included a comments section for each employee. As of January 9, Brewster was assigned a "5" and again identified as a member of the "union committee." The poll was distributed to Company supervisors and managers, and Sysco managers.[21]

At the January captive audience meeting, Shaeffer again appealed to the employees to resist union representation. In that presentation, he mentioned that employees would have to pay dues. The only employee to comment was Brewster, who corrected a statement by Shaeffer by noting that employees would not be required to pay dues under Michigan's "right'to-work" law. Shaeffer and Stephenson, a Company labor consultant, disagreed, noting that employees would still have to pay a service fee.[22]

E. George Brewster

1. Brewster's union activity

George Brewster was employed as a driver by the Company from January 2001 to February 17, 2015. He generally worked a daily shift of 5 a.m. to 7 p.m. Brewster interacted with coworkers on social issues in front of supervisors. His immediate supervisors were Quisenberry and Jim Brown. Brewster's disciplinary history consisted of a verbal warning in 2002 for chewing tobacco and a 2013 drive cam policy prohibiting employees from talking on a mobile telephone while driving.

Brewster signed an authorization card in early November 2014 in the cul-de-sac area in front of the Grand Rapids facility.[23] Shortly thereafter, he became involved in the Union's organizing drive and solicited coworkers to sign cards.[24] As documented in the Company's straw polls monitoring the extent of employee support for the Union, Brewster was noted to be a leader in the campaign.[25] In fact, Twyman approached Brewster in early December 2014 in Yokum's office. Twyman asked if Brewster could talk and proceeded to ask what his concerns were with the Company. Brewster said that he was not satisfied with the Company's insurance benefits. Dirk Krisi, a coworker, commented that the Company was not "doing enough to keep the Union out." Twyman agreed.[26]

2. The February 17th incident

On February 17, Brewster was assigned to a Grand Rapids delivery route. He made a food delivery to Charlie's Bar and Grill around 9:00 a.m. Upon exiting his truck, Brewster turned off the vehicle, but left the keys in the ignition, as was his regular practice. During the delivery, Brewster interacted with Doug Emery, a long-time employee of Charlie's Bar and Grill. About 20 minutes into the delivery, Brewster observed transportation supervisor Jim Brown looking at him from a parked van nearby. Brewster continued with his delivery.

Unbeknownst to Brewster, Brown was monitoring him pursuant to the Company's program for "idle time." Idle time is typically the amount of time a truck's engine is running while drivers make deliveries. Brewster was the second of several drivers with high idle time statistics chosen for monitoring on February 17. The observation included assessing other aspects of driver performance and was to be noted in a report and discussed with the driver.[27]

While Brewster was inside the restaurant making his delivery, Brown observed that Brewster's vehicle was not idling, but noticed the truck in the parking lot with the loading ramp engaged. He decided to check the truck's ignition to see if Brewster had removed the keys in accordance with Company policy. Brown found the keys in the ignition, removed them and placed them under the driver's seat. This was contrary to the Company's teaching tool of removing the keys and then "coaching" the driver. Compounding the problem, Brown did not stick around to discuss it with Brewster. Instead, Brown left for his next assignment, leaving Brewster clueless as to where his keys were.[28]

Upon completing his delivery at about 9:30 a.m., Brewster returned to his truck. As he prepared to drive to his next delivery, Brewster noticed that the keys were no longer in the ignition or anywhere in the vehicle. He immediately assumed that Brown removed the keys, but Brown was no longer in the vicinity. Brewster immediately texted Brown to return the keys: "BRING BACK MY KEYS NOW!!!!" Brown, driving to his next assignment, did not respond. Instead, he parked and texted Yocum, informing him that the keys were under Brewster's seat. Yocum read the text but also made no effort to communicate that information to Brewster.

After a futile attempt to find his keys and unable to move his truck, Brewster returned to the restaurant visibly upset. He informed Emery that he "screwed up" because he left the keys in the ignition while parked and unattended, which was against Company policy. Brewster added that the keys must have been removed from his truck by the Company employee who had been watching him. When Emery asked why the supervisor did that, Brewster responded, "that's Sysco for ya." As a result, Brewster informed Emery that his truck could remain in the parking lot for an indeterminate amount of time. Emery responded that it was "kind of Mickey Mouse" and observed Brewster make a call on his mobile telephone to find out where his keys were.[29]

At about 9:48 a.m., after hearing no response from Brown, Brewster called his other supervisor, Quisenberry. He told Quisenberry that Brown took his keys. Quisenberry merely responded that Brewster deserved the inconvenience for leaving his keys in the ignition. Brewster, still upset, told Quisenberry that unless the keys were returned, he would be unable to

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[21] GC Exh. 58.

[22] Brewster's testimony was credible regarding this event. (Tr. 45–46.)

[23] GC Exh. 2 at 8.

[24] GC Exh. 2 at 27, 192.

[25] GC Exh. 58.

[26] Brewster's version of this encounter, which is not the subject of a charge, was credible. (Tr. 41–43.)

[27] R. Exh. 11.

[28] It is undisputed that a supervisor had not hidden the keys of a driver for at least 10 years, much less ever left the premises under such circumstances. (Tr. 705, 1476, 1493–1495, 1476, 1505.)

[29] Brewster's version of the incident was corroborated by Emery. (Tr. 51–52, 66–69.)

complete his route, would need to take a sick day and someone would need to complete his route. Brewster added that the situation was "fucking bullshit" and noted that the customer agreed with him. Quisinberry asked how the customer knew about the incident and Brewster conceded that he told Emery about the circumstances by which he was stuck in the parking lot because of the missing keys. Shortly thereafter, Brewster hung up the telephone.[30]

At about 9:52 a.m., Quisenberry called Brown. He confirmed that Brown hid the keys under Brewster's seat and then called Yocum to discuss the incident, including the fact that Brewster was very upset about the situation. Yocum then called Brown and informed him that Brewster was upset about the keys. He also instructed Brown not to hide keys on any other employees in the future. Even after that conversation, Brown continued on to his next observation assignment and still did not send Brewster a message to let him know where the keys were. Quisenberry, however, did leave a voicemail message for Brewster to let him know where the keys were.

Meanwhile, Brown's response to the next driver on his monitoring list was a little different. Upon observing Eric Thelen at another location, in accordance with Yocum's instructions, Brown removed the keys, handed them to Thelen and counseled him not to do it again. Brown filled out the standard Driver Observation form, handed it to Thelen and had him sign the document.[31] After completing his observation of Thelen at 10:12 a.m., Brown finally texted Brewster that the keys were under his seat.[32] The Company's vehicle tracking system—Xata—confirms that Brewster continued with his route at about 10:30 a.m. and completed it without any further problems. At the completion of his route, Brewster returned to the facility and turned in his paperwork. While none of Brewster's supervisors, including Brown, Quisenberry or Yocum, approached him at the facility to discuss the key incident, they did inform Twyman about it.

The next day, February 18, Brewster sent a text message to Mercer that he was taking a sick day. That same morning, Yocum informed Twyman about the incident involving Brewster's keys. Twyman, Yocum, Quisenberry, and Brown discussed the incident with Campbell. The discussion concluded with a recommendation to Shaeffer that Brewster be terminated. Later that day, Tyman called Brewster and asked him to come in for a meeting the next day.

3. Brewster's Discharge

On February 19, Brewster attended the meeting with Twyman, Yocum, and Campbell. Campbell asked if Brewster wanted to start the discussion, but Brewster asked what it was about. Campbell replied that the meeting was about the incident relating to the keys left in the ignition. Brewster answered her questions, conceding that he left his keys in the truck and became angry and used profanity when he spoke with Quisenberry because his deliveries were being delayed and his truck was stuck in a customer's parking lot. Brewster also reiterated that the situation was "bullshit" and Brown's fault but was not loud or insubordinate during the meeting.

On February 20, Yocum summoned Brewster back for another meeting. Twyman and Campbell were also present. Campbell informed Brewster that he was terminated. He was not provided with a verbal or documentary reason for the discharge.[33] Nor was an internal document generated in his personnel file, aside from interview notes, documenting any reasons for Brewster's discharge at any time prior to or at the time of his discharge.[34] By the following day, the news of Brewster's termination had spread throughout the facility.[35]

The Company did, however, take actions to document its actions after Brewster's termination. Later that day, at Campbell's direction, supervisors sought out employees willing to testify that their supervisors had previously hidden their keys. In addition, she instructed supervisors to document the efforts made to cover Brewster's route on February 17.[36]

On February 24, Twyman finally communicated with Emery about the key incident 5 days earlier. Twyman told Emery that the Company received a complaint about a driver, but Emery said it was not made by him or about Brewster. Emery recalled that the restaurant made complaints about two other drivers regarding their deliveries, including one who got into an argument with the chef. Emery also recalled Brewster's concession about leaving the keys in the truck but recalled no profanity. Emery did express concern that the idle truck might block customer parking if the truck was not eventually moved. Twyman did not pursue further information about the two driver complaints.[37]

Finally, on March 2, Campbell asked Jim Brown to review notes she prepared for him and locate the observation forms he did for two other drivers on February 17.[38]

[30] R. Ex. 10.

[31] R. Exh. 14.

[32] GC Exh. 36.

[33] Twyman's testimony regarding Brewster's discharge was less than credible. Although he sat in on the disciplinary meeting, he initially professed ignorance. Twyman conceded that leaving keys in the ignition is not a basis for termination. When asked if he suspected that Brewster was a union supporter, he evaded the question by stating that Brewster's attitude compared to other drivers was bad. (Tr. 136–140.)

[34] The Company did not document the reasons for the discharge, but Twyman and Campbell testified that they based their decision on insubordination and profanity, involving a customer in an internal company matter, disclosing confidential company information, and threatening to abandon his job. (Tr. 58, 1389, 1429.)

[35] I based this finding on the credible testimony of Josh Meyers and Derrick Farr. (Tr. 91–92; 362–363.) My ruling mistakenly sustained a hearsay objection to the extent that it struck Meyer's testimony as to what *he* told coworkers, but not as to what *they* told him about Brewster's discharge. Consistent with my rulings regarding similar hearsay objections throughout the hearing, it was obvious that I misspoke, intending the opposite. In any event, Meyers' earlier, undisputed testimony was that the "word spread" throughout the Company the day after Brewster was terminated. (Tr. 91–92.)

[36] GC Exh. 37.

[37] Emery's testimony was credible and undisputed, including the fact that he confirmed to Twyman that the restaurant made no complaint against Brewster. His hearsay testimony that restaurant staff complained about *other* drivers was corroborated by Twyman's February 24 memorandum to Campbell. (Tr. 70–73, 78, 1284–1287; R. Exh. 10.)

[38] GC Exh. 34.

4. Comparable Discipline

There are several comparable situations of other employees disciplined for violating Company rules relating to customers. The most analogous example is the prior discipline to driver Keith Purvis for discussing an internal Company matter with customers. In September 2013, Purvis shared with two customers that he was concerned about being fired because he may have been caught driving with a mobile phone in his lap. The customers then called the Company and pleaded for Purvis to keep his job. Because Purvis discussed an internal Company matter with customers, he was suspended for 2 days.[39]

With respect to Brewster's threat to walk off the job in the midst of his route, a comparable incident is found in driver Jim Koepsell's email to his supervisor on February 18 informing that he would not drive his assigned route the next day. Koepsell, an employee noted in Straw Poll #4 as a likely vote against the Union, made inappropriate comments to supervisors and was found to be insubordinate for essentially abandoning his route by taking a sham sick day. He received a written warning about a month after the election.[40]

Driver Gary May had three customer complaints lodged against him on November 13 and 24, 2014 for rude and inappropriate comments to customers and supervisors, using profanity in front of a customer, and failing to make proper deliveries. In the first instance, Yocum discussed the matter with him and removed him from the route. In the second instance, Yocum disregarded the comments as a joke and issued no discipline. May's previous discipline included a written warning in 2010 for "inappropriate comments made about a fellow driver to a customer."[41]

Finally, David Achorn, had two customer complaints filed against him in May for rudeness to a customer, referred to Company policies as stupid, and derided a customer for ordering an excess amount of the Company's product. Achorn was not disciplined.[42]

F. Company's Position Reinforced by Supervisors' Statements

Shaeffer's message in the captive audience meetings was reinforced by supervisors on several occasions prior to the election. On February 24, Josh Meyers was in the driver's break room when supervisor Craig Pung approached him and asked if he had any questions about the Union before threatening more onerous work conditions and heavier workloads if employees chose the Union. He also predicted, on the other hand, that if the Union did not come in, work conditions would improve. Supervisor Jim Brown joined the conversation a short while later, remarking that employees would revert to minimum wage at the start of bargaining. He also added that employees would be terminated if they did not take breaks under union rules, but if a Union was not involved, drivers might just get written up for not taking mandated breaks.[43]

In addition, within a day or two after Brewster was terminated on February 20, Quisinberry spoke to Timothy Lowing in front of the break room. Lowing was voicing displeasure that Brewster was fired and Quisenberry responded that he would not be able to talk with Lowing and others in the same manner if the Union prevailed in the election. Qusineberry then asked Lowing if he was part of the organizing committee. Farr pulled Lowing away and they left the room.

G. The Union Files Petition for Representation Election

On March 11, the Union filed a petition for a representation election. Pursuant to the stipulated election agreement, a portion of the election was conducted by mail ballot procedures from April 22 to May 6. The manual election and ballot count was scheduled for May 7. Those sought to be included in a bargaining unit included:

> All full-time and regular part-time warehouse, transportation , facility, fleet employees, including drivers, yard spotter, beverage technicians , inventory control and sanitary employees, employed by Sysco Grand Rapids, LLC at, or based at its Grand Rapids Michigan facility and its domicile locations in Alanson, Cadillac, Kalkaska, West Branch, Niles and White Pigeon, Michigan; but excluding office clerical employees, sales employees, routing employees, slotting coordinator , and guards and supervisors as defined in the Act.

Shortly thereafter, the Union disseminated informational fliers to employees on "What To Expect Now That We Filed." The flier stated, in pertinent part:

> When we negotiate a first contract, we start with the pay and benefits we already have and build upward. This is called status quo bargaining per the National Labor Rights Act. The company cannot make unilateral changes once we vote in the union. We do not have to compromise or settle for anything less than we have now. Nothing can change until it is negotiated and ratified by us.[44]

After filing the representation petition, the Union convened supporters for rallies outside the Grand Rapids facility every day of the week, during the 2 weeks leading up to the election. They held up signs and posters supporting the Union during the rallies.

H. Captive Audience Meetings During Preelection Period

After the Union filed the representation petition for the election, the Company began holding mandatory employee meetings to discuss related issues.[45] The meetings were attended by an average of 15 to 20 employees, with less at the depot locations. The Company provided employees with similar presentations, created in conjunction with counsel, at the various locations, often using PowerPoint presentations.[46] In Grand Rapids, the meetings

[39] R. Exh. 6.

[40] GC Exh. 41.

[41] GC Exh. 67–69.

[42] GC Exh. 70–71.

[43] These findings are based on the credible testimony of Meyers, as essentially corroborated by Pung and Brown. (Tr. 87–89, 1462, 1497, 1481.)

[44] R. Exh. 8.

[45] The Company called 14 employees to testify that no action or statement of management influenced their support for the Union up to and including the election on May 7. (GC Exh. 5.)

[46] GC Exh. 6–8.

were held in the upstairs conference room. Yocum, Twyman and Shaeffer were usually present, with Twyman and Shaeffer speaking as they went through the slides. The presentations were usually unscripted, except in one instance when Shaeffer read from a script a few days before the election.[47]

1. Wages

At these meetings, Shaeffer usually repeated statements that bargaining over all employee wages would essentially start as a blank sheet of paper and that negotiations could go up or down from there, At these meetings in March and April in the Grand Rapids and Alanson facilities, Shaeffer, Twyman, or Bobby Jordan repeatedly made that point, using the same or similar language to support their predictions where negotiations with the Union over wages would start: they would "put nothing on the table" and start from a "blank page," "clean sheet," "clean slate" or "blank sheet of paper" or "ground zero" and "build from there." They also phrased it as employees possibly starting at the federally guaranteed "minimum wage" or start at nothing and possibly lose everything.[48] He urged employees to vote against the Union and, instead, "let us do this on our own." He used a blank sheet of paper on an easel to illustrate how negotiations would start from scratch.[49]

In a letter mailed to all employees, dated March 23, Shaeffer and Twyman supplemented the Company's message regarding the consequences of union representation. The letter stated, in pertinent part:

> Let me assure you, while the style/manner of delivery may have been direct, the primary goal was to make sure the message was communicated during the meetings. WHY? Because the Union's message has been: if the Teamsters get in YOU CANNOT LOSE – YOU CAN ONLY GET MORE IN NEGOTIATIONS!
>
> Quite simply, as valued associates of Sysco Grand Rapids, we owe you the TRUTH and the TRUTH is not always a particularly pleasant or happy message.
>
> IS THE UNION'S MESSAGE TRUE? NO. After last week you and we know without any doubt that good faith bargaining under the National Labor Relations Act does not guarantee that you keep what you have or cannot lose what you already have.
>
> The Teamsters want you to believe that you can't lose with the Union. THE TRUTH IS: you can lose in good faith bargaining. In fact, YOU CAN LOSE EVERYTHING YOU HAVE BY BEING PERMANENTLY REPLACED IN AN ECONOMIC STRIKE CALLED BY THE UNION OVER ITS DEMANDS AT THE BARGAINING TABLE.
>
> Please think about it. COLLECTIVE BARGAINING IS NOT A TODAY ONLY CONSIDERATION, IT IS A CAREER GAMBLE.
>
> And the only way to avoid running the threat of a union strike and losing everything is to VOTE NO in the election.[50]

Shaeffer's message was reinforced by supervisors in individual encounters with employees. On March 23, Grand Rapids transportation supervisor Quisenberry approached driver Timothy Lowing in the break room and told him that bargaining over wages would "start from zero" if the Union won the election. Lowing acknowledged the risk but insisted the effort was still worth it. Quisenberry also mentioned the potential loss of benefits and asked Lowing if he was willing to pay union dues with no guarantee that it would produce greater wages or benefits. Lowing held to his position, insisting it was worth the effort.[51]

2. Loss of Benefits

At a warehouse meeting led by Twyman on April 17, Warehouse manager Szlachcic told Strautz that the Company had been generous in permitting Strautz to take several sick days without a doctor's note during the previous week. Szlachcic then followed with the point that Strautz would not have gotten away with that if the Union got in.[52]

3. Loss of seniority

In addition to the potential impact on employee wages, the Company communicated its views to employees about the effect of bargaining on seniority based on a pending merger between the Company and U.S. Foods. Three slides presented during the captive audience meetings compared hypothetical Company and U.S. Foods employees against each other. Two of the slides indicated that if both were union employees, a U.S. Foods employee with greater seniority would prevail over a Company employee with less seniority. The third slide, however, indicated that if the same Company employee was nonunion, his/her seniority rights would prevail over the same U.S. Foods employee with more years of service.[53] At the March 19 meeting in Alanson, Twyman elaborated as to why the nonunion employee scenario was the only good outcome for Company employees:

> Here's a non-union scenario, and this is what I think we need to take a hard [look] here. Same situation. We've got a 20-year

[47] GC Exh. 54(b) at 23–24.

[48] This and related findings prove the allegations in Petitioner's Objections 1, 2, 4, 7, 8, 9, 12, and 15 in Case 07–RC–147973.

[49] These findings are based on the generally consistent and credible testimony of Christian Bergsma, Derrick Farr, Kevin Strautz, Jeffrey Compton, Frederick Moore, Timothy Lowing, Harley Vaughn, Adam Middleton, and Jesse Silva, and further corroborated by Quisenberry's testimony that Shaeffer referred to new contracts starting from scratch or a blank sheet of paper. (Tr. 257–258, 261–262, 365–366, 449–451, 464–467, 518–519, 555–558, 587–588, 670–671, 695–696, 1007–1008, 1048, 1184–1185.) Denials by Shaeffer that bargaining would start with a "blank sheet of paper" or Twyman that the Company would put nothing on the table were also undermined by Vaughn's tape recording of the meetings. (Tr. 1328–1329, 1343; GC Exhs. 54(b) at 9–11, and 74(b) at 26.) Moreover, Jordan's denial stating that he did not speak at any of these meetings was contradicted by Shaeffer. (Tr. 1357-1358, 1998–2000.)

[50] GC Exh. 22.

[51] This finding is based on Lowing's credible testimony, which was also corroborated by Quisenberry. (Tr. 510–511, 1531.)

[52] This finding is based on Strautz' credible and undisputed testimony. (Tr. 560.)

[53] GC Exh. 6 at 32–34.

> Grand Rapids employee and a 25-year U.S. Foods employee. In this situation, his—and Jesse, this is what we talked about last week. His contract does not follow him over to Grand Rapids. We open up and we say, guys, if you're a U.S. Foods driver, you know, we're going to welcome you to Sysco up here. Your contract does not follow you, but we have the say of how your seniority plays into this thing. I'm going to tell you guys right now that I value that 25 years of Sysco seniority a hell of a lot more than I do 20, 10, or any kind of seniority from the U.S. Foods guy.
>
> Right now Grand Rapids has the ability to say how much are we going to value this? If we go union, that discussion is out of our hands, and frankly that's—don't give a shit. It's the two parties, it's the two locals who are going to battle it out over this, not us. Right now, it's me. It's Shaeffer. It's obviously (sic) corporate would have a say because there's a merger, teams and whatnot. But I'll tell you right now, in this non-union scenario, I feel a lot better about the where your seniority stands versus where U.S. Foods guys' seniority stands. Okay.[54]

Twyman reinforced the same points about seniority based on whether an employee is nonunion or union at the March 26 meeting in Alanson. After Yocum made the point that the union contract of a Sysco Detroit employee would not follow him to Sysco Grand Rapids if the latter remained nonunion, Twyman stated, in pertinent part:

> Right. Yeah. And to go back to what we were talking about last week, is being non-union, we have the flexibility to determine how we want to honor that seniority as those guys come over. Remember that example we went through last week about that. I would feel a lot more confident, in your guys' shoes, if it's a non-union company, knowing that we are going to respect your guys' seniority and we're going to respect the fact that we know you guys and have known you guys for years, that you guys are 25 year veterans, versus some U.S. Foods guy we don't know. All right.[55]

Shaeffer echoed those sentiments at captive audience meetings at the Grand Rapids and Cadillac facilities, citing the likelihood that a unionized U.S. Foods employee would "trump" or "bump" a unionized Company employee based on seniority.[56]

4. Threats of job loss

On several occasions during the period prior to the election, Shaeffer and other managers commented on the potential loss of jobs if employees chose union representation. At several captive audience meetings in March 2015, the Company's slide presentations included depictions of the potential impact on employee job security if the Union prevailed. One slide depicted a doomsday result from the collective bargaining that would ensue, suggested there would be no agreement between the parties and, in such a case, the Company predicted that the Union's "only weapon" would be to "strike."[57] He warned that, in such a case, employees would not receive a paycheck, would be responsible for their health insurance premium costs and could be permanently replaced by new hires.[58]

The presentations were followed by a letter, dated March 23, 2015, to all employees from Shaeffer and Twyman which reinforced, in pertinent part, their point about job security:

> The Teamsters want you to believe that you can't lose with the Union. THE TRUTH IS: you can lose in good faith bargaining. In fact, YOU CAN LOSE EVERYTHING YOU HAVE BY BEING PERMANENTLY REPLACED IN AN ECONOMIC STRIKE CALLED BY THE UNION OVER ITS DEMANDS AT THE BARGAINING TABLE.
>
> Please think about it. COLLECTIVE BARGAINING IS NOT A TODAY ONLY CONSIDERATION, IT IS A CAREER GAMBLE.
>
> And the only way to avoid running the threat of a union strike and losing everything is to VOTE NO in the election.[59]

On April 21 at Alanson, Shaeffer told employees of the dire consequences if the Union prevailed in the election:

> We would be the only union operating company in Western Michigan of the big three, and that concerns me because I think customers, and I've seen in other operating companies . . . And all of a sudden an attitude kind of develops, well, I don't have to do that because it's not in my union contract . . . [and the customer] is going to say fine, I'll get my product from [the non-union company].
>
> It really concerns me what that impact could mean to our business, us being the only union company, because I think – I don't think, I know from previous experience where I've worked at a union company, it becomes a detriment. I don't know how well you can progress your company when I have to lay that excuse on a customer.[60]

Shaeffer made a similar statement during a captive audience at the West Branch facility in early April where he stated that customers would prefer to deal with nonunion companies over those that are unionized. As a result, the Company would lose jobs if the business went elsewhere.[61]

Threats of job loss were also conveyed to employees by other managers and supervisors. On March 20, a day shift sanitation

[54] GC Exh. 52(b) at 46-47.

[55] GC Exh. 53(b) at 26.

[56] The credible testimony of former warehouse supervisor Adam Middleton, Christian Bergsma, Thomas Holton and Kevin Strautz (Tr. 258, 415, 557, 584, 1176–1177.) indicates that Schaeffer's attempt to soft-coat his remarks about potential bumping based on seniority was not credible: "the Union could certainly request that U.S. Foods Wixom employees that had more seniority could potentially bump Sysco Grand Rapids employees that had virtually none or very little at that time." (Tr. 1336–1338.)

[57] GC Exh. 6 at 15, 17, 27.

[58] Silva and Schaeffer provided similar testimony regarding the latter's remarks regarding the impact of strikes on the employees, which is further corroborated by several PowerPoint slides. (Tr. 1075–1076, 1333–1335; GC Exhs. 24, 29–30.)

[59] GC Exh. 22.

[60] GC Exh. 54(b) at 34–35.

[61] This finding is based on the credible testimony of Thomas Holton. (Tr. 419–420.)

employee, Joe Bombul was approached in the warehouse by Campbell. Bombul was listed as a likely vote against the Union in the March 16 straw poll. She told Bombul that the Union was not looking out the "little guys," was more concerned about the drivers and if they got in he would likely be "bumped" out of his job by a driver and force him into a less desirable night shift position.

On April 22, Bombul was working in the warehouse when he was approached by Szlachcic. Szlachcic warned Bombul by reviving a recent topic up for consideration—the potential outsourcing of sanitation jobs at Grand Rapids. He warned that his job could be outsourced in a manner similar to that at Sysco's Detroit facility if the employees chose union representation.[62]

5. Access to supervisors, employee grievances and promised benefits

At the March 19 captive audience meeting in Alanson, Twyman stated that the employer-employee relationship would "fundamentally change" if the Union came in. While encouraging employees to communicate their issues and comments, he explained that employee concerns, including the safety bonus, would have to go through the Union if the latter prevailed. As a result, he would not be able to communicate directly with employees and receive feedback as he does now, including the ability to pass along employee concerns to all the way up to the top management of the Company and its parent organization: "when a third party gets involved, it doesn't become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here."[63]

During the same meeting, Yocum and Twyman stated that "everything is frozen" if the Union prevailed, including the Company's practice of the past several years to issue annual cost of living pay raises.[64]

At the captive audience meeting in Grand Rapids on April 9, Campbell told employees that senior management was "sincere in their efforts to arrive at some that could be implemented to address some of the opportunities. . . . And so I just want to let you know that I would like your no vote . . . I hope you'll reach out because, again, we know that there's opportunities . . ." Her comments were followed by Shaeffer, who warned that the risk of a strike increases "exponentially on first time contracts" and, consequentially, the likelihood of being "locked out."[65]

At the final captive audience meeting on April 21, Shaeffer responded to a grievance about the loss of several employee benefit programs, including the night program, safety bonus and guaranteed 401(k), by noting that management was listening to employees now. He implored employees to "[g]ive us a year. See if what we're doing today is not progressing the company, is not progressing your earnings potential, is not progressing your satisfaction with Sysco Grand Rapids, and if you don't feel that way this time next year, vote it in, vote it in."[66]

During this period, supervisors were conveying similar messages to employees. On March 23, transportation supervisor Quisenberry expressed concern to Lowing that Company managers and supervisors "wouldn't be able to talk to [you] anymore," adding "[o]nce the Unions [sic] in here, . . . you can't talk to me anymore." Brown joined the conversation and confirmed that "everything would be totally different" if the Union prevailed. He warned of stricter discipline if the Union came in because the Company would have no discretion and employees would have to "be written up for everything."[67]

6. The Employee Exchange Program

At the March 26 captive audience meeting at the Alanson facility, Twyman explained the adverse impact that unionization would have on the Company's intercompany employee exchange program. The intercompany employee exchange program enabled the Company and other Sysco companies to reassign employees to busy locations on a temporary basis. For example, the program enabled employees from Grand Rapids to volunteer for temporary reassignments at Sysco facilities in Florida and Texas during the winter months. At this time, however, Twyman said that the program was "on hold" because of the union campaign. If the Union came in, Twyman predicted "that it's highly unlikely that independent intercompany exchange will continue after, after a potential union – unionization effort, okay." Yocum stated, in pertinent part:

> [E]ven union people because you don't want, you know, hey, these people have this contract, these people have this in their contract, and you start getting people talking, you know, and again, contracts are always an up and down negotiation.[68]

I. Interrogations of Employees

1. Kevin Strautz

Strautz is one of four warehouse employees and is supervised by Mike Scott. He signed an authorization card in November 2014 and was identified in Straw Poll # 1 as not a likely supporter of the Union. He was known, however, to have grievances concerning a coworker, Kathee Harmon.[69]

On March 17, Campbell approached Strautz in the warehouse and asked "if anybody had talked to [him] about the union." Strautz responded that he was for the Union, was tired of preferential treatment that some employees received, and aired a bunch

[62] Except for mistakenly citing the date as March 22, a Sunday when neither he nor Campbell were working, Bombul was an extremely credible witness. (Tr. 308, 313–317.) Campbell, on the other hand, conceded speaking to Bombul about position "bumping" and was not credible on several other issues. (Tr. 1837–1838.) These findings also prove the allegations set forth in Petitioner's Objections 10 and 11.

[63] This finding also proves the allegations in Petitioner's Objection 5. (GC Exh. 52(b) at 9–12.)

[64] GC Exh. 52(b) at 13.

[65] This finding also proves the allegations in Objections 21 and 23. (GC Exh. 74(b) at 15–18.)

[66] This finding also proves the allegations in Objections 25 and 26. (GC Exh. 54(b) at 53.)

[67] This finding is based on the credible testimony of Lowing and Derrick Farr and corroborated by Quisenberry's understanding as to what Shaeffer stated at the meetings. (Tr. 363, 511, 514–516, 519–521, 696.) It also proves the allegation set forth in Petitioner's Objection 13.

[68] This finding also proves the allegations in Petitioner's Objection 6. (GC Exh. 53(b) at 27–28.)

[69] GC Exh. 2, 58.

of other grievances against his team leader for taking excessive breaks. Campbell responded that she "would look into it."

Campbell's statements to Strautz were followed up in the warehouse by his supervisor, Scott, on March 23. Scott approached Strautz and asked if anyone had spoken to him about the Union. Scott continued the discussion in his office where he told Strautz that he should be concerned about being bumped out of his job if the Union prevailed because he would probably be displaced by drivers with greater seniority. Strautz indicated that he was leaning toward the Union because of his issues with his coworker. Scott replied that those issues would "fix" the problem if Strautz "voted the right way."

On April 3, Strautz attended a Company-sponsored cookout when Chief Financial Officer Mark Lee suddenly asked him whether he had made a decision about the Union. Strautz responded that he was undecided.[70]

On April 6, Strautz was approached again in the warehouse by Scott and asked if he was still on the "fence" about the Union. Strautz stated "yeah" and asked Scott if he knew the law.

By April 22, Strautz was wearing a Teamsters cap at work. The cap was noticed by Transportation supervisor Brown, who stopped Strautz and asked, "Kevin, you?" He then asked Strautz why he supported the Union. Strautz replied that he had a "long list" of reasons. Brown continued the discussion for several more minutes.[71]

2. Thomas Holton

Holton, a West Branch depot driver, signed an authorization card in December 2014. On March 20, Holton was approached by three supervisors when he arrived at the Grand Rapids warehouse at the end of his route. Adam Middleton and Ryan Norman initially asked Holton what he thought about the Union. Holton declined to answer, but Norman persisted by suggesting that Holton must have an opinion about the Union. Lenhart echoed that remark. Once again, Holton declined to respond and left the room. Norman followed Holton, asking if he was involved in the organizing campaign and asking Holton if he wanted to see employees "lose their jobs." Holton replied that he had nothing to do with job security. The conversation was briefly interrupted by Holton's bathroom break, but Norman waited for him and continued asking questions about the Union. He concluded with a remark that he expected Holton to "make the right decision" when he voted.[72]

3. David Achorn

Achorn, a Grand Rapids delivery driver, was approached in his truck in the Grand Rapids parking lot by Transportation supervisor Mercer. He signed an authorization card in 2014, but was listed in Straw Poll # 4 as a likely vote against the Union. Mercer approached Achorn and asked what he thought about the Union. Achorn was reluctant to answer and Mercer replied that such a response was "what we like to hear, you know, we need you guys to vote against the union." Achorn repeated his reluctance to get involved, but Mercer suggested names of employees who opposed the Union that he could speak to and others that he could suggest voting against the Union.[73]

4. Jesse Silva and Harley Vaughn

On April 28, drivers Jesse Silva and Harley Vaughn were at the Alanson depot discussing the collective bargaining agreements at Sysco's unionized facilities with several drivers. Lead driver Kevin Lauer, who was also present, took exception, stating that Silva and Vaughn "better hope" the Union comes in or they would lose their jobs.[74]

J. Surveillance of Employee Activity

During the weeks leading up to May 7 election, employees frequently gathered outside the Grand Rapids facility with union representatives and engaged in pro-union activity. On April 30, about 10 employees, including driver Christian Bergsma, congregated with several union organizers when supervisor Jim Brown, in clear view, exited the facility and photographed or videotaped them.[75] The Union also publicized this activity on the internet.[76]

After manually voting in the election on May 7, Grand Rapids driver Kyril Brown went to the facility's break room to speak with coworkers. While there, he engaged in a general discussion about the election with supervisor Mike Scott. After Brown commented about how Scott had been displaced from his office that day because it was located next to the voting area, Scott told Brown that he knew how Brown had voted. Brown did not respond and walked away.[77]

K. Promulgation of No Solicitation Rules

The Company's drivers and warehouse employees routinely discussed nonwork matters during work time before and after the union campaign. In several instances late in the campaign,

[70] The Company does not deny that Lee made the statement but contends that Lee played no part in the Company's pre-election educational campaign. (Tr. 553, 1539–1540.)

[71] These findings are based on Strautz' credible testimony and also prove the allegations set forth in Petitioner's Objections 17 and 18. (Tr. 547–550, 554, 562–563.) Brown's credibility, on the other hand, was essentially eviscerated by his testimony and antics during the February 17 incident involving Brewster. (Tr. 1480–1483.) Scott essentially corroborated most of Strautz' testimony regarding the conversations at issue. (Tr. 1547–1550.)

[72] Holton's credible testimony was corroborated by Campbell's follow-up meeting with him a few days later to express regret for Norman's actions. (Tr. 405–409.)

[73] Achorn's detailed testimony was credible and essentially corroborated by Mercer, who conceded initiating the inquiry about the election. (Tr. 716, 1796.)

[74] Lauer did not testify, but his brother-in-law and depot driver Justin Schlappi testified generally that he has never heard Lauer threaten other employees. (Tr. 1745.) His testimony was insufficient to refute the specific, credible, and consistent testimony of Silva and Vaughn regarding the incident on April 28, which also proves the allegations in Petitioner's Objection 27. (Tr. 1013–1014, 1086–1087.)

[75] This finding is based on Christian Bergsma's credible and undisputed testimony. (Tr. 265–266.) The Company's assertion, on the other hand, that Brown videotaped the employees because the group was large and he, a supervisor, was concerned for his safety, was unsupported by credible evidence.

[76] R. Exh. 36.

[77] This finding is based on Kyril Brown's detailed and credible testimony, and also proves the allegations in Petitioner's Objection 19. (Tr. 1141-1143.)

however, Company supervisors attempted to regulate certain types of discussion. Throughout the organizing campaign, warehouse employee Jamie Compton and other union supporters often discussed the campaign during work time. On April 20, however, warehouse supervisor Szlachcic called Compton into his office and told him to stop talking to other employees about the union during work time. Compton did not respond and returned to work.[78]

The Company's restrictions on union-related solicitation continued even after the election. Shortly before the election, Achorn began wearing a Teamsters cap during work time. He continued wearing the cap throughout the summer until one day when he was called into Yocum's office to discuss his performance. Yocum told Achorn that he and other supervisors believed that Achorn had a bad attitude. Achorn said he would improve his attitude. Yocum replied that he did not want Achorn wearing his cap in front of customers. Achorn denied wearing the cap in front of customers. Yocum replied that Achorn had displayed a bad attitude ever since he began wearing the cap.[79]

L. Reduction of Jesse Silva's Scheduled Hours

Shuttle driver Jesse Silva was and is a prominent supporter of the Union's organizing efforts. He started wearing union support buttons in February or March. Silva also spoke up frequently and asked question of management at captive audience meetings. Towards the end of the April 9 captive audience meeting in Alanson, Silva got into a heated exchange with Shaeffer over the likelihood of a strike if the Union came in. The issue related to whether all employees, even nonunion members, would be obliged to pay dues if the Union won the election.[80]

Silva frequently received double run assignments as part of his schedule, which resulted in additional work hours and pay. However, double runs are cut to single runs on a routine basis – up to four to five per month depending on how busy the Company is. On the other hand, there was no precedent for the transfer of scheduled double runs after they had already been assigned to drivers.[81]

On April 10, Lauer informed Silva of a change in his route schedule for the following week. Silva asked if the schedule change had anything to do with Silva's exchange with Shaeffer the previous day, and Lauer simply responded, "I'm sure you know why." The change was a double run scheduled for April 16 and was reassigned to another driver, Brance Sluiter, an employee listed by the Company as opposed to the Union. The change to Silva's schedule resulted in a reduction of approximately 3 or 4 work hours, the equivalent of $70 to $75.[82]

M. Jeffrey Johnson's Reassignment to Light Duty Work

Jeff Johnson, a delivery driver, signed an authorization card and solicited other employees to sign authorization cards. He also participated in pro-union activity in the cul-de-sac area in front of the Grand Rapids facility prior to the representational election on May 7.[83]

On April 7, Johnson suffered a knee injury on the job. After determining on April 8 that Johnson's knee injury prevented him from performing driving duties, safety manager Christopher Wilfong assigned Johnson to light duty in the warehouse. While in the facility, Johnson interacted with coworkers and discussed the organizing campaign. However, Wilfong eventually ran out of work for Johnson to do in the warehouse.

At some point prior to April 14, Johnson was evaluated by a physician and placed on restricted work status. On April 14, as a result of the restrictions against Johnson driving and, in accordance with Company protocol, Wilfong reassigned Johnson to perform light duty work at an off-site charity pursuant to the Company's Re-employability Program. Under this program, if an employee suffers any type of injury which results in work restrictions being placed on the employee by a physician, the employee can be assigned to a charitable organization until the restrictions are lifted and the employee can return to normal duties.[84] On April 24, Johnson began working at an off-site charitable organization, Mel Trotter Ministries, while still being paid by the Company. Johnson continued to work there until he underwent knee surgery on June 23.[85]

N. The Safety Program Gift Cards

In or around September or October 2014, the Company devised and implemented a safety bonus incentive program which provided monetary gift cards to employees who met the no-injury requirements of the program. The initial roll-out for warehouse and transportation employees was based on an all or nothing threshold which provided that if a certain number of

[78] This finding is based on Compton's credible and undisputed testimony. (Tr. 632–633, 713.)

[79] I credited Achorn's detailed testimony over Yocum's denial that the latter mentioned the Teamster's cap during the conversation. Yocum's reference to customer complaints allegedly brought to his attention by other supervisors seemed pretextual in the absence of corroborating documentary evidence. (Tr. 718–726, 1373–1374.) Moreover, the complaint allegation that the conversation occurred on May 28 was amended to conform to the pleadings. The applicable charge was filed on October 30, well within the applicable Section 10(b) period. (GC Exh. 1(t), allegation no. 17.)

[80] Although his audio recording of the meeting did not cover the very end of the discussion, I credit Silva's detailed testimony over Shaeffer's general denial. (Tr. 1077–1079.)

[81] The testimony of Silva was credible and consistent regarding the availability of double runs and the unexplained and unprecedented nature of the transfer of his double run after it had been assigned to him. (Tr. 1110–1111, 1378–1379, 1441–1442.)

[82] Silva's testimony regarding Lauer's comment was credible, undisputed and supports a finding that the Company engaged in the conduct alleged as Petitioner's Objection 22. (GC Exh. 21 at 4; GC Exh. 50–51; Tr. 1084.)

[83] GC Exh. 2 at 42.

[84] The Company's custom and practice is evidenced by similar reassignments of 8 other employees to work for charitable organizations between April 2015 and January 2016. (R. 18–25.)

[85] Wilfong, terminated by the Company after the representation election for unexplained reasons, was not credible regarding the alleged statements by supervisors Mercer and Twyman on separate occasions "to get Johnson out of the building because he continuing to encourage or talk about the Union to the other co-workers there." Wilfong testified that the alleged statements were made 4 to 5 weeks after Johnson's physician placed him on light duty. Based on that scenario, since Johnson was placed on light duty on April 8, the alleged incriminatory statements to get Johnson out of the warehouse would have been made at a time when he was no longer there. (Tr. 476, 739–741, 748–755; GC Exh. 11.)

employees experienced recordable injuries during a specified time period, all employees would become ineligible for a bonus even if a particular employee had no recordable injury. The initial programs ran from September 2 to December 2, 2014.[86]

Both safety incentive programs failed as the maximum number of recordable injuries in each group was reached before it ended. The transportation and warehouse programs both started over again. When the programs reset, the driver program failed again, but the warehouse program continued for the entire ninety-day period. Warehouse employees qualified for a raffle which resulted in the issuance of cash bonus cards for a certain number of lucky employees.

In January and February, Twyman revised the safety bonus program to an individual disqualification process rather than a group disqualification process. The new programs resulted in the payout of bonuses to Transportation employees for the first time and larger number of bonuses to Warehouse employees.[87] The distribution of gift cards pursuant to the safety program was distributed to 49 warehouse and garage employees "on or near" April 27, even though the program did not end until April 28, 2015. Gift cards under the program were also issued to 66 drivers from the Transportation department "on or near" May 25.[88]

O. The May 7 Election

On May 5, two days before the representation election, employees supportive of the Union engaged in a "March on The Boss rally and approached Twyman to forgo election and proceed directly to bargaining. Twyman declined.

Pursuant to the petition in Case 07–RC–147973, filed by the Union on March 11, and a Stipulated Election Agreement approved on April 2, a mixed mail/manual secret ballot election was completed at the Company's facility on May 7 under the direction and supervision of the Regional Director for Region 7. The results of the election were as follows:

Approximate number of eligible voters	158
Void ballots	1
Votes cast for the Petitioner	71
Vot4s cast against the petitioner	82
Valid votes counted	153
Challenged ballots	2
Valid votes counted plus challenged ballots	155

The Regional Director ruled that the challenged ballots were not sufficient in number to affect the results of the election. On May 14, the Union filed 35 Objections to the Company's conduct affecting the results of the election.[89]

After conducting an investigation of the objections and issuing a Report on Objections, the Regional Director determined that the objections entailed substantial and material credibility issues requiring a hearing. Given the overlapping allegations raised by the objections and the unfair practice allegations in the third consolidated amended complaint, the Regional Director consolidated the cases for a hearing, ruling and decision by an administrative law judge.

P. Postelection Threats

On October 30, the Union filed, and the General Counsel served on the Company amended charges in Cases 07–CA–152332 and 07–CA–155882. Significantly, the latter charge included a request for a *Gissel* bargaining order.

Shortly thereafter, on November 4, Barnes, Shaeffer, Twyman and Yocum met with every shift in order to provide a Company "Update" or "State of the OPCO" meetings.[90] In addition to providing the customary subjects relating the Company's financial condition, management clearly wanted to share its views regarding the latest unfair labor practices charges.

Shaeffer opened the meetings. In pertinent part, he denied every making a statement about starting bargaining with a blank sheet. When he was finished, he introduced Barnes. Barnes' stated, in pertinent part: the Sysco Detroit union was going bankrupt and had been run out of Detroit; he had no problem breaking applicable rules and regulations under the Act because he did it before and always got away with it; he would never allow a union into Sysco Grand Rapids; the Company's employees were replaceable; the Company was only a small piece of the Sysco Corporation organization and the latter would shut the Company down and move it to Detroit if that happened.[91]

LEGAL ANALYSIS

I. THE SECTION 8(A)(1) ALLEGATIONS

A. The Threats

During the pre-election period, Company supervisors and managers consistently exercised their right to let employees know that they opposed the unionization of Company employees. Many of those communications, however, constituted threats that employees would suffer adverse consequences to their terms and conditions of employment if they supported the Union or the Union prevailed.

1. Loss of wages

On December 9, 2014, supervisor Quisenberry warned Josh Meyers in his work area that "if the Union got in, we would go

[86] GC Exh. 27.

[87] Twyman and Yocum conceded the change in the programs based on concerns expressed by employees during the organizing campaign. (Tr. 694, 771, 1894–1899, 1961–1962, 1970–1972; GC Exhs. 39, and 52(b) at 9–11, 19–20.) These findings also prove the allegations in Petitioner's Objection 29.

[88] Gift cards were issued to warehouse employees prior to the expiration of the applicable period and during the mail ballot period about a week before the May 7 election. In contrast, gift cards were issued to the drivers more than 10 days after the applicable period ended and more than two weeks after the election. (GC Exhs. 20, 23–24, 26, 61.)

[89] Attachment A to the amended complaint.

[90] GC Exh. 5 at 10.

[91] These findings are based on the credible and undisputed testimony of Christian Bergsma, Derrick Farr, Jeffrey Compton, Timothy Lowing, Reginald Chambers, Jamie Compton, Harley Vaughan, Frederick Moore, Jessie Silva, Kyril Brown and Adam Middleton. Barnes did not testify (Tr. 268–269, 366–370, 452–457, 520–521, 612–614, 634–639, 674–675, 1015–1017, 1089, 1146–1148, 1179–1180.) In arriving at these findings, I did not give any weight to the subjective testimony of Ross Tyler Case, Dirk Krisi, Timothy Loonsfoot and Keith Purvis that Barnes' comments at these meetings did not concern them in any respect. (Tr. 1653–1654, 1662–1663, 1775, 1789, 1878.)

back to minimum wage." Quisenberry's statement was unlawful because there was no reference to the fact that wages could be subject to change based on good faith negotiations or that they could go up or down. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (statements must be "carefully phrased on the basis of objective fact"); *Oklahoma City Collection District of Browning Ferris, Inc.,* 263 NLRB 79, 80 (1982), enfd. mem. 679 F.2d 900 (9th Cir. 1982) (statements must include proper context).

Most of the threats, however, occurred after the Union filed the representation petition. The subjects raised most frequently during this period were wages and benefits. At captive audience meetings in March and April, Shaeffer repeatedly warned employees that bargaining over wages would essentially start from scratch by referring to a blank sheet of paper and adding that negotiations could go up or down from there. Shaeffer, along with Twyman and Bobby Jordan, elaborated during those occasions by using similar language to support their predictions as to where negotiations over wages would start: they would "put nothing on the table" and start from a "blank page," "clean sheet," "clean slate" or "blank sheet of paper" or "ground zero" and "build from there." Employees were also warned that wages could revert to the federally guaranteed minimum wage rate or start at nothing and they could possibly lose everything.

In a letter sent to all employees on March 23, Shaeffer and Twyman warned that employees "CAN LOSE EVERYTHING YOU HAVE BY BEING PERMANENTLY REPLACED IN AN ECONOMIC STRIKE CALLED BY THE UNION OVER ITS DEMANDS AT THE BARGAINING TABLE . . . . And the only way to avoid running the threat of a union strike and losing everything is to VOTE NO in the election."

On March 19, Shaeffer's message was reinforced by supervisors Yocum and Twyman, who told Alanson employees that "everything is frozen" if the Union prevailed, including the Company's practice of the past several years to issue annual cost of living pay raises. On March 23, Quisenberry warned Lowing in the Grand Rapids break room that bargaining over wages would "start from zero" if the Union won the election.

The aforementioned Company predictions about the impact of unionization on wages violated Section 8(a)(1). The Supreme Court has held that when considering whether statements violate the Act, the Board must consider employees' economic dependence on their employers, as well as the likelihood that employees will "pick up intended implications" of their employers due to the nature of the relationship. *NLRB v. Gissel Packing Co.*, supra at 617. Here, given the context of the Company's other unfair labor practices and explicit threats about the bargaining process' futility (e.g., "Negotiations With A Union Gets You NOTHING That The Company Refuses To Give!"), the "blank page," "ground zero" and similar statements unmistakably communicated an intention to punish employees for selecting the Union through regressive bargaining.

2. Loss of jobs

At several captive audience meetings in March 2015, the Company's slide presentations depicted the likelihood of a strike because there would be no agreement with the Union. As a result, the slides conveyed the likelihood that employees could be permanently replaced by new hires. In a letter to all employees, dated March 23, Shaeffer and Twyman repeated the warning to employees that they could be replaced in an economic strike as a result of the Union's bargaining demands. The slides and March 23 letter constituted an impermissible threat of job loss in violation of Section 8(a)(1). Where comments regarding striker replacement are linked to retaliation for selecting union representation, as occurred here, ambiguities should be resolved against the employer when determining the existence of a violation of the Act. *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000) (comment by employer that it would bring in replacement workers during a strike constituted an unlawful threat of job loss because it could reasonably be interpreted to mean that employer would encourage a strike in order to hire replacements).

On April 21 at Alanson, Shaeffer warned employees that the Company would lose customers because, in his experience, they preferred not to work with unionized companies. Shaeffer made a similar statement during a captive audience at the West Branch facility in early April. Statements like these that forecast layoffs and job loss due to lack of competitiveness following a union victory, without being "carefully phrased on the basis of objective fact," violate Section 8(a)(1). *Crown Cork & Seal Co.*, 308 NLRB 445 fn. 3 (1992), decision vacated on other grounds, 36 F.3d 1130 (D.C Cir. 1994). Additionally, an employer may not equate unionization with dire consequences without reference to collective bargaining or the give-and-take of the bargaining process. *Overnight Transportation Co.*, 296 NLRB 669, 670 (1989).

Threats of job loss were also conveyed to employees by other managers and supervisors. On March 20, Campbell warned Bombul that he would likely be "bumped" out of his job by a driver and forced into a less desirable night shift position. On April 22, Bombul was warned by Szlachcic about the potential outsourcing of his sanitation job if employees chose union representation. The comments directed at Bombul violated the Act because the threat of being "bumped" warns of the prospective loss of a job and one that is "not easily erased from the minds of employees." *Tri-City Paving, Inc.,* 205 NLRB 174 (1973); *The Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 102 (1977) (threats to bump employees out of positions in the face of unionization violate Section 8(a)(1) and provide grounds for a bargaining order).

The bluntest job threat on behalf of the Company came from lead driver Kevin Lauer on April 28 when he threatened drivers Jessie Silva and Harley Vaughn at the Alanson depot. He overheard them discussing the collective-bargaining agreements at Sysco's unionized facilities with several drivers and chimed in that Silva and Vaughn "better hope" the Union comes in or they would lose their jobs. The Company did not seriously contest the allegation that Lauer blurted the threat of termination at Silva and Vaughn. As such, there no question that the coercive nature of the threat of job loss attributable to support for the Union violated Section 8(a)(1) of the Act. See *Overnite Transportation Co*., 329 NLRB 990, 991 fn. 11 (1999); *House Calls, Inc.,* 304 NLRB 311 (1991).

The Company did, however, seek to insulate itself from Lauer's statement by contesting his status as a Section 2(11) supervisor. The weight of the credible evidence strongly suggests

otherwise. In contrast to other lead drivers, Lauer exercised independent judgment in assigning, approving and changing the schedules of 25 drivers in the northern depots just like Quisenberry did in the southern territories. The filing of the paperwork at the Grand Rapids facility was merely perfunctory. Lauer also hired and terminated temporary drivers as necessary. In essence, he was the only Company representative in the northern territories and it is clear that he represented its interests as only a supervisor would. See *Dean & Deluca New York, Inc.,* 338 NLRB 1046 (2003). (the lack of other supervisors on site is a significant considering a lead employee's supervisory status).

3. Loss of benefits and access to supervisors

On or about February 21, Quisenberry warned Lowing that he would not be able to talk with Lowing and others in the same manner if the union prevailed in the election. Quisenberry then asked Lowing if he was part of the organizing committee. The threat followed Lowing's remarks criticizing Brewster's discharge a day or two earlier. Quisenberry's statement was unlawful because it indicated that a benefit (access to management) would be lost and was accompanied by other Section 8(a)(1) threats. See *Allegheny Ludlum Corp.*, 320 NLRB 484 (1995) (telling employees they will lose flexibility in working conditions if they bring in the union constitutes an unlawful threat of a loss of benefits); cf. *Tri-Cast, Inc.,* 274 NLRB 377 (1985) (statements by employers to employees indicating a change in a relationship if employees opt for union representation are permissible if unaccompanied by threats).

At the March 19 captive audience meeting in Alanson, Twyman warned that employees would lose direct access to management if the Union came in. Citing the fact that he was now listening and considering employee concerns about the safety bonus program, he warned that the program would be imperiled because the Union would have to become involved. In that instance, he noted, it becomes a priority for the Company to "stop this thing right here." Such threats of loss of benefits and access to management are unlawful. See *L'Eggs Products, Inc.*, 236 NLRB 354 383 (1978) (comments that employees may face different and more restrictive leave and vacation policies if unionized constitute unlawful threats); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1084 (2004) (statements to employees that previous leniency regarding break times would no longer occur in a union setting violated Section 8(a)(1).

On April 17, Warehouse manager Szlachcic warned Strautz that, if the Union came in, the Company would not be as generous in permitting employees to take sick days without doctor's notes. Szlachcic's threat to enforce Company rules more strictly if the Union came in was an unlawful threat of a loss of benefit. See *Hyatt Regency Memphis*, 296 NLRB 259, 271 (1989) (employer's statements that employees would not "get away with things" constituted an 8(a)(1) threat of benefit and change of working conditions).

4. Loss of seniority

The Company presented employees with several doomsday scenarios at the captive audience meetings. Numerous PowerPoint presentations predicted a loss of seniority if they were represented by the Union. The slides focus on hypothetical scenarios if the Company and U.S. Foods employees merged. The slides predicted that Company employees would lose out to the previously unionized U.S. Foods employees, while Company employees would fare better in a merger if they remained nonunion. During the March 19 and 26 meetings in Alanson, Twyman elaborated on those predictions, advising employees that the nonunion employee scenario was the only good outcome for them. Shaeffer issued similar predictions at captive audience meetings at the Grand Rapids and Cadillac facilities, citing the likelihood that a unionized U.S. Foods employee would "trump" or "bump" a unionized Company employee based on seniority.

These predictions violated Section 8(a)(1) because they were not carefully phrased on the basis of objective fact conveying an employer's belief as to demonstrably probable consequences beyond its control. Instead, they conveyed "a threat of retaliation based on misrepresentation and coercion." *NLRB v. Gissel Packing Co.*, supra at 618, citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, (1965). Moreover, it is unlawful to diminish the employees' seniority simply because they were not represented previously by a union. *Whiting Milk Corp.*, 145 NLRB 1035 (1964). See also *Teamsters Local 435 (Super Valu, Inc.)*, 317 NLRB 617, 617 fn. 3 (1995) (unlawful for a union to advocate granting less seniority to one group of employees because they had not been represented by a union as long as the employees in another group).

5. More onerous working conditions and discipline

On February 24, supervisor Craig Pung threatened Josh Meyers in the Grand Rapids break room with more onerous work conditions and heavier workloads if employees chose the Union. Supervisor Jim Brown joined the conversation and remarked that employees would revert to minimum wage at the start of bargaining. He also added that employees would be terminated if they did not take breaks under union rules. These statements were unlawful because there is no evidence that either statement was based on objective facts or communicated as a possibility contingent on good-faith bargaining. *Oklahoma City Collection District of Browning Ferris, Inc.*, supra (comments lacking proper context violate Section 8(a)(1)). Additionally, threats regarding more onerous working conditions are unlawful in particular when made without referring to the collective bargaining process. *Novelis Corp.*, 364 NLRB No. 101, slip op at 14 (2016), citing *Liberty House Nursing Homes*, 245 NRLB 1194, 1199 (1979).

On March 23, Quisenberry hurled an array of threats at Lowing if the Union won the election. He warned that wages would start at zero and employees would lose benefits, as well as access to talk to him. Jim Brown added that everything would change if the Union came in and that Company rules would be more strictly enforced and employees would be written up for everything. These actions were also unlawful because comments to employees conveying that rules would be enforced more strictly if employees chose the union, without any basis in objective fact, are inherently coercive. *Onsite News* supra, slip op at 7 (2013); *Schaumburg Hyundai Inc.,* 318 NLRB 449, 450 (1995) (informing employees that working conditions would be governed "strictly" by union contract violates Section 8(a)(1)).

B. The Solicitation of Grievances and Promises to Remedy Grievances

During the March 19 captive audience meeting in Alanson, Twyman told employees that the Company was communicating employees' concerns to Company management where there was an "understanding" of the issues causing the employees' "discomfort and happiness." Such statements during an organizing campaign are unlawful because the solicitation of grievances "raises an inference that the employer is promising to remedy the grievances," an inference that is especially compelling when the employer makes such statements during a campaign after not having a history of soliciting employee grievances. *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013) (citing *Amptech, Inc.,* 342 NLRB 1131, 1137 (2004). Here, there is no evidence that the Company addressed employee concerns to such an extent in the past. Twyman also stated that "when a third party gets involved, it doesn't become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here?" Under the circumstances, Twyman's promise to remedy employees' grievances violated Section 8(a)(1).

C. The Interrogations

The Board has held that the legality of an interrogation must be viewed in the context of all circumstances and whether the questioning would reasonably tend to coerce the employee such that he/she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Center*, 330 NLRB 935, 940 (2000); *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029 (2014). The Board looks to five factors: (1) the background; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) place and method of the interrogation; and (5) the truthfulness of the reply. Id. at 939 (2000). Supervisors reinforced the Company's anti-union message on an individual level by isolating employees in the workplace, interrogating and threatening them. In these instances, the supervisors singled out several subordinates–-including Kevin Strautz, Thomas Holton and David Achorn—that it thought would be open to persuasion and in some instances promised them benefits in exchange for a vote against the Union. Strautz vacillated, while Holton and Achorn were reluctant to answer. Under the circumstances, these interrogations violated Section 8(a)(1).

D. Surveillance and the Impression of Surveillance

On April 30, supervisor Brown used his mobile telephone to photograph or videotape approximately 10 employees congregating with union organizers outside the Grand Rapids facility. The Union also publicized the activity on the internet. Brown's activity was unlawful because he was an employer who "surveil[led] employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary.'" *Alladin Gaming, LLC*, 345 NLRB 585, 586 (2005). Indeed, without a "solid justification" for the recording, this was a violation of Section 8(a)(1). *National Steel and Shipbuilding Co.*, 324 NLRB 499 (1997), citing *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976).

Following the manual vote in the election on May 7, Grand Rapids driver Kyril Brown encountered supervisor Mike Scott in the facility's break room. Scott told him that he knew how Brown had voted. Scott's statement unlawfully conveyed the impression of surveillance in violation of Section 8(a)(1) because a reasonable employee in his position would assume that his union activities were being monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295 (2009). Here, Scott did not communicate to Brown that he learned the information from another co-worker or previous statements. As such, Brown could reasonably believe that Scott based his statement on information obtained through surveillance. *Alpers Jobbing Co.* 231 NLRB 449 (1977) (comments to employees that the employer knew how they voted in an election are coercive).

E. No Solicitation Rules

On April 20, warehouse supervisor Szlachcic told Compton to stop talking to other employees about the Union during work time. That "no talking" rule violated Section 8(a)(1). The Board has held that an employer may prevent employees from talking about a union when they are supposed to be actively working, if such a prohibition also extends to all subjects not connected to work tasks. However, an employer violates the Act when employees are not allowed to discuss unionization but may talk about other subjects unrelated to work. *G4 Secure Solutions, Inc.*, 364 NLRB No 92, slip op. at 2–3 (2016), citing *Jensen Enterprises Inc.*, 339 NLRB 877, 878 (2003). Here, a supervisor told Compton that the discussion about the Union was banned at work, while other non-work topics were frequently discussed by employees and supervisors during work time.

Shortly before the election, Achorn started to wear a Teamsters cap during work hours. When Yocum called Achorn into his office to discuss his performance, Yocum told Achorn that he thought Achorn had a bad attitude and he did not want Achorn wearing his cap in front of customers. This Company rule preventing employees from wearing union insignia was unlawful because an employer may not prohibit the wearing of union insignia in the absence of special circumstances. *Cintas Corp.*, 353 NLRB 752 (2009). The Board has only found special circumstances when the display jeopardizes employee safety, equipment or product safety or unreasonably interferes with a public image that the employer has established as part of its business plan. *United Parcel Service*, 312 NLRB 596, 597 (1993) citing *Nordstrom Inc*., 264 NLRB 698, 700 (1982). Here, no special circumstances existed justifying the prohibition of employees wearing union insignia. Accordingly, the directive violated Section 8(a)(1).

F. The Safety Bonus Program

On or about January 28, and again on February 14, the Company made significant changes to its safety incentive programs. Before the changes, the program terms were "all or nothing," which made everyone ineligible for the incentive pay if even one employee (or, for drivers, two employees) experienced an injury. The Company implemented programs in January that were much more favorable to employees. (The program became individualized, such that one employee's injury would not disqualify the entire group, and removed the raffle-style payout that benefited only some employees.) The record unequivocally shows that the Company promised the more generous safety bonus program as

employees' organizing efforts began to gain steam. The Company then granted the enhanced safety bonus to warehouse employees during the mail ballot election and approximately one week before the date of the manual portion of the election in which warehouse employees and drivers voted.

The Company's decision to change its safety program violated Section 8(a)(1) because an employer may not award benefits in an effort to induce employees to vote against the union in a pending election. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Further, an employer's legal duty when determining whether to issue a benefit at a time when employees are considering how to vote in a union election is to act in the same manner as it would have in the absence of a union. *Red's Express*, 268 NLRB 1154, 1155 (1984). Here, the timing of the Company's decision to make changes to the safety program clearly indicates that the organizing campaign served as its motivation. On March 2, Campbell sent an e-mail message to Twyman stating that she was working on "Union Avoidance" action items and asked for the date of the rollout of the "enhanced safety information." Further, Twyman testified that the "all or nothing" program had resulted in no injuries, and obfuscated the issue when asked to explain the decision to change a program that had not produced any injuries.

II. THE SECTION 8(A)(3) ALLEGATIONS

A. George Brewster's Discharge

The General Counsel alleges that the Company violated 8(a)(3) and (1) by terminating Brewster on February 20 because of his role as a union organizer.[92] The Company denies the allegation, contending that Brewster was lawfully terminated due to (1) insubordination and profanity, (2) involving a customer in an internal company matter, and (3) threatening to abandon his route. The Company also asserts that Brewster violated its prohibition against "disclosure or use of confidential information concerning an associate, customer or the company" as described in its Rules of Conduct.

Cases involving 8(a)(3) violations are analyzed using the burden-shifting framework applied in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *Wright Line* holds that the General Counsel must prove that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. The elements necessary to demonstrate such a showing include union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009); cf. *Libertyville Toyota.*, 360 NLRB 1298, 1302 fn. 10 (2014) (rejecting a heightened showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action). If the General Counsel meets the initial burden, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action regardless of the occurrence of the protected activity. Id. at 1066. On the other hand, if the evidence establishes that the respondent's reasons for its actions are pretextual, the respondent's Wright Line defense fails. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

It is undisputed that Brewster engaged in union activity and the Company was aware of that activity. He signed a union authorization card, worked on the Union's organizing drive and solicited coworkers to sign cards. More importantly, the Company's "straw poll" reports monitoring the involvement of employee support for the campaign documented Brewster's activity and flagged him as a top supporter for union representation. He was also openly discussing his concerns about the Company when Twyman approached him in Yokum's office.

The Company's union animus was also clearly present. Animus may be proven by direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Systems*, 343 NLRB 1183 (2004). Even before Brewster's discharge, the Company violated 8(a)(1) by threatening Josh Meyers with a loss of wages. Such violations are evidence of an employer's animus. *W.E. Carlson Corporation*, 346 NLRB 431 (2006); *Armstrong Machine Company*, supra at 1151–1152 (2004). The timing is also instrumental, as Brewster was terminated within two months of being identified as a union committee member. *Nichols Aluminum*, 361 NLRB 216 (2014); *Murtis Taylor Human Service Systems*, 360 NLRB 546 (2014). Additionally, the Company departed from past practice when a supervisor hid Brewster's truck keys while observing him, then failed to stick around, counsel him and fill out the requisite form. That exercise was an obvious attempt to lure Brewster into acting out. *JAMCO*, 294 NLRB 896, 905 (1989). Indeed, the Board has found that an employer may not use an employee's outburst that was created by its own malfeasance as grounds for discharge. *Paradise Post*, 297 NLRB 876 (1990).

Under the *Wright Line* burden-shifting analysis, the significant evidence of pretext causes any affirmative defense on the part of the Company to fail. Notably, where "the General Counsel, as here, makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial." *Bally's Park Place v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011); *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1207 (2014); cf. *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1113 (D.C. Cir. 2002) (quoting *Doug Hartley, Inc. v. NLRB*, 669 F.2d 579, 582 (9th Cir. 1982) ("the weaker a prima facie case against an employer under *Wright Line*, the easier for an employer to meet his burden . . . of proving [the employer's action] would have occurred regardless of protected activity").

Virtually nothing about how Company managers and supervisors handled this incident remotely resembles the Company's typical operational or disciplinary practices. Top Company managers engaged in an elaborate investigation over the incident, despite Brewster's relatively minor offense involving profanity,

[92] The General Counsel referred to February 19 as Brewster's termination date. However, he was not notified of that action until the following day.

but did not speak to him or the Charlie's Pub employee on the day of the incident. Similarly, Yocum and Quisenberry failed to discuss the incident with, much less mention any disciplinary action to, Brewster when he returned to the facility on February 17. See, *Advoserv of New Jersey*, 363 NLRB No. 143, slip op. at 4 (2016) (managers present during conversation that served as grounds for discharge and yet took no action provided evidence of pretext). The Company continued to bulldoze its normal procedures by discharging Brewster without giving him a reason for that action. *Lucky Cab Co.*, 360 NLRB 271, 278 (2014). The Company's questionable actions did not end there. Its shoddy investigation picked up steam following Brewster's departure, in what signifies an attempt to retroactively justify the termination. See, *2 Sisters Food Group, Inc*., 357 NLRB 1816, 1837 (2011) (Respondent's post-termination investigation into discriminatee's wrongdoing evidenced animus rather than compliance with past practices.)

Under the circumstances, the Company's discharge of George Brewster on February 20 violated Section 8(a)(3) and (1) of the Act.

B. Reduction of Jessie Silva's Work Hours

During the April 9 meeting at the Alanson facility, Shaeffer started a conversation about strikes and employee Jesse Silva challenged some of the assertions. At one point, Shaeffer become frustrated and shouted, "Jesus Christ, Jesse!" The next day, Kevin Lauer called Silva and told him that his route schedule for the following week had changed. Silva's original double run scheduled for April 16 was reassigned to another driver who the Company believed to be opposed to the Union. When Silva asked if the reduction in hours (and corresponding compensation) was due to his interaction with Shaeffer, Lauer responded, "You know why."

The adverse reduction of Silva's work hours was attributable to Company animus against the Union campaign in general, as well as Silva's protected concerted activities. He was an active and outspoken Union supporter and the record establishes an abundance of Company animus toward employees' union activities prior to and on April 9, including Shaeffer's hostility toward Silva. In addition, the comment by Lauer, "You know why," adds to the overwhelming evidence that Silva's protected activity was a motivating factor in his schedule change.

Based on the overwhelming evidence of a prima facie violation, the burden shifted to the Company to show that it would have reduced Silva's schedule hours even in the absence of his protected activity. The Company failed to meet that burden. It introduced evidence that double-run assignments had been cut in the past based on demand. However, the Company's transfer of Silva's scheduled double-run assignments to another employee was unprecedented.

Under the circumstances, the Company's reassignment of Silva's double-run route to an anti-Union employee was discriminatorily motivated due to his protected concerted and union-related activities in violation of Section 8(a)(3) and (1).

C. Transfer of Johnson to an Offsite Location

On about April 7, driver Jeff Johnson, an early card signer and consistent Union supporter, injured his knee while on the job and could no longer perform driving duties as of April 8. Johnson was assigned by Wilfong, the Environmental Health and Safety Manager, to light duty work in the warehouse, where he regularly spoke about the Union with other employees. Wilfong testified that he was directed by Mercer and Twyman to "get [Johnson] out of the building" because he was discussing the union with other employees while on the job. As a result, Wilfong further testified that, as a result of this directive, he assigned Johnson to an off-site charity organization to do light work on April 24, about a week before the election. However, I did not find Wilfong's version credible based on his timing of the alleged directives, which would have been issued after the election. As such, the credible facts established that Johnson was transferred to the off-site charity location in the ordinary course of the Company's practices once there was nothing else for him to do or training courses to watch in the warehouse. Under the circumstances, this 8(a)(3) and (1) allegation is dismissed.

III. THE SECTION 8(A)(5) ALLEGATIONS

The complaint alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union after it established its majority status by valid authorization cards and then engaging in unfair labor practices that destroyed the Union's majority and seriously impeded the election process. The Company opposes the requested bargaining order on several grounds: (1) the Union did not establish majority status as of December 18, 2014, nor did the Company's actions dissipate alleged majority support for the Union; (2) the Company experienced significant employee turnover after December 18, 2014; (3) the evidence does not support the elements in establishing a Category II *Gissell* violation; and (4) the vast majority of the alleged unfair labor practices occurred prior to the Union's demand for recognition on March 11.

The General Counsel's request for an order granting the extraordinary remedy of a bargaining order designating the Union as the legal representative of Company's employees must be analyzed under *NLRB v. Gissel Packing Co.*, supra at 610. In *Gissel*, the Supreme Court held that a bargaining order is warranted when "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside." Id. The traditional remedy for unfair labor practices is to hold an election once the atmosphere has been cleared of past misconduct; a bargaining order thus is an extraordinary remedy applied when it is unlikely that the atmosphere can be cleansed. *Aqua Cool*, 332 NLRB 95, 97 (2000). The issuance of a bargaining order, then, seeks to balance the rights of employees who favor unionization, and whose majority strength has been undermined by the employer's unfair labor practices, against the rights of those employees opposing the union who may choose to file a decertification petition at the appropriate time pursuant to Section 9(c)(1). See *Overnite Transportation Co.*, supra at 996.

In *Gissel,* the Supreme Court identified two categories of employer misconduct that warrant imposition of a bargaining order. Category I cases are "exceptional" and "marked by 'outrageous' and 'pervasive' unfair labor practices." 395 U.S. at 613. Consideration of a bargaining order examines the nature and

pervasiveness of the employer's practices. *Holly Farms Corp.,* 311 NLRB 273, 281 (1993) (citing *FJN Mfg.,* 305 NLRB 656, 657 (1991). Category II cases are "less extraordinary" and marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." Id. at 614. In category II cases, the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id. at 614–615; see also *California Gas Transport,* 347 NLRB 1314, 1323 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

The May 7 election was fairly close, with 82 votes cast against union representative and 71 votes cast in favor of representation. The Union has met its burden in proving most of the overlapping objections in Case 07–RC–147973 and there is no doubt that the results of the fairly close election must be set aside. When considering the unfair labor practice violations, however, it is evident that the traditional remedies—a rerun of the election in disposition of the representation case, and a cease and desist order and notice posting in the unfair labor practice proceedings—would be insufficient under the circumstances.

The aforementioned 8(a)(1) and 8(a)(3) violations constituted overwhelming evidence of conduct by the Company during the months leading up to the election which eroded the ideal conditions necessary to facilitate the free choice of employees and determine their uninhibited desires. *Jensen Enterprises,* 339 NLRB 877 (2003); *Robert Orr-Sysco Food Servs.*, 338 NLRB 614 (2002) (narrowness of the vote is a factor); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (factors include the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors); *Playskool Mfg. Co.*, 140 NLRB 1417 (1963); *General Shoe Corp.*, 77 NLRB 124 (1948). The Company's numerous unfair labor practices, while not rising to the level of exceptional, outrageous or pervasive conduct, warrant a category II analysis.

A. Establishment of Majority Status Prior to the Election

The evidence established that several Union representatives and numerous employees obtained 84 completed and signed clear and unambiguous union authorization cards from employees by December 18. By the filing of the representation petition on March 11, that total had increased to 99. Thirty-seven of the 84 cards signed before December 18 were authenticated pursuant to Federal Rule of Evidence 901(b)(3) and the remaining 47 cards were authenticated by the credible and undisputed testimony of the card signers and/or coworkers who solicited or witnessed the card signings. The cards were properly authenticated by witnesses, the employees themselves or handwriting comparison. See *Action Auto Stores*, 298 NLRB 875, 879 (1990) (citing Fed. R. Evid. 901(b)(3)) (authenticating cards by comparing the signature on the card with the employee's name and social security number on employment application). See also *U.S. v. Rhodis*, 58 Fed. Appx. 855, 856–857 (2d Cir. 2003) (factfinder may compare "a known handwriting sample with another sample to determine if handwriting in the latter is genuine"); *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000); *Thrift Drug Co. of Pennsylvania*, 167 NLRB 426, 430 (1967) (cards authenticated by comparison with other samples by nonexperts); *Traction Wholesale Ctr. Co.*, 328 NLRB 1058, 1059 (1999) (cards authenticated by judicial comparison of signatures to other records); *Justak Bros*., 253 NLRB 1054, 1079 (1981) (same).

There was nothing ambiguous about the wording of the authorization cards. The top of each card stated that the "undersigned" Company employee authorizes the Union "to represent me in negotiations for better wages, hours and working conditions." The rest of the card asked for detailed information, including names, dates, addresses, telephone numbers, email addresses and work-related information (job classification, department, shift), and a signature.[93]

Cumberland Shoe Corp., 144 NLRB 1268 (1963), established that an unambiguous card is valid unless and until it is rendered invalid through solicitation misrepresenting the sole purpose of the card. A card may be ambiguous, and thus facially invalid, through either the words on the card or through the manner in which the card is presented to the signee. The Board has found that a card is rendered ambiguous through the words on the card when it both authorizes union representation and states that "[t]he purpose of signing the card is to have a Board-conducted election" (*Nissan Research & Development*, 296 NLRB 598, 599 (1989) (internal quotation marks omitted)). The Board has clarified that cards which seek both majority status and cards which seek representation must, of necessity, express the intent to be represented by a particular labor organization. *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968). Thus, "the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides . . . *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation." Id. Absent evidence of such representation, inquiry into the subjective motives or understanding of the signatory to determine his or her intentions toward usage of the card is irrelevant. See *Sunrise Healthcare Corp.*, 320 NLRB 510, 524 (1995). As the Supreme Court clarified, summarizing and expanding upon *Cumberland Shoe* and *Levi Strauss*:

> [E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election…in hearing testimony concerning a card challenge, trial examiners should not neglect their obligation to ensure employee free choice by a too easy mechanical application of the Cumberland rule. We also accept the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give

[93] The Company's contention that the Union unlawfully obtained authorization cards by providing beer at some of its meetings is inconsequential since an employer may provide free refreshments of minimal value. See *Far W. Fibers, Inc*., 331 NLRB 950, 952 (2000) (bagels). Moreover, there is no evidence to suggest the absence of beer and other beverages in the regular course of other Union meetings.

testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of 8(a)(1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry.

NLRB v. Gissel Packing Co., supra at 606–608.

B. The Company's Actions Dissipated Majority Support for the Union

Determining whether the Company's actions dissipated majority support for the Union requires an examination of the nature and pervasiveness of the employer's unfair labor practices. In weighing a violation's pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practice. *Holly Farms Corp.*, 311 NLRB 273, 281 (1993) (citing *FJN Mfg*., 305 NLRB 656, 657 (1991)). A bargaining order is not warranted when the violations are not disseminated among the bargaining unit, such as when they are committed by low-level managers and affect employees on an individual basis. See, e.g., *Cast-Matic Corp*., 350 NLRB 1349 (2007); *Desert Aggregates*, 340 NLRB 289 (2003) (violations, including unlawful discharges, were committed on an individual basis by low-level supervisors); *Philips Industries*, 295 NLRB 717 (1989) (same). Also, a bargaining order may not be warranted when the most widely disseminated violations occur before a union demand for recognition and thus cannot have been said to have eroded the union's majority support. See, e.g., *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1121–1122 (2004). Conversely, violations are more likely to warrant a bargaining order when they are disseminated among employees to the extent of affecting all or a significant portion of the bargaining unit. *Evergreen America Corp.*, 348 NLRB 178, 180–181 (2006).

1. Severity of the violations

A bargaining order is warranted, absent significant mitigating circumstances, when the employer engages in hallmark violations such as threats of plant closure, threats of loss of employment, the grant of benefits to employees, and the reassignment, demotion, or discharge of union adherents. *NLRB v. Jamaica Towing, Inc.* 632 F.2d 208, 212–213 (2d Cir. 1980). Hallmark violations are significant in that they are reasonably likely to have an effect on a substantial percentage of the work force and to remain in employees' memories for a long period. Id. at 213. Cf. *Aqua Cool*, 332 NLRB 95 (2000) (single hallmark violation was directed to a single employee and thus counseled against issuing a bargaining order).

The Union attained majority support on December 18, 2014 and the Company committed its first hallmark violation on February 20 by discharging Brewster. The Union filed its petition for certification as the labor representative of its employees on March 11 and did not formally demand recognition until March 6. Under the circumstances, the applicable date for determining the appropriateness of a bargaining order is Brewster's discharge on February 20. *California Gas Transport, Inc.,* 347 NLRB 1314 (2006) (where union has not initially requested recognition, the employer will be ordered to bargain with the union after it attains majority status from the "approximate date thereafter that Respondent embarked on its course of unlawful conduct").

Information about Brewster's termination was widely disseminated throughout the plant as the Union was preparing to file its petition for representation on March 11 and was followed by numerous hallmark and other violations that continued until the May 7 election. The most serious violations consisted of threats during captive audience meetings by high ranking managers, including Shaeffer, Twyman, Szlachcik and Yocum, of loss of job loss, plant closure, loss of benefits and seniority. These violations, which were directly disseminated to the bargaining unit, will likely remain etched in employees' memories for a long period. See *Aldworth Co.*, 338 NLRB 137, 149–150 (2002) (allusions to potential total loss of business are the types of threats most likely to have the effect of causing union disaffection and that "[t]hreats of this kind are not likely to be forgotten by employees whose jobs depend on the stability of that relationship"); see also, *Homer D. Bronson Co.*, 349 NLRB 512, 549 (2007) (citing *A.P.R.A. Fuel, Inc.*, 309 NLRB 480, 481 (1992), enfd. mem. 28 F.3d 103 (2d Cir. 1994) (threats of plant closure and job loss are more likely to destroy election conditions for a longer period of time than other unfair labor practices).

Shaeffer and Twyman committed several other violations during the captive audience meetings by threatening reduced pay and benefits if the Union came in. These threats were directly disseminated to the bargaining unit. Further, the severity of these violations was exacerbated by their communication to employees via high-ranking officials. See *Aldworth Co.*, 338 NLRB at 149 (captive audience meetings convey a significant impact when conducted by high-level officials). When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten. See *Electro-Voice*, 320 NLRB 1094, 1096 (1996); *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 115 S.Ct. 2609 (1995).

The Company also committed a significant hallmark violation when it granted a benefit to warehouse and garage employees by awarding them safety bonuses on April 27, just 10 days before the election. This benefit was disseminated to a substantial portion of the proposed bargaining unit and is likely to have a long-lasting effect, not only because of its significance to employees, but also because of the expectation that it would continue in the future. *MEMC Elec. Materials, Inc.*, 342 NLRB 1172, 1174 (2004) (quoting *Holly Farms*, 311 NLRB at 281–282).

The Company committed another significant hallmark violation on April 10 when Lauer, alluding to Silva's exchange of views with Shaeffer, transferred Silva's double-run shift work to another employee and then strongly implied that the action was retribution for Silva's protected activity. There is no indication, however, that the punitive action, unlike Brewster's discharge, was likely to have a lasting and inhibitive effect on a substantial portion of the work force. See *Jamaica Towing, Inc.*, 632 F.2d at 213.

Finally, Twyman combined the chilling effect of coercive conduct by managers and supervisors by unlawfully soliciting and promising to remedy grievances during a captive audience meeting in April. Solicitation of grievances has a long-lasting

effect on employees' freedom of choice by eliminating, through unlawful means, the very reason for a union's existence. See *Teledyne Dental Products Corp.*, 210 NLRB 435, 435–436 (1974).

In addition to the hallmark violations, several Company supervisors committed several other violations by coercively interrogating employees, promising benefits, threatening decreased benefits, and expressing anti-union sentiment. These coercive actions by supervisors were likely to leave an impression sufficient to outweigh the general good-faith assurances issued by management. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999).

Thus, the Company's commission of numerous hallmark violations on and after February 20, along with numerous other violations, many of which directly affected the entire bargaining unit, and many of which directly involved upper-level management, strongly suggests that the lingering effect of these violations is unlikely to be eradicated by traditional remedies. *Evergreen America Corp.*, 348 NLRB at 182; *Koons Ford of Annapolis*, 282 NLRB 506, 509 (1986).

2. Remediation of potential effects of the violations

Evaluation of whether a bargaining order is warranted depends upon the situation as of the time the employer committed the unfair labor practices. *Highland Plastics, Inc.*, 256 NLRB 146, 147 (1981). Evaluation must consider the likelihood of the recurrence of violations. *Gissel*, 395 U.S. at 614. Evaluation may also, but need not, consider changed circumstances, such as the passage of time, the addition of new employees, and the issuance of a 10(j) injunction. See *Evergreen America Corp*., 348 NLRB at 181–182.

The Company's aforementioned unfair labor practices were severe and continuous during the critical period prior to the May 7 election. These coercive acts were conveyed to employees by the Company's top management and they included the most serious types of hallmark violations, specifically, the loss of jobs and plant closure. These actions significantly dissipated support for the Union at the most critical time. By March 11, when the Union filed its representation petition, it had obtained 99 valid authorization cards from the approximately 158 employees eligible to vote. On May 7, however, only 71 employees voted for union representation.

The Company's barrage of unfair labor practices did not end with the election. Six months later, after the Union filed its initial unfair labor practice charges, Barnes defiantly denounced the charges at a captive audience meeting, declared that he would never let the Union in, knew how to get around the Act, even it meant continuing to violate federal law, because he "always got away with it." He also warned that the Company was an insignificant part of the Sysco Corporation organization and would shut the Company down and move its operations to Detroit if the Union prevailed. That threat closed the lid on any possibility that employees would go into another election with the assurance that they would be able to exercise their unfettered choice, free from adverse consequences, if they voted for union representation

The Company cites *M.P.C. Plating v. NLRB*, for the preposition that changed circumstances, including employee and management turnover weigh against issuing a bargaining order. 912 F.3d 833, 888 (6th Cir 1990). However, longstanding Board precedent indicates otherwise. See *Overnite Transportation*, 334 NLRB 1074, 1076 (2001) (Board evaluation of bargaining order does not consider employee turnover). The Board recently reaffirmed this posture in *Novelis Corp.,* 364 NLRB No. 101, fn. 27 (2016), refusing to "consider turnover among bargaining unit employees or management officials and the passage of time in determining whether a *Gissel* order is appropriate." (Citing *Garvey Marine, Inc.*, 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *Be-Lo Stores*, 318 NLRB 1, 15 (1995), affd. in part and revd. in part 126 F.3d 268 (4th Cir. 1997). It also reaffirmed its "established practice is to evaluate the appropriateness of a bargaining order as of the time the unfair labor practices were committed (citing *State Materials, Inc.*, 328 NLRB 1317, 1317–1318 (1999)). Id.

Even considering the Company's evidence of employee and management turnover, the predominant factor is that a substantial number of the proposed unit employees remain employed by the Company. As the Board noted in *Novelis Corp.,* besides recalling the Company's coercive practices during the organizing campaign, "[t]hose employees are likely to have informed any new employees of what transpired during the Union's organizing campaign. Furthermore, the Respondent's ownership remains the same and some of the management personnel who engaged in the unfair labor practices remain employed by the Respondent." 364 NLRB No. 101, supra (citing *State Materials*, 328 NLRB at 1317–1318).

Moreover, the passage of time since the filing of the representation petition, followed by the string if unfair labor practices leading up to the May 7 election, is less than two years—even less when one considers the post-election hallmark violation by Barnes in November 2015. Either timeframe is less than the period found by Board in *Novelis Corp.* to be an insignificant change in circumstances.

Based on the foregoing, the evidence establishes numerous hallmark and other violations by the Company of Sections 8(a)(1) and (3) of the Act. The unfair labor practice violations were sufficiently severe so as to erode the majority support that the Union had acquired and demonstrated on or before December 18, 2014 and again when it made its initial demand for recognition on May 6, causing it to lose the representation election conducted on May 7 by 11 votes. Those actions, as well as Barnes' doomsday speech shortly after the Union filed charges, clearly demonstrated that traditional remedies, including a notice posting, cease and desist order and rerun of the election, would be insufficient to alleviate the impact reasonably incurred by eligible unit employees. Thus, a more extraordinary form of relief, including a bargaining order, is warranted.

CONCLUSIONS OF LAW

1. The Respondent, Sysco Grand Rapids, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. General Teamsters Union Local No. 406, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees that a strike is inevitable if they

chose to be represented by the Union.

(b) Threatening employees that the Respondent would lose business if they select the Union as their bargaining representative.

(c) Threatening employees that it would close the facility if they chose to be represented by the Union.

(d) Threatening employees with layoff if employees selected the Union as their bargaining representative.

(e) Threatening employees that negotiations will start from scratch if they chose to be represented by the Union.

(f) Threatening employees with a reduction in wages and benefits if they select the Union as their bargaining representative.

(g) Threatening employees with the loss of seniority if they chose to be represented by the Union.

(h) Threatening employees with more onerous working conditions if they select the Union as their bargaining representative.

(i) Threatening employees with loss of access to supervisors to discuss working conditions.

(j) Interrogating employees about their union membership, activities, and sympathies.

(k) Promulgating a rule prohibiting employees from wearing union insignia.

(l) Promulgating a rule instructing employees not to talk to each other about the Union.

(m) Soliciting grievances and promising to remedy them in order to discourage employees from selecting union representation.

(n) Granting increased benefits in the form of safety bonuses in order to discourage employees from selecting union representation.

(o) Creating the impression of surveillance among employees that their union activities are under surveillance.

(p) Videotaping or photographing employees engaged in union activity.

(q) Reducing the hours of employees who support the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating George Brewster because of his support for the Union or engaging in other protected concerted activities.

5 The Respondent violated Section 8(a)(3) and (1) of the Act by reducing Jesse Silva's work hours because of his support for the Union or engaging in other protected concerted activities.

6. The following employees constitute a union appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time warehouse, transportation, facility, fleet employees, including drivers, yard spotter, beverage technicians, inventory control and sanitary employees, employed by Sysco Grand Rapids LLC at or based at its Grand Rapids Michigan facility and its domicile locations in Alanson, Cadillac, Kalkaska, West Branch, Niles and White Pigeon, Michigan.
>
> Excluded: Office clerical employees, sales employees, routing employees, slotting coordinator, guards and supervisors as defined in the Act.

7. Since December 18, 2014, a majority of the employees in the above Unit signed union authorization cards designating and selecting the Union as their exclusive collective-bargaining representative for the purposes of collective bargaining with the Respondent.

8. Since February 20, 2015, and continuing to date, the Union has been the representative for the purpose of collective bargaining of employees in the above-described unit and by virtue of 9(a) of the Act has been and is now the exclusive representative of the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

9. Since about May 6, 2015, and at all times thereafter the Respondent has failed and refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

10. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of all employees in the above-described unit.

11. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated George Brewster, it must, to the extent it has not already done so, offer him reinstatement to the position from which he was unlawfully terminated, without prejudice to his seniority or other rights and privileges previously enjoyed and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Similarly, having found that the Respondent unlawfully reduced Jessie Silva's work hours, it must make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Backpay shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Further, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016), the Respondent shall compensate Brewster and Silva for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file reports with the Regional Director of Region 7 allocating the backpay awards to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[94]

ORDER

The Respondent, Sysco Grand Rapids, LLC, of Grand Rapids,

[94] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that a strike is inevitable if they choose to be represented by the Union.

(b) Threatening employees that the Respondent would lose business if they select the Union as their bargaining representative.

(c) Threatening employees that it would close the facility if they choose to be represented by the Union.

(d) Threatening employees with layoff if employees select the Union as their bargaining representative.

(e) Threatening employees that negotiations will start from scratch if they choose to be represented by the Union.

(f) Threatening employees with a reduction in wages and benefits if they select the Union as their bargaining representative.

(g) Threatening employees with the loss of seniority if they choose to be represented by the Union.

(h) Threatening employees with more onerous working conditions if they select the Union as their bargaining representative.

(i) Threatening employees with loss of access to supervisors to discuss working conditions.

(j) Interrogating employees about their union membership, activities, and sympathies.

(k) Promulgating a rule prohibiting employees from wearing union insignia.

(l) Promulgating a rule instructing employees not to talk to each other about the Union.

(m) Soliciting grievances and promising to remedy them in order to discourage employees from selecting union representation.

(n) Granting increased benefits in the form of safety bonuses in order to discourage employees from selecting union representation.

(o) Creating the impression of surveillance among employees that their union activities are under surveillance.

(p) Videotaping or photographing employees engaged in union activity.

(q) Reducing the hours of employees who support the Union.

(r) In any other manner interfering with restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make George Brewster and Jesse Silva whole for any loss of earnings and other benefits, including consequential damages they suffered because of the discrimination against them, and their search-for-work or work-related expenses, regardless of whether those expenses exceed their earnings at interim employment, together with interest in accordance with Board policy.

(b) Rescind and remove from its files and records all references to the discharge of George Brewster and notify him in writing that this has been done and that the action will not be used against him in any way.

(c) Offer George Brewster immediate and full reinstatement to his former position or, if the position is no longer available, to a substantially equivalent position without prejudice to his seniority or other benefits and privileges previously enjoyed.

(d) Recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain with it collectively and in good faith and execute a written contract incorporating any agreement reached.

(e) Post appropriate notices to employees at all its Michigan facilities.

(f) Convene meetings at each of its Michigan facilities during working time, scheduled to ensure the widest possible attendance, at which the notices to employees will be read to all employees, supervisors and managers by a Board agent in the presence of Thomas C. Barnes (or his successor) and Tom Shaeffer (or his successor) at each reading of the notice. Also, at least one of the following individuals—Mark Lee, Amy Campbell or Ted Twyman (or their successors)—must be in attendance at each reading and each of these individuals must attend at least one reading. At least two other supervisors/managers identified in the Complaint must be present at each reading.

(g) Allow the Union reasonable access to its bulletin boards and all places where notices to employees are customarily posted.

(h) Supply the Union, on its request, the names and addresses of its unit employees as of the day of the request.

(i) Grant the Union access to network areas during employees network time.

(j) Give the Union notice and equal time and facilities to respond to any address made by Respondent to employees regarding the issue of union representation.

IT IS FURTHER RECOMMENDED that the election conducted in Case 07–RC–147973 on May 7, 2015 be set aside, and the petition dismissed.

Dated, Washington, D.C. March 2, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising your rights as listed above.

WE WILL NOT threaten that you will lose wages or that your wages will revert to minimum wage if you choose to be represented by the General Teamsters Union Local No. 406, International Brotherhood of Teamsters (Union.)

WE WILL NOT tell you that you will no longer be able to have the ability to speak to or access supervisors if you choose to be represented by the Union.

WE WILL NOT threaten employees that the work rules will be more rigorously enforced or that employees will be disciplined more often if you choose to be represented by the Union.

WE WILL NOT threaten you with harsher or more difficult working conditions if you choose to be represented by the Union.

WE WILL NOT threaten you with the loss of work, the loss of your job due to any loss of work, or discharge if you choose to be represented by the Union.

WE WILL NOT tell you that any negotiations with the Union will start from scratch or from a blank slate or suggest that you will lose your wages and benefits as a result of negotiations with the Union;

WE WILL NOT threaten you with a loss of benefits if you choose to be represented by the Union;

WE WILL NOT threaten you that you will lose your seniority and all the benefits that go with seniority if you choose to be represented by the Union;

WE WILL NOT threaten employees that a strike is the only way for the Union to obtain benefits for you and that such a strike is inevitable.

WE WILL NOT interrogate or ask you about your level of support for the Union or the union activities and support of any other employees.

WE WILL NOT as you about your complaints and then offer or imply that we will remedy those complaints to discourage you from supporting the Union;

WE WILL NOT promise you that we will improve the safety bonus in order to discourage your support of the Union;

WE WILL NOT watch you or give you the impression that we are watching you engage in activities in support of the Union;

WE WILL NOT tell you that you cannot talk to other employees about the Union;

YOU HAVE THE RIGHT to discuss the union with other employees.

WE WILL NOT tell you that you cannot wear hats or other items to show your support for the Union;

WE WILL NOT threaten you that we will close the facility and "do what needs to be done" in order to keep the employees from being represented by the Union;

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit;

WE WILL NOT change the safety bonus program or give you gift cards and bonuses in order to discourage you from supporting the Union;

WE WILL NOT reduce your hours in retaliation for your support of the Union;

WE WILL NOT fire you in retaliation for your support of the Union;

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of the rights listed above.

WE WILL pay employee Jesse Silva for any wages and other benefits he lost because we reduced their hours or transferred them to a different job assignment in retaliation for their support of the Union;

WE WILL offer George Brewster immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed;

WE WILL pay George Brewster for all the wages and other benefits he lost because we unlawfully fired him;

WE WILL remove from our files all references to the discharge of George Brewster and we will notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL compensate Jesse Silva, Jeff Johnson and George Brewster for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and regular part-time warehouse, transportation, facility, fleet employees, including drivers, yard spotter, beverage technicians, inventory control and sanitary employees, employed by Sysco Grand Rapids LLC at or based at its Grand Rapids Michigan facility and its domicile locations in Alanson, Cadillac, Kalkaska, West Branch, Niles and White Pigeon, Michigan.
>
> Excluded: Office clerical employees, sales employees, routing employees, slotting coordinator, guards and supervisors as defined in the Act.

WE WILL, on request by the Union, rescind any changes to the terms and conditions of employment of our unit employees that were unilaterally implemented after February 19, 2015.

SYSCO GRAND RAPIDS, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-146820 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.