**Hogan Transports, Inc. *and* Teamsters Local 294, International Brotherhood of Teamsters *and* Mansfield Teetsel.** Cases 03–CA–107189, 03–CA–108968, and 03–CA–111193

May 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 26, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, an answering brief to the General Counsel's cross-exceptions, a reply brief, and a motion to reopen the record. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

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

The Board has considered the decision and record in light of the exceptions,[1] cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions except as specifically set forth below, and to adopt the recommended Order as modified and set forth in full below.[3]

The facts, which are more fully set out in the judge's decision, are summarized here. The Respondent provides trucking services throughout the United States utilizing a nationwide workforce of 1300–1400 drivers. In May 2013,[4] the Union began organizing the drivers at the Respondent's operation in West Coxsackie, New York, where the Respondent provides dedicated trucking services for the Save-A-Lot chain of discount supermarkets. On June 3, the Union filed an election petition with the Board. By June 13, the Union had obtained signed authorization cards from 18 of the 29 West Coxsackie drivers.

On June 19, the Respondent's management held three meetings with employees to discuss the union situation. One meeting was held on each of the three shifts in order to cover all of the Respondent's employees. The main speaker at the meeting was President David Hogan. Hogan told the employees:

> I can tell you Save-A-Lot made this clear to me, we don't have any transportation providers who will deliver to our stores in the country that are union so they said you need to keep in mind when you guys are working through the issue here. I don't know how to be—I don't know how to be more direct, but I think our business here is in jeopardy if the union comes in. It's not a threat, it's just my opinion with my discussions with Save-A-Lot when they remind me of how they operate. They don't want to operate in union environment, all that stuff.
>
> Employee: If we go union, we're all out of a job.
>
> Hogan: I agree 110% with that and I am just being honest with you. If it's organized here I think Save-A-Lot goes in a different direction. And you know, I think we can do a great job for Save-A-Lot but let's face it, we are not irreplaceable.

[1] We find no merit in the Respondent's contention that our review of the judge's decision violates the Respondent's due process rights because the Board authorized the General Counsel, under Sec. 10(j) of the Act, to seek an injunction against the Respondent in Federal district court. The Board's 10(j) procedures do not deny a respondent due process. *Kessel Food Markets*, 287 NLRB 426, 426 fn. 2 (1987), enfd. 868 F.2d 881 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989); *Holland Rantos Co.*, 234 NLRB 726, 726 fn. 3 (1978), enfd. 583 F.2d 100 (3d Cir. 1978).

[2] 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.

We adopt, for the reasons stated in his decision, the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employees Steven Ianno and Shane McDonald about their support for the Union. We find it unnecessary to pass on the judge's additional finding that the Respondent unlawfully interrogated employee Robert Sansone, as any such finding would be cumulative and would not affect the remedy. There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(1) by interrogating employees Mansfield Teetsel, James Young, and Alan Field.

We also adopt the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by moving the employees' work location and by assisting employees in revoking their union authorization cards.

[3] We shall amend the judge's conclusions of law and remedy to conform to our findings. In addition, we find merit in the General Counsel's cross-exception to the judge's failure to order the Respondent to cease and desist from refusing to recognize and bargain with the Union. We shall modify the judge's recommended Order accordingly. See, e.g., *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB 633, 640–641 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed.Appx. 45 (D.C. Cir. 2012). In addition, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy, and we shall further modify the Order to reflect this remedial change. We shall also substitute a new notice to conform to our modified Order and in accordance with our decision in *Durham School Services, L.P.*, 360 NLRB No. 85 (2014).

[4] All dates are in 2013, unless otherwise indicated.

> I have said a lot about Save-A-Lot today. I'm not here to bash Save-A-Lot because again they could easily pull the business from us at any time. Over the years they have that right for whatever reason. It's one of our longer-term customers. But again they have always made it clear the environment they want to work in. And they said what's this about the Union? And when they select their carrier that's always one of the questions they ask. So you know, they're concerned about it. When they hear about drivers talking about work stoppages, that doesn't go over well.
>
> Again, my opinion is we got to continue to work together because if you guys organize there is a strong possibility we lose the business. I do not want anyone to tell me two months down the road why didn't you mention that to us.

Hogan also told employees that they would receive a raise of 2 cents per mile on July 1. This raise amounted to an increase of between $40 and $60 per week.

A number of employees asked questions at the June 19 meetings, including Charging Party Mansfield Teetsel. Teetsel complained that when he returned to work at the Respondent after a period working for another company, the Respondent rehired him at the mileage-compensation rate for new drivers. Teetsel stated, "You want people to be loyal, which I'm still you know . . . but that makes me bitter. I mean, I can see you keeping me down to the bottom for a year; it's going on two years now. So it makes you real bitter." Later at that meeting, Hogan told the employees that the Respondent did not have any union drivers, to which Teetsel replied, "Hmm, not now. Not yet."

On June 24, the Union filed an unfair labor practice charge over the pay increase announced on June 19**.** On June 29, the Respondent distributed a document to employees stating:

> We are pleased to announce that the 2 cent per mile increase that was announced earlier this month is in effect starting 7/1/13. Please understand however, that the Teamsters have challenged Hogan's ability to give this increase and they have asked the National Labor Relations Board to seek an injunction forcing Hogan to rescind it.

On July 8, the Respondent held an offsite meeting with its employees. Hogan told the employees:

> Somebody asked at the end of the last meeting well, what can the Union do for us and what would change if the Union got in here? And I said well, you know, first of all, any wages or benefits, we have to agree to any changes in the wages and benefits. The Union can't just arbitrarily change them; get them all that stuff. But to me that's all a moot point, because I think again, if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs. We've got one customer here and that customer, in my opinion, is going to go down the road and find an alternative solution.

At the hearing, Hogan testified that Save-A-Lot contracts only with nonunion carriers and that all of Save-A-Lot's distribution centers and owned-and-operated stores are nonunion. Hogan also testified that: in 1992, Save-A-Lot outsourced delivery operations in St. Louis to rid itself of the union; in 2003, Save-A-Lot was prepared to shut down its operations in Lansing, Michigan, if employees unionized; in 2010, after employees in Muncie, Indiana, began to organize, Save-A-Lot fired its distribution manager for failing to develop a good working relationship with his employees; and in 2010, Save-A-Lot and Hogan conducted a joint seminar informing employers how to remain union free.

*1. Hogan's June 19 and July 8 Statements About Job Losses*

We affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by threatening employees with the loss of their jobs if they joined or assisted the Union. The judge found that the "principal message that management conveyed to its employees was that its only customer in the area was Save-A-Lot; that this customer was nonunion and operated with nonunion carriers at other locations; and that if the employees chose union representation there was a high likelihood that Save-A-Lot would cancel its contract with Hogan thereby causing the employees in Coxsackie to lose their jobs." The judge further found that there was no evidence that anyone from Save-A-Lot ever informed the Respondent that it would cancel the contract if employees voted to unionize, or that anyone from the Respondent ever asked Save-A-Lot whether it would; that, at most, Save-A-Lot expressed concern about the possibility of future work stoppages. Applying *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the judge concluded that the statements made by the Respondent's representatives were "mere speculation and not based on objective facts."

We agree with the judge that the Respondent's predictions at the June 19 and July 8 meetings—that, if the Union came in, Save-A-Lot might terminate its contract, in which case the West Coxsackie drivers would lose their jobs—were not "carefully phrased on the basis of objec-

tive fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Id. at 618. The burden of proof is on the employer to demonstrate that its prediction is based on objective fact. See *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995). Moreover, as the Supreme Court has explained, in assessing the Respondent's statements we "must take into account the economic dependence of the employees on their employer[], and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 617.

Here, the purportedly objective facts cited by the Respondent show, at most, that Save-A-Lot does not like unions, does not currently employ unionized carriers, and may have taken steps in the past to avoid unions at other locations. But, as the judge pointed out, there is no evidence that anyone from Save-A-Lot ever informed the Respondent that it would—or even might—cancel its contract with the Respondent if its employees unionized.[5] Nor is there any evidence that Save-A-Lot had ever canceled a contract with a carrier when its employees unionized. Indeed, when Hogan contacted John Gerber, Save-A-Lot's executive vice president, to inform him of the Union's petition, Gerber merely indicated that Save-A-Lot would be willing to "support" the Respondent. Our dissenting colleague contends that, in context, Gerber's promise of support could only have referred to support in opposing the union drive. But even accepting the dissent's interpretation, Gerber's promise to support efforts to oppose the Union is a far cry from a threat—even an implicit one—to cease doing business with the Respondent if its employees unionized. In any event, Hogan admitted that employees *are* unionized at some of Save-A-Lot's franchised stores (including at least one to which the Respondent delivers) and at some stores operated by Save-A-Lot's parent corporation, SuperValu, which undercuts the Respondent's assertion that Save-A-Lot does not do business with unionized employees or companies.

The dissent also contends that Hogan explained to employees the "context of and basis for his predictions" when he "accurately referred to Save-A-Lot's ability to cancel its contract with the Respondent by stating that Save-A-Lot 'could easily pull the business from us at any time . . . . [T]hey have that right for whatever reason.'" But contrary to the dissent, Hogan's explanation was not accurate. The Respondent's contract with Save-A-Lot provides for termination by either party with "at least three (3) months' prior notice of such termination to the other Party and [if] the date set forth as the effective termination date is an anniversary of the Commencement Date (the 'Effective Date')."[6] In other words, the contract automatically renews each year unless either party opts to provide notice of termination 3 months before the anniversary date.[7] As the anniversary date of the Respondent's contract with Save-A-Lot is February 21, the earliest that Save-A-Lot could have terminated the contract, with 3 months' notice, was February 21, 2014—approximately 8 months after Hogan made his predictions. Hogan did not simply fail to provide employees with the "context of and basis for his predictions" of job loss when he told them that Save-A-Lot could "easily pull the business from [the Respondent] at any time"; he misled them as to the "probable consequences" of unionization by misrepresenting the contract. See *DTR Industries*, 350 NLRB 1132, 1133 (2007) (employer's prediction that unionizing would result in the loss of customers and a decrease in business violated the Act where, among other things, the employer did not provide employees with the "context and basis for" its prediction), enfd. 297 Fed.Appx. 487 (6th Cir. 2008); *More Truck Lines*, 336 NLRB 772, 773, 777 (2001) (where two rival unions were competing to represent employees, employer unlawfully threatened employees by telling them that the contract with the incumbent union would be "null and void" if a new union was selected because the statement "misrepresented" the employer's legal obligations), enfd. 324 F.3d 735 (D.C. Cir. 2003).

All we are left with is speculation about what Save-A-Lot *might* do based on Hogan's testimony about Save-A-Lot's supposed desire to remain union free and the fact that Save-A-Lot could conceivably terminate its contract with the Respondent 8 months later.[8] But Hogan did not merely tell the Respondent's employees that Save-A-Lot

[5] No Save-A-Lot representative testified at the hearing.

[6] Nothing in the contract expressly allows Save-A-Lot to void the contract because employees unionized.

[7] The dissent relies on *TNT Logistics North America*, 345 NLRB 290, 291 (2005). In that case, the majority, in finding the employer's statements protected by Sec. 8(c), examined the statements "in context, together with the comments the following day" by a higher-ranking official, who expressed uncertainty about what the employer's customer would do if employees unionized. The majority found that this uncertainty "would have underscored to all employees" that the customer's actions "were entirely outside the Employer's control." No subsequent expressions of uncertainty were made here, and Hogan's remarks were emphatic: when an employee asked if unionization would mean "we're all out of a job," Hogan stated, "I agree 110% . . . ." Further, Hogan repeated this clear, unequivocal message to employees on July 8 when he stated that "if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs."

[8] Under the dissent's theory, a customer's history of antiunionism coupled with a contract that is silent on unionization but terminable at some future date would supply an objective basis for virtually any employer prediction as to the effects of unionization.

desired to be union free and could terminate the contract in 8 months. Rather, he predicted that "if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs" and he agreed "110%" with an employee who said, "[i]f we go union, we're all out of a job." For the foregoing reasons, we agree with the judge that Hogan's predictions were not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel*, 395 U.S. at 618.

*2. The Wage Increase*

We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by promising and granting employees a wage increase in order to dissuade them from supporting the Union.[9] The judge rejected the Respondent's contention that the increase had been planned before the Union filed the election petition and was therefore lawful. Rather, he found that the Respondent did not decide to give a wage increase to the West Coxsackie drivers until after the Union filed the petition.

In determining whether a grant of benefits during a union organizing campaign is unlawful, the Board draws an inference of unlawful motivation and interference with protected rights. See *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995). An employer may rebut the inference by "coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits." *Lampi, L.L.C.,* 322 NLRB 502, 502 (1996) (citations omitted).

Here, the Respondent claims that it faced labor shortages at various facilities caused, in part, by the wage rates being offered to current and prospective drivers, which had not been increased in 3 years; in response, it decided to give wage increases at certain locations throughout the country. The Respondent announced the increase for West Coxsackie drivers on June 19 and implemented it on July 1. It also granted increases to employees at some other locations on May 1, June 1, June 5, June 29, and July 1.[10] Employees at most of these locations, including West Coxsackie, received an increase of 2 cents per mile, but employees at other locations received different amounts.

As the judge acknowledged, it is clear that the Respondent began *to consider* granting wage increases at various facilities, including West Coxsackie, before it became aware of the Union's organizing drive at West Coxsackie. But there is no documentary evidence or credited testimony supporting the Respondent's contention that it had decided, before the Union filed the petition on June 3, that the West Coxsackie drivers would receive an increase, the amount of the increase, or when the employees would receive it.[11]

The Respondent and the dissent point to Hogan's testimony that he decided in May to grant a wage increase to employees at three locations, including West Coxsackie. The judge did not explicitly address this testimony, but his findings make clear that he implicitly discredited it. In any event, even assuming its truth, Hogan's testimony establishes only that the Respondent made a general decision in May to grant an increase to the West Coxsackie employees. Nothing in his testimony establishes that he decided in May when the increase would be implemented or the amount of the increase. Indeed, immediately after stating that he made the decision to grant an increase in May, Hogan added that the "next step" was to "figure out when we're going to institute the increase" and "work up an analysis on the impact to the company."[12]

The dissent and the Respondent also point to a June 13 email by Director of Operations Charles Johnson, which set forth three possible wage increases—from 1 cent to 3 cents per mile—and their cost to the Respondent. But that document actually proves that the Respondent did not finalize its decision to give a wage increase to the

[9] We find merit in the General Counsel's cross-exception to the judge's failure to find that the Respondent's promise and grant of the wage increase also violated Sec. 8(a)(3). We agree with the General Counsel that this omission was "inadvertent" in light of the judge's finding, which we affirm, that the Respondent promised and granted the increase "in order to dissuade employees from supporting the Union." See, e.g., *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961–962, 965 (2004) (employer violated Sec. 8(a)(3) and (1) by "[g]ranting wage increases designed to undermine the employees' support for the [u]nion").

We also find merit in the General Counsel's cross-exception to the judge's failure to find that the Respondent violated Sec. 8(a)(5) and (1) by granting the July 1 wage increase without affording the Union notice and an opportunity to bargain. Unilateral changes made after a *Gissel* bargaining obligation has attached violate Sec. 8(a)(5) and (1). See, e.g., *Stevens Creek*, supra, at 639, citing *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000), enfd. 24 Fed.Appx. 1 (D.C. Cir. 2001). Here, the judge found, and we agree, that a bargaining order was warranted retroactive to June 13, the date the Union obtained majority status.

[10] Employees at five additional locations received increases between July 11 and October 1.

[11] Tom Lansing, the Respondent's vice president, admitted that there was no "nationwide" increase, and agreed with the judge's characterization of the Respondent's increases as "depend[ing] upon the circumstances at [each] location, a[nd] supply and demand circumstances."

[12] With regard to the amount of the raise, the Respondent's brief points to page 722 of the hearing transcript, which it claims shows that "the Company had previously determined to implement a 2-cent/mile increase at Coxsackie." But Hogan's testimony there is that "[i]t wasn't a firm decision."

West Coxsackie drivers until, at the earliest, 10 days after the Union filed the petition. For the foregoing reasons, we agree with the judge that the Respondent has failed to rebut the inference that the wage increase announced on June 19 was unlawfully motivated.[13]

We further find, contrary to the judge, that the Respondent violated Section 8(a)(1) by blaming the Union for attempting to take away the unlawful wage increase announced by the Respondent on June 19. The judge found that the Respondent's communication "truthfully announced that the Union had filed charges with the NLRB challenging the legality of the increases." Finding that, "[a]t most, it may have misrepresented the remedy" because the Board does not typically require a company to rescind a wage increase in such cases, the judge concluded that the Respondent's conduct did "not rise to the level of unlawful interference." We disagree. As explained above, we adopt the judge's finding that the Respondent's June 19 announcement of the wage increase violated the Act. By accusing the Union of trying to take the increase away, the June 29 message would reasonably tend to coerce employees to refrain from voting for the Union to avoid placing their unlawful raises in jeopardy.[14] See *Wellstream Corp.,* 313 NLRB 698, 707 (1994).

*3. Teetsel's Effective Discharge*

We also adopt, for the reasons stated in his decision, the judge's finding that the Respondent violated Section 8(a)(3) and (1) by effectively discharging Teetsel by refusing to allow him to rescind his resignation. On exceptions, the Respondent argues that the General Counsel did not carry his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), because he failed to prove that the Respondent knew of Teetsel's alleged union activity. The Respondent also contends that, even assuming it had such knowledge, it did not violate the Act because it had a legitimate, nondiscriminatory reason for its conduct. Specifically, the Respondent points to testimony by Vice President Lansing that "it was very common knowledge that [Teetsel] was unhappy [with his pay] . . . . So I thought [the company] would be better off on getting someone new in there that would appreciate the job they had and would want to stay."[15]

We find no merit in the Respondent's contentions. A representation election was to take place on July 12. At a captive-audience meeting on June 19, where Hogan told employees that he was "strongly against" the Union and asked them to "vote no," Teetsel complained that he was "bitter" about his pay because the Respondent rehired him at the new employee wage rate when he returned to the Respondent in 2011 after working for another company. Later at that meeting, after Hogan mentioned that the Respondent did not have any union drivers, Teetsel replied, "Hmm, not now. Not yet." Given the antiunion theme of the meeting, the Respondent would reasonably have interpreted Teetsel's comments as prounion sentiments. Moreover, the timing of the Respondent's refusal to allow Teetsel to rescind his resignation—only 6 days before the scheduled election—suggests that it was motivated by Teetsel's protected activity. See *Masland Industries*, 311 NLRB 184, 197 (1993), citing *NLRB* v. *Rain-Ware, Inc.* 732 F.2d 1349, 1354 (7th Cir. 1984). For these reasons, we find that the General Counsel met his initial burden under *Wright Line* by proving that Teetsel engaged in protected or union activity, that the Respondent was aware of that activity, and that the Respondent's action was motivated by antiunion animus.

We further find that the Respondent has not proved that it would have discharged Teetsel in the absence of his union activity. As detailed in the judge's decision, when Teetsel attempted to rescind his resignation, the Respondent had a shortage of drivers at the West Coxsackie location and was offering bonuses to new drivers and any employee who referred a new driver. These facts undermine the Respondent's assertion that it "would be better off on getting someone new in there

[13] We do not agree with the judge to the extent that he found the violation based solely on the fact that the Respondent had not decided the *amount* of the wage increase before the union filed the petition on June 3. As explained above, the credited evidence and the weight of the judge's findings support our finding that the Respondent did not make a final decision to grant the increase to the West Coxsackie drivers until after that date.

[14] Citing *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982), the dissent contends that the Respondent's statement was lawful because the Board does not "probe into the truth or falsity of the parties' campaign statements." But the *Midland* rule, which holds that the Board will not set aside an election because of a party's misleading campaign propaganda, does not apply where, as here, the campaign statement contains a "threat of reprisal or force or promise of benefit." *Gissel*, 395 U.S. at 618.

[15] The dissent contends that Teetsel's June 19 comments did not constitute protected activity because "there is no evidence that any other employees were in Teetsel's predicament or even expressed support for his personal gripe." This argument was not raised by the Respondent on exceptions and it is therefore not properly before us. We would reach the same result, however, even if our colleague's argument were properly before us. As mentioned, the Respondent held the June 19 captive-audience meetings to make clear that it opposed the Union. In such circumstances, Teetsel was engaged in concerted prounion activity when, at one of those meetings, he told Hogan that he was "bitter" because the Respondent rehired him at a lower wage rate and then said "not yet" after Hogan mentioned that the Respondent did not have any union drivers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984) (Sec. 7 of the Act "defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities").

that would appreciate the job." Moreover, it is noteworthy that the Respondent's own stated reason for refusing Teetsel's request—that it was "common knowledge" that he was "unhappy"—is consistent with the judge's finding that the Respondent suspected Teetsel would be voting for the Union.

*4. The Bargaining Order*

The judge found that the Board's traditional remedies cannot alone erase the coercive effects of the Respondent's conduct, and that a bargaining order is therefore necessary. We agree.

In *Gissel Packing,* 395 U.S. at 613–614, 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." Id. at 613. 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; *California Gas Transport, Inc.*, 347 NLRB 1314, 1323 (2006), enfd. 507 F.3d 847 (5th Cir. 2007).

Although the judge did not state which *Gissel* category this case falls under, we find that it meets the standard for category II.[16] In reaching this conclusion, we have examined the "seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices." *Intermet Stevensville*, 350 NLRB 1349, 1359 (2007) (citations omitted).

The Respondent argues that the Board's traditional remedies could adequately remedy the violations and that the case relied on by the judge, *Stevens Creek Chrysler Jeep Dodge*, supra, 357 NLRB 633, is distinguishable. Specifically, the Respondent argues that, unlike the "extensive list of unfair labor practices" in that case, its "'most egregious' action consisted of its President giving his heart-felt opinion as to what its sole customer might do in the event of unionization"; its "second 'most egregious' action is Hogan's decision to continue implementing a pay increase it decided upon before it had knowledge of organizing"; and it did not target the Union's main organizer, as, "[w]ithout question, Teetsel quit his job of his own volition and the Company acted properly in not permitting him to rescind [his resignation]." The Respondent also points out that the unit in this case is twice as big as the unit in *Stevens Creek*.

Contrary to the Respondent's contention, however, *Stevens Creek* is on point, and the Respondent's conduct is well within the bounds of what the Board has found to warrant a category II *Gissel* order. The Respondent here committed three "hallmark" violations, the coercive effects of which tend to "destroy election conditions, and . . . persist for longer periods of time than other unfair labor practices." *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008), citing *Gissel*, 395 U.S. at 611 fn. 31.

First, like the employer in *Stevens Creek*, the Respondent threatened employees with job loss. "Threats of plant closure and job loss . . . 'are among the most flagrant of unfair labor practices and are likely to affect the election conditions negatively for an extended period of time.'" 348 NLRB at 380, quoting *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003).

Second, the Respondent unlawfully discharged an employee for union activity. Teetsel was not a leader of the Union's campaign. But like the discharged employee in *Stevens Creek*, the Respondent refused to allow him to rescind his resignation after he challenged the Respondent's president in front of other employees at a captive-audience meeting, and because it suspected that he would be voting for the Union in the upcoming election. In these circumstances, Teetsel's discharge would likely "have a lasting inhibitive effect on a substantial percentage of the work force." *Stevens Creek*, above, at 638, quoting *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212–213 (2d Cir. 1980).

Third, like the employer in *Stevens Creek*, the Respondent granted employees a wage increase in order to dissuade them from supporting the Union. This violation has "a particularly longlasting effect on employees and [is] difficult to remedy by traditional means not only because of [its] significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." *Evergreen America*, 348 NLRB at 180, quoting *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996), enfd. 137 F.3d 936 (7th Cir. 1998).

Furthermore, the Respondent accentuated the coercive effect of these violations by unlawfully interrogating employees about their support for the Union and by blaming the Union for attempting to take away the unlawful wage increase. Finally, the gravity and coercive

[16] The Respondent does not dispute the judge's finding that the Union had achieved majority status by June 13, 2013.

impact of all the violations are heightened by the relatively small size of the unit (29 employees), by the fact that two of the three "hallmark" violations occurred at captive-audience meetings involving all employees, and by the involvement of the Respondent's highest management officials. See *Stevens Creek*, above, at 639.

In evaluating the appropriateness of a *Gissel* order, we have considered the inadequacy of the Board's traditional remedies to remedy the Respondent's conduct in this case. Given the severity of the violations, the possibility of erasing the effects of the Respondent's unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight. Merely requiring the Respondent to refrain from unlawful conduct in the future, to reinstate Teetsel with backpay, and to post a notice would not, in our view, be sufficient to dispel the coercive atmosphere that this Respondent has created.

We have also duly considered the Section 7 rights of all employees involved. As the Board has stated previously, "the *Gissel* opinion itself reflects a careful balancing of the employees' Section 7 rights 'to bargain collectively' and 'to refrain from' such activity." *Mercedes Benz of Orland Park*, 333 NLRB 1017, 1019 (2001), enfd. 309 F.3d 452 (7th Cir. 2002). The rights of the Respondent's employees favoring unionization, who expressed their views by signing authorization cards, are protected by the bargaining order. The rights of those employees opposing the Union are safeguarded by their access to the Board's decertification procedure under Section 9(c)(1) of the Act, following a reasonable period of time to allow the collective-bargaining relationship a fair chance of success. Id. For all of these reasons, we agree with the judge that a *Gissel* order is warranted.[17]

[17] On December 2, 2014, the Respondent filed a motion to reopen the record for the purpose of adducing evidence of alleged substantial employee turnover and expansion of the workforce since the judge imposed the bargaining order, which, it contends, renders that order presently inappropriate. According to the affidavit of Vice President Lansing and attached exhibits, only 18 of the Respondent's 48 current employees (37.5%) were employed in June 2013 when the Union filed its petition, and only 9 of the 18 employees who signed union-authorization cards are presently employed.

Having duly considered the matter, we deny the Respondent's motion to reopen the record. The Board traditionally does not consider turnover among bargaining unit employees in determining whether a *Gissel* order is appropriate. See *Garvey Marine, Inc.*, 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001), citing *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990). Rather, the Board has consistently held that the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed, and that to hold otherwise would reward rather than deter unlawful conduct. See *State Materials, Inc.*, 328 NLRB 1317, 1318 (1999), citing *Highland Plastics, Inc.*, 256 NLRB 146, 147 (1981), and cases cited there. Consistent with this policy, the Respondent's evidence of alleged employee turnover and expansion of the workforce since the unfair labor practices were committed is irrelevant to the issuance of the *Gissel* bargaining order.

Nevertheless, even if we were to consider the Respondent's evidence, it would not change the result. As explained above, the Respondent committed three hallmark violations of the Act, which are likely to affect election conditions in the bargaining unit for an extended time. Although some of the employees who were employed at the time of the Respondent's unlawful conduct may have left the workforce for reasons unrelated to that conduct, a substantial number (18 out of 48) of unit employees who *would* recall those events remain in the Respondent's employ. Those remaining employees are likely to have conveyed to any new employees what transpired during the Union's organizing campaign in June and July 2013. See *State Materials*, 328 NLRB at 1317–1318. As the United States Court of Appeals for the Fifth Circuit has observed, "Practices 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." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978). Accordingly, even if we were to accept the facts asserted by the Respondent concerning employee turnover, those facts would not require a different result.

## AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 2.

"2. By promising and granting wage increases in order to dissuade employees from voting for the Union, the Respondent has violated Section 8(a)(3) and (1) of the Act.

2. Insert the following as Conclusions of Law 5 and 6 and renumber the subsequent paragraphs.

"5. By blaming the Union for attempting to take away the wage increase announced by the Respondent on June 19, the Respondent has violated Section 8(a)(1) of the Act."

"6. By granting the July 1 wage increase without affording the Union notice and an opportunity to bargain, the Respondent has violated Section 8(a)(5) and (1) of the Act."

## AMENDED REMEDY

In addition to the remedies provided in the judge's decision, we shall order the Respondent, on request, to meet at reasonable times and bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

## ORDER

The National Labor Relations Board orders that the Respondent, Hogan Transports, Inc., West Coxsackie, New York, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

(b) Promising and granting wage increases in order to dissuade employees from supporting the Union.

(c) Interrogating employees about their union membership or support.

(d) Discharging employees because of their union membership or support or for engaging in concerted protected activity protected by Section 7 of the Act.

(e) Blaming the Union for attempting to take away the unlawful wage increase announced on June 19, 2013.

(f) Refusing to recognize and bargain in good faith with Teamsters Local 294, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time drivers employed by Respondent at its West Coxsackie, New York location; excluding all guards and all professional employees and supervisors as defined in the Act.

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

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

(a) On request by the Union, rescind the unlawful wage increase granted to unit employees on or about July 1, 2013.

(b) Within 14 days from the date of this Order, offer Mansfield Teetsel 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.

(c) Make Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

(d) Compensate Mansfield Teetsel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

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

(f) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(g) 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.

(h) Within 14 days after service by the Region, post at its West Coxsackie facility copies of the attached Notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by 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 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 notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility 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 June 10, 2013.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 19, 2016

[18] 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."

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I part ways with my colleagues on several issues in this case. Specifically, and for the reasons explained below, I believe that the Respondent engaged in lawful conduct when it (1) predicted, based on objective facts, that its only customer might terminate its contract with the Respondent if the Union prevailed in an upcoming election; (2) granted employees at multiple facilities a wage increase that was decided upon *before* the Respondent learned of the union organizing drive at the facility at issue here, at a time that happened to coincide with the preelection period; and (3) refused the eleventh-hour request of an employee who expressed a desire to rescind his resignation after he resigned, was rehired, and then resigned a second time. Accordingly, I would dismiss these complaint allegations, along with others related to them as detailed below.[1]

*1. Respondent's lawful predictions about the impact of unionization*

The Respondent is engaged in the trucking industry and employs a nationwide workforce of between 1300 and 1400 drivers. This case involves the Respondent's 29 drivers at its facility in West Coxsackie, New York, where they provide trucking services for Save-A-Lot, a nationwide chain of discount supermarkets.[2] Save-A-Lot's West Coxsackie distribution center warehouses food products for its retail stores throughout the Northeast. To service its contract with Save-A-Lot, the Respondent maintained a facility adjacent to the distribution center. Save-A-Lot is the Respondent's only customer in West Coxsackie.

The record clearly supports the judge's finding that Save-A-Lot maintained an "expressed hostility to unionization." Respondent's president, David Hogan, testified that since 1988, Save-A-Lot has repeatedly expressed to him its intent that it—and its transportation providers—remain union free. Hogan explained that Save-A-Lot has boasted to him that its employee handbook states that Save-A-Lot wants "to be a union free environment." There is no record evidence that any of the Respondent's facilities have ever been unionized.

Hogan testified without contradiction about multiple instances when Save-A-Lot has made good on its stated intent to remain union free. In 1992, Save-A-Lot subcontracted trucking services at a St. Louis location after employees there unionized. In 2003, a union commenced an organizing campaign at Save-A-Lot's Lansing, Michigan distribution center. At that time, a director of transportation for Save-A-Lot told Hogan that "depending on how far the organizing attempt goes," Save-A-Lot intended to either close that distribution center or consolidate it with a nonunion facility in Muncie, Indiana, where the Respondent provided nonunion trucking services.[3] In 2010, an executive vice president for Save-A-Lot told Hogan that Save-A-Lot terminated a Muncie distribution center manager for failing to establish a good working relationship with employees because a union attempted to organize there. Also in 2010, the Respondent and Save-A-Lot conducted a joint seminar for other employers on how they could remain union free.[4] It is thus no surprise that none of the 1200 stores owned and operated by Save-A-Lot has unionized employees. Even more to the point for purposes of the instant case, Save-A-Lot only uses nonunion carriers.[5]

[1] I agree with my colleagues that the Respondent violated Sec. 8(a)(1) by coercively interrogating employees Steve Ianno and Shane McDonald. I further agree with my colleagues that it is unnecessary to pass on the judge's additional finding that the Respondent unlawfully interrogated employee Robert Sansone.

[2] Charles Johnson, Respondent's director of operations, testified without contradiction that Save-A-Lot owns and operates 1200 stores and 16 distribution centers. The Respondent provides trucking services at eight of Save-A-Lot's distribution centers.

[3] Hogan further testified that the director of transportation explained to him that "[i]f we have an issue where we think that there's an organizing attempt, we can't be union. So we're going to have a back up plan. And they said that Muncie was their back up plan for . . . Lansing. They were very outspoken."

[4] At the December 2013 hearing in this case, Director of Operations Johnson testified that within the prior 6 months, a Save-A-Lot regional manager had told him that Save-A-Lot had initiated anti-union campaigns at several of its stores.

[5] Save-A-Lot also acts as a franchisor, and employees at a very small number of franchised Save-A-Lot stores—owned and operated by franchisees, not by Save-A-Lot—are unionized. (Hogan testified that "one or two" franchisee stores were unionized; Johnson testified a "handful" were unionized.) In addition, Super Valu, the parent company of Save-A-Lot, had some union operations. There is no allegation or record evidence that Save-A-Lot is a single or joint employer with any of its franchisees or Super Valu. Nor is there any evidence that Save-A-Lot controls or has the right to control its franchisees' labor relations or that Super Valu controls or has the right to control Save-A-Lot's labor relations or its choice of carriers. Thus, the fact that Super Valu and "one or two" or a "handful" of franchised Save-A-Lot stores have some union-represented employees is irrelevant. As to operations directly within Save-A-Lot's control (the 1200 stores it owns and operates) and carriers with which Save-A-Lot chooses to contract, Save-A-Lot has met its explicit goal of remaining union free.

In May 2013, the Union began an organizing campaign at the Respondent's West Coxsackie facility.[6] The Respondent learned of that campaign on June 3, when the Union filed an election petition. The parties scheduled an election for July 12. Around this time, Hogan notified Save-A-Lot Executive Vice President John Gerber about the upcoming election. Gerber asked that Hogan update him about the progress of the campaign and stated, "We'll support you any way that we can. If there's anything that we need to do." Because the Respondent's trucking operations were located on the same property as Save-A-Lot's distribution center, Hogan expressed to Gerber a concern that campaign-related labor disputes might disrupt Save-A-Lot's operations, and Hogan suggested moving the Respondent's operations to property across the street. Gerber agreed.[7]

The issue here is whether the Respondent made lawful predictions or unlawful threats about the effect that unionization would have on its West Coxsackie operations.[8] This issue centers on the following remarks made by Hogan during a June 19 employee meeting:[9]

> Hogan: I can tell you Save-A-Lot made this clear to me, we don't have any transportation providers who will deliver to our stores in the country that are union. So they said you need to keep that in mind when you guys are working through the issue here. I don't know how to be more direct, but I think our business here is in jeopardy if the union comes in. It's not a threat, it's just my opinion with my discussions with Save-A-Lot when they remind me of how they operate. They don't want to operate in union environment, all that stuff.
>
> Employee: [I]f we go union, we're all out of a job.
>
> Hogan: I agree 110% with that and I am just being honest with you. If it's organized here I think Save-A-Lot goes in a different direction. And you know, I think we can do a great job for Save-A-Lot but let's face it, we are not irreplaceable. I have said a lot about Save-A-Lot today. I'm not here to bash Save-A-Lot because again they could easily pull the business from us at any time. Over the years they have that right for whatever reason. It's one of our longer term customers. But again they have always made it clear the environment they want to work in. And they said what's this about the Union? And when they select their carrier that's always one of the questions they ask. So you know, they're concerned about it. When they hear about drivers talking about work stoppage, that doesn't go over well. [A]gain, my opinion is we got to continue to work together because if you guys organize there is a strong possibility we lose the business. I do not want anyone to tell me two months down the road why didn't you mention that to us.

In addition, at a July 8 meeting with employees, Hogan briefly reiterated his earlier remarks, stating that "if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs. We've got one customer here and that customer, in my opinion, is going to go down the road and find an alternative solution."

The judge found that Hogan was "careful to couch [his] message in terms of what could happen" and that "this is what they [the Respondent] believed the customer [Save-A-Lot] would do if the employees voted for the Union." The judge noted that the Respondent did not tell employees that it *would* cease operating the facility if employees voted for the Union or that it *would* discharge employees for supporting the Union. Nevertheless, the judge found that Hogan's assertions were not based on objective facts but on mere speculation. Accordingly, he found that Hogan's remarks tended to interfere with, restrain or coerce employees in the exercise of their Section 7 right to unionize in violation of Section 8(a)(1) of the Act. My colleagues agree with the judge's finding. I do not. Having carefully reviewed the entire record, I would find that Hogan's remarks were predictions based on objective facts and thus did not violate the Act.

The applicable standard is firmly grounded in the Act itself. NLRA Section 8(c) protects the free-speech right of all parties that are subject to the Act. It provides that "[t]he expressing of any views, argument, or opinion . . . *shall not constitute or be evidence of an unfair labor practice* . . . if such expression contains *no threat of reprisal or force or promise of benefit*."[10] In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court explained how an employer may remain within the protection of Section 8(c) when it predicts the effects it believes unionization will have on its company. The Court said this:

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[6] All subsequent dates are in 2013 unless otherwise indicated.

[7] I join my colleagues in adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by moving its operations across the street. I also join my colleagues in adopting the judge's dismissal of the allegation that the Respondent helped employees revoke their union authorization cards.

[8] The distinction between lawful "predictions" and unlawful "threats" is based on the analysis of the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), quoted in the text accompanying fn. 11, infra.

[9] An employee recorded the meeting on his cell phone, so we have a verbatim record of what Hogan said.

[10] Sec. 8(c) (emphasis added).

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "*threat* of reprisal or force or promise of benefit." *He may even make a prediction as to the precise effects he believes unionization will have on his company*. In such a case, however, the prediction *must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control*.[11]

Thus, the question we must answer is whether Hogan's predictions concerning what Save-A-Lot—the only customer the Respondent serviced out of its West Coxsackie facility—might do if the Respondent's drivers unionized were based on objective fact to convey Hogan's belief as to demonstrably probable consequences beyond his control. I believe they were, and closely applicable precedent supports my conclusion that Hogan's remarks were lawful.

In *TNT Logistics North America, Inc.*, 345 NLRB 290 (2005), the Board found that the respondent trucking company did not violate the Act when its supervisors told an employee that its primary customer, Home Depot, would cancel its contract if employees voted to unionize. Id. at 290–291. The supervisors stated that "Home Depot doesn't like the Union; that if the Union comes in we wouldn't have a job with Home Depot," and they explained that "Home Depot does not have any union carriers doing home delivery services." Id. at 290. The Board found that the supervisors had an objective basis for their prediction based on three uncontroverted facts: (1) Home Depot did not like using unionized carriers, (2) Home Depot did not use unionized carriers, and (3) the company's contract with Home Depot was set to expire in five months. Id. at 291. The Board noted that Home Depot's actions "were beyond the Employer's control" and that the prediction did not include "threats . . . or comments against the [u]nion." Id.

The uncontroverted facts here are strikingly similar to those in *TNT Logistics*. It is undisputed that Save-A-Lot does not like using unionized carriers and has never used unionized carriers. Hogan testified without contradiction that since 1988—i.e., over the course of *25 years* as of the time of the events at issue in this case—Save-A-Lot had consistently communicated to him that it would not permit unionization among its employees and will only work with nonunion carriers. When Hogan reported the organizing campaign to Save-A-Lot, Save-A-Lot neither said nor did anything to contradict this oft-repeated and consistent message. Its executive vice president promised to "support [the Respondent] in any way that we can" (a promise that, in context, could only have meant support in opposing the union drive), he requested that Hogan keep him updated concerning the union campaign, and he agreed that the Respondent should take the significant step of relocating its facility to avoid the possibility of disrupting Save-A-Lot's operations. Save-A-Lot's well-established "hostility to unionization," in the judge's own words, is further confirmed by Director of Operations Johnson's testimony that a Save-A-Lot regional manager told him that Save-A-Lot had initiated anti-union campaigns at several of its stores. And, like the situation faced by TNT Logistics in its relationship with Home Depot, where the parties' contract was set to expire in 5 months, the record here establishes that Save-A-Lot could easily terminate its business relationship with the Respondent. Under the parties' contract, Save-A-Lot could provide notice of termination, without cause, at any time.[12] In this regard, Hogan testified without contradiction that if Save-A-Lot moved to terminate the West Coxsackie contract, the Respondent would have little leverage to negotiate with Save-A-Lot given the competitive nature of the trucking industry and the Respondent's desire to maintain its other Save-A-Lot contracts. Finally, as the judge correctly noted, Hogan's remarks did not include any threats that the Respondent would close the facility or discharge employees for supporting the Union.

There are additional facts here that further strengthen the rationale for finding Hogan's June 19 and July 8 remarks lawful, making this an even clearer case than *TNT Logistics*. Hogan provided specific examples of occasions when Save-A-Lot has done more than merely communicate a general dislike of unions and a disinclination to use unionized carriers. He testified that in 1992, Save-A-Lot outsourced trucking services after drivers at a St. Louis facility unionized. He testified that in 2003, Save-A-Lot told Hogan that if employees at its Lansing, Michigan distribution center unionized, it was prepared

[11] 395 U.S. at 618 (emphasis added).

[12] Although Save-A-Lot could give notice of termination at any time, the contract provides that any termination would be effective on its anniversary date, so long as at least 3 months' written notice had been given. In this regard, the contract states that it "continues until either Party terminates this Agreement," and termination is accomplished "if the terminating Party gives at least three (3) months' prior written notice of such termination to the other Party and the date set forth as the effective termination date is an anniversary of the Commencement Date." Aside from these temporal limitations, the contract places no limits on either party's ability to terminate it. Thus, if the Respondent's employees unionized, Save-A-Lot was free to give notice of termination immediately, and contract termination would be effective the following February.

to shut down that facility. He testified that in 2010, Save-A-Lot terminated a manager because employees at his location attempted to organize. Finally, Hogan testified that Save-A-Lot had conducted a seminar with the Respondent to teach other employers how to remain union free.

Moreover, in his remarks to employees, Hogan furnished support for his predictions regarding the probable consequences if employees unionized. He referred to his "discussions with Save-A-Lot when they remind me of how they operate." He accurately explained that Save-A-Lot has no "transportation providers who will deliver to [their] stores in the country that are union," and that Save-A-Lot does not "want to operate in [a] union environment." He referred to the 2003 Lansing, Michigan incident by noting that "[w]hen they hear about drivers talking about work stoppage, that doesn't go over well." Hogan also accurately referred to Save-A-Lot's ability to cancel its contract with the Respondent by stating that Save-A-Lot "could easily pull the business from us at any time . . . . [T]hey have that right for whatever reason." Thus, Hogan explained to employees the context of and basis for his predictions. Cf. *DTR Industries*, 350 NLRB 1132, 1133 (2007) (finding that employer's prediction of job loss violated the Act where, among other things, the employer did not provide employees with the "context and basis for" its prediction).

In sum, I believe that these undisputed facts furnished an objective basis for Hogan's June 19 statements that "our business is in jeopardy if the union comes in" and "[i]f it's organized here I think Save-A-Lot goes in a different direction."[13] These were not threats, but reasonable predictions based on objective facts of all-too-probable consequences entirely within Save-A-Lot's control and beyond Hogan's control.[14] Accordingly, I would reverse the judge's finding of an unfair labor practice.[15]

*2. The wage increase*

During the three years prior to 2013, the Respondent did not increase wages at any of its facilities. By the spring of 2013, the Respondent faced labor shortages at many of its facilities, including West Coxsackie, in part because its wages were not competitive. Director of Op-

[13] I also believe that these same undisputed facts furnished an objective basis for Hogan's subsequent July 8 statement to employees, which included the prediction that Save-A-Lot would "go down the road and find an alternative solution" if employees unionized. As the judge found, the import of Hogan's July 8 statement was "the same as [Hogan's statement at] the previous meeting held on June 19."

[14] In finding Hogan's predictions unlawful, my colleagues say there is no evidence that anyone from Save-A-Lot ever told the Respondent that it would cancel the contract if Respondent's employees unionized. Such a declaration is not necessary to render Hogan's statements lawful. See *TNT Logistics*, supra (finding respondent's prediction that employees "wouldn't have a job with Home Depot" if they unionized lawful, absent evidence that Home Depot told respondent it would cancel their contract if the union came in). If Save-A-Lot had told Hogan that it would cancel their contract, Hogan could have made an *announcement* to the drivers regarding the *certain* consequences of unionization. Under the applicable standard, however, the issue is whether Hogan's *predictions* were based on objective fact to convey his belief as to *probable* consequences beyond his control. *Gissel*, supra. Probability, not certainty, is the standard; and for the reasons set forth in the text, I believe Hogan's predictions were based on objective facts, and the consequences if the drivers unionized were all too probable.

My colleagues also emphasize two isolated portions of Hogan's remarks: that Save-A-Lot could "pull the business . . . at any time," and that Hogan agreed "110%" with an employee's statement that "if we go union, we're all out of a job." I disagree that these statements warrant an unfair labor practice finding. As to the first statement, although any termination of the relationship by Save-A-Lot would be effective on the anniversary date of the contract (not "at any time"), Save-A-Lot could give notice of termination at any time. The contract requires that Save-A-Lot give "at least" 3 months' notice of its intent to terminate the contract. Thus, if the Respondent's drivers unionize, Save-A-Lot could immediately announce its intent to "pull the business" from the Respondent. Hogan also stated that Save-A-Lot can terminate the contract for any reason, which is corroborated by the absence from the contract of any "cause" requirement for termination on at least 3 months' notice. As to Hogan's "110%" remark, he did not offer it independently but rather in response to a statement made by an employee, and he surrounded that remark with more qualified statements: "*I think* Save-A-Lot goes in a different direction"; "*I think* our business here is in jeopardy"; "*it's just my opinion*"; and there is "a strong *possibility* we lose the business" (emphasis added). In this context, it was lawful for Hogan to give an affirmative answer to the question posed by the employee, and his expression of opinion is not rendered unlawful merely because he said that he agreed "110%" rather than providing some other affirmative response. Regardless of the precise language he used, it is uncontroverted that Hogan carefully qualified any suggestion that unionization would automatically lead to job loss. Particularly when viewed in context—i.e., Hogan's more nuanced statements—the isolated remarks emphasized by my colleagues do not render unlawful Hogan's reasonable and objectively based predictions.

[15] See also *Curwood, Inc.*, 339 NLRB 1137 (2003), enfd. in part, vacated in part and remanded 397 F.3d 548 (7th Cir. 2005); *Tri-Cast, Inc.*, 274 NLRB 377 (1985). In *Curwood*, an employer sent employees a preelection letter stating: "Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That's why we say remaining union-free affects our business and our livelihood." 339 NLRB at 1137. The Board found the letter lawful because, consistent with their past practice, several of the employer's customers raised concerns about the impact of potential work stoppages, underscoring "just how much of a concern such disruptions really are for those customers." Id. at 1137–1138. In *Tri-Cast*, an employer told employees that if, as a result of unionization, it had to "bid higher or customers feel threatened because of delivery cancellations (union strikes) we lose business—and jobs." 274 NLRB at 378. The employer also stated that it could not "stay healthy with union restrictions" and would "lose the flexibility we need to . . . beat the competition." Id. The Board found no objectionable conduct in "[m]aking these reasonable possibilities known to employees," explaining that "[h]igher bids or customer feelings of dissatisfaction because of problems caused by union strikes *can* lead to lost business and lost jobs." Id. (emphasis in original).

erations Johnson testified that because the Respondent was having difficulty recruiting and retaining drivers at its West Coxsackie facility, it began offering several incentives there, including bonuses for employees who referred new drivers and sign-up bonuses for new drivers. Hogan testified that in late April to early May, the Respondent decided to increase wages at various locations throughout the country, including West Coxsackie. The judge found that there was "no doubt that the Respondent began to seriously consider wage increases for employees at its various facilities before May 2013," but the Respondent did more than simply "seriously consider" wage increases. It is undisputed that on May 1, it began implementing wage increases at multiple facilities. St. Louis, Missouri drivers received a 2-cents-per-mile increase on May 1; Austinburg, Ohio drivers received a 1-cent-per-mile increase on June 1. A May 4 e-mail from Operations Manager Jim Lauda to Director of Operations Johnson reveals that a West Coxsackie driver was aware of the Austinburg wage increase nearly a month before it happened. Hogan testified that the Respondent decided before June 3, when it learned of the union organizing drive, to grant a wage increase at West Coxsackie. By June 13, the Respondent was determining the amount of that increase: a June 13 email shows Johnson considering an increase of 1 to 3 cents per mile. On June 19, the Respondent formally announced a 2-cents-per-mile increase at West Coxsackie, which it implemented July 1. After July 1, the Respondent continued to implement wage increases at additional facilities. The record includes a September 17 email showing that the Respondent granted wage increases at a total of 13 facilities. For the most part, employees received either a 2 percent or 2-cents-per-mile increase.

The judge found that the Respondent promised and granted the West Coxsackie wage increase to dissuade employees from supporting the Union, in violation of Section 8(a)(1). He acknowledged Hogan's testimony that the Respondent decided to grant the West Coxsackie wage increase prior to June 3, and he did not discredit that testimony. He faulted the Respondent for not offering documentary evidence to corroborate Hogan's testimony, but the mere fact that *more* evidence regarding the timing of the decision was not introduced does not render Hogan's sworn, uncontradicted testimony insufficient to support a finding that the decision was made before June 3. And the judge apparently accepted Hogan's testimony regarding the timing of the decision to *grant* the West Coxsackie increase, since he based his unfair labor practice finding on evidence that the Respondent settled on the precise *amount* of the West Coxsackie increase after June 3. The relevant question, however, is when the decision to *grant* the increase was made, not when the *amount* of the increase was determined. An employer confronted with a union organizing campaign must decide whether to grant or withhold benefits precisely as it would if the union were not on the scene. See, e.g., *United Airlines Services Corp.*, 290 NLRB 954, 954 (1988).[16] If a wage increase is "part of an already established company policy and the employer did not deviate from that policy upon the advent of the Union," the employer's announcement and implementation of the increase prior to the election is lawful. *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980) (finding employer's announcement of pension plan the day before the election lawful, where the pension plan "was conceived prior to the campaign and it covered employees at other locations not involved in the election"), modified on other grounds 667 F.2d 20 (6th Cir. 1981). Indeed, an employer that has already decided to grant a wage increase before learning of an organizing drive would violate the Act if it *withheld* the increase. See, e.g., *Famous-Barr Co.*, 174 NLRB 770, 770 (1969) (finding that employer violated Section 8(a)(1) when it granted wage increase to other employees but withheld increase from unit employees who "were still involved in the representation campaign").[17] There is no basis in law or logic to apply a different rule where an employer had already decided to grant a wage increase before learning of a union organizing drive but had yet to determine the precise amount of the increase. That employer's duty would be to grant the increase, regardless of the fact that the amount of the increase necessarily would have to be determined after it learned of the union drive.[18] That employer is the Respondent.

[16] *United Airlines Services Corp.*, supra, was a representation case, but the same principle applies in unfair labor practice cases. See, e.g., *SBM Management Services*, 362 NLRB No. 144, slip op. at 1 (2015).

[17] Although a wage increase decided upon before the employer learns of union activity must be granted, an employer may *postpone* granting the increase until after the election provided it informs its employees that (i) the increase is being postponed until after the election to avoid creating the appearance of interfering with the employees' free choice, and (ii) the increase will be given after the election regardless of its outcome. See, e.g., *Uarco Inc.*, 169 NLRB 1153, 1154 (1968). However, the law does not *require* employers to postpone the increase.

[18] One could, of course, imagine a situation where the amount decided upon, in light of the relevant circumstances, would support an inference of intent to discourage union support. See, e.g., *Lampi, L.L.C.*, 322 NLRB 502, 502–503 (1996) (finding that preelection wage increase violated the Act where, among other things, it was three times larger than the increase given the previous year). But that is not the situation here: as explained above, the 2-cents-per-mile increase granted to employees at West Coxsackie was right in line with the increases the Respondent granted at 12 other facilities within the same time frame.

The judge relied on timing alone to find the increase presumptively unlawful. Contrary to the judge, when an employer announces and/or grants employees increased wages or benefits during a union organizing campaign, the Board *does not* rely on any presumption that the announcement or grant is unlawful. *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). Rather, the Board determines whether "an inference of improper motivation and interference with employee free choice" is to be drawn "from all the evidence presented." Id. In making this determination, the Board examines the size of the benefit conferred, the number of employees receiving it, the timing of the benefit, and how employees reasonably would view the purpose of the benefit. *STAR, Inc.*, 337 NLRB 962, 962–963 (2002). Moreover, the employer may rebut any inference of coercive intent by establishing a legitimate business reason for the timing and grant of the benefit. Id. at 962.

I would find that the Respondent has proven a legitimate business reason for the timing and grant of the West Coxsackie wage increase. Hogan testified without contradiction that the Respondent had already decided to grant a wage increase at West Coxsackie before it learned of the Union's organizational campaign. While the judge and the majority note the absence of documentary corroboration,[19] the totality of the circumstances support Hogan's testimony by making clear that the West Coxsackie wage increase was simply part of a broader wage increase program, which the General Counsel does not allege to be unlawful. Undisputed evidence establishes that because its wages had become uncompetitive, the Respondent faced a shortage of drivers at many of its locations, including West Coxsackie. The undisputed evidence also demonstrates that the Respondent decided to address this issue at multiple locations by increasing wages, and that it began increasing wages well before it learned of the organizing drive at West Coxsackie on June 3, beginning with the May 1 increase in St. Louis and the June 1 increase in Austinburg, Ohio. The evidence also establishes that at least one West Coxsackie driver was aware as early as May 4 that wages were about to be increased in Austinburg, putting additional pressure on the Respondent to follow suit promptly in West Coxsackie. In all, the Respondent granted wage increases at 13 locations in 2013, and the West Coxsackie 2-cents-per-mile increase was right in line with the increases drivers at other facilities received.[20] Thus, the size of the benefit and the number of employees receiving it both run counter to any inference that the increase at West Coxsackie was motivated by a purpose to interfere with employee free choice, and the temporal proximity of that wage increase to the union campaign was mere happenstance.

Moreover, the record supports a conclusion that the West Coxsackie drivers would have reasonably viewed their wage increase as part of the Respondent's lawful, multi-facility initiative to address wage stagnation and understaffing, not as a response to the election petition. Prior to any union activity, the Respondent implemented sign-on and referral bonuses in West Coxsackie in an attempt to increase the number of drivers there. Because employees already knew that the Respondent was pursuing fiscal efforts to address its driver shortage, they would have reasonably viewed the Respondent's subsequent announcement of a wage increase as another step in that process. Indeed, at least one West Coxsackie driver was aware that the Respondent was implementing wage increases elsewhere before the election petition was even filed. In sum, I would find the Respondent lawfully announced and granted the wage increase.[21]

On a related issue, and contrary to my colleagues, I would adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by telling employees that the Union had challenged the West Coxsackie wage increase and asked the Board to seek an injunction forcing the Respondent to rescind it. This statement was accurate. The Union *had* challenged the West Coxsackie wage increase: it had filed a charge with the Board alleging that the wage increase was un-

[19] Our statute requires that Board findings be supported by a "preponderance" of the evidence. Sec. 10(c). As I have stated elsewhere, the Board must base its findings on the record evidence that has been admitted, and we may not properly disregard uncontroverted evidence "merely because it could have been stronger, more detailed, or supported by more specific examples." *Cook Inlet Tug & Barge*, 362 NLRB No. 111, slip op. at 3 (2015) (Member Miscimarra, dissenting).

[20] Contrary to my colleagues' assertion that Vice President Tom Lansing admitted that the Respondent did not implement a "nationwide" wage increase, Lansing simply admitted that the Respondent did not grant wage increases at different locations "at the same time." The facts plainly demonstrate that the increase at West Coxsackie was part of a broader plan to increase wages at multiple facilities.

[21] My colleagues' finding to the contrary puts the Respondent in a difficult situation. Had it withheld the increase at West Coxsackie, the evidence that a series of increases had been decided upon and was already underway before the Respondent learned of the union organizing drive at West Coxsackie almost certainly would have elicited a charge and complaint alleging a violation of the Act for withholding the increase. As I have stated elsewhere, it is unfair to interpret the Act in such a manner as to place a party in violation of the Act no matter what it does. See *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 6–7 (2015) (Member Miscimarra, dissenting); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981) (a party must have "certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice").

lawful, which became the basis for the Board's injunction proceedings against the Respondent pursuant to Section 10(j) of the Act.[22] And rescission of the wage increase *was* a potential outcome of the injunction proceeding: the Regional Director's petition for injunctive relief under Section 10(j) asked the district court to order rescission of the wage increase upon the Union's request. In any event, the Respondent's statement was campaign speech, and under the well-established *Midland* standard, I believe the employer's statement about the Union's role in the pending injunction proceeding and the potential consequences of the litigation must be considered lawful. See *Midland National Life Insurance Co.*, 263 NLRB 127, 133 (1982) (the Board does not "probe into the truth or falsity of the parties' campaign statements").[23]

The case cited by my colleagues, *Wellstream Corp.*, 313 NLRB 698 (1994), is distinguishable. There, an employer violated the Act by telling employees that it would have to withhold a promised wage increase because the Board would not permit such action during a union dispute. Id. at 707. The Board reasoned that when an employer "attributes to the Union its failure to grant a pay raise, it violates Section 8(a)(1)." Id. As the judge in this case found, the Respondent's statement did not fall within the narrow category of cases like *Wellstream* because it did not add "insult to injury" by blaming the Union for a refusal to grant an earlier-promised benefit. Here, the Respondent promised *and granted* a wage increase.

*3. Teetsel's resignation*

Mansfield Teetsel worked for the Respondent from 2004 until June 2011, when he resigned after finding work with another employer.

In December 2011, Teetsel asked the Respondent to rehire him. The Respondent agreed, but set Teetsel's salary at the then-current starting rate, which was less than Teetsel was earning when he resigned.

At Hogan's June 19 meeting with employees, Teetsel complained about his pay. The judge found that Teetsel stated as follows: "You want people to be loyal, which I'm still you know . . . but that makes me bitter. I mean, I can see you keeping me down to the bottom for a year; it's going on two years now. So it makes you real bitter."

Around that same time, Teetsel resigned from the Respondent a second time after giving notice that he had accepted a position with another company. Teetsel advised the Respondent that his last day would be July 5.

On July 5, Teetsel told the Respondent that he had changed his mind and wanted his job back. The Respondent refused to rescind its acceptance of Teetsel's second resignation, and Vice President Lansing testified that he did so because "he thought that the company would be better off with a new employee who would appreciate the job instead of Teetsel who had resigned once before." Lansing added that it was "common knowledge" that Teetsel was "bitter" about his pay.

My colleagues find that the Respondent violated the Act by refusing to permit Teetsel to rescind his second resignation. In finding that the General Counsel met his initial burden under *Wright Line*[24] to prove that protected activity was a motivating factor in the Respondent's decision, the majority finds that Teetsel engaged in protected activity during the June 19 employee meeting.

I disagree with my colleagues because the record does not establish that Teetsel engaged in protected concerted activity, which is a prerequisite to any finding that the General Counsel has satisfied his initial burden under *Wright Line*. As I explained in *Fresh & Easy Neighborhood Market*,[25] the presence or absence of protected activity turns on whether Section 7's statutory requirements are met—i.e., whether there is "concerted" activity by two or more employees engaged in "for the purpose of collective bargaining or other mutual aid or protection."[26]

[22] Sec. 10(b) of the Act authorizes the Board to investigate any charges that allege a party has engaged in an unfair labor practice as defined in the Act and to issue a complaint "stating the charges in that respect," which becomes the basis for the Board's subsequent unfair labor practice proceedings. In turn, Sec. 10(j) authorizes the Board, "upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice," to seek an injunction for "appropriate temporary relief or [a] restraining order."

[23] My colleagues claim that the *Midland* rule does not apply here because the Respondent's statement contained a threat of reprisal or force or promise of benefit. In my view, this contention makes no sense. The statement concerned what *the Union had done*, not what *the Respondent would do*. A statement about what another party has done cannot constitute a threat or promise, for two reasons. First, a statement concerning what has been done concerns the past, and threats and promises are statements about *what may or will be done in the future*. Second, a statement concerning action by another party cannot constitute a threat or promise, since threats and promises are statements concerning what *the speaker* may or will do (or cause to be done).

[24] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As to the judge's characterization of the *Wright Line* standard, I would adhere to the formulation I described in *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 fn. 1 (2014) (Member Miscimarra, concurring), and *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 9 fn. 5 (2014).

[25] See 361 NLRB No. 12, slip op. at 13 (2014) (Member Miscimarra, dissenting in part).

[26] Sec. 7 of the Act states in relevant part that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring mem-

And as the Third Circuit explained in *Mushroom Transportation*, "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[27]

Applying these long-settled principles, I believe that Teetsel's June 19 comments did not constitute protected activity. When Teetsel sought to return to the Respondent after his first resignation, the Respondent agreed to rehire Teetsel and did so at the wage rate for new hires. Teetsel's statement that he was "bitter" due to the Respondent "keeping me down to the bottom" plainly referred to his unhappiness with his own wage rate. The statement was not forward-looking, and there is nothing to suggest that Teetsel had an object of initiating, inducing, or preparing for group action. Indeed, there is no evidence that any other employees were in Teetsel's predicament or even expressed support for his personal gripe. See *Meyers II*, supra (for mere conversation between a speaker and listeners to constitute concerted activity, it must have "'some relation to group action in the interest of the employees'") (quoting *Mushroom Transportation*, 330 F.2d at 685). In addition, given the individualized nature of Teetsel's wage gripe, I disagree with my colleagues that the Respondent would have interpreted it as demonstrating that Teetsel harbored "prounion sentiments."[28]

In the absence of unlawful discrimination or retaliation based on protected concerted activities, nothing in the NLRA creates a statutory right for an employee to resign, get reemployed, exhibit bitterness about his treatment by the employer, resign again, and then insist on being reemployed. At some point—which I believe has been reached in this case—an employer can accept an employee's resignation(s) at face value, resulting in the termination of his employment. In this regard, Section 10(c) of the Act states that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been . . . discharged, or the payment to him of any backpay, if such individual was . . . discharged for cause." In the circumstances presented here, the employer had reasonable "cause" to believe that Teetsel, an unhappy employee, meant it when he tendered his resignation for the second time. Our statute prohibits unlawful discrimination or retaliation based on protected concerted activity, but it does not require an employer to disregard multiple resignations by an individual who has repeatedly expressed unhappiness about and dissatisfaction with his personal treatment.

Because the General Counsel has failed to establish that Teetsel's comments constituted protected activity, I would find that he has failed to establish his initial burden under *Wright Line*.[29] Accordingly, I would reverse the judge and find no violation.

In the ways and for the reasons set forth above, I respectfully dissent.

Dated, Washington, D.C. May 19, 2016

Philip A. Miscimarra, 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

bership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[27] *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964). The Board adopted the *Mushroom Transportation* standard in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[28] Contrary to my colleagues, I do not believe that the Respondent would have concluded that Teetsel was prounion from the fact that Teetsel said "not yet" after Hogan remarked that the Respondent did not have any union drivers. This retort simply reflected the drivers' current nonunion status and the possibility that their status might change. Without more, I do not believe it can reasonably be interpreted as expressing support for the Union's efforts to organize drivers.

[29] Even if the General Counsel had met his initial *Wright Line* burden, I would find that the Respondent did not violate the Act because it would have refused to rescind Teetsel's resignation even in the absence of any protected activity. Teetsel had a history of working for the Respondent, resigning, and then asking the Respondent for reemployment. Teetsel tried to do it again here. I thus find persuasive Lansing's testimony that he refused to accept Teetsel's rescission of his resignation because he felt that the Respondent "would be better off [] getting someone new in there that would appreciate the job they had and would want to stay." While the General Counsel presented evidence that the Respondent had permitted other employees to work on a casual basis—which Teetsel requested after the Respondent refused to rescind its acceptance of his resignation—there is no evidence that any of those employees had a similar history of repeated resignations or that they engaged in unprotected mere griping about wages.

Because I would find that the Respondent's sole violation of the Act was its unlawful interrogation of employees Ianno and McDonald, I believe a Category II *Gissel* bargaining order is unwarranted. Accordingly, I find it unnecessary to reach the Respondent's request to reopen the record to consider employee turnover. In appropriate cases, however, I would apply *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056 (D.C. Cir. 2001), in which the court pertinently held that "where only category II abuses are found . . . the Board *must* carefully consider employee turnover." Id. at 1066 (emphasis in original) (internal quotation marks omitted).

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 with the loss of your job because you joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

WE WILL NOT promise and/or grant wage increases in order to dissuade you from supporting the Union.

WE WILL NOT interrogate you about your union membership or support.

WE WILL NOT discharge any of you because of your union membership or support or for engaging in concerted protected activity protected by Section 7 of the Act.

WE WILL NOT blame the Union for attempting to take away the unlawful wage increase announced on June 19.

WE WILL NOT fail and refuse to recognize and bargain in good faith with Teamsters Local 294, International Brotherhood of Teamsters, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time drivers employed by Respondent at its West Coxsackie, New York location; excluding all guards and all professional employees and supervisors as defined in the Act.

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

WE WILL, on request by the Union, rescind the unlawful wage increase granted to unit employees on or about July 1, 2013.

WE WILL, within 14 days from the date of this Order, offer Mansfield Teetsel 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 Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL compensate Mansfield Teetsel for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

HOGAN TRANSPORTS, INC.

The Board's decision can be found at www.nlrb.gov/case/03-CA-107189 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.

*Greg Lehmann, Esq.*, for the General Counsel.
*Alan I. Model, Esq.* and *Jason J. Silver, Esq.*, for the Respondent.
*Bruce Bramley, Esq.*, for the Charging Parties.

## DECISION

### STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in Albany, New York, on September 24, 26, and 27, and December 17 and 18, 2013. The charge and the amended charge in Case 03–CA–107189 were filed by the Union on June 14 and 24, 2013. The charge in Case 03–CA–108968 was filed by Mansfield Teetsel, on June 12, 2013. The charge in Case 03–CA–111193 was filed by the Union on August 14, 2013. The consolidated complaint that was issued on August 30, 2013, and amended at the hearing, alleged as follows:

1. That on or about June 11, 2013, the Respondent by Charles Johnson and Tom Lansing, interrogated employees about their union activities.

2. That on various dates between June 11 and early July 2013, the Respondent by David Hogan, Charles Johnson, and Tom Lansing threatened employees with job loss if they selected the Union.

3. That on June 17, 2013, the Respondent moved the employees' work location in order to discourage union or protected activities.

4. That on or about July 1, 2013, the Respondent gave a wage increase to its employees in order to discourage them from engaging in union or concerted activities.

5. That on or about July 6, 2013, the Respondent, for discriminatory reasons, discharged Mansfield Teetsel.

6. That on or about July 8, 2013, the Respondent blamed the Union for trying to take away the wage increase granted on July 1, 2013.

7. That the Union requested recognition on June 3, 2013 after it had obtained a majority of the Respondent's employees in a unit of all full-time and regular part-time drivers employed at the Respondent's West Coxsackie, New York location, excluding guards, professional employees and supervisors as defined in the Act.

8. That because of the unfair labor practices described above, the Respondent has made a fair election impossible and that a bargaining order is an appropriate remedy.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

## FINDINGS AND CONCLUSIONS

### I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(1), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. THE ALLEGED UNFAIR LABOR PRACTICE

Hogan Transport is engaged in the trucking industry. Its headquarters are in St. Louis, Missouri, and its president is David Hogan. (A descendent of the person who founded the company, 93 years ago.) Unlike a typical common carrier, Hogan provides what is called "dedicated customer services." This means that Hogan enters into contracts to provide exclusive trucking services for particular customers on a local or regional basis. In this case, Hogan is the dedicated service provider for a company called Save-A-Lot which is a retail chain of discount supermarkets. Save-A-Lot has a number of distribution centers, but the one involved in this case is located in West Coxsackie, New York. In order to perform its services, Hogan maintains a facility next to the customer's warehouse and it employs a group of drivers who transport food stuffs from Save-A-Lot's West Coxsackie distribution center to its retail stores in the Northeast.[2] This means that these Hogan employees only transport goods for Save-A-Lot. It also means that Hogan's only customer in this geographic area is Save-A-Lot. Hogan's work force at this location consists of about 29 drivers. Its nationwide work force includes about 1300–1400 drivers.

There was testimony that Hogan is not the only company that provides dedicated trucking services to various customers. Its principle competitors are J.B. Hunt, Swift Transportation, Werner, U.S. Express, and Snyder. All of these companies, which apparently do not have collective-bargaining agreements, employ many more truckdrivers than Hogan.

Jim Lauda is the operations manager at the West Coxsackie facility and he reports to Charles Johnson, the director of operations. Tom Lansing, a vice president, is also involved in this case. As noted above, David Hogan is the company's president.

It seems that about 3 years ago, there was a previous failed attempt by a union to organize the truckdrivers at the West Coxsackie location. At that time, Charles Johnson visited the facility and was in some way involved in that campaign.

The Union's organizing drive started in May 2013. The primary employee involved in this effort was Robert Sansone who also intended to leave the company in June. Sansone solicited union authorization cards from his fellow employees and he was assisted in this process by James Young, Mansfield Teetsel, Steven Ianno, and Timothy Mabee. An initial meeting between union representatives and employees was held on June 2.

On June 3, 2013, the Union filed an election petition in Case 3–RC–106334 with the Board's Albany office. Simultaneously, it delivered a letter requesting recognition on behalf of the West Coxsackie drivers. Thus, the Respondent became aware of union activity amongst its employees no later than June 3.

By June 3, 2013, the Union had obtained signed cards authorizing union representation from 14 employees. Thereafter, from June 7 to 13, the Union obtained cards from four other employees. The parties stipulated that there were 29 drivers who comprised the appropriate unit. Thus, the evidence shows that by June 13, the Union had obtained signed authorization cards from 18 employees.

With respect to the authorization cards, I note that Bob Sansone, who signed a card on June 7, resigned from the company on June 14. With respect to Mansfield Teetsel, who signed a card on May 10, the Respondent asserts that he resigned before June 3, whereas the General Counsel contends that Teetsel changed his mind and that the Respondent, for discriminatory reasons, decided to accept his resignation. Employees Brian Pennick, Antonio Rogers, and June Glennon all signed union cards before June 3, but they retracted their cards in August 2013.

[1] During the hearing, the Respondent objected to certain documents being turned over to the General Counsel based on attorney-client and/or attorney work product privileges. Counsel also objected to the trier of fact, (me), being the person to review these documents in camera on the grounds that if they were deemed to be excludable, they nevertheless might unduly influence the person deciding the case. I agreed and with the consent of Judge Fish, the documents were submitted to him for in camera inspection and ruling. I am attaching his Order to this Decision as appendix A.

[2] On occasion, the drivers located in Coxsackie will take goods from that distribution center to another Save-A-Lot distribution center located in Austinburg, Ohio.

During the week of June 10, Charles Johnson came to the facility in order to talk to the employees on an individual basis. (Obviously for the purpose of dissuading them from voting for the Union.) The question here is whether his conversations stayed within, or crossed the line of legality.

James Young testified that when Johnson approached him he asked Johnson; "What's up?" According to Young, Johnson replied; "What's going on?" When Young said he didn't know, Johnson said that the Union had filed a petition and that if the Union comes in, Save-A-Lot was already prepared to bring in a third party carrier. According to Young, he understood this to mean that if Save-A-Lot terminated its contract with Hogan, the drivers would lose their jobs.

Virgil Smith testified that he had a conversation with Johnson who said that Save-A-Lot did not want the union, that Hogan didn't want the union and that if they did go union, the drivers would probably not have jobs because Save-A-Lot would throw them out.

Robert Sansone testified that when he met Johnson at the facility, he was asked what he thought was going on. According to Sansone, he replied that the company was not paying enough and that the benefits were sub-par. Sansone states that he told Johnson that he was soon going to leave the company so this didn't affect him one way or the other, but that the company wasn't treating the other employees right. Sansone testified that later in the day, he overheard Johnson tell employee Bill Gates; "You know Bill, if they get the Union in here . . . the Company will lose the work at the Save-A-Lot Coxsackie location."

Sansone left the company on June 14, 2013.

Steve Ianno testified that he spoke to Johnson and Tom Lansing and that Johnson asked him; "How did we come to this? What's going on? Why are we back here again?" Ianno states that he responded; "It's the same old story that a lot of guys are not happy. All the favoritism. Things that have been going on. It's been three years and you've done nothing about it." According to Ianno, Johnson said; "You know Save-A-Lot doesn't want the Union here. We don't want the Union here." Ianno testified that Tom Lansing interjected by saying; "You know, if the Union comes in then . . . all you guys are going to be out of work. Where are you going to be?" Ianno nonplused, replied he didn't care because there was a company right up the road that would hire him right away. "If you want to pull out, go ahead."

Shane McDonald testified that he had just returned to work when he had a conversation with Johnson who welcomed him back to the company. He states that Johnson told him that he wanted to give an update on what was going on; that a petition had been filed and he wanted to explain the company's position. According to McDonald, Johnson said that Save-A-Lot is a nonunion company that did didn't want to do business with anybody that has anything to do with a union. McDonald testified that Johnson said that he thought that this would put our contract with Save-A-Lot at risk and that there was a possibility that you could lose your job if we lose that contract. According to McDonald, Johnson said; "What do you think about this whole thing? McDonald responded that he had just gotten back and didn't even know what was going on.

Alan Field testified that he too had a conversation with Johnson within this time period. His testimony was, however, somewhat confused. Although he related that a part of the conversation dealt with Save-A-Lot's contract with Hogan and the possibility that Save-A-Lot could hire a new carrier, it is not clear from his testimony whether he or Johnson brought this possibility up.

On June 13, a Stipulated Election Agreement was signed and an election was scheduled for July 12, 2013. It is agreed that as of June 13, there were a total of 29 drivers who worked at the West Coxsackie facility.

On June 15, the Respondent notified the drivers that instead of reporting to the property of Save-A-Lot, they had to check in and park their vehicles across the street on a property owned or leased by Hogan. David Hogan explained that when the election petition was filed, Save-A-Lot was told of it and he suggested that the trucking operation be moved across the street so that there would be no possible disruption of Save-A-Lot's operations in the event of a labor dispute. John Gerber, Save-A-Lot's Executive Vice President, agreed and the move was made. Although there was some testimony that the lot across the street had some pot holes, was a bit dirtier, and more congested, it seems to me that the effect of this move on the drivers was insignificant. To the extent that this is alleged as a violation of the Act, I recommend that it be dismissed.

Virgil Smith testified that on June 18, he had another conversation with Johnson who told him that the drivers were going to get a raise on July 1. Smith testified that he had not heard anything about a raise before this conversation.

On June 19, 2013, management held three meetings with employees to discuss the union situation. These meetings were arranged at different times in order to cover all of the drivers. James Young made a recording of the meeting that he attended and a transcript was introduced into evidence. The employees who testified as to the other two meetings, basically related the same types of statements. The main speaker for the company was James Hogan. There were two themes that were emphasized during these meetings. First, the probability that if the union came in, Save-A-Lot would terminate the contact at Coxsackie and the drivers could lose their jobs. The second point was that the employees would be receiving on July 1, a 2 cent per mile increase in their compensation. In the latter regard, this would amount to between a $40 to $60 increase per week. In pertinent part, the transcript reads;

> I can tell you Save-A-Lot made this clear to me, we don't have any transportation providers who will deliver to our stores in the country that are union so they said you need to keep in mind when you guys are working through the issue here. I don't know how to be—I don't know how to be more direct, but I think our business here is in jeopardy if the union comes in, it's not a threat, it's just my opinion with my discussions with Save-A-Lot when they remind me of how they operate. They don't want to operate in union environment, all that stuff.
>
> Employee: "If we go union, we're all out of a job."
>
> Hogan: "I agree 110% with that and I am just being honest with you."

> If its organized here I think Save-A-Lot goes in a different direction. And you know, I think we can do a great job for Save-A-Lot but let's face it, we are not irreplaceable.
>
> I have said a lot about Save-A-Lot today. I'm not here to bash Save-A-Lot because again they could easily pull the business from us at any time. Over the years they have that right for whatever reason. It's one of our longer term customers. But again they have always made it clear the environment they want to work in. And they said what's this about the Union? And when they select their carrier that's always one of the questions they ask. So you know, they're concerned about it. When they hear about drivers talking about work stoppages, that doesn't go over well. Again, my opinion is we got to continue to work together because if you guys organize there is a strong possibility we lose the business. I do not want anyone to tell me two months down the road why didn't you mention that to us.

At the June 19 meeting, a number of employees asked questions including Mansfield Teetsel. Basically, he complained that when he returned to the company (after a hiatus), he was hired as a new employee at the mileage compensation rate that is given to new drivers. He stated; "You want people to be loyal, which I'm still [am] you know . . . but that makes me bitter. I mean, I can see you keeping me down to the bottom for a year; it's going on two years now. So it makes you real bitter."

On June 24, 2013, the Union held a meeting with employees and they decided to file an unfair labor practice charge and to cancel the upcoming election.

On June 29, a document was handed out announcing an increase of 2 cents per mile effective on July 1. This stated:

> We are pleased to announce that the 2 cent per mile increase that was announced earlier this month is in effect starting 7/1/13. Please understand however, that the Teamsters have challenged Hogan's ability to give this increase and they have asked the National Labor Relations Board to seek an injunction forcing Hogan to rescind it.[3]

With respect to this announced increase, I note that there was nothing said at the June 19 meeting and there is nothing in the notice to indicate that this wage increase had been planned or decided upon before the Union filed the election petition.

On or about July 5, Teetsel, who had previously notified Lauda that he had gotten another full-time job, told Lauda that he had changed his mind and that he wanted to keep his full-time job at Hogan. Lauda told Teetsel that this would be fine because he hadn't yet filed his papers in St. Louis. Lauda also told Teetsel that he shouldn't do this again, because he might not have a job to come back to.

On July 6, Teetsel was informed that the company had accepted his resignation notwithstanding his change of mind.

Tom Lansing testified that he made the decision to not accept Teetsel's change of mind because he thought that the company would be better off with a new employee who would appreciate the job instead of Teetsel who had resigned once before. Lansing also testified that it was common knowledge that Teetsel was bitter about his pay. It therefore would be surprising if the company did not consider that Teetsel would likely be voting in favor of the Union in the election that was scheduled for the following week. (July 12). Thus, accepting Teetsel's resignation would mean one fewer vote for the union.

On July 8, the company held a meeting with its employees at Red's restaurant. Basically, the remarks made here were the same as at the previous meeting held on June 19. In substance, Hogan told employees that it was his strong opinion that if they went union, Save-A-Lot would terminate the contract and the employees would lose their jobs. A recording of this meeting has Hogan making the following statements:

> Somebody asked at the end of the last meeting well, what can the Union do for us and what would change if the Union got in here? And I said well, you know, first of all, any wages or benefits, we have to agree to any changes in the wages and benefits. The Union can't just arbitrarily change them; get them all that stuff. But to me that's all a moot point, because I think again, if the Union comes in here I feel like there's probably not much to talk about because there won't be jobs. We've got one customer here and that customer, in my opinion, is going to go down the road and find an alternative solution.

At this same meeting, the company distributed to the employees, a leaflet that read in part:

> As you know, the [NLRB] will be conducting an election on Friday, July 12 at which you will be asked to decide whether or not you wish to be represented by Teamsters Local 294. As I have already explained, I think that having the Teamsters here would be one of the worst things that could happen to Hogan employees. In my opinion, the Teamsters cost employees money and put employees' jobs at risk by making companies inefficient. . . .
>
> Many people without realizing the mistake they were making signed Teamsters authorization cards. Just because you signed a Teamsters' card does not mean you have to vote for the Teamsters. You are perfectly free to vote against the Teamsters, even if you signed a card. Now is the time to clear up your mistake by voting NO!
>
> I think that everyone eligible to vote should take advantage of that opportunity. It is not enough to just stand by and do nothing. Don't let a few people decide your future and that of Hogan. Give the Teamsters a clear message and vote NO!

In August 2013, several employees indicated to company supervisors or managers that they wanted to retract their union authorization cards. The testimony regarding these conversations was basically that the employees were told that they could contact either the Union or the NLRB. They were then given a piece of paper that had the names, addresses, and phone numbers of the Union and the NLRB. To me this doesn't amount to illegal conduct and I recommend that this allegation be dismissed. *R. L. White,* 262 NLRB 575, 576 (1982).

[3] The Union had filed a charge that alleged, in part, that the Respondent had promised wage increases in order to dissuade employees from joining or supporting the Union.

The recitation of events described above does not fully disclose the Respondent's position on these allegations and I will address its arguments and the facts relevant thereto in the Analysis Section of this Decision.

## III. ANALYSIS

### *A. Predictions v. Threats*

In the present case, the evidence shows that the principle message that management conveyed to its employees was that its only customer in the area was Save-A-Lot; that this customer was nonunion and operated with nonunion carriers at other locations; and that if the employees chose union representation there was a high likelihood that Save-A-Lot would cancel its contract with Hogan thereby causing the employees in Coxsackie to lose their jobs. The company's management and supervisors were careful to couch this message in terms of what could happen and were careful to state that this is what they believed the customer would do if the employees voted for the Union. No one on behalf of management told the employees that Hogan would cease operating the facility if the employees voted for the union or that the Respondent would discharge employees for supporting the union. The closest thing to a definitive statement was when an employee at the June 19 meeting stated that if the employees went union, "we're all out of a job," and David Hogan replied that he agreed 110 percent.

The Respondent elicited testimony from its witnesses to the effect that Save-A-Lot was, except for one franchise store, a nonunion operation that used nonunion carriers throughout the United States.[4] As an example of Save-A-Lot's expressed hostility to unionization, the Respondent cited an incident back in 1992 when that company subcontracted transportation work at its St. Louis distribution center when the employees at that location unionized. Hogan also testified that back in 2003, when employees at Save-A-Lot's Lansing Michigan distribution center starting unionizing, he was told that they (Save-A-Lot), had a plan to close that facility and combine it with another facility, "depending on how far the organizing attempt goes." Based on these comments and the fact that Save-A-Lot basically operates in a nonunion environment, the Respondent contends that its management had a reasonable basis to believe that Save-A-Lot would terminate its contract with Hogan if Hogan's employees voted for the Union.

The General Counsel points out, and it is conceded, that no one from Save-A-Lot ever actually told any representative of the Respondent that the contract would be cancelled if the employees went union. Moreover, the evidence shows that no one from the Respondent chose to ask. And I suspect that the reason they didn't ask is because if the wrong answer was given, it would constrain the Respondent from making the "predictions" that are the subject matter of this case.

There has been a great amount of spilled ink and substantial disagreement about where to draw the line between what is an illegal threat of job loss and what is merely an opinion regarding the consequences of unionization. If statements are construed as a threat of job loss or plant closure, they would violate Section 8(a)(1) of the Act. If merely an opinion or reasonably based prediction, such statements would be protected by Section 8(c) of the Act.

The main case on this subject is *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1968), in which the Supreme Court stated:

> It is well settled that an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on the company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.

Because the test for legality may depend on a statement's context and whether it is based on "objective fact," it is therefore possible for the same words to be either legal or illegal. That is, one cannot predict that a statement of this sort will be legal, simply by looking up words or phrases in a form book.

There have been a number of cases dealing with employer statements in the context of organizing or election campaigns, where employees were told of the possibility, probability, or certainty that a major customer(s) would cease doing business if they chose to be represented by a union.

One of the cases cited by the Respondent is *TNT Logistics North America*, 345 NLRB 290 (2005). In that case, the employer during preelection speeches, told employees that its main customer didn't like unions and that the company could lose its contract if the employees voted for the Union. A majority on the Board concluded that these statements were predictions and not threats. They stated:

> Our colleague says that "nothing in the record substantiates the prediction" that Home Depot would cancel its contract with the Employer if the Employer's employees voted to unionize. We disagree. The uncontroverted facts are that (1) Home Depot does not like using unionized carriers; (2) Home Depot does not use any unionized carriers; and (3) the Employer's contract with Home Depot would expire in October 2005. Although there was no certainty that Home Depot would not renew its contract with the Employer if the Employer's employees voted for unionization, we think that the above unrefuted facts furnished an ample basis for a reasonable prediction that Home Depot would so act.
>
> Furthermore, even assuming, as our dissenting colleague contends, that Haynes' prediction had some threatening aspect when uttered to Cook on May 26, it would have lost this aspect the very next day, when General Manager Gundlach—an official of higher authority than Haynes—indicated to employees, including Cook, that it was not certain that Home Depot would terminate it's relationship with the Employer, if the employees unionized.

The Respondent also cites *Curwood Inc*., 339 NLRB 1137 (2003), a case in which the employer, in a letter, told employees:

[4] The General Counsel showed however, that Save-A-Lot's parent corporation, operates a number of supermarkets which have unionized employees.

> Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood.

In deciding that the employer in *Curwood* did not violate the Act, a majority on the Board concluded that the statement constituted a legitimate prediction instead of a threat of reprisal. The Board stated:

> In conveying its customers' concerns about possible unionization, the Respondent's June 30 letter contained no threat of reprisal. Furthermore, the Respondent provided objective material reflecting its customers' concerns. . . . The material consisted of written inquiries from large customers such as Nestle, Nabisco, Kraft, and Minute Maid, asking whether the Respondent's products were produced in unionized plants. Some of the inquiries specifically raised concerns about "possible interruption in receipt of materials" and "continuity of supply" in the event of a work stoppage. Contrary to the judge, the fact that the Respondent's customers also sent similar letters to other suppliers cuts against the violation finding, not in favor of it. That the Respondent's customers routinely and generally ask their suppliers about their contingency plans in the event of union-related supply disruptions underlines just how much of a concern such disruptions really are for those customers.
>
> The Board's decision in *Tri-Cast, Inc.,* 274 NLRB 377 (1985), makes clear that the Respondent's statement here was lawful. In *Tri-Cast*, the employer told employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, the company would lose business and jobs. The Board found that the employer had accurately represented what others outside its control might do. . . .
>
> The facts in the instant case militate even more strongly against finding the Respondent's statement unlawful. In *Tri-Cast*, supra, the employer had not actually received concerns from customers. Here, the Respondent received expressions of concern from various customers.
>
> Seeking to distinguish *Tri-Cast*, our dissenting colleague emphasizes that the employer there phrased its statements in terms of what its customers *might* do if employees unionized. But *Tri-Cast* does not stand for the proposition that the *only* permissible statements about customer loss are those expressed in the conditional. In *Tri-Cast*, the employer reasonably talked about what its customers might do because it had not actually received concerns from customers. Here, the Respondent had received such concerns, and, thus, reasonably dispensed with the conditional mood.

On the other hand, the General Counsel cites a number of other cases, some more recent, where the Board has found similar statements to constitute 8(a)(1) threats. See *UPS Supply Chain Solutions*, 357 NLRB No. 106, 108 (2011); *DTR Industries Inc*., 350 NLRB 1132 (2007); *Contempora Fabrics, Inc*., 344 NLRB 851 (2005); *Adworth Co. & Dunking Donuts Mid-Atlantic Distribution Center*, 338 NLRB 137, 142–143 (2002); and *Holly Farms Corp*. 311 NLRB 273, 300 (1993).

In *UPS Supply Chain Solutions*, 357 NLRB No. 106, the employer told employees that some of its contracts required that it maintain a nonunion work force and that the employees could lose their jobs by supporting a union because the Respondent could lose those clients. The Board stated inter alia:

> The judge found lawful [the] statements regarding the possibility of job loss due to client contracts requiring the maintenance of a nonunion work force, because the statements were couched in terms of business necessity and did not imply that the Respondent would terminate employees simply for voting in favor of the Union. Contrary to the judge, we find that the statements . . . were unlawful. . . . At the hearing, [she] could name only one client that allegedly imposed such a contractual provision. She was, however, unfamiliar with even the general terms of that contract and admitted a general lack of knowledge of any of the Respondent's current client contracts, including the named client. Moreover, it is impossible to determine whether the contract of the named client actually provides support for [her] claim, because the Respondent failed to offer it into evidence. In short, because the record does not provide objective support for [her] prediction or, alternatively, indicates that, at most, only one named client had a contract that required the Respondent to remain nonunion, [her] statement that multiple clients' contracts require a nonunion work force was overbroad, unsupported by objective fact, and therefore not protected as a lawful expression of opinion under Section 8(c).

In *DTR Industries Inc*., 350 NLRB 1132 (2007), the Board held that similar statements were violative of the Act because the employer had not shown that they were based on objective considerations. It stated:

> In *DTR Industries v. NLRB*, supra, the Sixth Circuit, inter alia, reversed the Board's finding that in a pre-election letter to employees, the Respondent's then president, Yuji Kobayashi, unlawfully threatened plant closure. Reviewing the 4-page letter, the court determined that Kobayashi provided an objective context and explained the reasons why he believed customers who had been using the Respondent as their sole source for parts "were likely to split their business in order to have an alternative supply source in the event of a strike." The court reasoned that because the letter explained that Kobayashi's perspective was based upon his industry experience and knowledge of the Respondent's customer base, he was entitled to make those statements. The court held that once an employer provides such rationale, the violation can be found only if it is shown that the prediction falls outside Section 8(c) as either not objective in nature or untruthful. Absent evidence that the statements in the letter were subjective or false, the court concluded that no violation of the Act had occurred.
>
> In this case, by contrast, the statements provided no objectively-based rationale. Employee Rita McVetta testified that King said that if the Union got into the plant, customers "wouldn't probably do business with us and we wouldn't have jobs." This mirrored the substance of McVetta's affida-

> vit, which referred to a statement that "customers would not want to deal with us because of the Union." Testifying about another of King's meetings, employee James Lehman said King told them they "would lose sole supplier source from Honda and Toyota and if this happened there would be a reduction of jobs"; that if customers became concerned about the reliability of DTR's production flow, they "would look for other sources" which "would mean there would be less work and fewer jobs at DTR." Finally, employee Daniel Gahman testified that King said, "if the UAW was to get into DTR we would lose that sole supplier status," and with customers allowing other companies to compete with DTR to provide parts, "it would result in layoffs" and DTR's longstanding no-layoff policy "would have to change." Thus, based on the credited testimony of these employees, the consistent message of King's remarks was that unionizing would result in the Respondent's loss of customers and a decrease in business, leading inevitably to the loss of work and the jobs. Unlike the earlier case, where the context and basis for Kobayashi's prediction were part of his remarks, King's statements offered no support for his prediction. In these circumstances, we find that the Respondent unlawfully threatened employees in violation of Section 8(a)(1). (Footnotes omitted.)

These cases illustrate a divergence of views about where to draw the line for determining whether a statement constitutes a permissible prediction versus a threat of reprisal. Of course, from the perspective of a "reasonable" employee, such statements, whether based on "objective" facts or not, would no doubt be viewed as cautions that voting for a union would probably result in the loss of their jobs. That is, unlike those of us in the legal profession, employees as lay people, are not so adept at counting angels on the heads of pins.

In my opinion, the statements in the present case were not supported by objective evidence. The assertions of management that they knew of Save-A-Lot's hostility to unions were based on statements allegedly made at least 10 years ago. In this case, when the Respondent made Save-A-Lot aware of the union's organizing drive, Save-A-Lot's management merely indicated that it would be happy to assist the Respondent. They did not say that if the Union won the election, Save-A-Lot would terminate the contract. In fact, it is admitted that no one from the customer ever told anyone from the Respondent that the contract would be cancelled if the employees chose the Union. At most, Respondent was told that Save-A-Lot was concerned about the possibility of future work stoppages. Moreover, if cancellation of the contract was a real concern to the Respondent, it could have asked but chose not to. In short, the statements made by Respondent's representatives to the effect that unionization would probably cause Save-A-Lot to cancel the contract were, in my opinion, mere speculation and were not based on objective facts. As such, it is my opinion that this case is more closely analogous to the cases cited by the General Counsel and I conclude that these statements, made individually by management to employees or in the meetings held on June 19 and July 8, 2013, violate Section 8(a)(1) of the Act.

*B. Promising and Granting a Wage Increase*

Wage increases or other benefits granted upon the advent of a union organizing campaign (assuming the Employer is aware of it), creates a presumption that they are granted to influence employees to withhold their support for unionization. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990). To rebut this presumption, an Employer must establish a legitimate explanation for the timing of the grant of benefits and this usually consists of evidence that they were part of an existing practice *or* that they were planned beforehand. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (l963); *Baltimore Catering Co*., 148 NLRB 970 (l964). An employer cannot grant benefits when an election is pending without facing the presumption that it has violated the Act.

Moreover, even where benefits have been previously planned, an employer may violate the Act if the timing of the announcement is designed to influence an election. *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002).

The Respondent asserts that the increase in mileage compensation (a wage increase), that was formally announced on June 19 and became effective on July 1, had been planned before the election petition was filed.

The last group of wage increases that were given to employees at any location occurred more than 3 years ago. Because of the great recession, the company decided to halt any further wage increases until economic conditions improved. For example, in 2009, despite the terms of the existing contract, Save-A-Lot basically forced the Respondent to lower its rates for the services provided. Thus, the company did not have an existing practice of granting wage increases on a regular basis.

The Respondent claims that in the spring of 2013, it faced at various of its facilities, labor shortages, in part caused by the wage rates being offered to existing and prospective drivers. That is, current drivers were leaving for other jobs (as in the case of Teetsel), and job applicants were hard to find. The testimony was that a decision was made between Hogan and Dave Stock to start giving wage increases at various locations throughout the country. The first increases were given in St. Louis on May 1, 2013. The next wage increases were respectively given in Austinburg, Ohio, on June 1; Fulton, Missouri, on June 5; and Indianapolis, Illinois, on June 29. As described above, the wage increase for the Coxsackie employees was announced on June 19, and was implemented on July 1. Also on July 1, the employees at Lexington, North Carolina received an increase. Employees at five other locations received wage increases from July 11 through October 1, 2013. Although employees at most locations, including Coxsackie received an increase of 2 cents per mile, some locations received different amounts.

I have no doubt that the Respondent began to seriously consider wage increases for employees at its various facilities before May 2013, and therefore before it became aware of the union organizing drive at Coxsackie. This is demonstrated by the fact that employees in St. Louis received a 2 cent per mile increase on May 1, 2013, and the employees at Austinburg received a somewhat different raise on June 1, 2013. Not so

convincing is its claim that the Respondent decided, before the election petition was filed, to give a raise to the Coxsackie employees, or that it made a decision regarding the amount to be given, or when it would be implemented.

The Respondent provided no documentary evidence to support its claim that the decision to grant a wage increase to the Coxsackie employees was made before the petition was filed. (June 3, 2013). To the extent that there are documents relating to this wage increase, one is an email dated May 4, from Facility Manager Lauda to Johnson stating that one of his drivers told him that increases had been given to the Austinburg drivers. The heading of the email states; "Austinburg raises?" The other document is one prepared by Johnson on June 13, 2013 setting forth three possible increases, (from 1 to 3 cents per mile), and their cost to the company.

Therefore, the decision as to how much of an increase would be given to the Coxsackie employees was made on or after June 13, almost 2 weeks after the petition had been filed.[5] Accordingly, as I conclude that a decision had not been made regarding the amount of any wage increase to the Coxsackie employees before June 3, when the petition, was filed, I find that this wage increase violated Section 8(a)(1) of the Act.

The General Counsel contends that the Respondent also violated the Act by telling employees that the Union had challenged the increase and had asked the National Labor Relations Board to seek an injunction forcing Hogan to rescind it. It is, of course true, that the Union did file an unfair labor practice charge alleging that the announced increase violated Section 8(a)(1) of the Act. But it is also true that a typical remedy for this type of violation does not require a company to rescind a wage increase already given.

The General Counsel cited some cases where the Board found violations in circumstances where companies, for anti-union reasons, threatened to withhold expected wage increases or changed existing conditions, and then blamed the union for their own actions. See for example *Valerie Manor Inc*., 351 1306, 1317 (2007), and Cen*tre Engineering, Inc.,* 253 NLRB 419, 421 (1980). But those cases are distinguishable. In *Valerie*, the company told employees that it was going to withhold a scheduled wage increase because the union had filed an unfair labor practice. The threat to withhold a scheduled raise because a union files a charge with the Labor Board is, by itself, a violation of the Act. By blaming the Union for its own violation of the law, the employer was adding insult to injury. In *Centre Engineering*, the employer told its employees that it was withholding a scheduled wage increase because of the pending election. The employer did not tell the employees that it was deferring the increase in order to avoid the appearance of election interference; instead blaming the union for its unlawful withholding of the expected wage increase.

This is not the case here. The communication truthfully announced that the Union had filed charges with the NLRB challenging the legality of the increases. At most, it may have misrepresented the remedy that would be appropriate in the event that a violation of the Act was found. In my opinion, this does not rise to the level of unlawful interference. I therefore recommend that this allegation be dismissed.

### *C. Mansfield Teetsel*

Teetsel had previously worked at the West Coxsackie facility from 2004 to 2011. At that time, he resigned and got another job.

In December 2011, he asked to be rehired and was rehired, but as a new employee at a lower pay rate than what had previously received. Although not the main union activist, Teetsel did solicit union cards from two other employees.

As noted above, at the June 19 meeting, Teetsel stated that he was bitter because he was hired at a lower rate when he returned to work.

In June, Teetsel accepted another job and told Lauda about it. He also testified that he told Lauda that he wanted to continue to work for Hogan on a casual basis when he was available. To me, this is tantamount to a resignation by Teetsel of his full-time driver's position.

On or about July 5, Teetsel told Lauda that he had changed his mind and wanted to remain employed on a full-time basis. He testified that Lauda responded that his papers hadn't yet been submitted so this was fine, but that Teetsel shouldn't do this again because he might not have a job.

On July 6, Teetsel received a phone call from Lauda informing him that his resignation had been accepted.

Lansing who testified that he made the decision to accept Teetsel's resignation, said that he did so because he thought the company would be better off with a new employee who would appreciate the job instead of Teetsel who had resigned once before. Lansing also testified that it was common knowledge that Teetsel was bitter about his pay.

As of July 6, 2013, the Respondent admits that it did not have, at the Coxsackie location, enough truckdrivers to efficiently perform the services required for the Save-A-Lot account. Moreover, this situation was a chronic one that went back at least to the start of 2013. At the time that Teetsel's resignation was accepted, the company was advertising for truckdrivers, was offering new drivers a $4000 bonus, and was offering bonuses to any employee who referred a new driver.

I don't buy the company's explanation for refusing to allow Teetsel to remain on as a full-time driver. Perhaps if there was not such a pressing need to hire new drivers and retain its existing work force, it would have made sense to allow Teetsel to resign for a second time. But in this case, I believe that Lansing figured that Teetsel would likely be voting in favor of the Union in the election that was scheduled for the following week. (July 12.) Thus, accepting Teetsel's resignation would mean one fewer vote for the union. Accordingly, I conclude that by the de facto discharge, the Respondent violated Section 8(a)(1) and (3) of the Act.

[5] Before the decision was made to give the Coxsackie employees a raise, the Respondent, at this location, implemented $500 and $1000 bonuses to be given to employees who referred new full-time or part-time drivers. Also, it offered a $4000 sign up bonus for new drivers. These bonuses were offered and given because by the start of 2013, the driver complement at Coxsackie was understaffed and management was having difficulty recruiting and retaining drivers.

*D. Interrogation or Greeting*

The General Counsel alleges that on several occasions in June, the Respondent's agents interrogated employees about their union support or activities. All of these incidents involved Charles Johnson, either alone, or with Tom Lansing.

As previously noted Johnson and Lansing visited the Coxsackie facility a week after the petition was filed in order to speak to the employees and to present the company's views on unionization. In doing so, they basically approached and spoke to each employee on an individual basis. The primary message was the possibility or probability that choosing the union would cause the Respondent's only customer in the area to terminate its contract. (Discussed above.) Johnson's last visit to this site occurred 3 years before when there was a previous union organizing drive. From the employees' point of view, there was no surprise as to why Johnson was there. This obviously was not a casual visit nor was it about something other than the union campaign.

The evidence presented by the General Counsel's witnesses does not indicate that Johnson or Lansing directly asked employees about the union. Employees were not asked if they signed union cards. They were not asked if they supported the union. They were not asked how they felt about the union. The approach was indirect and in some cases would be indistinguishable from a typical greeting such as, "what's up?"

Mansfield Teetsel credibly testified that on June 10, Johnson approached him and said; "How's it going?" Teetsel replied that he was thinking about leaving the company and that Johnson asked him not to leave. According to Teetsel, Johnson introduced him to Lansing and they spoke about how trucking had gotten harder and how the company would like to give Teetsel a raise but couldn't because "of that," pointing to the NLRB poster. According to Teetsel's testimony, he told Johnson that he couldn't say who was going to join the union and that Johnson said; "Well, that's fine."

Robert Sansone credibly testified that on or about June 10, Johnson came out to greet him and said; "What do you think about what's going on?" He states that he replied; "Charlie, I don't know where you've been for three years. . . ." Sansone testified that after that opening he was a bit sarcastic with Johnson and they spoke about wages and other benefits that he felt were lacking.

Steven Ianno credibly testified that on June 11, he was approached by Johnson and Lansing who asked to talk to him. According to Ianno, Johnson said; "What's going on? Why are we back here again?" Ianno states that he told them that it's the same old story; that a lot of guys are not happy and that it's been 3 years and the company hadn't fixed anything.

James Young credibly testified that Johnson asked to speak to him and he asked Johnson; "What's up?" Young testified that they went outside where Johnson said: "What's going on?" He responded that he didn't know and again asked Johnson; "What's up?" According to Young, Johnson said that the union had filed a petition and he told Johnson that he didn't know anything about it. (This sounds a bit like the dialogue in an Abbot and Costello movie.) Following this interchange, Johnson told Young that if the Union came in, Save-A-Lot was prepared to bring in a third party carrier.

Shane McDonald credibly testified that in June, he had a conversation with Johnson in the hallway and that Johnson said he wanted to introduce himself and welcome McDonald back. He states that Johnson said that he was glad to have him back, that he hoped that everything was going well and that he wanted to give McDonald an update about what was going on. According to McDonald, Johnson said that a petition had been filed by a union and proceeded to talk about the relationship between the Respondent and Save-A-Lot. McDonald states that after some further discussion about the possibility that the drivers could lose their jobs, Johnson asked; "What do you think about this whole thing?" McDonald replied that he just got back to work and didn't know what was going on.

Alan Field testified that on June 13, he had a conversation with Johnson and that he told Johnson that his family were members of a Union. (There is no indication that he was asked.) Field also testified that he told Johnson that it was his opinion that Save-A-Lot was nonunion and that they could just hire another carrier to replace us. From what I can gather from Field's testimony, Johnson didn't say much if anything because Field had apparently already adopted the company's view on the matter. (By June 13, Johnson had already met with many of the other drivers.)

Under Board law, not all interrogations are automatically considered to be coercive. *Rossmore House*, 269 NLRB 1176 (1984). See also *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). In the Board's view of the law, interrogation of employees will violate the Act if, considering the totality of the circumstances, it is deemed coercive. *Rossmore House Hotel,* 269 NLRB 1176 (1984), affd. sub nom *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985); Raytheon Co., 279 NLRB 245 (1986). In *Bloomfield Healthcare Center*, 352 NLRB 252, the Board stated:

> The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; *Stoody Co.*, 320 NLRB 18, 18–19 (1995). The Board has held that questioning employees about whether they attended a union meeting and what occurred at the meeting is an unlawful interrogation. *Resolute Realty Management Corp.*, 297 NLRB 679, 685 (1990), and cases cited therein.

In my opinion the conversations between Johnson, Teetsel, Young, and Field do not constitute unlawful interrogations. The statement by Johnson to Teetsel; "how's it going?" is, in my opinion, simply a normal greeting and cannot be construed as an illegal interrogation. And the exchange of "what ups"

between Johnson and Young do not, in my opinion, warrant the conclusion that Young was being interrogated about the union.

On the other hand, I am going to conclude that the conversations with McDonald, Sansone, and Ianno crossed the line. In context, they could reasonably be construed as inquiries into the employees' union activities. Moreover, because I have already concluded that the statements regarding the possible cancellation of the Save-A-Lot contract should be deemed as coercive, these interrogations coupled with the Save-A-Lot comments, are also deemed to be coercive.

*E. Is a Bargaining Order Warranted?*

In *NLRB v. Gissel Packing Co*., supra at 395 U.S. 575, the Supreme Court distinguished between three categories of situations insofar as the propriety of granting a bargaining order to remedy an employer's unfair labor practices. The first category involved the "exceptional" case where "outrageous" and "pervasive" unfair labor practices are committed. The second category involves "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. As to this second category, the Court held that a bargaining order would be proper to remedy an employer's unlawful conduct which had the effect of making a fair election unlikely where at some point the Union had majority support amongst the employees. The third class of cases, concern those where minor or less extensive unfair labor practices have been committed which would have a "minimal impact" on an election. The Court held that in the third category of cases, a bargaining order would be inappropriate to remedy an employer's unfair labor practices.

The first thing to consider is whether the Union ever obtained majority status within an appropriate bargaining unit. In this regard, the evidence shows that the Union, having obtained 14 signed cards authorizing the union to bargain on behalf of employees, did not obtain a majority by the date (June 3), that it demanded recognition and filed an election petition with the Board. Nevertheless, four additional cards were signed between June 3 and 13. (I note that Sansone quit on June 14.) Inasmuch as it was stipulated that the unit consisted of 29 truckdrivers, the Union had reached majority status by June 13,[6] the date that parties executed a Stipulated Election Agreement. Moreover, this majority status would not be affected by the disaffection of three employees, who in August, tried to get their cards back. This is because it reasonably could be concluded that they were motivated, at least in part, by the unfair labor practices committed by the Respondent in June and July.

The next question is whether the unfair labor practices found to have been committed are sufficiently serious to make the holding of a fair and free election improbable. I think the answer is yes.

The Respondent, in my opinion, crossed the line and essentially threatened employees with job loss by indicating, without an objective basis, that its sole customer at West Coxsackie would terminate its contract with the Respondent and thereby cause all of the jobs to be lost. Second, I have concluded that the Respondent promised and granted a substantial wage increase in order to dissuade the employees from voting for the Union in the upcoming election. Third, it is my opinion that the Respondent effectively discharged Mansfield Teetsel, an active union supporter, because it believed that he likely would vote for the Union. And finally, but less seriously, I have concluded that the Respondent coercively interrogated some of its employees.

In *Stevens Creek Chrysler Jeep Dodge, Inc*., 357 NLRB No. 57, enfd. by the D.C. Cir. on December 14, 2012, under the name *Mathew Enterprise, Inc. v. NLRB,* the Board held that a bargaining order was warranted under similar circumstances. The Board stated inter alia:

> Threats of job loss and plant closure are "hallmark" violations, long considered by the Board to warrant a remedial bargaining order because their coercive effect tends to "destroy election conditions, and to persist for longer periods of time than other unfair labor practices." *Evergreen America Corp.*, 348 NLRB 178, 180 (2006) (citing, inter alia, *Gissel*, supra, 395 U.S. at 611 fn. 31), enfd. 531 F.3d 321 (4th Cir. 2008).
>
> The Respondent then discharged Rocha, whom it perceived to be the leader of the organizing effort. This, too, is a "hallmark" violation, perhaps the most flagrant, "because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). In *NLRB v. Jamaica Towing, Inc.,* 632 F.2d 208, 212–213 (2d Cir. 1980), the seminal case defining "hallmark violations," the Second Circuit Court of Appeals noted, in enforcing the Board's Order, that the discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force," and would remain in employees' memories for a long time.
>
> The Respondent committed a third hallmark violation later in the organizing campaign by awarding eight employees wage increases on May 14. Grants of wage increases have long been held to be a substantial indication that a bargaining order is warranted because they 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." *Evergreen America*, supra, 348 NLRB at 180 (quoting *Gerig's Dump Trucking*, 320 NLRB 1017, 1018 (1996)); see also *Pembrook Management*, 296 NLRB 1226, 1228 (1989) (discussing cases in which bargaining orders were given based solely on the grant of wage increases).

In my opinion, the violations in this case would make a fair election unlikely. Therefore, because the Union obtained majority status by June 13, 2013, I am going to recommend the granting of a *Gissel* bargaining order effective on that date.

CONCLUSIONS OF LAW

1. By threatening employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International

[6] Even if we don't count Sansone's card, the Union had obtained 17 other cards, which is more than half of 29.

Brotherhood of Teamsters, the Respondent has violated Section 8(a)(1) of the Act.

2. By promising and granting wage increases in order to dissuade employees from supporting the Union the Respondent has violated Section 8(a)(1) of the Act.

3. By interrogating employees about their union membership or support, the Respondent has violated Section 8(a)(1) of the Act.

4. By effectively discharging Mansfield Teetsel because of his union support, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. Because the Union obtained majority status by June 13, 2013, and the violations found above have made a fair and free election improbable, a bargaining order effective retroactive to June 13, 2013 is an appropriate remedy for these violations.

6. The aforesaid violation affects commerce within the meaning of Section 2(6) and (7) of the Act.

7. Except as found herein, the other allegations of the complaint are dismissed.

## REMEDY

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

Having concluded that the Respondent unlawfully discharged Mansfield Teetsel, it must offer him reinstatement, and 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 *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enfd. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F. 3d 1137 (D.C. Cir. 2011). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge and to notify the employee in writing that this has been done and that the unlawful discharge will not be used against him in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Teetsel for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

In addition, as I have concluded that the Respondent has committed "hallmark" violations sufficient to make a fair and free election improbable, it shall be required to recognize and bargain with the Union in the following appropriate unit.

> All full-time and regular part-time drivers employed by Respondent at its West Coxsackie, New York location; excluding all guards and all professional employees and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

## ORDER

The Respondent, Hogan Transports Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

(b) Promising and granting wage increases in order to dissuade employees from supporting the Union.

(c) Interrogating employees about their union membership or support.

(d) Discharging employees because of their union membership or support or for engaging in concerted protected activity protected 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 Mansfield Teetsel 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 Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

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

(d) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(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 West Coxsackie facility copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the

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[7] 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.

[8] 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

Regional Director for Region 3, after being signed by 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 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 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility 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 June 10, 2013.

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

Dated, Washington, D.C. February 26, 2014

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HOGAN TRANSPORTS, INC. Case Nos. 03–CA–107189

and 03–CA–111193

TEAMSTERS LOCAL 294,

AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

and Case No. 03–CA–108968

MANSFIELD TEETSEL, an Individual

ORDER

On November 6, 2013, Administrative Law Judge Raymond P. Green ordered that Respondent submit to the undersigned for ruling documents that it claimed to be privileged as well as a privilege log. Judge Green also provided the General Counsel the opportunity to state objections or comments to the undersigned. General Counsel submitted his comments and objections, which I have carefully considered.

The attorney-client privilege protects communications between client and counsel, where such communications are made for the purpose of seeking or providing legal advice and are intended to be and are, in fact, kept confidential. *Upjohn Corp. V U.S.,* 449 U.S. 383, 398 (1981); *Fisher v. United States,* 425 U.S. 391, 403 (1976); *U.S. v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2nd Cir. 1996). The burden of establishing the existence of an attorney-client privilege in all its elements rests with the party asserting it. *US. v. Int. Bros. of Teamsters, AFL–CIO,* 119 F.3d 210, 214 (2nd Cir. 1997).

Documents sent from one corporate officer to another with a copy sent to an attorney do not automatically qualify, as attorney-client communications. *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 403 (8th Cir. 1987); *United States Postal Service v. Phelps Dodge Refining Corp.,* 852 F.Supp. 156, 163–164 (ED. New York 1[]994). The attorney-client privilege does not protect client communications that relate only business or technical data. *Simon v. G.D. Searle,* supra at 403; *SCM* v. *Xerox Corp.,* 70 F.R.D. 508, 515 (D. Conn 1978) ("legal departments are not citadels in which public business or technical information may be stored to defeat discovery and thereby ensure confidentiality").

While it is essential that communications between client and attorney concern legal assistance and advice in order to be privileged, it is not essential, however, that the request for advice be expressed. Client communications intended to keep the attorney apprised of continuing developments may be privileged if they embody an implied request for legal advice based thereon. *Simon v. G.D. Searle,* supra at 404; *Hercules v. Exxon Corp.,* 434 F.Supp 136 (D. Delaware 1977); *Jack Winter v. Kranton Co.,* 54 FRD 44, 46 (ND. California 1971).

I have attempted to reconcile the somewhat conflicting principles set forth in the above precedent to determine whether the commutations, here, from various officials of Respondent to each other with copies to its attorney or directly to its attorney, constitute business communications or communications impliedly requesting legal advice by keeping the attorney advised of business developments.

I am guided by *Patrick Cudahy Inc.,* 288 NLRB 968 (1988), where the Board applied these principles to documents involved in collective bargaining negotiations.

The Board reversed an ALJ, who had refused to recognize the attorney-client privilege, in part, because he viewed the nature of the work performed by the law firm as more in the nature of affording business assistance than rendering legal advice to the client. The Board disagreed, noting that the presence of business considerations intertwined with legal advice does not necessarily destroy the privileged nature of communications between attorney and client. 288 NLRB at 970. The Board further observed that the ALJ failed to recognize that "the process of collective bargaining invites the contributions of legal advice at all of its stages and that a primary purpose of the law firm's employment by Cudahy was to render legal advice throughout contract negotiations with the Union." Id. at 971.

Therefore, the Board found, contrary to the judge, that the attorney-client privilege applied to advice rendered by the law firm in connection with negotiations and preparations for operations of the plant in the event of a strike. It further held consistent with *Upjohn,* supra, and other cases that the privilege extends to the giving of information to the lawyer to enable him to give sound and informed advice. Id. at 971.

I find the reasoning of *Patrick Cudahy* applicable to the instant matter. Here, it appears that Jon Bierman, Respondent's outside counsel, has been retained to represent it with respect to all matters relating to the organizing campaign by the Union at

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of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

its facility in Coxsackie, New York. I conclude that such representation likely had business and economic aspects as well as legal aspects. Therefore, where the communications relate to matters involving the union campaigning and issues related to potential advice concerning Respondent's response thereto, the communications are privileged. Further, even though some of the communications do not expressly contain or seek legal advice, I find that most of the communications from Respondent's officials to each other and to its attorney represent "the giving of information to the lawyer to enable him to give sound and informed advice." Id at 971.

Accordingly, I conclude that the vast majority of the items included in the privilege log, which I have carefully examined, fall within the attorney-client privilege in that they either expressly relate to legal advice or are communications intended to keep the attorney apprised of business matters, which embody an "implied request for legal advice based thereon." *Simon v. G.D. Searle,* supra, 816 F.2d at 404.

General Counsel argues that Respondent acknowledges that some of the documents relate to the Union's organizing campaign and management's impressions and beliefs regarding employee support for the Union. Therefore, since such evidence concerning Respondents knowledge, beliefs or possible animus concerning employee support for the Union and their union activities is clearly relevant to the merits of the complaint, these documents must be produced. However, the fact that such information may be relevant to the allegations of the complaint does not end the inquiry. As I have explained above, the communications need not expressly request legal advice in order to become privileged as long as it embodies an implied request for advice based on the communications keeping the attorney apprised of business matters. Here, the privilege log and the underlying documents contain a number of communications, email attachments on various dates from Charlie Johnson, Respondent's director of operations, and David Stock, vice-president of dedicated operations, to each other and to Tom Lansing, vice-president of safety and driver servicers, with ccs to David Hogan, president of Respondent, and to Attorney Bierman. Tracey Miller, Respondent's director of recruitment and personnel, was also the recipient of some of these emails as was Jim Lauda, manager at the West Coxsackie, New York facility. The log states that the subject was "Albany Excelsior List: Updated," and relates to various dates in June and July of 2013. The log further states, under the column privilege, "attorney-client communications re revision to draft documents." These comments are not entirely clear since the official *Excelsior* list does not get updated (other than providing home addresses) over the course of the various dates involved in the communications. The updated "*Excelsior* list" also contained information concerning the perceived union sympathies and voting intentions of each of the unit employees on the list on the various dates of the emails. While no legal advice is expressly asked for in these communications, it is reasonable to conclude, which I do, that this information was provided to counsel to enable him to give sound and informed legal advice. *Patrick Cudahy,* supra (i.e. advice on how to conduct Respondent's campaign in regard to the pending election).

I, therefore, conclude that these communications are all privileged and need not be disclosed, pursuant to the subpoena.

General Counsel also objects to the designation of the July 1, 2013 email, relating to "Manny Teetsel/Albany Not Leaving," as privileged, asserting that unless it seeks legal advice, it should be produced. This email is from Johnson to Stock, Lansing, Hooper and Bierman, and the subject is as related above. The privilege log states as a description "attorney-client communication re Teetsel matter." While this email does not expressly seek legal advice, it is a report detailing Respondent's notification of Teetsel's desire not to leave Respondent's employ, which in my view is privileged as a communication intended to keep the attorney apprised of business matters that embodies an implied request for legal advice based thereon." *Simon v. G.D. Searle,* supra; *Patrick Cudahy,* supra. Teetsel was terminated on July 6, 2013, and it is likely that Respondent's attorney provided legal advice concerning this action and that the facts communicated to the attorney in this email was considered and evaluated by him before providing such legal advice.

I have concluded based on the foregoing analysis and precedent that nearly all of the communications detailed in the privilege log were subject to the attorney-client privilege and need not be produced.

There are some exceptions, however, and they include the following items. Emails from Stock to Bierman, cc to Hogan, Lansing and Johnson and from Stock to Lauda, cc to Bierman, both dated June 29, 2013 with attachments as well as an email from Stock to Johnson and Lauda, cc to Bierman and Lansing, with attachments, dated July 16, 2013. These communications related to documents that were posted at the Coxsackie facility by Respondent, and the emails instructed the supervisors to post and distribute these items. While the attorney undoubtedly was involved in preparing or, at least, reviewing these documents before they were posted, they cannot be deemed privileged since they were not intended to be confidential. Indeed, the attachments were intended to and, in fact, were distributed to third parties (i.e. the employees), *U.S. v. White*, 970 F.2d 328, 334 (7th Cir. 1992). Therefore, there can be no privilege and these documents must be disclosed to General Counsel, pursuant to its subpoena.

Dated: New York, New York December 6, 2013

## APPENDIX B

### 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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of their jobs because they joined or assisted Teamsters Local 294, International Brotherhood of Teamsters.

WE WILL NOT promise or grant wage increases in order to dissuade our employees from supporting the Union.

WE WILL NOT interrogate our employees about their union membership or their support for the Union.

WE WILL NOT discharge employees because of their union membership or support.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer Mansfield Teetsel 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 Mansfield Teetsel whole for any loss of earnings and other benefits suffered as a result of the discrimination against him and we will remove from our files any reference to the unlawful discharge of Mansfield Teetsel, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

WE WILL recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative, retroactive to June 13, 2013, of employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

HOGAN TRANSPORTS, INC.