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

NOVELIS CORPORATION,	)		
	)		
AND	)	**CASES:**	**03-CA-121293**
	)		**03-CA-121579**
UNITED STEEL, PAPER AND	)		**03-CA-122766**
FORESTRY, RUBBER	)		**03-CA-123346**
MANUFACTURING, ENERGY, ALLIED	)		**03-CA-123526**
INDUSTRIAL AND SERVICE	)		**03-CA-127024**
WORKERS, INTERNATIONAL UNION,	)		**03-CA-126738**
AFL-CIO.	)		
	)		
NOVELIS CORPORATION,	)		
	)		
AND	)	**CASE:**	**03-RC-120447**
	)		
UNITED STEEL, PAPER AND	)		
FORESTRY, RUBBER	)		
MANUFACTURING, ENERGY, ALLIED	)		
INDUSTRIAL AND SERVICE	)		
WORKERS, INTERNATIONAL UNION,	)		
AFL-CIO.	)		
	)		

RESPONDENT NOVELIS CORPORATION'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ALJ'S DECISION AND PROCEEDINGS

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Respondent Novelis Corporation respectfully excepts to the ALJ's decision and proceedings as follows and hereby requests that oral argument be taken in this case:[1]

I. STATEMENT OF CASE

A. Novelis' Business And Operations

Novelis is a leading producer of rolled aluminum. R-Ex. 285; Tr. 2869. Its Oswego, New York plant has never been unionized; however, Novelis has collective bargaining agreements with the United Steelworkers Union ("Union") at its Terre Haute, Indiana and Fairmont, West Virginia plants. R-Exs. 37, 40, 243, Tr. 2879-83. Novelis has a longstanding and successful bargaining history with the Union and with other unions. Tr. 2879. Under its current ownership, Novelis has never been found to have engaged in an unfair labor practice.

Beginning in 2010, Novelis made significant investments in the Oswego facility in anticipation of increased demand for aluminum based alloys from the automotive industry. R-Ex. 47; Tr. 2015, 2346-48. Specifically, it designated Oswego for the installation of Continuous Annealed Solution Heat-Treat lines ("CASH lines"), aimed at the more efficient production and fabrication of solution heat treated aluminum alloy sheet materials. Tr. 2262. Novelis began construction on two new CASH lines for automotive applications at Oswego in 2011 (Tr. 2346-49) and added more than 100 jobs at the plant as a result of the expansion. Tr. 2346-49; R-Exs. 285-12. In 2011, business issues resulted in a decreased demand for production at Oswego. R-Ex. 47; GC-Ex. 6 at 3:9-14. To avoid layoffs of 200-300 employees at Oswego, Novelis closed its plant in Saguenay, Quebec, and transitioned its production operations to Oswego. GC-Ex. 6 at 3:15-4:2; R-Ex. 285; Tr. 2260-62. These changes were communicated to employees in 2012, long before any alleged union activity. Tr. 2250, 2284.

[1] The Executive Secretary denied Novelis' request for 125 pages to this brief, instead granting a 90 page limit. This limit does not provide enough space for Novelis to fully describe the magnitude of the ALJ's errors in his decision and during the proceedings. Novelis respectfully requests that the Board do a searching review of the ALJ's decision and the proceedings below.

Ford Motor Company selected Novelis as its lead supplier of aluminum alloy sheet to be used in production of Ford's F-150 trucks. Tr. 1674, 2349. As a result, Novelis began work on a third CASH line at Oswego in December 2013, and Novelis announced to its entire workforce it was creating 200 new jobs at Oswego as a result. R-Exs. 252, 274; Tr. 1668, 2346. In December 2013, Novelis commenced construction on a Scrap Receiving Facility that, upon its completion in September of 2014, houses the largest closed loop metal recycling system in the world. Tr. 2362-64; R-Ex. 278. In total, Novelis has invested over $450 million in Oswego's operations since 2010. R-Ex. 252. All of this information was communicated to the employees as events occurred. Tr. 1264, 1622-23, 2015, 2081; R-Ex. 252. The physical expansion and construction of the CASH lines was not delayed or stopped at any time during the election period. R-Exs. 252, 274, 277; Tr. 1679, 2274, 2348.

B. Novelis' Wage And Benefits Practices

In May 2013, well before the advent of any union organizing activity, Novelis' corporate management announced changes to a number of policies impacting Oswego, including vacation and overtime policies. Tr. 513-17, 919-21. These proposed changes included the same proposed changes to the Sunday premium pay and overtime policies at issue here. *Id.* The proposed changes were to be effective immediately. Tr. 918. Many Novelis hourly Crew Leaders, however, voiced concerns to management regarding the proposed changes. Tr. 515-17, 918-20. As a result, Novelis decided to maintain the same Sunday premium and overtime pay practices in 2013. Tr. 515-17, 920.

In November 2013, again well before the advent of the Union's campaign, the employees again became aware that Novelis intended to discontinue its Sunday premium and overtime pay practices. Tr. 284-93, 520, 527, 895. In response, a number of Cold Mill employees staged a work stoppage, or "safety time out." Tr. 292, 522. During the stoppage, the employees

conveyed their concerns about the proposed changes to H.R. Director Peter Sheftic, who informed them that he would get answers to their concerns from management. Tr. 527.

In December 2013, Novelis held its annual wage and benefits meetings. Tr. 257, 528, 714, 894-95. Through Novelis announced its intention to discontinue the Sunday premium and overtime pay practices, it also announced a 5% wage increase and a $2,500 lump sum bonus for each employee to offset the impact of the change. Tr. 257-60, 528-29, 715-17, 923, 928. The employees, however, were still upset and expressed their concerns to Sheftic and Plant Manager Chis Smith. Tr. 529-32, 714, 896, 924-27. GC witness Chris Spencer testified that he asked Sheftic during the meeting he attended: "How do they expect to keep tradesmen without paying them time-and-a-half for Sundays?" Tr. 897. According to Spencer, Sheftic had no answer, but stated that Novelis would have to "look into that whenever it happens." *Id.*

On January 9, 2014, after continued dialogue with employees and management, Novelis announced during meetings held between 7:30 a.m. and 9:00 a.m. that, based on employee feedback, the proposed changes to Novelis' Sunday premium pay and Vacation and Holiday pay policies would not become effective during calendar year 2014. GC-Ex. 16; Tr. 729.

C. The Union's Petition For Representation And Misrepresentation In Solicitation Of Authorization Cards

Unbeknownst to Novelis, a group of employees contacted the Union on December 17, 2013, and began organizing efforts thereafter. Tr. 125-26, 532-34, 536. During the time that authorization signatures were gathered to support a demand for recognition, card solicitors engaged in a widespread pattern of misrepresenting the purpose of cards. Specifically, employees who were approached to sign cards were told that the purpose of the authorization card was just to receive more information about the Union or just to obtain an election.[2] Many

[2] Tr. 1498, 1637-38, 1743, 1804, 1827, 1875, 1878, 1918, 1994-96, 2032, 2135, 2160, 2186, 2232, 2471, 2456,

employees signed cards on the basis of these representations.[3] There is no evidence that Novelis managers were aware of any card signing activity by employees. ALJ Dec. 11.

D. Novelis' Lawful And Fact-Driven Campaign

The Union demanded recognition in a letter from Lead Organizer James Ridgeway to Plant Manager Smith, which Novelis received in the afternoon of January 9, 2014. Tr. 129-30; GC-Ex. 9. On January 16, 2014, in Novelis' initial employee communication following receipt of the Union's Petition, Smith expressly told employees: "The law protects your choice whether you decide to have a union represent you or not, the Company cannot interfere with that right and there will be no repercussions." R-Ex. 49. Smith also emphasized employees' free will and encouraged them to get the facts, consider both sides, get involved, and ask questions. *Id.*

From the campaign's outset, Novelis told employees it would provide facts so that they could make an informed decision about union representation, and it wanted employees to vote based on their best interests. Novelis distributed letters from Plant Manager Smith and CEO Phil Martens reiterating the messages contained in the informational literature and emphasizing Novelis' commitment to the future of the Oswego facility and its employees.[4]

Novelis created a series of handouts which were distributed to Novelis' managers during the election period. They, in turn, discussed and shared them with the employees in their units. R-Exs. 70, 243, 244; Tr. 2342, 2355, 2982-83. The handouts were purely informational in nature and focused on issues such as employees' legal rights, the collective bargaining process, and the

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2499, 2702, 2703, 2713, 2743, 2783-85, 2856, 2859, 2861, 2864, 2948, 2954, 2959, 2971, 2977-78, 3083.

[3] Tr. 1638, 1684, 1743, 1875, 1878, 1918, 2031-32, 2186-88, 2231-32, 2328, 2456-57, 2499, 2678, 2702-03, 2724-25, 2743, 2854, 2856, 2864, 2954, 2958-59, 2960, 2965, 2970-71, 3083.

[4] R-Exs. 47, 49; Tr. 1925, 1974, 2001-04, 2021-22, 2038-39, 2078, 2114-15, 2140, 2192, 2235, 2310, 2442-43, 2460-61, 2476, 2486-87, 2501. Throughout the campaign, both pro-union and anti-union supporters were permitted to distribute literature in the plant. R-Exs. 107, 111, 113, 114, 115, 123; Tr. 596-98, 1923, 1955-58, 2118-58, 2118-20, 2139, 2190, 2304, 2312, 2314-19, 2474, 2490, 2504, 2531-32, 2560-61. When Novelis policy did not allow literature to be posted in certain areas of the plant, management applied such policy in a non-discriminatory manner. Tr. 1957-58. For instance, pro-Company supporter Richard Farrands was told by management not to use Novelis equipment or company time after he sent two emails against unionization to his co-workers through Novelis' email system. Tr. 2073-75.

impact it might have on their terms and conditions of employment. *Id.* Novelis also distributed a PowerPoint presentation to employees containing factual information regarding the election process and explaining that the collective bargaining process is a "give and take" process which could result in more, the same, or less for employees. R-Ex. 77; Tr. 1640, 1746, 1864, 1985, 2018, 2035, 2045, 2101, 2138, 2168, 2221, 2276, 2333, 2427, 2439, 2530, 2982-83.

Novelis provided employees with factually accurate comparative wage and benefit data from its unionized plants, including its Fairmont and Terre Haute locations. R-Exs. 37, 40, 243; Tr. 1748, 2278, 2405, 2440, 2982-83. Additionally, Novelis launched an intranet site where employees accessed similar information. Tr. 1753-55, 1865-66, 2112.

In a letter to employees on February 14, 2014, Martens gave a chronology of the investments Novelis made in the Oswego facility and assured employees that: "The most important communication I can make is that the future of the employees at Oswego is more secure today as a result of the above actions. No other plant in North America has seen the same level of dedication to ensure their future." R-Ex. 47.

1. Supervisor Communications With Employees

Over a six-week campaign involving nearly 600 bargaining unit employees, the GC only conjured up five instances where Novelis' lower-level supervisors allegedly violated the Act. And, none of these managers violated the Act in any respect.

a. Bro's Conversations

Cold Mill supervisor Jason Bro had conversations with groups of employees on January 23 and 30, 2014. During the January 23 meeting, Bro never told the group of employees how to vote, nor did he ask them how they were going to vote. Tr. 680, 752, 1041. Indeed, the meeting was open and interactive, as employees questioned his math presentation and spoke freely; neither an employee who stated that he "was going to vote yes and hope for the best" or

employee who placed a union sticker on his face after Bro requested that he remove the sticker from his uniform were disciplined. Tr. 668-69, 671, 678-80, 726, 752, 1014-16, 1018, 1040-42. During the January 30 meeting, Bro did not ask any of the employees how they intended to vote, and employees freely spoke their mind about the union election. Tr. 703, 706, 1423-24.

b. Quinn's Conversation

On February 15, 2014, Oswego plant H.R. Leader Andrew Quinn, spoke with employees Dennis Parker, Tim Boyzuck and Gordon Barkley. Quinn approached them because he heard that Boyzuck was not happy about a conversation he had with management. Tr. 2925-26. Quinn did not make any promises to the employees, and, in fact, communicated to them that Novelis could not make any promises in light of the impending union election. Tr. 2926-27. He also communicated that the employees' situation could stay the same, get better or get worse as a result of the collective bargaining process. Tr. 2926.

c. Formoza's Conversation

CASH Line Manufacturing Unit Manager Craig Formoza spoke with employee Al Cowan three weeks before the election for five minutes or less. Tr. 650-51. During the conversation, Formoza discussed his previous experiences with unions. Tr. 2414. Formoza did not ask Cowan about his feelings on the Union or union activities or sympathies. Tr. 651, 2377-78.

2. The 25th Hour Speeches

On February 17 and 18, 2014, Novelis held its last meetings with employees prior to the election. GC-Exs. 5, 6, 19, 20, 42, 43. The speeches were presented by Martens, Marco Palmieri (President of Novelis North America) and Plant Manager Smith, lasting approximately 40 minutes each, and are memorialized by video recording and an unofficial written transcript.

Id.[5] Martens reiterated the message from his February 14, 2014 letter and emphasized the substantial investments that Novelis had made in the plant and its employees during recent years, including the construction of the CASH lines, the redistribution of operations to the Oswego facility following the closure of Saguenay. Martens stated, "we have secured your future, your family's future, and we have done that in a collaborative sense." *Id.*

Palmieri emphasized the favorable working conditions at Oswego, including the significant wage increase and lump sum bonus payment recently provided to the employees, the flexible shift schedule tailored to the Oswego facility, and efforts to secure employee retirement through Novelis' pension plan and matched 401K contributions. *Id.*

Martens then spoke again to reiterate Palmieri's message and to point out that terms in existence at Oswego, such as wages and shift schedules, are more favorable than those bargained for by the Union in Novelis' unionized facilities. Martens told the employees that a "yes" vote meant that Novelis would have to bargain over these terms and conditions in the future. He urged them to consider those conditions, along with the "security of everything we've brought here," in casting their vote. *Id.*

Smith then provided a PowerPoint presentation that again emphasized Oswego's bright future, as evidenced by Novelis' $450 million investment and announcement of over 200 new jobs. Smith shared a video from Ford Motor introducing the release of the new F-150 truck to be manufactured in partnership with Novelis. Smith again reiterated Novelis' $450 million investment, the construction of the newest CASH line, the creation of new jobs, and emphasized the facility's need to continue to achieve and deliver in the face of future challenges. *Id.*

[5] As discussed more fully in the argument section, the ALJ selectively quoted and conflated statements from each speech, each of which were different and attended by a different group of employees. Tr. 2927-29. Approximately half of the employees attended one of the speeches. Tr. 441-42, 900-01, 1257, 2928. Because of the speeches' length and the page limitation to this brief, Novelis cannot reproduce the text of each speech herein, but encourages the Board to review each separate speech in its entirety.

Notably, many employees who attended these meetings heard no threats whatsoever,[6] and not a single employee testified that he or she heard a threat.

3. Novelis' Communications About Board Agent Petock's Letter

On February 10, 2014, investigating Board Agent Patricia Petock sent a letter to Novelis seeking evidence "regarding the allegations raised in the investigation of the above-captioned matter[,]" referring to the Union's charge filed against Novelis on January 27, 2014. GC-Ex. 40; R-Ex. 292.[7] The letter expressly stated that the allegations being investigated included: "Plant Manager Chris Smith and Human Resource Manager Peter Sheftic announced to employees that it was restoring 1 ½ premium pay for Sunday and vacation and holiday time would be considered 'hours worked' in the calculation of overtime in response to learning that there was an ongoing union organizing campaign." *Id.*

Novelis communicated to employees the information from Petock that the Union's charge included allegations on Sunday premium pay and overtime policies. Tr. 145, 157-58, 160-62; GC-Ex. 40, R-Exs. 66, 292; *see also* Tr. 139-40. When the Union learned that Novelis communicated Petock's information, it denied filing a charge over those issues. Tr. 136-37, 139-41, 144-45, 157-58, 178-79, 947-48; *see also* GC-Ex. 201. Lead union organizer Spencer also told employees that the Union had not filed such a charge and encouraged other members of the in-plant organizing committee to tell employees the same. Tr. 947-51.

To prove Novelis was telling the truth, it shared redacted versions (to protect employee identities) of Petock's letter with employees. Tr. 145-46, 157-62, 903-04, 912, 951; GC-Ex. 40,

[6] Tr. 1650, 1832, 1864, 2005, 2018, 2037, 2076, 2171, 2172, 2280-81, 2308, 2335-36, 2428-29, 2440-41, 2461-62, 2473-74, 2491-92, 2503-04, 2531, 2562-63, 2578, 2694-95, 2704, 2727-28, 2788.

[7] Respondent's Exhibit 292 is a composite exhibit (Tr. 1392-99) containing the redacted and blurred forms of the February 10, 2014 letter from Petock to Novelis that were shown to the employees during the campaign (Tr. 160-61, 904, 912, 928, 951; GC-Ex. 40, R-Ex. 66), as well as the full form of the letter.

R-Exs. 66, 292; *see also* GC-Ex. 201.[8] During a 25th Hour Meeting, Martens held up and referenced the contents of a copy of Petock's letter. GC-Ex. 6, p. 9:4-16. Smith also referenced the Board's letter and stated: "how many of you actually knew that that was actually being filed. Not many, I would guess." GC-Ex. 6, p. 20:18-20.

E. The Election Results

On February 20 and 21, 2014, the election was conducted and supervised by the Board. Of the 599 employees eligible to participate, 571 voted in the election. GC-Ex. 13. 287 employees voted against unionization, and 273 voted for it.[9] *Id.*

F. Novelis' Clarifying Communications

Following the election and the filing of the instant charges, in June 2014, both Smith and Martens sent correspondence to all Novelis employees to clarify any possible misunderstandings regarding their comments during the 25th Hour speeches. R-Exs. 54, 56. Both letters were unequivocal. Smith clarified that he did not, and would not, make any threats to eliminate jobs at the plant, or predict any loss of business at the plant if the Union was elected. R-Ex. 54. Martens similarly clarified that he never threatened to close the Oswego plant, and that when he mentioned the closure of the Saguenay plant, it was simply to emphasize Novelis' commitment to Oswego. R-Ex. 56. Martens also clarified that he did not threaten a reduction in wages or benefits during his speeches. *Id*.

G. Abare's Demotion For Telling Co-Workers To "Eat Shit" And Calling Them "Fucktards"

Roughly six weeks after the election, Novelis received complaints about a Facebook posting by employee Everett Abare, who, at the time, was a Crew Leader, a plant-wide Crane

[8] At the hearing, the letter from Petock to Novelis' counsel was admitted into evidence by the GC. GC-Ex. 40; *see also* R-Ex. 292. But, the ALJ refused to permit Novelis to examine her and from asking other witnesses about conversations with Petock regarding the letter. Tr. 928-33.
[9] An additional 10 votes were cast, but challenged. One ballot was void. GC-Ex. 13.

Trainer, and the Shift Captain on Oswego's Fire Department and EMT squads. Each of these roles represented positions of leadership and responsibility within the plant.

As a Crew Leader, Abare directed the work of seven employees, evaluated their technical skills, assigned them tasks, and was the "go-to" person for his work area. Tr. 255-56, 498-99, 503-07. Many times, Abare was the most senior leader on shift. Tr. 494. As a Crane Trainer, Abare was responsible for training new Crane Operators. Tr. 3061-62, 3066-67. As Shift Captain of the Fire Department and EMT squad, Abare was the top-ranking Fire Department and EMT official during A Shift and was in charge of all first responder activities for A Shift. Tr. 248, 252, 509-11, 2689-91.[10] To use Abare's own words: "The fire captain is the heart and soul of the fire department when you're on shift. You are the commander of the fire department." Tr. 248.

Upon receiving complaints about Abare's post, Novelis' investigation revealed that on March 29, 2014, Abare posted the following statement on Facebook:

> As I look at my pay stub for the 36 hour check we get twice a month. One worse than the other. I would just like to thank all the F*#KTARDS out there that voted no and that they wanted to give them another chance…! The chance they gave them was to screw us more and not get back the things we lost….! Eat $hit "NO" Voters…..

GC-Ex. 25(b) (ellipses in original); Tr. 2884-86.

On April 4, 2014, Quinn and Supervisor Greg Dufore met with Abare. *Id.* Abare admitted to making the post and stated that he (Abare) knew that what he had written was bad and that he would take it back if he could. Tr. 571. Abare also admitted that he put the post up "out of frustration" and that "if there was anybody or any one party that I could apologize to … then I'm more than willing to apologize." Tr. 468, 571. Abare testified that, at the time of his post, he was at home on a Saturday paying bills on his personal computer. Tr. 472-73, 578. He

[10] The ALJ's finding, without record citation, that Abare spent "approximately 110 to 140 additional hours *per week*" engaged in EMT and fireman training is erroneous. ALJ Dec. 43 (emphasis added). Rather, Abare testified that he worked approximately 110 to 140 additional hours *per year*. Tr. 245, 252.

also testified that no one asked him to make the posting, that he made the posting on his own accord and volition, and that it was not an immediate reaction to the election. Tr. 568-69.

As a consequence of Abare's misconduct, on April 11, 2014, Novelis removed Abare from his roles as a Crew Leader, Crane Trainer, EMT/Fire Department member and Fire Department Shift Captain, although he continued his employment without interruption as a Cold Mill Operator. Tr. 2896-97. Quinn informed Abare that the decision was not permanent and that, depending on how Abare handled the decision, he could be reinstated to his positions at a future date. *Id.* Abare's replacement as a Crew Leader in the Cold Mill was Michelle Johnson – a vocal union supporter. Tr. 885-87, 892. It is undisputed that Novelis reviewed only GC-Ex. 25(b), and not GC-Ex. 25, at the time it disciplined Abare. Tr. 479-81, 566-67, 2885. Thus, Novelis was not aware of the identity of the individuals who had "liked" or commented on Abare's post at the time of its decision to demote Abare.[11]

II. QUESTIONS INVOLVED

The primary legal questions implicated by these exceptions are, based upon the errors enunciated in Novelis' exceptions and as set forth in the legal argument section below:

1) **Did the ALJ err in concluding that Novelis violated the Act by threatening employees with plant closure, reduction in wages, more onerous working conditions, including mandatory overtime, job loss, and that they would lose business if they voted for the Union?** Exceptions 2, 5-8, 11, 13-15, 70-71, 79, 95-97, 106, 109-114, 116-122, 150-61, 196-99, 205-11, 213-15, 225, 227-30, 243, 248, 277, 283, 303-05, 332-33, 336-40, 345, 349, 351-52, 354, 367.

2) **Did the ALJ err in concluding that Novelis violated the Act by disparaging the Union by telling employees that the Union is seeking to have Novelis rescind their pay and/or benefits and that they would have to pay back wages retroactively as a result of charges filed by the Union?** Exceptions 9, 15, 98-101, 103-106, 109-115, 117, 121-122, 150-51, 162-70, 197, 227, 232-33, 248, 277, 283, 303-06, 313-14, 329, 331, 338.

[11] Notwithstanding this difference, the ALJ rested his legal analysis entirely on GC-Ex. 25 and did not even acknowledge GC-Ex. 25(b) or the fact that Novelis never saw GC-Ex. 25 prior to demoting Abare. The ALJ's decision is also devoid of any finding that Novelis knew of the identity of the individuals who "liked" or commented on Abare's post at the time of its decision to demote Abare.

3) **Did the ALJ err in concluding that Novelis violated the Act by interrogating employees about their union membership, activities, and sympathies and union membership, activities, and sympathies of other employees?** Exceptions 12, 15, 89-90, 92-93, 95-97, 106-08, 176-83, 196-97, 225, 235-38, 240, 248, 277, 303-05, 321, 328.

4) **Did the ALJ err in concluding that Novelis violated the Act asking employees how to vote if they do not want the Union?** Exceptions 12, 15, 71, 89-90, 92-93, 106, 176-79, 181-83, 196-97, 225, 235-38, 240, 248, 277, 303-05, 321.

5) **Did the ALJ err in concluding that Novelis violated the Act by threatening employees by telling them that they did not have to work for Novelis if they are unhappy with their terms and conditions of employment?** Exceptions 12, 15, 71, 89-90, 92, 106, 179, 196-97, 235-38, 240, 248, 277, 303-05, 307, 321.

6) **Did the ALJ err in concluding that Novelis violated the Act by prohibiting employees from wearing union insignia on their uniforms while permitting employees to wear antiunion and other insignia?** Exceptions 12, 15, 20-22, 80-83, 89-90, 92-93, 106, 174-75, 197, 235-38, 240, 248, 277, 303-05, 321.

7) **Did the ALJ err in concluding that Novelis violated the Act by promulgating and maintaining rules prohibiting all postings, distribution, and solicitation related to Section 7 activities and maintaining a rule that prohibits employees from posting, soliciting ,and distributing literature in all areas of Novelis' premises?** Exceptions 10, 15, 20-22, 80-94, 106, 171, 197, 248, 277, 284, 303-05, 335.

8) **Did the ALJ err in concluding that Novelis violated the Act by selectively and disparately enforcing Novelis' posting and distribution rules by prohibiting union postings and distributions while permitting nonunion and antiunion postings and distributions?** Exceptions 10, 15, 20-22, 80-94, 106, 172-74, 197, 235-38, 240, 248, 277, 284, 303-05, 321, 330.

9) **Did the ALJ err in concluding that Novelis violated the Act by granting wage and/or benefit increases in order to discourage employees from supporting the Union?** Exceptions 9, 11-20, 24-26, 67-69, 72-76, 100, 106, 137-39, 140, 143-49, 196-99, 210-12, 216-17, 225, 237, 243, 248, 277, 303-05, 308, 316-18, 324, 331, 366, 372.

10) **Did the ALJ err in concluding that Novelis violated the Act by soliciting employee complaints and grievances and promising improved terms and conditions of employment if employees did not select the Union?** Exceptions 15, 106-108, 184-86, 197, 225, 237, 240-42, 277, 303-05.

11) **Did the ALJ err in concluding that Novelis violated the Act by demoting Everett Abare because he engaged in protected concerted activity and/or union activities?** Exception 20, 132-35, 188-95, 197, 218-24, 243, 248, 263-68, 277, 303-05, 320, 322, 355-59, 368-69.

12) **Did the ALJ err in refusing to permit Novelis to put on evidence establishing that Everett Abare was a supervisor within the meaning of the Act?** Exceptions 128-31.

13) **Did the ALJ err in concluding that Novelis violated the Act by maintaining and giving effect to its social media standard?** Exceptions 187, 197, 220, 303-05.

14) **Did the ALJ err in finding that the Union enjoyed majority support at the time it demanded recognition?** Exceptions 2, 15, 23, 27-66, 100, 128, 200-04, 278, 311, 319, 323, 326-27, 334-35, 337-38, 355-59, 363-64, 372.

15) **Did the ALJ err in issuing the remedy, including issuing a bargaining order?** Exceptions 1-3, 5-7, 11-20, 23, 24-78, 98-106, 109--22, 136-37, 140-61, 196, 198-99, 205-40, 241-310, 313, 316-19, 324, 331-32, 334-59, 364-65, 367, 370-72.

16) **Did the ALJ err in refusing to permit Novelis to establish evidence indicating other reasons for the Union's loss of alleged majority support, including so-called subjective evidence?** Exceptions 1, 2, 20, 71, 98-100, 102, 104, 121, 241, 279, 301, 311, 313, 325, 327, 336-45, 348-49, 351-52, 354, 366.

17) **Did the ALJ's findings and conclusions violate Novelis' right to engage in free speech under the First Amendment of the Constitution?** Exceptions 70, 79, 110-112, 114-120, 152-55, 162-63, 167, 169-70, 226, 306-07, 309-10.

18) **Did the ALJ conduct a fair proceeding without bias against Novelis?** Exceptions 15, 20, 22, 26-67, 69.73, 105, 107, 108, 110, 111, 123-27, 132, 136, 139, 141, 146-47, 176, 183, 200, 232, 270, 273, 303, 312, 315, 361-63 355-60, 364-66, 372.

III. LEGAL ARGUMENT

A. The ALJ Erred In Concluding Novelis Threatened Employees During The 25th Hour Speeches

1. The ALJ's Abridged And Hyper-Generalized Analysis Of The Speeches Renders It Impossible To Interpret His Findings

The ALJ's analysis of the speeches is fatally flawed because he selectively took isolated statements made during each speech and then conflated them as though made in a single speech to all employees. ALJ Dec. 48-50. But, Novelis conducted three separate 25th Hour speeches to three different employee audiences, and while they followed a similar order of presentation and outline of topics, the specific statements made by each speaker varied from speech to speech, especially as it relates to the alleged threats at issue. GC-Exs. 5, 6, 19, 20, 42, 43.[12]

The ALJ's generalized treatment of the statements obfuscates his findings. The

[12]As discussed below, these errors undermine the purported reasons for the ALJ's decision to issue a bargaining order because the evidence shows that the alleged threats in one speech were not made in other speeches and were made to only a small portion of the workforce. Tr. 441-42, 900-01, 1257, 2928.

Complaint allegations involve implied threats, the assessment of which is critically dependent on context and objective interpretation. Thus, it was incumbent upon the ALJ to analyze whether violations occurred one speech at a time, and one statement at a time in the context of that speech and the overall campaign, rather than to conflate the speeches into a summary the ALJ hoped to portray. His failure to do so makes it impossible to determine what exactly he found unlawful. For this reason alone, the ALJ's analysis cannot be adopted.

2. The ALJ Failed To Consider Relevant Context And In Some Cases Completely Mischaracterized The Record

The ALJ's analysis also utterly disregarded contextual evidence that was critically relevant to the lawfulness of the comments made in the speeches. Section 8(a)(1) compels the ALJ to consider "whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Reeves Bros., Inc*., 320 NLRB 1082, 1084 (1996) (emphasis added). The operative test "is an objective one, requiring an assessment of all the surrounding circumstances in which the statement is made as the conduct occurs." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 28 (2014) (emphasis added); *see also Arch Beverage Corp*, 140 NLRB 1385, 1387 (1963).[13] The ALJ's analysis of these alleged threats falls far short of the Board's stated expectations.

a. Plant Closure

The most blatant example of the ALJ's indifference to Board standards is his analysis of Martens' alleged implied threats of plant closure. ALJ Dec. 48-49. The ALJ gleaned such a threat from what he termed a "sophisticated ploy" by Martens to coerce employees by conflating the terms "business decision" and "personal decision." ALJ Dec. 49. In reaching this finding, the ALJ tried to rely on various statements attributed to Martens, highlighted as lengthy block

[13] Thus, the ALJ's subjective finding that the "tone" at the meetings was "rather ominous, not positive, as the Company contends" (ALJ Dec. 31), is not only legally irrelevant, but is based on nothing in the record and contradicts his own ruling precluding the admission of "subjective" evidence (incorrect, though it was).

quotes contained in his findings of fact. ALJ Dec. 32-33, 35-36, 39. But the language the ALJ quoted is disjointed, incomplete, and selectively-quoted. A closer examination of the transcripts reveals not only that the ALJ mischaracterized significant portions of the statements at issue, but also that he failed to consider a wealth of contextual evidence that was unquestionably relevant.

i. The ALJ Erred In Considering The Significant Delay Between Martens' "Personal" And "Business" Comments

The ALJ's decision creates the impression that Martens' comments concerning alleged "personal decision" to close Saguenay were immediately followed by his comment that unionization at Oswego would lead to "business decisions" implicating the future of the plant.[14] Review of the transcripts, and examination of the ALJ's footnote citations, however, reveal that Martens' comments regarding potential "business decisions" actually came much later in the speeches.[15] GC-Exs. 6, 20, 43. In fact, in each of the three speeches, Palmieri made an entire unchallenged presentation **in between** Martens' "personal decision" and subsequent "business decision" comments. *Id*.

Thus, the ALJ's analysis is based on a misrepresentation of the timing, sequence, and context of Martens' statements. The employees did not hear the statements in the continuous sequence presented by the ALJ. To determine the existence of any coercive effect implicit in Martens' statements, the ALJ should have assessed whether a reasonable employee could have

[14] Specifically, the ALJ recounted Martens' comments relating to the purported "personal decision," and followed by stating that Martens "then proceeded to tell the employees that, should they select the Union . . . the future of the Oswego plant and its workforce would be decided on the basis of a 'business decision.'" ALJ Dec. 49 (emphasis added).

[15] An examination of the footnote citations within the decision makes this point clear. On pages 33-34 of the decision, the ALJ presents a lengthy apparent quote reflecting Martens' comments during the first 25th Hour Speech. The time during the audio recording of the speech at which Martens' alleged comments relating to his "personal decisions" were made is reflected in footnote 112. The time at which Martens made his purported "business decision" comments is reflected in footnote 114, which demonstrates the comments were made nearly five minutes later. In the second speech, nearly ten minutes elapsed between Martens' comments. Compare ALJ Dec. 36. In the third speech, nearly nine minutes elapsed. Compare ALJ Dec. 39. At all three meetings, Martens' comments were separated by Palmieri's presentation. GC-Exs. 5, 6, 19, 20, 42, 43.

connected the dots between two statements made in wholly separate portions of the speeches, and separated by an entire presentation by an intervening speaker. Thus, the ALJ's analysis is based on a distortion of the facts and contravenes established Board standards. *Saginaw Control & Eng'g, Inc.*, 339 NLRB 541 (2003) ("In determining whether an employer's statement violates Section 8(a)(1), the Board considers the 'totality of the relevant circumstances.'").

ii. The ALJ Ignored Objective Factors Communicated By Martens Regarding The Closure Of Saguenay

The ALJ's characterization of Martens' decision to close the Saguenay location and transition its operations to Oswego as merely "personal" is also contradicted by the record. In each of the 25th Hour Speeches, and as previously communicated in his February 14 letter (R-Ex. 47), Martens communicated objective business reasons for Novelis' unprecedented investments in Oswego in 2010, its shifted focus to automotive manufacturing, and the resulting need to maintain and even grow employment levels at Oswego. GC-Ex. 6, p. 2-5; 20, p. 2-5; 43, p. 3-7. Any rational interpretation of the speeches leads to the obvious conclusion that these wholly objective factors prompted Martens' decision to transition the Saguenay operations to Oswego.

Martens' comments were completely disregarded by the ALJ. Indeed, he found that "in [Martens'] own words," his past decisions involving the Saguenay location "had not been based on objective criteria." ALJ Dec. 48. He then found that "employees were led to believe that he would base future decisions at Oswego on subjective criteria, such as the presence of a union."[16] *Id.* These findings are contrary to the record and cannot be sustained. Martens never made any statement to the effect that decisions about the future of Oswego would be based on subjective criteria; he never mentioned the possibility of a plant closure at Owego, and he never connected any plant closure to the presence of a union. The supposed coercive effect of Martens'

[16] Martens' factual account of Saguenay's closing cannot be deemed unlawful of itself, as his comments concerning its closure were never connected to any indication of union presence or activity, and there is no evidence that the Saguenay plant was even a union facility. *Smithfield Foods, Inc.,* 347 NLRB 1225 (2006).

comments is wholly dependent on the ALJ's subjective interpretation connecting what the ALJ characterizes as Martens' prior "personal decisions" to save jobs at Oswego and his comments regarding "business decisions" that could result from unionization. But, the objective criteria communicated by Martens, and conveniently ignored by the ALJ, completely nullifies the coercive inference suggested by the ALJ.

If anything, Martens' comments signaled the **secure future** of Oswego. He expressly informed employees that the decision to close Saguenay was made "to secure your future, your family's future, the employment levels at this plant, and to keep it in its unique way an integrated part of our company."[17] GC-Ex. 6, p. 2:12-15. His actions, however, speak even louder than his words. Whether Martens' decisions were motivated by personal or business reasons is ultimately inconsequential.[18] Martens' decisions, communicated to employees during the 25th Hour Speeches and in other campaign materials, established Oswego as Novelis' "automotive center for North America." The overwhelming evidence shows that no employees heard any threats of plant closure from Martens or others during the campaign.[19] The reason for this is simple: no employee could have reasonably have interpreted the speeches in the strained manner adopted by the ALJ because Martens informed them over and over again that Oswego's future was secure.

iii. The ALJ Mischaracterized Martens' Statements Reflecting The Lawful Realities Of An Employer's Bargaining Tenor In A Union Environment

The ALJ's attempt to cast Martens' statements regarding "business decisions" as a veiled

[17] Martens made similar statements at the other 25th Hour Speeches. At the first February 18 speech, Martens stated that, as a result of his decisions, "[w]e now have a commitment in this plant and in this community that secures your future today, tomorrow, and your family's future." GC-Ex. 43 p. 6:6-9. At the second February 18 speech, he stated "[n]obody can deny that we are positioned as the global leader in automotive, nobody can deny that we've invested heavily in this plant, and nobody can deny that your future, and your family's future are more secure today than they ever have been." GC-Ex. 20, p. 5:1-6. These comments were omitted from the ALJ's accounts of the speeches.

[18] Indeed, it is clear that employer motives are wholly irrelevant to whether employer statements violate the Act. See, e.g., *KenMor Electric Co*., 355 NLRB 1024, 1027 (2010). For this reason alone, the ALJ's reliance on the subjective versus objective basis for Martens' comments is, of itself, wholly improper.

[19] Tr. 2005-06, 2037-38, 2694-95, 2076, 2109-12, 2171-73, 2223-24, 2280-81, 2335-36, 2440-41, 2428-29, 2461-62, 2473-74, 2491-92, 2503-04, 2530-31, 2562-63, 2577-78, 2694-95, 2704, 2715-16, 2727, 2737, 2750, 2787-88.

threat of plant closure is another blatant mischaracterization. Martens' "business decision" comments followed a separate presentation by Palmieri and addressed a completely separate topic from Saguenay: a comparison of the terms and conditions of employment at Oswego with Novelis' Fairmont and Terre Haute facilities, where Novelis has a long-standing bargaining relationship with the Union. GC-Ex. 6, p. 7-10; 20, p. 9-12; 43, p. 10-14. Martens made no reference to Oswego's future during this portion of the speech. From any objective interpretation, Martens' comments regarding "business decisions" referred to the collective bargaining process at Novelis' unionized locations, not to plant closure. These statements about bargaining at union plants - when Novelis had communicated that no layoffs had occurred at these plants in the past five years - cannot be reasonably interpreted as a threat of plant closure or job loss. Thus, the ALJ's finding that Martens' reference to "business decisions" constituted an implied threat of plant closure is unsupported by the record.

iv. The ALJ Ignored Evidence Of Novelis' Unprecedented Investment In Oswego And Numerous Positive Communications To Employees

Perhaps the ALJ's greatest failing, however, was his disregard of the wealth of undisputed evidence related to Novelis' unprecedented investment in the Oswego plant and the numerous communications by Novelis, both before and during the campaign, emphasizing the secure future of the plant and its workforce.

The dramatic growth and opportunity existing at Oswego is too significant to ignore. The undisputed evidence reflects that Novelis has invested approximately $450 million in the Oswego facility since 2010. R-Exs. 47, 252, 274. These investments not only establish an expansion in operations, they reflect a fundamental shift in Novelis' efforts to become the global leader in aluminum manufacturing for the automotive industry, with the Oswego facility the focal point of that initiative. R-Exs. 47, 252, 285.

These investments, and their impact on Oswego, were not abstract and distant notions. Tangible and overwhelming proof of the plant's growth and longevity was evident even during the Union's campaign. The third CASH line at Oswego was the result of a $200 million investment announced in the months leading up to the campaign. Construction of the CASH line began one month before the Union's campaign, and continued uninterrupted throughout its course. R-Exs. 252, 274; Tr. 1668, 2346. Novelis announced, in December 2013, that it was creating 200 additional jobs at Oswego as a result of the new CASH line. R-Exs. 252, 274; Tr. 1668, 2346. All of this information was evident and communicated to the Oswego employees as the events occurred. R-Exs. 252, 274, 277; Tr. 1679, 2274, 2348.[20]

If employees needed further confirmation of Oswego's secure future, it was evident in numerous Novelis communications during the campaign. During the 25th Hour speeches, Smith and Martens reiterated Novelis' commitment to the Oswego facility and the expectation for immense growth and success. GC-Ex. 6 at 2:11-15; 2:16-3:4; 3:5-8; 4:11-16; 10:14-21; 10:22-11:1; 13:5-12; 16:21-17:11. Martens also sent a letter to employee homes prior to the election in which he explained the objective facts supporting the decisions made regarding Sagenauy and Oswego and again stated that the Oswego plant's future is "secure." R-Ex. 47.

In light of this overwhelming evidence of the investment and growth taking place at Oswego, the ALJ's finding that Martens' impliedly threatened to close the plant is patently implausible. No listener could reasonably perceive Martens' comments to constitute an implied threat of plant closure, and the record evidence shows that no listener did. Any such interpretation of Martens' comments would require the listener to somehow conclude that Novelis would make the irrational "business" decision to throw away the $450 million invested

[20] Novelis also began construction of a Scrap Receiving Facility the month before the campaign, and construction was ongoing during the campaign. Tr. 2372. The facility is the result of an additional $150 million investment and now houses the largest closed loop metal recycling system in the world. Tr. 2362-64; *see also* R-Ex. 278.

in Oswego and the greatest opportunity for growth in the history of Novelis by closing Oswego in response to the results of a union election. This is inconceivable. The ALJ's interpretation is contrary to the actual experience of the employees who heard no such threats and completely disregards the overwhelming context evidence demonstrating the secure future of Oswego.

b. Reduced Pay and Benefits

The ALJ's findings that Novelis threatened to reduce pay and benefits are equally unsustainable. During each speech, Martens noted that Oswego employees enjoy higher wages and greater scheduling flexibility than their unionized counterparts. GC-Ex. 6, p. 7-10; 20, p. 9-12; 43, p. 10-14. Even assuming *arguendo* that Martens' comments indicate some form of regressive bargaining posture, as the ALJ suggested, no reasonable employee could have perceived the comments as a threat of reduced wages and benefits given the wealth of contextual evidence. From the outset of the campaign, Novelis lawfully communicated that if the Union was elected, all wages, benefits and working conditions would be subject to the bargaining process, that bargaining was a "give and take" process and that employees could get more, the same or less than what they already have. R-Exs. 49, 70, 77, 243, 244. Wages, benefits and working conditions under the union contracts at Novelis' Fairmont and Terre Haute plants also were discussed as part of the campaign. R-Exs. 37, 40, 243; Tr. 1748, 2278, 2405, 2440, 2983. And, as confirmed by the unrebutted testimony from numerous employees, the Oswego workforce was well-educated, long before the 25th Hour meetings, on the collective bargaining process, and were well aware of the comparisons to the Terre Haute and Fairmont contracts.[21] **Given this context, Martens' comments were unquestionably lawful.** *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980) (finding that even presumptively unlawful statements, such as

[21] Tr. 1640, 1642, 1746-51, 1853-61, 1864-66, 1985, 2017-19, 2035-36, 2045, 2101, 2137-39, 2168-70, 2221, 2276-81, 2333, 2427, 2439, 2530, 2982-83.

"bargaining from scratch," or "bargaining from ground zero" are not violative of the Act "when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations"); *see also Stumpf Motor Company, Inc*., 208 NLRB 431, 432 (1974). Thus, as with his analysis of Martens' implied threat of plant closure, the ALJ turned a blind eye to this pivotal context evidence. Instead, he relied on cherry-picked comments considered in isolation and taken out of context.[22]

c. More Onerous Work Conditions

The ALJ also found that Martens and Smith threatened that employees would lose their flexible work schedules. But, again, the ALJ's findings represent a dramatic and inexplicable departure from the actual statements reflected in the speech transcripts.[23]

No reasonable employee could construe any comment made during the 25th Hour Speeches as a threat to the flexible work schedule given the express assurances during the speeches that the schedule would remain unchanged. Martens emphasized that the Oswego plant had more scheduling flexibility than Novelis' unionized facilities, that such flexibility was unique for a plant of its size and that Novelis wanted its employees to have this flexibility. GC-Exs. 6, p. 7:21, 8:22-9:3, 20, p. 10:4-6; 20, p. 10:8-9, p. 11:7-10, 43, p. 12:21-22. Martens' point was confirmed by Palmieri, who ensured employees that Novelis had no interest in making changes to the employees' J-12 shift schedule, and made clear that any future changes to that schedule would be the result of changes in the customers' demands – not as a result of unionization. GC-Ex. 6, p. 5:20-24; GC-Ex. 43, p. 8:3-9; GC-Ex. 20, p. 7:14-24. Martens re-

[22] Even if considered as threats, the threatened loss of pay or benefits is not considered a hallmark violation and would not support a bargaining order. *NLRB v. Chester Valley, Inc.,* 652 F.2d 263, 272 (2d Cir. 1981).

[23] Novelis is at a loss as to what portion of Smith's statements could even be considered such a threat given the undeniable fact that he makes no mention of the employee work schedules in any of the three speeches. Novelis is also at a loss as to what portion of Smith's statements could be considered a threat of layoff, as suggested by the ALJ. The ALJ devotes only a single sentence in his analysis to this finding. ALJ Dec. 50. A review of the speech transcripts reveals that he made no references whatsoever to layoffs in his speeches. *See, e.g.*, *NLRB v. River Togs, Inc.*, 382 F.2d 198, 201-02 (2d Cir. 1967) (stating that "an employer is free to tell his employees what he reasonably believes will be the likely economic consequences of unionization that are outside his control").

emphasized Palmieri's assurances. GC-Exs. 6, p. 7:22-25, 20, p. 10:4-6. And he made clear that Novelis was willing to provide such flexibility, not because of the lack of any union presence, but because of Novelis' confidence in the employees' ability to "work at a level that is world-class," which, according to Martens, was "worth a hell of a lot."[24]

d. Prediction Of Loss Of Business

Finally, the ALJ's analysis concerning the alleged predictions by Smith that unionization would result in the loss of business by Novelis shows the same careless disregard of Smith's actual statements and the legal framework applicable under Section 8(a)(1). Again, the ALJ's analysis provides scant insight as to the specific statements at issue. When reading the transcripts of Smith's comments, however, one cannot remotely find a prediction of loss of business, especially when considering the context of the repeated comments within the speeches themselves about the growth of business at Oswego. For example:

> "[H]opefully you've over time, understood a little bit of what we've been saying in terms of the opportunities that lie ahead of us once we're successful in delivering the material for the launch of this program. The recent $200 million announced in December for a third cash line brought the total over $400 million to be invested in Oswego announced over the last three or four years. Where else can you look at any other industry in this part of the world that even comes close to demonstrating that sort of support; to guarantee that sort of an opportunity, to be on the edge of cutting technology that will have such an impact on the future of this organization, as well as the customer base that we're going to be supplying. Two hundred new jobs already." GC-Ex. 6 at 16:21-17:11.
>
> "Now we have that same chance multiplied by a hundred times in terms of the volumes that we're going to be producing in support of the automotive market." GC-Ex. 20 at 26:15-18.
>
> "We have the highest percentage of aluminum going into that vehicle [versus competitors]. So as their sales go up, so does our opportunity to deliver more material to the program. That's a pretty neat position to be in." GC-Ex. 6 at 16:15-19.

When considering the speeches in their entireties and in the context of Novelis' consistent communications throughout the campaign period emphasizing Novelis' commitment to the

[24] The ALJ's outlandish conclusion is contradicted by his own findings of fact, which reflect that the "common refrain" from Novelis was that "bargaining is a 'give and take' process which could result in more, the same or less for employees. ALJ Dec. 24.

future and growth of Oswego and its employees, there is simply no rational basis to find that Smith's comments amounted to a threatened loss of business.

Smith's comments, at most, amount to his opinion that Novelis' ability to meet its automotive customers' expectations could be negatively impacted by various future challenges. Smith noted the challenges to operational safety resulting from the ongoing construction at the facility. GC-Ex. 6, p. 12; 20, p. 14; 43, p. 16-17. Smith noted the rigorous standards imposed by the contract, and the significant output required of a product Novelis had never previously produced. GC-Ex. 6, p. 13-14; 20, p. 15-17; 43, p. 18-19. Smith noted that the employees were working with new equipment with which they had no previous experience. *Id*. Smith noted the unanticipated presence of domestic competition. GC-Ex. 6, p. 14; 20, p. 17; 43, p. 20. All such factors are clearly objective challenges to Novelis' ability to meet its contractual obligations.

Within this same vein, Smith opined that Novelis' ability to meet its automotive customers' expectations could be negatively impacted by a distracted workforce and that the union campaign had caused distractions in the weeks leading up to the election. Smith noted the Union had limited knowledge of the business operations at the Oswego facility, that it had no understanding of Novelis' contractual commitments, and no understanding of Novelis' global strategy with respect to the automotive industry. Smith's statements relating to the Union were perfectly lawful. *See Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1429 (2d Cir. 1996); *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967). Indeed, "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.'" *Laborers' Dist. Council v. NLRB,* 501 F.2d 868, 874 (D.C. Cir. 1974).

These facts make clear that Smith's comments communicated objective reasons for the risks to Novelis' ability to meet its customers' expectations. But, while the ALJ characterized

these comments as based in conjecture, the speech transcripts reveal that Smith couched these statements on objective and lawful criteria. To view Smith's comments as implied threats in this context would be tantamount to a prohibition on any employer statements regarding the potential business impact of unionization. *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1140 (D.C. Cir. 1994) ("If the Board may take management statements that very emphatically assert a risk, twist them into claims of absolute certainty, and then condemn them on the ground that as certainties they are unsupported, the free speech right [articulated in *Gissel*] is pure illusion.").

3. The ALJ's Careless And Unsupported Analysis Threatens Novelis' Rights Under The First Amendment And Section 8(c) of the Act

The ALJ's decision reflects a total indifference to Novelis' First Amendment and Section 8(c) rights. By its terms, Section 8(c) protects an employer's use of nonthreatening and noncoercive speech in the context of labor relations, and "manifests a congressional intent to encourage free debate on issues dividing labor and management." *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966). As the Second Circuit has noted, Section 8(c) not only protects employer's speech rights, but also serves the function of allowing employers to present an alternate view and information a union would not present: "Granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance." *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986). In this respect, the ALJ's analysis must not be confined to a simple evaluation of the rights of the employees under Section 8(a)(1) to associate freely for purposes of collective bargaining. Rather, the ALJ must balance those rights against Novelis' right of free expression. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Indeed, the 25th Hour Speeches must be considered "'against the background of a profound ...

commitment to the principle that debate ... should be uninhibited, robust, and wide-open.'" *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966) (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The undisputed record evidence demonstrates that Novelis went to great lengths throughout the course of the campaign to guarantee an atmosphere of open and free debate where the employees were not only well-educated of the rights guaranteed them under the Act, but were encouraged to participate - regardless of their allegiances - without fear of adverse consequences.[25] Novelis provided a near continuous flow of factual information about how bargaining works, factual, historical facts about unionization at other Novelis locations, a message of growth and expansion, and a message for employees to do what was best for themselves and their families without any threats, intimidation, or instruction to vote against the Union. *Id*. Novelis repeatedly emphasized employee free will, encouraged employee participation in the election process regardless of viewpoint, and provided assurances against reprisal or adverse consequences. *Id*. Indeed, there is not a single allegation that Novelis made any express threat during the course of the campaign, much less during the 25th Hour Speeches.

These speeches must be examined in the context provided by this backdrop and under the protective cloak provided by Section 8(c), which "operates to ensure an effective exchange of information from both union and management in the sphere of labor relations." *NLRB v. K&K Gourmet Meats*, 640 F.2d 460, 465 (3d Cir. 1981). In his subjective scrutiny of the words used by Martens and Smith, the ALJ effectively punished Novelis for using persuasive speech by characterizing efforts to personalize Novelis as "sophisticated ploys" and the like. In finding such speech unlawful in the absence of actual threats, the ALJ violated Novelis' rights under

[25] R-Exs. 37, 40, 49, 70, 77, 243, 244. Tr. 1748, 2004, 2017, 2036, 2076, 2107-08, 2168, 2278, 2405, 2438, 2440, 2500, 2559-60, 2703-04, 2751, 2787, 2795, 2927, 2983.

Section 8(c) and the First Amendment.[26]

B. The ALJ Erred In Concluding That Novelis Unlawfully Conferred Benefits

The ALJ found Novelis conferred an unlawful benefit to employees on January 9, 2014, when it "restored" Sunday premium and overtime pay policies. The ALJ's analysis of these allegations shows not only a complete lack of understanding of both the evidence and Board law, but also a results-oriented analysis designed to find a violation regardless of the record. The ALJ's findings and conclusions cannot be upheld.

1. The ALJ Ignored The Lack of Evidence That Novelis Promised Or Conferred An Actual Benefit To Its Employees

Any claim under Section 8(a)(1) first requires proof of either a promise or conferral of benefits, or intrusive threats and conduct. *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964). In very general terms, *Exchange Parts* recognizes that an employer may try to counter a union organizing drive either by using a "stick," such as threats of retaliation, or by using a "carrot," such as the promise of benefits. Here, unlike most cases analyzed under *Exchange Parts*, where the employer is alleged to have conferred a new benefit like a wage increase or incentive program, the Complaint alleges that Novelis unlawfully conferred a benefit to employees by "restoring" certain Sunday premium and overtime pay policies. This distinction is significant, as any finding Novelis "restored" the pay practices at issue necessarily requires proof that, at some prior point, Novelis discontinued them. Stated differently, Novelis cannot "restore" pay practices unless it first took them away.

The GC presented virtually no evidence at trial to satisfy this predicate burden. Although several witnesses testified that Novelis **announced** plans to discontinue the practices at issue effective January 1, 2014 (Tr. 257-61, 714-19, 894-97), none testified that these announced

[26] The ALJ's selection of remedies was equally offensive to Novelis' free speech rights, and portions of the remedy clearly cannot be enforced. ALJ Dec. 72-73.

changes were **actually** implemented.[27] Tr. 517, 718. Thus, the record simply does not establish that Novelis made a change with respect to the pay practices at issue either before or after the advent of the Union's organizing campaign. This obvious gap in the record should doom this claim. The ALJ, however, engaged in a conscious effort to bridge the gap between Novelis' mere announcement of a proposed change and the actual change in benefits required under an *Exchange Parts* analysis.[28] These purported "findings" are unsupported by the record and aimed at overcoming the GC's failure to carry its evidentiary burden.

2. The ALJ Erred In Finding Novelis Was Aware of the Union's Organizing Campaign Before January 9, 2014

The ALJ's finding that Novelis had knowledge of the Union's organizing activities at the time of its January 9, 2014 pay practices announcement is a blatant misconstruction of both the evidence and applicable legal standards. Proof that Novelis had knowledge that the Union was "actively seeking to organize, or else that an election was ... impending" at the time of its January 9 announcement is a necessary predicate to any finding that Novelis unlawfully conferred a benefit. *Hampton Inn Ny--JFK Airport*, 348 NLRB 16, 18 (2006) (*quoting NLRB v. Gotham Indus., Inc*., 406 F.2d 1306, 1310 (1st Cir. 1969)). Where such knowledge is not

[27]There is no evidence that any employee was actually denied Sunday premium pay or denied the use of vacation or personal time as hours worked for the purpose of calculating overtime. The GC easily could have attempted such a showing, as it subpoenaed myriad Novelis records, and could have asked for pay stubs reflecting whether employees who worked the first two weeks of January 2014 received overtime for Sundays or vacation days. While Novelis contends that effort would have been fruitless, the GC did not attempt to make such a showing.

[28] For instance, the ALJ noted that "the [Sunday and premium pay] changes became a reality at the mandatory employee annual wage and benefit meetings on December 16 when Sheftic and Smith formally announced the new pay scale, effective January 1." ALJ Dec. 9. Obviously, changes in benefits do not become "a reality" upon the mere announcement that they will be implemented at some point in the future. They become "a reality" when they are implemented. Similarly, the ALJ noted an "unscheduled overtime pay was previously eliminated in December 2013." ALJ Dec. 45. But, his own findings belie this conclusion since he makes clear throughout the decision that the changes were merely announced in December 2013, and were not to be effective until January 1, 2014. ALJ Dec. 24, 47. The ALJ added, "[s]ince I found that premium overtime pay had been taken away and then restored on January 9, I find Smith's [post-election] statement implying that it had not been restored as a calculated attempt to respond to the corresponding allegations in the Complaint." ALJ Dec. 45. Again, the ALJ made no actual substantive findings that the Sunday and premium pay benefits had ever been taken away. Thus, while the ALJ described Novelis' announcement on January 9 as a powerful "give back to employees" (ALJ Dec. 24), his characterization is nothing more than a hollow assumption. Novelis can't "give back" a benefit it never took away.

established, a promise or conferral of benefits cannot be found unlawful. *Norfolk Livestock Sales Co.*, 158 NLRB 1595 (1966); *Sigo Corp*., 146 NLRB 1484, 1486 (1964). The defects in the ALJ's findings with respect to this key element are as numerous as they are irreparable.

a. Ridgeway's Statement As To Smith's Awareness Of Campaign

The ALJ's heavy reliance on Ridgeway's January 7, 2014 letter "referring to Smith's awareness of the campaign" is indefensible. Ridgeway's statement is reflected in the Union's formal demand for recognition, which provides in pertinent part: "[a]s you are aware, the United Steelworkers have been asked by a majority of your employees to represent them for the purpose of collective bargaining." ALJ Dec. 22; GC-Ex. 7. The ALJ noted that, "[s]ignificantly, Smith did not dispute Ridgeway's assertion that he (Smith) was 'aware' of the organizing campaign prior to receipt of the January 7 letter." ALJ Dec. 23. Further, the ALJ found that "there is sufficient circumstantial evidence that the Company knew of the incipient union campaign prior to receiving Ridgeway's letter on January 9," in part, because "Ridgeway's statement in the January 9 letter referring to Smith's awareness of the campaign was neither denied in Smith's subsequent response nor testimony by Smith or any other high level manager." ALJ Dec. 47.[29]

The ALJ's reliance on the "as you are aware" phrase contained in Ridgeway's letter as "proof" of Novelis' knowledge is erroneous for several reasons. Notably, Ridgeway's statement is textbook hearsay, as the ALJ accepted it squarely for the truth of what it asserts: that Smith was aware of union organizing prior to January 9th. Moreover, the GC did not elicit, and Ridgeway did not provide, any explanation or support for the statement. The statement was not otherwise corroborated by direct evidence, as is routinely required to ensure the reliability of this

[29] To further illustrate the absurdity of this reasoning, the timing of events on January 9 shows that there are other equally plausible reasons for the absence of a "denial" from Smith. It is undisputed that the decision to maintain Sunday premium and overtime policies was announced between 7:30-9:00 AM on January 9 and that Ridgeway's letter was received on the afternoon of January 9. What if Smith became aware of union organizing at noon on January 9? He would have no reason to issue a "denial" and he would not have had knowledge of union activity before the announcement to employees. In other words, the absence of a denial is proof of nothing.

manner of hearsay. The letter containing Ridgeway's statement is unsigned, and was not sent on Union letterhead. Tr. 130-31.

And, there is no indication in the ALJ's decision that the reliability of Ridgeway's statement was ever measured against the incontrovertible fact that the GC admitted, to both the ALJ in this case and to the federal district court judge who considered the GC's request for Section 10(j) relief, that Ridgeway provided false testimony in his sworn Jencks affidavit.[30] The ALJ denied Novelis' motion requesting that the letter from Leslie be included as part of the formal record. And, a review of the ALJ's decision reveals only a single passing comment regarding Ridgeway's credibility and his false sworn statement. ALJ Dec. 10.[31]

But, even casting these concerns aside, the ALJ's reliance on Ridgeway's statement cannot be reconciled with his own treatment of that statement at the hearing. He ruled that the factual basis for Ridgeway's statement and that the basis for Ridgeway's understanding that the campaign was known to Novelis was mere speculation. Tr. 190-91. And, to remove all doubt

[30] Specifically, GC Leslie's letter, dated August 7, 2014, indicated that Ridgeway's March 14, 2014 affidavit contained misrepresentations of fact involving telephone calls that he purportedly received during the course of the campaign. That Ridgeway lied in the affidavit given as part of the Region's investigation in this case is relevant to his credibility. Indeed, the relevancy of his testimony is highlighted by the ruling of the Honorable Judge Sharpe, Chief Judge for the Northern District of New York federal court, when he stated in his decision on the GC's request for Section 10(j) relief that he was "troubled" by Ridgeway's affidavit and that it was "concerning" that the GC "all but admitted a fabrication or embellishment by Ridgeway" and still relied on other parts of his affidavit. *Ley v. Novelis Corp*., Case No. 5:14-cv-775, Memorandum Decision and Order [Doc. 73] (N.D. N.Y. September 5, 2014).

[31] The ALJ's casual, and even dismissive, treatment of Ridgeway's admitted falsehoods stands in stark contrast with his treatment of Smith's statements made in response to the Union's demand for recognition. According to the ALJ, Smith "acknowledged receipt of Ridgeway's January 7 letter, specifically noting receipt "on the afternoon of January 9, 2014.'" ALJ Dec. 23. The record indisputably reflects that Novelis first announced its decision with respect to its Sunday and premium pay practices on January 9, 2014, between 7:30 and 9:00 a.m., and that Novelis did not receive the Union's formal demand for recognition until after its announcement. Indeed, the ALJ acknowledges that "[t]here is no dispute as to the timing of the announcement and receipt of the Union's demand for recognition." ALJ Dec. 25. Upon these facts, there is no basis upon which to discredit Smith's statement. Nonetheless, the ALJ treats Smith's statement with undue skepticism. According to the ALJ, "[g]iven the lack of company testimony as to when it actually received Ridgeway's letter on January 9, I found it suspicious that Smith would pinpoint its receipt in the afternoon, and construe it as a further attempt by the Company to establish a paper trail justifying its restoration of benefits earlier in the day." ALJ Dec. 23. The ALJ's decision reflects that he fully credited Ridgeway's statement, despite obvious grounds upon which to question Ridgeway's credibility, but found "suspicious" a statement from Smith that he, himself, acknowledges to be true. The ALJ's contrasting treatment of these statements is not only incomprehensible, it evinces a form of bias so firmly rooted as to render impossible any credibility findings based on the objective evidence he, himself, acknowledged.

concerning the substantive weight to be afforded it, the ALJ instructed that the basis for Ridgeway's statement was of no consequence since he was "just interested in evidence." Tr. 191. Yet, in his decision, the ALJ completely reversed course, and characterized the very same statement as circumstantial evidence that Novelis was, in fact, aware of the Union's organizing campaign. ALJ Dec. 23. The ALJ cannot have it both ways. He cannot, at trial, consider Ridgeway's statement to be so founded on speculation and subjectivity that he does not consider it to be evidence, and then, in his decision, rely heavily on this same statement as proof of Novelis' knowledge of the Union's campaign.

For the ALJ to infer employer knowledge from such speculative and subjective evidence is untenable under Board precedent.[32] By recasting that statement now as "circumstantial evidence," the ALJ is substituting an adverse inference based on unsubstantiated speculation and hearsay for the requirement that GC submit actual evidence of knowledge. The impact of the ALJ's evidentiary rulings relating to Ridgeway's statements cannot be ignored. Ridgeway was the first witness to testify at the hearing. The ALJ's rulings not only precluded any and all opportunity for cross-examination concerning the foundation and veracity of his statement, they established the baseline foundation for the parties' understanding of both the relevance and the substantive weight to be afforded the statement going forward.[33] By expressly stating that Ridgeway's statement was not "evidence," the ALJ eliminated both Novelis' obligation and incentive to rebut the statement. Why would Novelis present witness testimony to rebut

[32] Indeed, *Exchange Parts* and its progeny make clear that knowledge element is more than critical-it is **essential**. *Hampton Inn*, 348 NLRB at 18; *Norfolk Livestock Sales*, 158 NLRB at 1595; *Sigo Corp*., 146 NLRB at 1486. It is also unquestionably the GC's burden to prove. *See id.* For this reason alone, an adverse inference on knowledge element cannot be based upon a mere lack of record evidence. *Laborers' Int'l Union*, 360 NLRB No. 72, slip op. at 7 (2014) (noting it inappropriate to use an inference to fill the "gaps in the record"). According to the Board, if an employer's knowledge of union organizing activity "could be predicated simply on the company's failure to call witnesses to deny such knowledge, the General Counsel's typical litigation 'burden' in [a ULP] case requiring proof of such knowledge would be reduced to a virtually weightless load." *Raley's*, 348 NLRB 382, 460, n. 139 (2006).

[33] The impact of the ALJ's rulings is even evident in the fact that the GC, having received the benefit of the ALJ's evidentiary objections, did not even argue in its post-hearing brief that Ridgeway's statement was evidence of Novelis' knowledge.

Ridgeway's statement after the ALJ ruled that the statement was based on inadmissible subjective evidence? Why would Novelis present testimony to rebut Ridgeway's stated understanding that Novelis knew of the Union's organizing efforts after the ALJ ruled his understanding speculative? And, why would Novelis attempt to rebut his statement after the ALJ's admonishment that he did not consider it to even be "evidence"? The ALJ cannot draw an adverse inference against Novelis for its purported silence in rebutting Ridgeway's statement, when that silence is such an obvious construct of the ALJ's own evidentiary rulings. Indeed, if the ALJ were to draw an adverse inference, it should be against the GC, who chose not to call Smith or any other management member to establish Novelis' knowledge.

b. <u>The Purported Warnings By Employees To Sheftic And A Low-Level Supervisor That Employees Might Reach Out To A Union</u>

The ALJ's reliance on purported "warnings by employees to Sheftic and at least one other supervisor that employees might reach out to a union" as circumstantial evidence "that the Company knew of the incipient union campaign" (ALJ Dec. 47) further highlights the ALJ's strained logic and misapplication of the law. Most egregiously, the ALJ himself struck, as inadmissible hearsay, testimony that an employee had mentioned the possibility of reaching out to a union during the meeting with Sheftic. Tr. 261. So the first half of the ALJ's finding is based on "evidence" that does not exist. Even if the employee's question was in evidence, Sheftic's response is evidence of **nothing**. The Board has drawn a "clear and appropriate demarcation" between an employer's lawful general desire to remain union free, and a specific unlawful intent to interfere with an active and ongoing campaign. *Hampton Inn*, 348 NLRB at 17. In order to find that Novelis unlawfully interfered with a union, it must be proven that it possessed knowledge of actual union organizational activity among its employees. *Id*. Thus, the requisite element of knowledge cannot be based on an employer's mere awareness that its

employees might reach out to a union at some point in the future.

The import of this distinction was clearly lost on the ALJ. The purported "warning" to Sheftic, referenced by the ALJ in support of his finding, cannot constitute knowledge of actual organizing activity because actual organizing activity had not yet taken place. This fact is undisputed in both the record and the ALJ's findings of fact. ALJ Dec. 9-10.[34] The ALJ's conclusion based on this fact cannot be reconciled with Board precedent, which, as noted above, requires proof that the employer had knowledge of actual union organizing activity.

The other "warning" referenced by the ALJ is also insufficient to establish that the Company possessed the requisite knowledge of actual union organizational activity. The ALJ found that, during December 2013, "an employee, Dennis Parker, told his supervisor, Bryan Gigon, the associate leader in the Remelt department, that the announced changes to wages and benefits had caused employees to consider union affiliation. Parker shared the information during his performance review meeting after Gigon asked if Parker had any concerns." ALJ Dec. 11. According to the ALJ, this exchange also represented circumstantial evidence sufficient to establish the requisite element of knowledge.[35] ALJ Dec. 47.

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[34] Specifically, the ALJ found that "[i]n response to one employee's suggestion that employees might look to affiliate with a labor organization ... Sheftic responded 'we certainly hope that we don't have to have a union here at this point, that we will – we're better off doing our own negotiating.'" ALJ Dec. 9-10. At the hearing, Novelis objected to, and moved to strike, portions of the testimony relating to Sheftic's statement on the basis that the statement was protected under Section 8(c) of the Act, was irrelevant, and was inadmissible hearsay. Tr. 261-282. In response, the GC repeatedly stated its position that Sheftic's alleged comment was relevant as evidence of Novelis' knowledge of union organizing activity, and thus an admissible party admission. Tr. 272-74. While the ALJ appears to have avoided this issue in his analysis, Novelis excepts to his refusal to strike the testimony and his finding that Sheftic's statement is evidence of knowledge. Sheftic's statement cannot show Novelis' knowledge, as it was made before the Union's organizing efforts. Indeed, Sheftic's statement indicates nothing more than a general desire to remain union free. Such sentiment is wholly lawful, is protected under 8(c) of the Act, and thus constitute a party admission. It is thus irrelevant to any analysis concerning knowledge and the unlawful motive necessary to establish a violation under *Exchange Parts* and should have been struck from the record as a result.

[35] The ALJ's finding that Parker told Gigon that "the announced changes to wages and benefits had caused employees to consider union affiliation" mischaracterizes the actual testimony by Parker: "We went through the review and towards the end of the review he asked me if I had any concerns or questions. I mentioned to him on the floor things were getting real bad, people couldn't focus on the job at task, I was worried about people safety wise, and I mentioned there was talk of a union." Tr. 769. There is an obvious distinction between Parker's testimony that there was "talk of a union" and the ALJ's finding. Indeed, in follow up to Parker's testimony, the GC asked "[d]id

Parker's statement to Gigon is not a legally sufficient basis to prove Novelis had knowledge sufficient to establish unlawful motive. Gigon was an entry-level supervisor. Tr. 2870. Even assuming that Parker actually made his purported statement to Gigon, Parker admitted that he did not know whether Gigon informed anyone else of his statement or concerns. Tr. 781-82. Thus, there is no evidence that any member of Company management, aside from Gigon, was aware of the statement. Tr. 771, 781-82. In the absence of such evidence, Parker's comment is insufficient to impute knowledge to Novelis. *See Gestamp S.C., L.L.C. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 686 (7th Cir. 2000); *Jim Walter Resources, Inc. v. NLRB*, 177 F.3d 961, 963 (11th Cir. 1999); *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923, 932 (5th Cir. 1993).

Moreover, there is no evidence that the conversation took place after the advent of the Union's organizing efforts, or that the Union was actively organizing at the time of the statement. Parker testified only that the conversation took place in "December 2013." Tr. 768. Although the ALJ notes that the purported "warning" was in response to "announced changes to wages and benefits" (ALJ Dec. 11), this finding is too ambiguous to establish a sufficiently reliable timeframe given the record evidence that reflects that the employees were made aware of Novelis' announced proposed changes in both May and November of 2013. Absent proof that actual union organizing was underway, the statement is proof of nothing and fails to show Novelis' knowledge of union organizing activity. *See Hampton Inn*, 348 NLRB at 17-18.

Finally, even if made after the start of the union campaign, Parker's vague and general statement that "there was talk of a union" is not indicative of actual union activity. As stated previously, the Board has noted that to prove formal knowledge, "the situation must have

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Mr. Gigon respond to your statement that employees may be interested in the union for that reason?" Tr. 769. Notably, the ALJ sustained Novelis' objection on the express basis that the question mischaracterized Parker's prior testimony. *Id.* That the ALJ then relied on a near identical mischaracterization in support of his analysis (ALJ Dec. 11) is yet another example of his flippant and irreconcilable treatment of his own evidentiary rulings.

sufficiently crystallized so that some specific orientation exists." *Hampton Inn*, 348 NLRB at 17. Mere "talk of a union" falls short of this threshold. Indeed, if an employer's motive is called to question under the Act any time the mere talk of a union arises, the employer's ability to effectuate even the most basic business decisions would be unreasonably chilled.

c. Organizing Committee's Solicitations Of Cards

The ALJ's reliance on the organizing committee's solicitation of authorization cards is perhaps the most egregious example of the liberties he took to justify finding Novelis' purported knowledge. Though the Union initiated its card signing campaign on December 17, 2013 (Tr. 536), there is **no** evidence that Novelis had any knowledge of such activity before January 9, 2014. No witness testified that any Novelis' manager was present for, observed, was made aware of, or otherwise knew of any of these card solicitations prior to its announcement on January 9. In fact, the Union's card solicitors universally testified, and the ALJ found, that their card solicitation activities occurred outside management's presence.[36] *See id.*; ALJ Dec. 11. Thus, the ALJ's finding is contrary to the only substantive evidence and the ALJ's own findings of fact.

Despite this evidence, the ALJ found card solicitation activities were known to Novelis as a result of the participation of "the very crew leaders that the Company refers to as Section 2(11) supervisors." To be clear, Novelis **never** alleged that its Crew Leaders were Section 2(11) supervisors.[37] The ALJ's distortion of Novelis' position as a purported basis upon which to

[36] Tr. 222-37, 534-63, 658-60, 690-91, 782-83, 800-02, 811-24, 845-55, 861-62, 863-67, 877-83, 1225-41, 1251-54, 1282-1324, 1683-85, 1742-45, 1802-06.

[37] Novelis has asserted that Crew Leader Everett Abare is a supervisor as a result of the responsibilities of his specific position as well as his additional responsibilities as an EMT, Captain of the EMS Squad, and Fire Captain, among other additional leadership functions he performed. Novelis' full account of its position with respect to Abare's Section 2(11) status, and its obvious relevance both to the Section 8(a)(3) allegations contained in the Complaint and to the validity of any union authorization cards solicited by Abare pursuant to the legal framework set forth in *Harborside Healthcare, Inc.,* 343 NLRB 906 (2004), is contained in Respondent's Brief Regarding Admissibility of Evidence Establishing Everett Abare's Supervisory Status, submitted to the ALJ on October 10, 2014. Notably, the introductory paragraph of that brief expressly states that Novelis "was not attempting – and does

impute knowledge of the union organizing campaign demonstrates a degree of bias that is unbefitting of his duties as an impartial fact finder.[38]

d. The Participation Of Antiunion Employees At The Organizing Meetings In Late December And Early January

Finally, the ALJ's finding that circumstantial evidence of Novelis' knowledge is evident from "the participation of antiunion employees at the organizing meetings in late December and early January" again reflects a strained and indefensible characterization of both fact and law. There is no evidence that any member of Company management had knowledge of these meetings. No witness testified that Novelis was aware of the Union's meetings; that anyone notified Company management of the Union's meetings; that the comings and goings of employees on the days of these meetings were any different from those of any other day; or that any supervisor paid attention to its employees' off-hour movements relating to these meetings.

Most importantly, there is absolutely no evidence anywhere in the record that any "antiunion employee" told any Novelis supervisor about a Union meeting. Accordingly, the ALJ's finding that Novelis was aware of the Union's organizing campaign as a result of the participation of "antiunion employees" at these meetings is unabashed speculation and insufficient to establish knowledge. *See Hampton Inn*, 348 NLRB at 17; *Laborers' Int'l Union*, 360 NLRB No. 77 at 7.

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not intend – to establish that all crew leaders working at the Oswego plant are supervisors." Novelis' position is also reflected in the record transcript (Tr. 2767) as well as Novelis' Motion to Reconsider, December 20, 2014, following the ALJ's ruling granting the GC and Charging Party's motion *in limine* related to this issue.

[38] If the Crew Leaders can be considered Section 2(11) supervisors for the purpose of imputing knowledge of the card signing activities to Novelis, as the ALJ suggested, then the same Crew Leaders must be considered supervisors for the purpose of assessing the validity of the cards signed and solicited by them. *See Harborside Healthcare, Inc*., 343 NLRB 906 (2004). The ALJ's decision reflects that Crew Leaders solicited over 150 cards of the 351 cards the ALJ deemed authenticated. ALJ Dec. 11-22, 64. The Board has long refused to consider cards directly solicited by supervisors as evidence of a union's majority status. *See Reeves Bros.*, 277 NLRB 1568, n. 1 (1986); *Sarah Neuman Nursing Home*, 270 NLRB 663, n. 2 (1984); *A.T.I. Warehouse, Inc.*, 169 NLRB 580 (1968). If the ALJ had a shred of intellectual honesty, he would also have invalidated union cards solicited by Crew Leaders pursuant to *Harborside* since, in his view – and his view alone – those individuals were Section 2(11) supervisors sufficient to impute knowledge of card-signing to Novelis.

An objective review reveals that the record is devoid of any evidence establishing Novelis' knowledge of actual union activity at any point before the afternoon of January 9. *See Norfolk Livestock Sales*, 158 NLRB at 1595; *Sigo Corp.*, 146 NLRB at 1486. For this reason, alone, the ALJ's finding that Novelis possessed the requisite knowledge to establish a violation is untenable. More troubling, however, is the ALJ's myriad distortions of the record evidence and the operative legal standards, reflected above, which are too comprehensive to ascribe to mere carelessness. The ALJ's findings, instead, show a biased mischaracterization of fact and law intended to manufacture a finding of knowledge where proof and legal support are clearly lacking. His findings are undeserving of adoption.

3. The ALJ Disregarded The Evidentiary Proof That Novelis' Motivation Was Wholly Lawful Under *Exchange Parts*

Finally, the ALJ's findings reflect his utter disregard of the undisputed evidence that proves Novelis' motivations were wholly lawful. *Exchange Parts* and its progeny make clear that the promise or conferral of benefits during an organizing campaign is not unlawful *per se*. Rather, lawfulness is contingent on the employer's motivation. *See Hampton Inn*, 348 NLRB at 17. For a violation to exist, "the employer's motive for conferring a benefit during an organizing campaign **must be to interfere with or influence the union organizing.**" *Farm Fresh Co. Target One, LLC.*, 361 NLRB No. 83, slip op. at 19 (2014) (emphasis added).

Here, the evidence **actually proves** that Novelis' conduct was lawful. The GC presented a letter from Smith, in which Novelis announced its decision as to the practices at issue. GC-Ex. 16. That letter makes clear that Novelis was engaged in dialogue with its employees concerning the policies since May 2013. Novelis shared information, answered questions, and listened to employee concerns relating to those practices. At its wage and benefit meetings in December 2013, Novelis committed to respond to employee concerns by mid-January. Novelis

communicated those concerns to its corporate partners in Atlanta. And, **in response to those concerns**, Novelis decided to continue its practices of providing Sunday premium pay and of considering vacation and holiday time as hours worked for the purpose of calculating overtime. The testimony from GC's own witnesses validates this explanation –that Novelis' decision was based on its continuing dialogue and employee feedback on these policy issues. More importantly, there is not a shred of contradictory evidence regarding Novelis' motives. Tr. 257-60, 284-93, 513-17, 520, 522, 527-32, 714-19, 894-97, 918-21, 923-27.

The significance of both the letter and the supporting testimony cannot be overstated. These undisputed facts are dispositive for two reasons. First, "an employer faced with a union organizing campaign is required to maintain the status quo ante." *Anthem, LLC*, 2005 NLRB LEXIS 97, at *27 (ALJ Mar. 23, 2005). Stated differently, an employer is required to proceed as if the union were not in the picture. *Great Atl. & Pac. Tea Co*., 166 NLRB 27, 29 n. 1 (1967), *enf. in relev. part*, 409 F.2d 296 (5th Cir. 1969). When an employer follows this course it, in fact, maintains the *status quo*, in accordance with the *Exchange Parts* rationale. *Care One at Madison Ave., LLC*, 361 NLRB No. 159 (2014). The undisputed facts prove that Novelis did not effectuate **any** change at all to the pay practices at issue. The Sunday premium and overtime pay practices in effect throughout the campaign remained the same as those in effect at all relevant times prior to the advent of the union's activities. Novelis' conduct was consistent with its obligations under *Exchange Parts*.

Second, even assuming *arguendo* that Novelis' *status quo ante* treatment of these practices resulted in the conferral of some benefit, a conferral is unlawful only if it is intended to interfere with or influence union organizing. *Farm Fresh Co.*, 2013 NLRB LEXIS 549, at 82-83 (ALJ Aug. 8, 2013). The substance of Novelis' January 9 letter, coupled with the unrefuted testimony, prove that Novelis' decision not to implement its planned changes to the Sunday and

premium pay policies was based on employee feedback and was completely consistent with its response to the employees' concerns over the same planned changes in May 2013, well before the Union began its organizing efforts.

Incredibly, the ALJ did not even consider these unrefuted facts in his analysis. Indeed, the ALJ made no substantive findings relating to Novelis' motive. Instead, he again admonished Novelis for not providing manager testimony about its decision. ALJ Dec. 25, 47.[39] From this purported lack of testimony alone, the ALJ purported to draw "a plausible inference that the decision to restore premium pay was not in response to employee concerns but, rather, in response to concerns about a union organizing campaign." *Id.* Again, the ALJ committed error when he failed to consider undisputed evidence and testimony that demonstrated Novelis' lawful motives and the lawful basis for the timing of its announcement on January 9. Tr. 257-60, 284-93, 513-22, 527-31, 714-19, 918-27; GC-Ex. 16. It was the GC's burden to prove unlawful motive, and it failed to do so by not calling any manager. Given the unrebutted evidence, the ALJ is not entitled to draw an inference as to Novelis' motives that contradicts the unrebutted evidence and testimony that was put before him **on this very issue**. *See Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007). By substituting inference for evidence, the ALJ improperly shifted the burden of proof to Novelis in contravention of Board precedent. For all of these reasons, the ALJ's conclusions relating to Novelis' alleged unlawful conferral of benefits is untenable and should not be enforced.

C. The ALJ Erred In Concluding That The Communication Of The Board's Own Letter Constituted An Unfair Labor Practice

[39] The ALJ also chided Novelis for "the lack of any testimony by high level managers" concerning whether the announced changes were actually implemented. ALJ Dec. 47. But, his admonishment is legally inconsequential given the GC's failure to meet its threshold evidentiary burden. *Laborers' Int'l Union*, slip op. at 7. And, the ALJ cannot draw an inference that contradicts the actual substantive evidence, reflected in Novelis' January 9 letter and confirmed by GC's own witnesses, that **proved** that Novelis maintained the *status quo ante* with respect to its pay practices at all relevant times. Tr. 517, 714-19; GC-Ex. 16.

1. The ALJ Erred In Refusing To Require Board Agent Petock To Testify

The GC offered the February 10, 2014 letter from Board Agent Petock to Novelis' counsel. GC-Ex. 40; R-Ex. 292. Petock sent this letter to obtain employee affidavits and additional evidence concerning the Union's charge. *Id.* The GC alleged that Novelis violated the Act by sharing copies of Petock's letter with employees in the days preceding the election. *See* GC-Ex. 1(cc), ¶¶ VII and VIII. This is a central allegation in the case.[40]

Given the importance of the allegations surrounding the letter, under Board precedent, Novelis should have been allowed to call Petock as a witness. *See Laidlaw Transit, Inc.*, 327 NLRB 315, 316 (1998) (Board agent may be compelled to testify in "unusual circumstances"); *see also Indiana Hosp., Inc. v. NLRB*, 10 F.3d 151, 154-55 (3d Cir. 1993); *Drukker Commc'ns v. NLRB*, 700 F.2d 727, 730-31 (D.C. Cir. 1983). However, the Board represented that it would not be producing Petock as a witness (Tr. 931), and the ALJ held that Novelis would not be permitted to examine her. Tr. 931, 933.

The ALJ also prohibited Novelis from eliciting testimony about conversations with Petock regarding the letter from other witnesses based on *Laidlaw Transit, Inc.*, 327 NLRB at 316, *Sunol Valley Golf Co.*, 305 NLRB 493 (1991); *Independent Stations Co.*, 284 NLRB 394 (1987); and *Frank Ivaldi*, 310 NLRB 357 (1993). Tr. 928-33. The cases, however, do not preclude Novelis from attempting to elicit testimony regarding Petock's out of court statements. Instead, the cited authorities suggest only that Board agents should not be called as witnesses absent unusual circumstances. None even impliedly preclude the admission of the out of court statements of Board agents. Indeed, *Sunol Valley Golf* is replete with references to record testimony of several witnesses regarding what a Board agent told them about the processing of

[40] Indeed, Union official Ridgeway testified that information contained in the letter caused the Union to lose the election. Tr. 147-49.

charges, *see* 305 NLRB at 493-494, and in *Independent Stations*, a Board agent actually testified at the hearing. *See* 284 NLRB at 414; *see also Hunt-Wesson Foods, Inc.*, 220 NLRB 922 (1975); *Barney's Club*, 288 NLRB 803 (1988); *St. Vincent Hosp., LLC*, 344 NLRB 586, 597 (2005). These cases do not support the proposition that a Board agent's out of court statements are inadmissible at a hearing but establish the opposite.[41]

2. The ALJ's Findings Regarding The Petock Letter Are Unsupported

Regardless of his failure to permit Novelis to call Petock, many of the ALJ's critical factual findings leading to his conclusion that Novelis' use of the Petock letter violated the Act have no record support. The ALJ found that "the impact" of Novelis' distribution of redacted versions of the Petock letter to employees "became evident almost immediately" (ALJ Dec. 30), but he cited no evidence in support of this finding. Further, despite this finding of purported "impact" (without evidentiary support), the ALJ refused to allow Novelis to present evidence showing that its conduct did not impact the outcome of the election and refused to consider such evidence to the extent it was presented. *See* Section IV.B.1. Evidence of whether the alleged unfair labor practices (here, the purported improper comments about and/or distribution of the letter) had an impact on the election conditions is directly relevant to the bargaining order analysis and should have been permitted. *See Gissel*, 395 U.S. at 614 ("[t]he Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.").

Additionally, the ALJ's finding that "no such charge" was ever filed by the Union is plainly erroneous, as it directly contradicts the statements in Petock's letter which expressly stated that the allegations of the Charge include: "Plant Manager Chris Smith and Human

[41] The ALJ committed further error by excluding Petock's out of court statements as hearsay. Tr. 931-32, 934-37. Petock is an agent of the Board, which is a party to this proceeding. Thus, her out of court statements are admissible under FRE 801(d)(2) as opposing party statements. Moreover, the statements at issue were not being offered for the truth of the matters asserted in the statements and, as such, are not hearsay in the first instance.

Resource Manager Peter Sheftic announced to employees that it was restoring 1 ½ premium pay for Sunday and vacation and holiday time would be considered 'hours worked' in the calculation of overtime in response to learning that there was an ongoing union organizing campaign." GC-Ex. 40. Thus, the ALJ's finding is plain error.[42] Moreover, the ALJ's refusal to permit Novelis' inquiries into this area prevented a complete and accurate record on this point.

3. The ALJ Erred In Concluding That Novelis Acted Unlawfully By Its Comments And Display Of The Petock Letter

The undisputed evidence, as set forth in Section I.D.3., compels the conclusion that Novelis' comments about and display of the Petock letter were not unlawful. The "campaign" issue at stake was the credibility of Novelis or the Union. Martens' comments merely informed employees that Petock's letter contradicted the Union's misleading claims. If there was any misrepresentation, it was the Board's or the Union's, not Novelis'.

Moreover, even if any misrepresentation could be found by Novelis, such conduct is lawful. Under well-established Board law, misrepresentations and false campaign statements, including mischaracterizations of Board actions, do not constitute an unfair labor practice or a basis to object to an election. Indeed, in *Virginia Concrete*, the Board found conduct nearly identical to be perfectly lawful. 338 NLRB 1182, 1186 (2003). During the election campaign, the employer told employees about the charge and that, if the union was successful with its charge, it "would result in employees losing the wage increase, and characterized the union's charge as an 'attempt[] to take away' the increase." *Id.* The union lost the election and claimed that the employer interfered with the election by telling employees about the unfair labor practice charge and erroneously informing them that the Board's remedy for such charge would be to

[42] Any purported distinction between a "charge" and "allegations" related to or in support of a charge is a distinction without a difference. Novelis merely communicated what Petock represented in her letter were the allegations being made in support of the charge. *Id.* The ALJ's ludicrous attempt to distinguish a "charge" from its "allegations" is legally and practically baseless.

take away the increase. *Id.* The Board held that the employer's statements about the union's charge and the potential remedy arising out of the charge were no different than any other potentially false or misleading campaign statement: "[W]e do not agree that the Employer's campaign propaganda 'improperly involved the Board and its processes.' At most, the Employer misstated Board law and possible future Board action. Mere misstatements of law or Board actions are not objectionable." *Id.; see also Riveredge Hospital*, 264 NLRB 1094, 1095 (1982), *enf. in relev. part*, 789 F.2d 524 (7th Cir. 1986) (finding that even though union's leaflet clearly misrepresented Board action, the union's conduct not unlawful); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (Board will not probe into the truth or falsity of parties' campaign statements); *Blue Grass Indus.*, 287 NLRB 274, 276 (1987).

The ALJ's conclusion that the display and communication of the letter to employees violated the Act (ALJ Dec. 50-52) is contrary to Board precedent in *Virginia Concrete*. Smith's and Martens' comments at most are mere misstatements of Board action or Board law and are not unlawful.[43] Further, the ALJ erroneously concluded that Novelis' actions were unlawful because they were purportedly "accompanied by an altered Board document and represented as charges by the Company." ALJ Dec. 52. However, it is undisputed that Novelis did not substantively alter the letter but only minimally redacted it for privacy purposes and subsequently disclosed the unredacted version of the letter in full to ensure there was no

[43] Smith's comment merely reflected his understanding of a potential legal remedy over which Novelis had no control. It cannot be deemed a threat for the simple reason that it echoes a lawful sanction available to the Board. Indeed, just months before the election in this case, the Board sought such a remedy in an action for 10(j) relief pending before the same judicial district. *Murphy v. Hogan Transports Inc.*, No. 1:13-mc-00064-GLS-RFT, Petition for Injunction Under Section 10(j), Dkt. 1 (N.D.N.Y. Oct. 25, 2013). Further, Martens' statements regarding the Board's letter are protected by the First Amendment and Section 8(c). *See Laborers' Dist. Council*, 501 F.2d at 878. If Novelis is not permitted to communicate the facts to counter false statements made by the Union, then it cannot speak at all. *See*, *e.g.*, *Kinney Drugs,* 74 F.3d at 1429 ("The labor laws do not suppress one side of the debate."); *Beverly Enters., Inc. v. NLRB*, 139 F.3d 135, 141 (2d Cir. 1998) (holding that "an employer does not violate section 8(a)(1) by publicizing existing benefits during a union organizational campaign").

confusion.[44] The ALJ's attempt to distinguish the conduct at issue in this case from the virtually identical conduct at issue in *Virginia Concrete* is not supported by the law or facts.[45]

D. The ALJ Erred In Concluding That The GC Carried Its Burden In Proving Other Alleged Miscellaneous Violations During The Campaign

Over the span of a six-week campaign involving nearly 600 bargaining unit employees, the GC only conjured up five instances in which Novelis' lower-level supervisors allegedly violated the Act through their interactions with about 10 employees. The ALJ erred in finding any of these instances to have violated the Act.

1. The ALJ Erred In Concluding That Andy Quinn Acted Unlawfully

In support of his erroneous finding that Quinn unlawfully solicited employee grievances during the campaign by promising to make things "better" if employees voted against unionization, the ALJ found that "it was unusual for Quinn to engage in discussion with [Gordon Barkley, Tim Boyzuck, and Dennis Parker] in the work area" and that Quinn stated that the situation "would be better than it is now" if Novelis won the election. ALJ Dec. 31. The ALJ, however, neglected to consider the critical holes in Boyzuck's and Parker's testimony (the GC did not call Barkley to testify). Neither specified what it was that Quinn allegedly promised to make better. Tr. 768, 1507-09. Parker even admitted that the conversation was in the context of employee morale in general. Tr. 780-81. Indeed, Boyzuck and Parker both admitted that they could not remember the details of the entire conversation. Tr. 768, 1507. In contrast, Quinn

[44] The ALJ recognized the letter was not forged and that Novelis posted both the redacted and non-redacted versions of the letter for employees. ALJ Dec. 51. The Board has held that for a physical alteration to be objectionable, "the misuse of the Board's documents [must] secure an advantage." *Riveredge*, 264 NLRB at 1095. The redactions in no way secured an advantage or otherwise convey a fraudulent message but were merely for privacy purposes. Moreover, the redactions were subsequently removed. Clearly, there was no "misuse" here.

[45] The ALJ's reliance on *Goffstown Truck Center, Inc.*, 356 NLRB No. 33 (2010), is misplaced. *Goffstown* involved entirely different facts from those involved in the present case. In *Goffstown*, the Union's organizer visited employees at their homes prior to an election and fraudulently represented to employees that she (the Union organizer) was there "on behalf of the NLRB." *Id.* at 1. The Board found that the union organizer's conduct was objectionable because she falsely conveyed a message from the Board itself and falsely suggested that the Board was working with the Union in the election process thereby indicating that the Board was not neutral. *Id.* at 2. The evidence here includes no misrepresentations and no false statements implicating the neutrality of the Board.

testified (unrebutted) that he specifically said that Novelis could not make any promises. Tr. 2926-27. At most, Quinn merely relayed Novelis' generalized opinion that it wants to improve things at Oswego, which has long been held to be lawful campaign propaganda. *See McDonald Mach. Co.*, 335 NLRB 319, 320 (2001).

2. The ALJ Erred In Concluding That Craig Formoza Acted Unlawfully

The ALJ found that Formoza unlawfully threatened and interrogated Cowan in his work area. He reasoned that "Formoza's hypothesis that unionization could lead to layoffs in order of seniority constituted an implied threat." ALJ Dec. 56. First, Formoza testified in a credible manner that he never asked Cowan where he fell in the seniority pecking order.[46] Tr. 2377. Moreover, even if Formoza indicated that seniority could be used to determine the order of layoffs, such objective statement is perfectly lawful given Formoza's previous experience with unions. Tr. 2414. *See Bentelier Industries, Inc.*, 322 NLRB 715, 719 (1996); *Atlantic Forrest Products, Inc.*, 282 NLRB 855, 861 (1987). Thus, the finding that Formoza made threats against Cowan is unsupported by the evidence. The ALJ also erred in finding that Formoza unlawfully interrogated employees, as it is undisputed that Formoza never interrogated Cowan about his or any other employee's union memberships, sympathies or activities.

3. The ALJ Erred In Concluding That Jason Bro Acted Unlawfully

In support of his erroneous ruling that Bro unlawfully interrogated and coerced employees during a January 23, 2014 meeting, the ALJ found that Bro "discouraged workers who disagreed with his presentation and coached individual employees one-by-one on how to vote." ALJ Dec. 55. First, all of the GC's witnesses who testified about the incident admitted that Bro never told them how to vote, nor did he ask them how they were going to vote; rather,

[46] None of the other nearly 40 employee witnesses called by the GC mentioned unlawful behavior by Formoza, which undermines the legitimacy and impact of Cowan's sole claimed encounter, a pro-union witness the ALJ found not credible as to his testimony regarding card solicitation. ALJ Dec. 18.

he merely stated that if any employee did not want the Union, he or she needed to vote "No." Tr. 680, 752, 1041. Thus, the ALJ's contention that the employees were "coached" on how to vote is misleading. Moreover, the circumstances makes clear that there was no threatening or intimidating atmosphere during the January 23 meeting. Employees were permitted to question Bro during his presentation, and some even jokingly defied him without any chastisement or consequences. Tr. 668-69, 678-79, 1015, 1040. Thus, there was no basis to determine that the employees felt restrained to exercise their rights.

The ALJ also erred in ruling that Bro unlawfully interrogated employees during a January 30, 2014 meeting, holding that he "coached employees both as a group and individually, one-by-one how to vote" and that the totality of the circumstances supported his determination of unlawful coercion. ALJ Dec. 56. Again, Bro never asked employees during this meeting how they intended to vote, but merely educated employees on the mechanics of the voting procedure. Tr. 703, 1423. Moreover, the evidence establishes that no coercive atmosphere was created by Bro during the meeting, as. several employees engaged in banter with Bro and openly defied his presentation. Tr. 705, 1424, 1425. Thus, this meeting, just like the one held on January 23, did not form a legitimate basis to determine that the employees were restrained from exercising their Section 7 rights.

4. The ALJ Erred In Finding The Solicitation And Distribution Policy Unlawful

The ALJ erroneously found that Novelis' policy regarding use of its email system was unlawfully vague by citing the Board's December 2014 *Purple Communications* decision (ALJ Dec. 53), which was decided over a month after the record closed. That decision overturned long-standing precedent established in *Register Guard*, 351 NLRB 1110 (2007). The Board applies new rules retroactively so long as doing so does not result in "manifest injustice." In

determining whether retroactive application will cause manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the Act's purposes, and any particular injustice from retroactive application. *SNE Enters*., 344 NLRB 673, 673-74 (2005).

The Board's 2007 *Register Guard* decision established that an employer may prohibit employees from using the employer's email system for Section 7 purposes as long as the ban is not applied discriminatorily. Novelis' policy thus complied with established law under *Register Guard*. *Purple Communications*, however, overturned *Register Guard* and thus represented a radical departure from well-settled law. The ALJ's application of *Purple Communications* to this case was grossly prejudicial to Novelis, and violated its due process rights by retroactively imposing a legal standard.

5. The ALJ Erred In Concluding That Management Discriminatorily And Selectively Removed Union Literature

The ALJ further erred in determining that Novelis unlawfully enforced the solicitation and distribution policy during the campaign.[47] The ALJ determined that on January 12, 21,[48] and 23, Bro confiscated Union propaganda. ALJ Dec. 54.[49] There is no evidence that Bro, however, on any occasion permitted anti-union propaganda to remain posted at the expense of pro-union propaganda. Thus, no basis exists for the conclusion that Bro enforced Novelis'

[47] The ALJ cited *Reno Hilton Resorts*, 320 NLRB 197 (1995), for the proposition that "[a] discriminatory manner is evinced through the restriction of pro-union solicitations to nonworking-times and areas while alternately placing no such restrictions on antiunion campaigning." ALJ Dec. 53. Clearly here, the GC failed to show that Novelis supervisors permitted the antiunion campaigning at the expense of prounion campaigning. In fact, as explored below, the GC's own witnesses testified that Novelis also enforced the rules against antiunion campaigning.

[48] Regarding the January 12 incident, the ALJ supported his determination against Bro in part by crediting specific testimony from employee Ball. ALJ Dec. 27. Ball, however, never even testified about the office in which the January 12 incident allegedly occurred, as he only referenced the "furnace office" (also known as the "Anneal Metal Movement" office) which is distinct from the office in which Rookey worked. Tr. 1011-1029, 1419-23.

[49] The ALJ erred in finding that any of these areas are not work areas in which Novelis could lawfully regulate distribution. ALJ Dec. 25-26.

policy in an unlawfully discriminatory manner.[50]

The ALJ also concluded in error that because Bro "directed employees wearing prounion stickers to remove or cover them up beneath their uniforms," he "unlawfully restricted employees' long-established right to wear stickers at work." ALJ Dec. 54. First, Bro permitted the employees to wear union stickers on their personal clothing but not on their uniforms, in line with Company policy. Tr. 684-85, 750, 757. Further, the GC did not establish that Bro applied the dress code policy in a discriminatory manner.[51]

Regarding Gordon, the ALJ erred in ruling that he unlawfully confiscated union materials in the cabana office on January 21, 2014. The ALJ specifically found that Gordon confiscated pro-union literature and replaced it with Company campaign literature. ALJ Dec. 54. Thus, the ALJ erred in finding a violation against Gordon, as the GC failed to establish Gordon discriminated against pro-union materials versus pro-Company materials.

The ALJ also erred in determining that Granbois unlawfully discriminated against a pro-union document from the Remelt cafeteria on January 23, 2014 (ALJ Dec. 55), as the GC failed to establish that the document removed was even pro-union propaganda or that Granbois permitted anti-union documents to remain posted on the bulletin board.[52]

E. The ALJ Erred In Concluding That Novelis Unlawfully Demoted Abare

When reviewing a claim that an employer took adverse action against an employee because of protected concerted activity, the Board employs the well-known *Wright Line* test. *See Wright Line*, 251 NLRB 1083, 1089 (1980). "Under that test, the [GC] must first 'make a prima

[50] The ALJ determined that, during the same meeting on January 23, Taylor unlawfully enforced Novelis' solicitation/distribution policy. ALJ Dec. 55. Again, there was no evidence that the Taylor confiscated pro-union materials while leaving anti-union materials undisturbed.

[51] In fact, the GC's witnesses admitted that Bro approached sticker enforcement in a non-discriminatory manner, stating that he would not permit pro-Company stickers on uniforms either. Tr. 684-85, 1018.

[52] The ALJ failed to properly evaluate witness credibility, as Griffin's testimony and demeanor at the hearing clearly indicated that lead union organizer Spencer engaged in coercive conduct in obtaining Griffin's affidavit. Tr. 1405, 1411, 1413.

facie showing sufficient to support the inference that protected ... conduct was a motivating factor in the [conduct].'" *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001) (*quoting TIC–The Indus. Co. SE v. NLRB*, 126 F.3d 334, 337 (D.C. Cir. 1997)). The elements required to meet this initial burden are threefold: "protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer." *Staffing Network Holdings, LLC*, 2014 NLRB LEXIS 563, at *41 (ALJ July 17, 2014) (*citing Consol. Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), *enf'd.* 577 F.3d 467 (2d. Cir. 2009)). If the GC meets its initial burden, the burden then shifts to the employer to prove it would have taken the same action absent the employee's alleged protected concerted conduct. *Wright Line*, 251 NLRB at 1089. In finding that Novelis violated Section 8(a)(1) and (3) with respect to Abare, the ALJ erred in all aspects of his application of the *Wright Line* test.

1. As A Threshold, The ALJ Erred By Denying Novelis The Right To Put On Evidence Of Abare's Supervisory Status

Throughout the hearing, Novelis attempted to elicit testimony establishing that Abare was a statutory supervisor under Section 2(3) of the Act and did not enjoy the Act's protections for purposes of the claim that Novelis unlawfully demoted him.[53] During Novelis' case-in-chief, the GC moved to preclude such evidence. The ALJ sustained the GC's Motion and precluded Novelis from arguing that Abare was a statutory supervisor on three grounds: (1) Novelis "waived" the issue by failing to plead it as an affirmative defense, (2) Novelis was bound by its pre-election stipulation allowing Abare to vote in the secret ballot election, and (3) the introduction of Abare's supervisory status during Novelis' case-in-chief would be prejudicial because the GC had already put on its case. *See* ALJ Ex. 5, Oct. 16, 2014 Order.

The ALJ's reasoning was flawed on all three fronts. Novelis did not "waive" its right to

[53] Abare's status as a statutory supervisor is also relevant to whether the Union ever enjoyed majority status because, as a supervisor, the cards that he solicited are invalid and may not be considered in determining whether the Union obtained majority support. *See Harborside Healthcare, Inc.*, 343 NLRB 906, 911-13 (2004).

demonstrate that Abare was a supervisor. Novelis' Amended Answer added the affirmative defense that it "did not take any adverse action against any employee under the Act." *See* Amended Answer, First Affirmative and Other Defense. This defense is an obvious reference to the statutory definition of an "employee" under Section 2(3) of the Act. Because Abare's demotion was the only adverse action at issue in this matter, this defense could only mean that Novelis was challenging Abare's status as an employee under the Act.[54]

Equally erroneous was the ALJ's conclusion that Novelis' pre-election stipulation to permit Abare to vote in the election prevented it from challenging his supervisory status in this matter. The Board has rejected such a conclusion in previous cases. *Insular Chemical Corp.*, 128 NLRB 93, 95-96 (1960); *Oakland Press Co.*, 266 NLRB 107, 108 (1983); *Gordonsville Indus., Inc.*, 252 NLRB 563, 596 (1980). In fact, the Board has ruled that findings regarding an employee's supervisory status made in a representation proceeding do not finally and conclusively resolve the issue for purposes of a subsequent unfair labor practice proceeding. *Leonard Niederriter Co.*, 130 NLRB 113, 115 n. 2 (1961).

Finally, the ALJ's finding of prejudice was baseless. Both parties litigated the issue of Abare's supervisory capacity from the onset of the GC's case-in-chief. Indeed, Abare's supervisory responsibilities were placed squarely at issue by the GC at the onset of the hearing when it elicited significant testimony during its direct examination of Abare concerning his duties and responsibilities. Tr. 246-56. And, Novelis elicited further testimony from Abare on

[54] As to the card majority issue, Novelis never needed to plead Abare's supervisory status as a defense because it is not an affirmative defense to that issue. Thus, even if the ALJ was correct in ruling that Novelis had waived its right to argue Abare's statutory supervisory status for purposes of the demotion charge, that ruling should have had no bearing on whether Novelis was permitted to introduce such evidence for purposes of establishing that the Union failed to obtain majority status as a result of the authorization cards Abare solicited. The ALJ failed to appreciate this distinction and instead precluded the evidence altogether. On a different note, even if Novelis' Amended Answer could be read to exclude this defense, the appropriate remedy was not for the ALJ to exclude Novelis' evidence and bar it from arguing that Abare was a supervisor. Instead, under Board precedent, the ALJ should have allowed Novelis to amend its Amended Answer to cure the alleged deficiency. *See Operating Eng'rs Local Union No.* 3, 324 NLRB 1183, 1186-87 (1997) (allowing employer to amend answer to include statutory supervisor challenge even though defense not raised before the hearing or in position statement).

cross-examination concerning his authority to train and direct the work of others and to perform certain staffing functions. *See* Tr. 498-99, 507. Moreover, Novelis elicited testimony from Novelis' Fire Chief regarding Abare's duties as a Fire Captain, without objection to the line of questioning. Tr. 2687-93.

Each of the functions detailed in the record cites above represent indicia of Abare's supervisory authority. The notion that Novelis sprung this issue on the GC in Novelis' case-in-chief is nonsense. What's more, even if the GC could credibly claim that it was unaware Novelis was pursuing this issue and thus did not adequately develop evidence on the issue in its own case-in-chief, the GC could have easily introduced such evidence in its rebuttal case.[55]

In sum, the ALJ should have allowed Novelis to introduce evidence of Abare's supervisory status and argue that he was a statutory supervisor under the Act. Accordingly, the ALJ's decision on this portion of the Charge should be overruled or, at the very least, the matter should be remanded to the ALJ for reopening of evidence on Abare's supervisory status.

2. The ALJ Erred In Finding That Abare Engaged In Protected Concerted Activity

In ruling that Abare's posting was protected activity, the ALJ described the posting as a "critique of his wages and coworkers who voted against the Union" and held that because the post related to wages and the Union election, it amounted to protected activity.[56] ALJ Dec. 43. However, the ALJ's holding missed the point entirely. Abare chose to personally attack his

[55] Ironically, the ALJ's decision is littered with findings of fact that clearly suggest that Abare was, in fact, a statutory supervisor. For example, he found that Abare "led a crew of seven furnace and crane operators," was responsible for "assigning tasks to crew leaders, and evaluating their technical skills," was "the go-to person for his work area," and "played a prominent role as fire captain." ALJ Dec. 42-43. These findings lay bare the error of the ALJ's ruling. The evidence that he did permit before sustaining the GC's objection clearly suggested a genuine issue around Abare's supervisory status. Notwithstanding, the ALJ shut the issue down mid-hearing, all on legally and factually incorrect bases.

[56] The ALJ's characterization of Abare's post as a "critique" as compared to his characterization of Jason Bro's "how do you vote" presentation as a "bombardment" and an "anti-union" rant is yet another example of the ALJ's results-orientated shading of the evidence. ALJ Dec. 43. Time and time again, he bent over backwards to describe otherwise banal conduct by Novelis as near-nuclear behavior, while at the same time describing unacceptable, threatening, and discriminating statements such as Abare's as mere "critiques."

fellow employees, referring to them as "fucktards," and telling them to "eat shit." The word "fucktard" is a contraction for "fucking retards." Thus, it is no different than Abare calling his fellow workers "retards" or "retarded" – slurs that have long been widely-viewed as unacceptable and downright discriminatory. The severity of Abare's conduct is underscored not only by the offensive, targeted nature of his comment, but also by the fact that he served in leadership roles (Crew Leader, Fire Department Captain, and EMT) that involve an important safety component within the Oswego facility. Though the Board has held that the mere use of salty language does not typically render an otherwise protected statement unprotected, there are certain forms of language that are undeserving of the protection of the Act. *See, e.g.*, *Atl. Steel*, 245 NLRB 814, 816 (1979); *Fresenius USA Mfg.*, 358 NLRB No. 138, at 7-8 (2012); *Plaza Auto Ctr., Inc.*, 355 NLRB 493, 494 (2010); *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05 (2007); *DaimlerChrysler Corp.*, 344 NLRB 1324, 1328-30 (2005); *Seneca Foods Corp.*, 244 NLRB 558, 558-59 (1979).[57] Use of the word "fucktard" or "fucking retard" combined with a directive for employees to "eat shit" easily falls into the latter category, particularly when, as here, it is directed at fellow employees (not management) that the employee was charged with directing and overseeing, training, protecting, and rescuing.[58]

Even if Abare's post retained its protected status, it certainly was not concerted activity. An individual employee's conduct is concerted only when he acts "with or on the authority of other employees," when the individual seeks to initiate, induce, or prepare for group action, or

[57] The ALJ's analysis of the protected nature of Abare's conduct focused on disloyalty cases, like the Board's recent decision in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014). However, Novelis never argued that Abare's post was disloyal or harmful to Novelis' reputation, but rather that Abare's post lost protection because it was discriminatory and threatening to co-employees over whom he had leadership and safety responsibilities. That is an entirely different, legitimate employer concern, and the ALJ failed to recognize it.

[58] The ALJ failed to consider Abare's elevated roles in his analysis. Abare was no ordinary employee; he was responsible for leading a crew, training new employees, and leading the fire department and emergency response team at the plant. These positions required that he be held to a higher standard, and his failure to live up to that standard is why he lost those titles.

when the employee brings "truly group complaints to the attention of management." *Meyers Indus., Inc. II*, 281 NLRB 882, 885-87 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987). Thus, to qualify as concerted activity, an individual's statement "must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964); *see also Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993). In *Meyers II*, the Board made clear that the Act "requires some linkage to group action in order for conduct to be deemed 'concerted'" under Section 7. 281 NLRB at 884.

In a recently issued Advice Memorandum, the Board's Division of Advice applied these principles to a Facebook posting nearly identical to Abare's, and it opined that the posting was not concerted activity because it amounted to an "individual gripe" that did not seek to initiate or induce coworkers to engage in group action. *See Wal-Mart*, 39 NLRB Advice Mem. Rep. 19, 2011 WL 3813084 (July 19, 2011). Abare's post similarly amounted to an individual gripe about his paycheck and the manner in which other employees voted. The post did not seek to initiate or induce coworkers to engage in group action of a protected nature. Abare specifically testified that he was not acting on behalf of or as a representative of other employees in making the post and that he was instead expressing his own individual frustration. Tr. 468, 472, 568-69.

Notwithstanding Abare's own testimony, the ALJ found that Abare's post was concerted activity simply because it referenced the election. ALJ Dec. 58-59. This conclusion ignored the post's clear context. Abare was <u>not</u> attempting to get people to vote in an election, and he was not advocating on behalf of anyone else or attempting to spur anyone into action. Referencing the election does not cloak Abare's personal rant about bygone events with concerted status. As it relates to the Facebook "likes" and "comments," the ALJ's factual conclusion that 11 employees viewed, "liked," and "commented" (ALJ Dec. 59) about this posting was wrong. The

only evidence on the identity of who "liked" Abare's posting shows that Abare only had three Facebook "friends" who worked at Novelis, and none of them are included in the list of individuals who "liked" Abare's post. Tr. 473-74. Similarly, only one employee – Spencer – commented on Abare's posting, and his posting indicated that he was going to resign his employment with Novelis. The remainder of the comments to Abare's Facebook post were about drinking beer. Thus, it is clear the posting was not concerted.

3. Novelis Had No Knowledge That Abare's Activity Was "Concerted"

Even if the ALJ was correct to conclude that Abare engaged in concerted activity, he nonetheless erred in finding that Novelis acted unlawfully because the GC failed to establish that Novelis was aware of the identity of the individuals who "liked" or commented on the post when it demoted Abare. It was undisputed that GC-Ex. 25 was not the version of the post that Novelis saw and relied upon during its investigation and subsequent decision to demote Abare. Instead, as Quinn and Abare very clearly testified, GC-Ex. 25(b) was the version of Abare's post that Novelis used and relied upon in demoting Abare. Indeed, Abare testified that GC-Ex. 25 did not even come into existence until after Abare had been demoted. Tr. 480.

Importantly, GC-Ex. 25(b) did not show the identity of the individuals who "liked" or commented on Abare's post, which means Novelis was unaware at the time it demoted Abare as to who had "liked" or commented on his post. Therefore, Novelis' decision to demote Abare could not have been motivated by alleged concerted activity that took place when other Novelis employees allegedly "liked" or commented on Abare's post. *Philips Indus.*, 295 NLRB 717, 718 (1989) ("The issue here turns on employer motivation. An employer cannot be motivated by facts of which it is not aware."). The ALJ failed to appreciate this important distinction between the two exhibits, and he failed to even make a finding as to whether Novelis had knowledge of the alleged concerted nature of Abare's post – a critical component of the *Wright Line* analysis.

4. The ALJ Erred In Finding That The GC Showed Anti-Union Animus

The ALJ's heavy focus on Abare's status as a Union supporter during the campaign and conclusion that Novelis was motivated by Abare's pro-Union activities during the campaign is unsupported. Indeed, the GC offered no evidence establishing that Novelis harbored any anti-union animus towards Abare when it demoted him in April 2014. To the contrary, Abare was never once disciplined during the campaign and election process. Moreover, after Abare served as a Union observer during the election, he received a favorable performance review and rating in March of 2014 – merely weeks after the election and weeks before his posting and subsequent demotion. Tr. 586-88; GC-Ex. 21. It defies logic that Novelis' demotion of Abare was motivated by an anti-union bias when it had very recently given him a favorable performance review. Moreover, Novelis replaced Abare with Johnson, another known union supporter. Logic compels the conclusion that, if Novelis had it in for Union supporters, it would not have replaced Abare with a Union supporter. The ALJ ignored this fact completely.[59]

Even more egregious is the ALJ's reliance on his mischaracterization of Novelis' progressive discipline policy as a basis for finding union animus against Abare. Specifically, the ALJ concluded that the progressive discipline policy required Novelis to issue a warning to Abare or suspend him as a less drastic disciplinary action before demoting him, and that Novelis' failure to follow the progressive discipline steps showed that Novelis was out to get Abare. ALJ Dec. 60. However, the ALJ selectively quoted from the policy and ignored the key provision that belies his conclusions about how Abare's discipline should have been handled. *See* ALJ Dec. 8-9 (selectively quoting from disciplinary policy). Among other things, the policy plainly

[59] The ALJ's other factual conclusions about Novelis' demotion decision are also fundamentally flawed and/or irrelevant to the *Wright Line* analysis. For example, there was no evidence to support the ALJ's conclusion that "Smith and Sheftic decided to send a message by demoting Abare because of the Facebook post" or that "Quinn and Dufore carried out their directive." ALJ Dec. 44. These facts were ginned up by the ALJ to try to suggest that Novelis was out to get Abare, when in fact there is no record evidence on this issue.

states that not every disciplinary step would be followed at all times and that Novelis could skip steps where the employee's behavior warranted it. GC-Ex. 27 at 3-4. Nothing in the policy obligated Novelis to warn or suspend Abare before demoting him. The policy even permitted Novelis to terminate Abare if his conduct warranted such discipline.[60]

Finally, the ALJ erred in relying on the fact that employees have used the word "fucktard" or "retard" when addressing each other in other settings. There was no evidence that employees routinely called each other fucktards or retards in the hateful and directed manner in which Abare used the word fucktard or that employees had complained to H.R. about the use of such language as was the case with Abare. Abare's reference to his co-workers as "fucktards" and his directive to them to "eat shit" was far different than the salty "shop talk" that the ALJ considered for comparison purposes.

At the end of the day, the evidence on the animus issue was one-sided and showed that Novelis' decision to demote Abare was based on legitimate business reasons. For all of these reasons, there is no reason to infer anti-union animus toward Abare, and the ALJ erred in ruling that the GC carried its burden on this critical element of the *Wright Line* analysis.

5. The ALJ Erred By Failing To Find That Novelis Would Have Demoted Abare In The Absence Of Any Alleged Unlawful Motive

Even if the ALJ correctly concluded that the GC had met its initial burden under *Wright Line*, Novelis nonetheless demonstrated that it would have taken the same actions absent any protected concerted activity by Abare. As discussed above, the severity of Abare's conduct was

[60] For the same reason, the ALJ's reliance on the fact that Novelis had given a different Crew Leader "an opportunity to remediate his performance deficiencies" before demoting him was misplaced. ALJ Dec. 61. As Abare was not demoted for a performance issue, the fact that Novelis followed the progressive discipline policy for a different Crew Leader with performance issues sheds no light on how Novelis should have handled Abare. The ALJ's suggestion that all disciplinary problems and performance issues, regardless of type, warrant similar disciplinary action ignores the realities of the workplace. Moreover, the fact that the ALJ found it significant that Novelis "failed to establish that any employees, much less crew leaders, have ever been disciplined for similar behavior" is non-sensical. ALJ Dec. 61. This holding suggests that if an employee engages in conduct that no other employee has previously engaged in (as was with Abare's case) the employer can never take action against that employee because there are no prior comparators available. There is no legal basis for this inflexible approach.

compounded by the offensive nature of his comment, which is an obvious slur directed at those with mental disabilities or impairments, his targeting of co-workers with different viewpoints, and his leadership roles that co-workers rely upon for safety within the Oswego facility. Further, despite the ALJ's attempt to implicate Novelis' social media standard, Abare was not removed from his leadership positions for violating Novelis' social media standard or in retaliation for alleged exercise of Section 7 rights. Rather, Novelis removed him from those roles for violation of the Code of Conduct due to his use of discriminatory epithets directed toward co-workers who held a different viewpoint than his own. Tr. 2896. The removal of leadership roles would have occurred regardless of whether the action took place through social media, or some other means, and regardless of Abare's pro-union activities, because Abare's conduct in cursing fellow co-workers, many for whom he had supervisory, training, and rescue responsibilities, violated both Novelis' Code of Conduct policy applicable to all communications and common decency. *Id.*

F. The ALJ Erred In Finding That Novelis' Social Media Standard Violated The Act

The Complaint alleged that Novelis maintained a Social Media Standard (GC-Ex. 26) that interfered with, restrained and coerced employees in the exercise of their rights under the Act. GC-Ex. 1(cc) at ¶¶ XII(c), XIX. The GC, however, did not put on a shred of evidence demonstrating that the existence of the Standard interfered with, restrained, or coerced any employee in the exercise of any Section 7 right, that Novelis enforced the Standard against any employee during the campaign, that the Standard diminished the Union's purported majority support, or that the Standard impacted the election.

Contrary to the ALJ's statement that the Standard "uses overly broad language" (ALJ Dec. 57), the policy did not impermissibly interfere with employee's Section 7 rights. In determining whether a company rule or policy unlawfully interferes with an employee's

Section 7 rights, the Board applies the analysis set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, if a work rule or policy "does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

There is no evidence that the Standard was promulgated in response to union activity or applied to restrict the exercise of Section 7 rights. The ALJ's finding that employees could reasonably construe the Standard as prohibiting Section 7 activities (ALJ Dec. 57-58) is wrong. It is well-established that, "[i]n determining whether a challenged rule is unlawful, the Board must ... give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Id.* at 646 (*citing Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998)).

The Standard provides that it "applie[d] to the extent permitted by applicable law[,]" and "[was] not intended to supersede any applicable local, state or country law or the terms or provisions of any current collective bargaining agreement. In the event of an conflict with this standard, the applicable law, contract, or collective bargaining agreement shall prevail." GC-Ex. 26 at 1, 3. In giving the rule a reasonable reading, employees would not reasonably construe the language to prohibit activity protected by Section 7. Further, the Standard by its express terms was developed for legitimate business reasons, namely to "empower employees to participate in social media, and at the same time represent [the] Company and [the] Company values[,]" "guide employee participation in this area," and to help employees "recognize when the Company might be held responsible for or otherwise impacted by their behavior." *Id.* at 1. These legitimate business reasons support a finding that the Standard could not reasonably be construed to

prohibit or restrict Section 7 activity. *See Lafayette Park Hotel*, 326 NLRB at 825 (upholding rule that addressed legitimate business concerns); *see also Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 29 (D.C. Cir. 2001) ("[T]he NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence, particularly where, as here, there are legitimate business purposes for the rule in question and there is no suggestion that anti-union animus motivated the policy."). Simply put, the Standard did not violate the Act.

IV. THE ALJ FAILED TO JUSTIFY THAT THE EXTRAORDINARY BARGAINING ORDER REMEDY IS NECESSARY OR PROPER BASED ON THIS RECORD

Despite the evidence establishing Novelis' overwhelmingly lawful campaign, the ALJ found Novelis' alleged misconduct rendered the possibility of a fair second election impossible. Based on this finding, he issued a *Gissel* bargaining order, the most extreme remedy the Board can impose under labor law and supposedly reserved for the most severe cases of misconduct. The ALJ's imposition of compelled bargaining on this record turns that notion on its ear. As he told the parties at the hearing, this was his first *Gissel* case. It showed.

The record does not remotely satisfy the factual prerequisites on which a *Gissel* bargaining order must be based. In this regard, the ALJ completely failed to establish, or even analyze, the factors necessary to support a *Gissel* order. He engaged in no analysis of the impact Novelis' alleged unfair labor practices had on the election, and for good reason – the GC did not present such evidence. In fact, the only evidence on this point, presented by Novelis, shows that other objective factors besides its alleged unfair labor practices caused the Union to lose the election. Moreover, the ALJ improperly excluded a mountain of relevant and objective evidence on this point based on his mistaken view of such evidence as "subjective." These errors compromised the record and marred any chance for the Board to comply with the evidentiary analysis *Gissel* and the appellate courts require.

Instead, the ALJ, without any evidentiary support and based solely on his subjective views of the severity of Novelis' alleged misconduct, inferred the effects of Novelis' alleged conduct were substantial. He also inferred without evidence that traditional remedies would be inadequate. The ALJ cannot order bargaining simply because an employer commits unfair labor practices he thinks are serious. That, unfortunately, is what the ALJ did here. Upholding his bargaining order based on this record would serve no other purpose than to punish Novelis for allegedly violating the law. The Board, however, lacks the authority to issue punitive orders.

Finally, the GC failed to establish a majority of bargaining unit employees expressed their support for the Union through authorization cards. The evidence showed many cards were obtained through misrepresentations and fraud, but the ALJ misapplied the legal standard for determining whether a union card was obtained through misrepresentation. Consequently, he admitted dozens of fraudulently obtained cards into evidence. He also engaged in a variety of other evidentiary missteps that allowed unreliable card evidence into the record.

In sum, the record does not establish any violations of the Act, let alone "hallmark" violations. The ALJ's analysis completely fails to address why a second election, when accompanied by traditional remedies, cannot be fairly held. By any measure, this is not a bargaining order case.

A. The *Gissel* Bargaining Order Is An Extreme Remedy, And The Standard For Imposing One Is High

In *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), the Supreme Court outlined the evidentiary prerequisites for a bargaining order remedy. In analyzing whether a bargaining order is appropriate in such cases, the Board must find that "the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed

through cards would, on balance, be better protected by a bargaining order." *Id*. at 614-15 (emphasis added).

This is not merely an academic exercise. The Supreme Court stated that in making this determination, the Board must "take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future." *Id*. at 614. That is, the Board should not simply find that unfair labor practices occurred and that they are of the type that would normally undermine majority support, and then infer – as an intellectual proposition – that the possibility of a fair election is slight.

To warrant imposition of such an "extraordinary" remedy, the Board must make '"specific findings' as to the immediate and residual **impact of the unfair labor practices on the election process**" and conduct '"a detailed analysis' assessing the possibility of holding a fair election in terms of any continuing effect of misconduct, the likelihood of recurring misconduct, and the potential effectiveness of ordinary remedies." *NLRB v. Century Moving & Storage, Inc*., 683 F.2d 1087, 1093 (7th Cir. 1982) (emphasis added). In other words, "the Board **must** make factual findings and **must** support its conclusion that there is a **causal** connection between the unfair labor practices and the probability that no fair election could be held." *Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1110 (6th Cir. 1994) (emphasis added); *see also NLRB v. Pace Oldsmobile, Inc*., 739 F.2d 108, 110 (2d Cir. 1984) ("[T]he Board may issue a bargaining order **only after it has taken evidence and made appropriate findings** as to the need for the bargaining order at the time it is issued") (emphasis added). *See, e.g., NLRB v. J. Coty Messenger Servs., Inc.*, 763 F.2d 92, 100 (2d Cir. 1985) ("We state once again that hallmark violations do not permit issuance of a bargaining order automatically ... adding a conclusory statement that ... violations are likely to have a 'lasting inhibitive effect' does not satisfy the board's obligation to analyze whether such an effect is actually present here and how it will

prevent a fair election"); *Grandee Beer Distribs., Inc. v. NLRB*, 630 F.2d 928, 934 (2d Cir. 1980) (refusing to enforce bargaining order where Board "focused only on the violations and their severity" and failed to consider evidence of the effects of employer's misconduct and likelihood it would recur).

B. The ALJ Failed To Substantiate His Finding That Traditional Remedies Would Be Insufficient

The ALJ's bargaining order cannot be enforced because the record contains no evidence even suggesting traditional remedies would be inadequate. The ALJ's dubious findings that serious "hallmark" unfair labor practices occurred do not substitute for what is conspicuously absent from this case – record evidence on the *Gissel* factors. To support a bargaining order, the ALJ must point not just to the alleged violations, but also to evidence showing that Novelis' alleged misconduct was widespread and/or pervasive, that it caused a loss of majority support and had an impact on election conditions, that the effects of those unfair practices linger today, and that Novelis is likely to commit more unfair labor practices in the future.

Here, the GC presented no evidence on any of these points. It therefore was impossible for the ALJ to explain why a bargaining order is legally justified. Without evidence actually addressing the *Gissel* considerations, the ALJ's "analysis" is meaningless. The ALJ made wild assumptions based on no evidence, totally ignored (or excluded) Novelis' contrary evidence, and bungled the applicable legal standards at every turn. His bargaining order cannot be enforced.

1. The ALJ Engaged In No Analysis Of Causation and Ignored, Or Improperly Excluded, Novelis' Impact Evidence

The GC engaged in no effort at the hearing to present evidence that Novelis' alleged actions impacted the election results. Only a single witness, Ridgeway, testified that Novelis cost the Union the election. And his testimony concerned Novelis' lawful communication of Petock's letter. Tr. 147-49.

Other than Ridgeway, not one witness testified that support for the Union dwindled after any of Novelis' alleged unlawful actions. No one claimed attendance at union meetings dropped, that the volume of union literature in the plant decreased, or that other expressions of support for the Union dried up. The only evidence on this point shows a "significant percentage" of Oswego employees continue to support the Union based on the Union's own post-election pamphlet announcing a Minority Works Council for Oswego employees. R-Ex. 238; Tr. 614-15. Moreover, none of the GC's witnesses claimed that any alleged Company threat affected how they voted or chilled their support for the Union.[61]

In contrast, many of Novelis' witnesses testified they never heard any management member make a threat during the campaign.[62] While employees' perception of whether Novelis made threats may not be relevant to the question of Novelis' liability, it is highly relevant to the question of whether the threats, if made, had any impact on the outcome of the election. *See Chester Valley,* 652 F.2d at 273 ("[T]he impressive amount of testimony by employees who did not even recall the statements which were found to constitute unfair labor practices suggests that the effects of those practices would be minimal."). Thus, the only evidence of impact shows Novelis' actions had no impact, and that evidence was unrebutted by the GC.

The ALJ, however, completely ignored this evidence in his decision. It cannot be said more clearly – he simply did not conduct an impact analysis. He did not acknowledge the dearth of evidence presented by the GC on this point, nor did he even mention, let alone consider, the testimony of employees who suggested the impact of any Company violations was minimal. He

[61] In this regard, the ALJ's finding that Novelis' allegedly unlawful restoration of pay practices "clearly had an impact on employees, with some requesting that their Union authorization cards be returned to them," (ALJ Dec. 25), is totally baseless. Despite making this "finding," the ALJ admitted in the next breath that "no evidence [exists] as to the total number of authorization cards requested and returned," and he acknowledged that only a single employee, Robert Wise, actually requested his card back. *Id*. at n. 83. The record offers no explanation why he made such a request.

[62] *See* Tr. 1650, 1832-33, 1864-65, 2004-06, 2018-19, 2037-38, 2076, 2171-73, 2280-81, 2307-08, 2335-36, 2428-29, 2440-41, 2461-62, 2473-74, 2491-92, 2503-04, 2531, 2562-63, 2577-78, 2694-95, 2704, 2727-28, 2788.

did not even pretend to pay lip service to Novelis' evidence by considering, and then rejecting it. It is as if the evidence does not exist in the record.

Instead, the ALJ simply assessed Novelis' violations based on his own view of their severity. The ALJ recounted each unfair labor practice he found was committed, lacing his analysis with statements such as, "[t]hreats of plant closure and loss of jobs are more likely to destroy election conditions for a longer period of time than other unfair labor practices." ALJ Dec. 66.[63] The conclusion that Novelis' alleged plant closure threats (and all of the other alleged threats) are "more likely" to "destroy election conditions" is based on zero evidence and is actually contrary to the evidence. Likewise, his conclusion that Martens' comments "will likely remain etched in employees' memories for a long period," (ALJ Dec. 65), is based on nothing but his own opinion and citation to past Board cases that cannot substitute for evidence. As stated, the employees who did address this issue stated they never heard Novelis make threats. Thus, the only evidence on this point suggests the impact of any plant closure threat has fully dissipated.

Moreover, the caselaw the ALJ claims as support for his findings does anything but. For example, he cites *NLRB v. Jamaica Towing, Inc*., 632 F.2d 208 (2d Cir. 1980), for the premise that bargaining orders are warranted "when the employer engages in the type of hallmark violations committed here." ALJ Dec. 65. But in *Jamaica Towing*, the Court ruled that it is "[t]he actual use of a 'stick' in the form of a plant closure, or the resort to physical force or discharge" that allows for a finding, without "extensive explication," that such violations are "likely to have a lasting inhibitive effect on a substantial percentage of the workforce." 632 F.2d

[63] Incidentally, the ALJ did not find Novelis violated Section 8(a)(1) by threatening "loss of jobs." His findings relative to the 25th Hour meetings were that Novelis: (i) made implied threats of plant closure (ALJ Dec. 48-49), (ii) made implied threats of reduced pay and benefits (ALJ Dec. 49), (iii) made express threats of more onerous working conditions (ALJ Dec. 50), and (iv) made express threats of loss of business (ALJ Dec. 50). Thus, the ALJ's *Gissel* analysis includes consideration of a violation he did not even find Novelis committed.

at 213. That is because "these are complete acts which may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period." *Id*. (emphasis added). In contrast, the Court held that the "threat of plant closure," while serious, may not support a bargaining order if there is a "lack of proof of pervasiveness." *Id*.. The Court thus refused to enforce the bargaining order.

The ALJ did not find Novelis actually did any of the things it supposedly threatened to do during the 25th Hour speeches, and not all were even "hallmark" threats. None of the violations alleged to have been committed during the 25th Hour speeches are "complete acts." Under *Jamaica Towing*, the ALJ needed to identify "proof" of the pervasive nature of such events. The ALJ, of course, did no such thing.[64]

The ALJ also erred by refusing to allow Novelis to present additional objective evidence that would have been directly relevant to the *Gissel* causation and impact analysis. The ALJ rejected Novelis' proffered evidence regarding the prior union experiences of Oswego employees or the experiences of their friends and family and that these employees shared their experiences and opinion why they believed unionization was not in Novelis' best interests with scores of their co-workers during the campaign.[65] Likewise, the ALJ refused to allow Novelis to present evidence from Oswego employees that Union supporters engaged in harassment and

[64] Similarly, the ALJ cited *Homer D. Bronson Co*., 349 NLRB 512 (2007) for the premise that threats of plant closure are "more likely to destroy election conditions for a longer period of time than other unfair labor practices." ALJ Dec. 66. The employer in *Homer Bronson* engaged in significantly more egregious misconduct than anything that is alleged to have occurred here. In comparison to Novelis, the employer there: (i) displayed posters graphically depicting closed UAW plants (here, Novelis made presentations about its growing CASH line), (ii) actually removed machines from the production floor after suggesting unionization could cause business losses (here, Novelis never stopped production of its CASH line at any point during the campaign and evidence of ongoing production was visible to all employees), and (iii) granted employees an unplanned wage increase (here, Novelis maintained the status quo by not implementing a reduction in benefits it had planned many months before the hint of a union campaign). *Homer Bronson* does not remotely support a finding that Novelis has engaged in behavior that is "more likely to destroy election conditions for a longer period of time."

[65] Tr. 1629, 1717, 1797-98, 1842-43, 1948-54, 1988, 2027, 2102-03, 2125-26, 2152, 2208, 2225-26, 2243, 2291-92, 2323-24, 2341, 2432-33, 2452-53, 2465-66, 2480-81, 2494-95, 2510-11, 2434-35, 2568, 2698-99, 2720, 2731-32, 2747, 2752, 2995-96, 2999, 3000-01, 3002, 3003, 3004-05, 3006-07, 3010, 3011, 3012.

disparagement of anti-union employees on numerous occasions during the campaign and that employees were aware that area union plants had closed. *See e.g.*,Tr. 1831, 1842, 1988-89, 2103, 2151, 2209, 2579, 2753, 3008. He further excluded evidence regarding various Union campaign paraphernalia and statements,[66] which he found was "subjective" and irrelevant.

It was error to exclude this evidence, as none of it was subjective. Evidence the Union made certain statements, or that employees talked among themselves about the potentially negative effects of unionization, is objective evidence of events that occurred during the campaign. They are clearly relevant to the question whether the Union's loss of support was actually caused by Novelis' actions or by other factors. Failure even to admit this evidence necessarily means the ALJ's *Gissel* analysis was incomplete.[67]

2. The ALJ's Analysis of Pervasiveness Is Flawed Beyond Repair

In addition to its failure to present any evidence of alleged impact on election conditions, the GC also failed to prove that any specific alleged unfair labor practice was "pervasive" within the meaning of *Gissel*. That did not stop the ALJ from reaching sweeping (and totally inaccurate) findings that Novelis' alleged unlawful actions affected the entire bargaining unit.

[66] *See, e.g.*, Tr. 1758-60, 1869, 1899, 1939, 2053-54, 2103, 2125, 2179-80, 2226, 2241, 2292, 2323, 2433, 2451-52, 2464-65, 2481, 2495, 2435-36, 2568-69, 2579, 2681, 2699, 2709, 2731, 2738-39, 2752, 2998, 2999, 3002, 3003, 3005, 3007-08, 3009, 3010. The ALJ erred in refusing to permit Novelis to question Union rep Jack Vanderbaan on issues related to employee interactions with the Union that would have shown the Union's own acts and other lawful reasons caused the Union's loss. Tr. 1561, 1563-64, 1569, 1572, 1574, 1581-82, 1585-93, 1595-97, 1613, *see also* Tr. 1880.

[67] Likewise, the ALJ refused to admit testimony from numerous employees directly relevant to the question of the impact of Novelis' alleged unfair labor practices. He refused to admit evidence that many employees believed Novelis ran a fair and evenhanded campaign, did not make any threats at all during the campaign, and did not affect the way they voted in the election, *see, e.g.*, Tr. 1990, 1939, 1989, 2009, 2054, 2126, 2183, 2226, 2292, 2324, 2434, 2453, 2466, 2495, 2436, 2720, 2753, 2998, 2999, 3001, 3002, 3003, 3005, 3007, 3011, 3012, that employees believed they could vote their true feelings in a second election, *see, e.g.*, Tr. 1939, 2028, 2054, 2104, 2126, 2152, 2226, 2434, 2481, 2511, 2700, 2739, and that it would be unfair for the Board to saddle them with a Union they did not want. *See, e.g.*, Tr. 1843, 1990, 1989, 2126, 2153, 2182, 2292, 2324, 2466, 2496, 2569, 2709, 3007, 3011, *see also* I-Ex. 2. The ALJ's exclusion of all of this evidence on the grounds it was "subjective" and irrelevant was doubly wrong. The fact that an employee believes Novelis ran a clean campaign – admittedly, a subjective opinion – is not what is relevant. Rather, such testimony strongly suggests that the employee did not know about, or was not impacted by, Novelis' alleged unlawful conduct. The evidentiary value of the evidence in this context is plainly objective and is highly relevant to the question whether traditional remedies are adequate. It was error for the ALJ to exclude it.

Those findings cannot be sustained on review.

ALLEGED HALLMARK VIOLATIONS

- **25th Hour Threats**. The threats allegedly made by Chris Smith and Phil Martens during their February 17 and 18, 2014 employee speeches carry far less weight than the ALJ asserts in his decision. First, Andy Quinn testified that approximately half the total number of bargaining unit employees actually attended the meetings. According to Quinn's estimate, only 250-300 employees in total attended these meetings – 100 at the first meeting held on the CASH line, and 75-100 at each of the two meetings held in the main cafeteria area. Tr. 2928. The ALJ did not discredit this testimony. The testimony from the GC's own witnesses further supports that these meetings were attended by approximately one half of the bargaining unit. Jason McDermott testified approximately 60-80 employees attended the first meeting on the CASH line (Tr. 1257), Spencer estimated 120-155 employees attended the second meeting (Tr. 900-01), and Abare testified approximately 100 employees attended the third meeting (Tr. 441-42). Thus, the Board's own witnesses estimate the total number of attendees at the three meetings to be 280-335 – approximately half of the bargaining unit.[68] Corroborating this evidence is employees' testimony who testified they did not attend any of the three meetings, and Novelis' security gate records (which the ALJ found reliable) (ALJ Dec. 14) confirm that many employees were not even at the plant at any time on February 17 to 18, 2014. *See* Ex. R-282, Tr. 2647-48 (demonstrating that 72 employees were not at the plant at any time on February 17 to 18, 2014), *see also* Tr. 1764, 2743 (employee testimony that they did not attend any speech).

Thus, approximately half of the workforce did not attend any 25th Hour speech. As such, any alleged threats Martens and Smith may have made during those meetings at most reached

[68] These numbers, as well as the security records belie the ALJ's erroneous finding that the meetings were "mandatory" and that the meetings were "attended by all employees." ALJ Dec. 31, 48.

half of the unit, as the GC offered no testimony that attendees shared what they heard with co-workers who did not attend. The ALJ, however, blew past these inconvenient facts in his decision. He found Novelis' alleged threats of plant closure were "directly disseminated to the bargaining unit," making no mention how much of the bargaining unit the record reflects actually heard those remarks. ALJ Dec. 65. He likewise found that Novelis' "unlawful" disparagement of the Union via the Petock letter, which occurred "during the captive audience meetings," was "disseminated among the entire bargaining unit." ALJ Dec. 66. These findings are simply wrong, as they did not reach the "entire bargaining unit." Thus, the pervasiveness of any violations occurring during the speeches is far less than what the ALJ represented.[69]

The ALJ further compromised any meaningful review of his pervasiveness analysis by conflating the remarks made by Martens and Smith into paraphrased summaries he then considered *in toto*, both during his Section 8(a)(1) analysis and his *Gissel* analysis. This was grave error. Martens and Smith were not speaking from a script and therefore their remarks were slightly different each day in front of different audiences. Thus, it was incumbent on the ALJ to analyze whether violations occurred <u>one speech at a time</u>, rather than to conflate the three speeches as he did. This is especially the case since the most serious threats alleged–those of plant closure and reduced pay and benefits – are alleged to be implied threats.

Just as the ALJ's analytical choice obfuscates the scope of his Section 8(a)(1) findings, it hopelessly muddies any analysis of the alleged pervasiveness of these violations. Without knowing which remarks, during which speech, the ALJ believes are unlawful, it is impossible to determine how pervasive those remarks actually were. This is not an error the Board can correct.

[69] Additionally, witnesses testified that the speakers during the first meeting, which was held out on the CASH line, were difficult to hear because of amplification problems and the noise of the CASH line, which continued running during the speeches. *See* Tr. 1268, 2929. The GC made no meaningful attempt to address these issues – it called no witnesses in rebuttal to testify that they attended this meeting and could clearly hear everything that was being said. Thus, it is questionable whether many of the employees who attended the CASH line meeting even heard the alleged threats made by Smith and Martens. Again, the ALJ did not even cite this evidence in his decision.

The ALJ's missteps do not end there. As noted, the alleged threats of plant closure or loss of business – the only threats alleged during the 25th Hour speeches that might rise to the level of "hallmark" violations – were found by the judge to be implied threats, not explicit threats. Such statements "thus were less likely to have a strong and lasting effect." *Chester Valley,* 652 F.2d at 273. The ALJ fails entirely to account for this fact in his analysis.

Moreover, many employees testified that they never heard any threats made by Novelis at any point during the campaign.[70] This is powerful evidence that any unlawful statements made during the speeches had little impact on election conditions. *Accord Chester Valley,* 652 F.2d at 273. Once again, the ALJ pretends as if this evidence does not exist, as he does not even mention it in his decision except to characterize it as "subjective." ALJ Dec. 24. As noted above, this evidence is not "subjective" when considered as part of the *Gissel* analysis.

Finally, Quinn testified that Novelis has hired approximately 50 employees since the election. Tr. 2874-75. Clearly, those employees were not affected at all by any statements made at the meetings. The ALJ again did not consider whether those employees were impacted by the speeches except to discount the importance of the evidence – in his view, the hiring of 50 new employees in a workforce of 600 is "minimal." ALJ Dec. 67. But the ALJ refused to allow Novelis to present evidence that it has plans to hire hundreds of new employees in the coming year. Tr. 2875-76. This evidence would not have been relevant merely as changed circumstances evidence, but also to the question of pervasiveness and whether traditional remedies can suffice.

- **Restoration of Sunday Premium Pay and Vacation Pay**. The GC also failed to prove that any bargaining unit employee was affected by Novelis' decision to not implement

[70] Tr. 1650, 1832-33, 1864-65, 2004-06, 2018-19, 2037-38, 2076, 2171-73, 2280-81, 2307-08, 2335-36, 2428-29, 2440-41, 2461-62, 2473-74, 2491-92, 2503-04, 2531, 2562-63, 2577-78, 2694-95, 2704, 2727-28, 2788.

certain changes to Sunday premium pay and vacation overtime pay practices. Not a single witness testified that they began to lose these benefits in their paychecks at any point between the time Novelis originally announced these planned changes in May 2013 and the time it announced the decision to not proceed with them on January 9, 2014. Thus, the record does not establish Novelis' January 9, 2014 announcement had any tangible effect on any member of the bargaining unit. Simply put, maintaining the status quo cannot be deemed to have any "lingering effect."

The ALJ, of course, did not consider any of these factors in his decision. He merely found that Novelis committed a "significant hallmark violation" by restoring Sunday premium pay, that the violation was "disseminated to the entire bargaining unit" and that it "is likely to have a long-lasting effect" in part because "this benefit will regularly appear in paychecks as a continuing reminder." ALJ Dec. 66. These findings, once again, are based not on evidence but solely on the ALJ's suppositions. There is no evidence Sunday premium pay and unscheduled overtime were worked, but not paid, after January 1, 2014. Thus, the record does not suggest these benefits ever failed to appear in a paycheck. Thus, how can the ALJ possibly conclude that the maintaining of this benefit will be a "continuing reminder" of anything?[71]

ALLEGED NON-HALLMARK VIOLATIONS

"Hallmark violations" generally include "'closing of a plant or threats of closure or loss of employment, granting of benefits to employees, or reassignment, demotion or discharge of union adherents.'" *Kinney Drugs*, 74 F.3d at 1428 (*quoting NLRB v. Chester Valley,* F.2d at 272). The remaining allegations in the GC's case, including the alleged threats of loss of

[71] The case the ALJ cited as support for his finding of pervasiveness, *MEMC Elec. Materials, Inc.*, 342 NLRB 1172 (2004), had distinctly different facts. There, the employer cut employee wages by 10 percent. Employees were then paid those reduced wages for months before the employer, in response to union organizing activity, returned employees' wages to their previous levels through a series of bonus payments, including one made just days before the election. The nature and timing of those payments may indeed have served as a "reminder" to employees of the employer's violation. The facts here are not remotely similar.

benefits,[72] constitute "lesser misconduct" that do "'not support a bargaining order absent serious and long-lasting untoward effects on employees.'" *Id.* at 1428-29 (*quoting Chester Valley*).[73] The GC did not establish these "lesser" violations had any impact on employees, much less the "long-lasting untoward" impact required to support a bargaining order. Predictably, the ALJ found that all of these other violations were pervasive in nature.

- **Individual Supervisor Misconduct**. Out of a bargaining unit of almost 600 employees and approximately 40 to 50 supervisors, the GC could muster only five minor and isolated examples of alleged supervisor misconduct–the Quinn conversation on February 15, 2014, the Formoza conversation on January 28, 2014, and the two Bro meetings on January 23 and 30 involved about 10 employees. In contrast, the record reflects that Novelis held dozens of meetings with employees throughout the course of the union campaign to share information about election details, the collective bargaining process and Novelis' position on unionization.[74] The GC never alleged that anything from those meetings was unlawful. Thus, the evidence at most shows that the Bro, Quinn and Formoza incidents potentially impacting about 10 employees were isolated and the only incidents of their kind that occurred during the campaign.

The ALJ casually brushed these factors aside, remarking in his decision that "these discriminatory actions committed by supervisors were likely to leave an impression sufficient to outweigh the general good-faith assurances issued by management." ALJ Dec. 67. Again, the ALJ based this finding on no evidence. There is no testimony in the record, even from the witnesses who testified to the violations committed by Formoza and Bro, that they did not believe the myriad assurances made to them by Company management during the campaign that

[72] *See Eldorado Tool,*, 325 NLRB 222, 238 (1997) ("The threat of loss of benefits is not ordinarily considered among the 'hallmark' violations justifying a bargaining order ... The posting of a proper notice should suffice to inform the employees of their rights under Section 7 of the Act and of the requirements of good faith bargaining").
[73] The AJL erred in finding other alleged unfair labor practices "hallmark violations." ALJ Dec. 65-66.
[74] *See, e.g.,* Tr. 1639-44, 1686-89, 1745-53, 1863-64, 2004, 2016, 2034-36, 2099-2100, 2107-09, 2136-38, 2437-40, 2703-04, 2787; R-Exs. 70, 77, 243.

they should vote their true feelings and that Novelis would bargain with the Union in good faith. Tr. 649-98, 710-59, 1011-49, 1417-44. Thus, it is baffling that the ALJ could reach this conclusion.

The ALJ likewise found that the "warmer approach taken by Quinn" of soliciting grievances was likely to have a "long-lasting effect on employees' freedom of choice by eliminating, through unlawful means, the very reason for a union's existence." ALJ Dec. 67. This assertion is indefensible, particularly given the case the ALJ cited as support for the premise, *Teledyne Dental Products Corp*., 210 NLRB 435 (1974). In that case, the plant manager, in response to union activity, held two employee meetings in which he solicited employee grievances, later persuaded employees to list their demands, and then approved and implemented them. Here, Quinn talked to three employees and gave them nothing, and there is no evidence those employees reported their conversation with Quinn to anyone else. Equating the alleged pervasiveness of Quinn's actions with those of the plant manager in *Teledyne* makes no sense.

- **Solicitation and Distribution**. The GC cobbled together a few incidents in which it claimed Novelis removed pro-union literature from non-work areas or asked employees to remove pro-union stickers and buttons. But the witnesses questioned on these issues testified that pro-union literature was littered throughout the plant and many had never seen it taken down.[75] Even Bro, who is alleged to have told a small group of employees they could not have union literature in a control room/pulpit, is acknowledged by the GC's own witnesses to have told them they could distribute union literature in non-work areas and wear union stickers on their personal clothing. Tr. 671, 684, 750, 757, 1044; *see also* Tr. 1957-58 (testimony of

[75] *See* R-Exs. 107, 111, 113, 114, 115, 123; Tr. 596-98, 1923, 1955-58, 2118-20, 2139, 2190, 2304, 2312, 2314-19, 2474, 2490, 2504, 2531-32, 2560-61.

Company-supporter employee that Bro told him that pro-union literature could be distributed in break areas and instructed him to return pro-union literature that he had removed). Thus, the record suggests the vast majority of employees freely distributed both pro-union and anti-union literature throughout the plant – indeed, the ALJ acknowledges this in his decision. ALJ Dec. 10. Yet he completely ignored this evidence in finding that Novelis' managers "discriminatorily enforced the Company's unlawfully overbroad and restrictive solicitation and distribution policy." ALJ Dec. 67. As described above, the facts simply do not support this conclusion.

- **Abare's Demotion**. Everett Abare's demotion was not shown at the hearing to have had a pervasive effect on the bargaining unit even if it did violate the Act. Most importantly for *Gissel* purposes, it occurred after the election and thus had no effect whatsoever on election conditions. Additionally, there is minimal evidence in the record that the rest of the bargaining unit knew about his demotion until the reading of the federal district court's 10(j) Order. Only a few employees working in Oswego's massive facility testified they were even aware he had been demoted prior to the reading of the order. Tr. 1982-83, 3131-32, 3151, 3155-56. Thus, the ALJ's finding that Abare's demotion was "widely known among the work force" is flatly contradicted by the record. ALJ Dec. 66. The ALJ cannot merely find that Abare is a "known union adherent" (ALJ Dec. 66), and then presume that everyone would have known about his demotion on that basis alone. But that is exactly what he did. The ALJ's finding that Abare's demotion therefore is "likely to have a lasting inhibitive effect on a substantial portion of the workforce" is baseless and not supported in the record, especially in light of the fact that every employee is now aware that Abare has been reinstated.

3. The ALJ's Likelihood of Recurrence Analysis Is Remarkably Inappropriate and Tramples Novelis' Due Process Rights

Incredibly, the ALJ's analysis of whether Novelis is likely to engage in unfair labor

practices in the future is even more deeply flawed than his lack of impact and pervasiveness analysis. First, what is not in the record speaks volumes on this point. The GC put on no evidence suggesting Novelis has a history of anti-union animus or prior unfair labor practices, or that it would continue to commit such practices in the face of a traditional cease and desist order. This failure is not insignificant. Some appellate courts have viewed the Board's decision to ignore these factors as outcome determinative. *See, e.g.*, *Century Moving*, 683 F.2d at 1093.

Here, the GC submitted no evidence suggesting that the traditional remedies for unlawful employer conduct during a campaign – including a notice posting, other "communication" remedies, a cease and desist order, and/or potentially a rerun election – would be ineffective. Novelis' lawful campaign communications and activities outweigh its allegedly unlawful ones by an overwhelming margin. The record abounds with evidence of Novelis' lawful campaign communications, statements, letters, internet postings and practices. Smith's and Martens' campaign speeches likewise are replete with positive and lawful statements. Thus, evidence of Novelis' lawful campaign conduct dwarfs the evidence of its alleged unlawful actions.

Moreover, there is no evidence Novelis has a history of unfair labor practices at Oswego or any other facility. Nor does the record indicate Novelis would refuse to honor the results of a second election. Novelis has long-standing relationships with the Steelworkers Union in other unionized facilities and has successfully negotiated union agreements at those facilities. Tr. 2879; R-Exs. 37, 40.

Finally, the Board did not even allege, much less prove, that Novelis would discipline or discharge known union supporters in the future. Novelis' demotion of Abare six weeks after the election for calling his co-workers "Fucktards" and telling them to "eat shit" is the only Section 8(a)(3) allegation, and Abare has already been restored to his former positions. No employee testified they feared retaliation by Novelis for any action taken during the campaign. Thus, the

record lacks any indication that Novelis is likely to commit unfair labor practices in the future.

As with the other portions of the *Gissel* analysis, the ALJ failed even to mention, much less consider, these facts. Instead, he focused on "contextual evidence" submitted in the GC's rebuttal case that Novelis "heap[ed] 5 years of pay raises on the employees" following the election. ALJ Dec. 69. This "unusual occurrence" reflected the fact that Novelis was "clearly emboldened" by how it "peeled away union support with its unlawful tactics during the election campaign." *Id*. In the ALJ's view, the "only fair, justified and appropriate remedy" in the face of such action is a bargaining order. It is difficult to identify a more deeply flawed and inappropriate finding in the entire case than this one.

At the hearing, Novelis moved to preclude evidence of post-election misconduct, since the GC had not charged it with committing any unfair labor practices after the election besides its demotion of Abare. The GC had attempted to introduce evidence of the pay raises at issue as "context" evidence, and claimed the pay raises rebutted evidence Novelis had submitted demonstrating its efforts to remediate the effects of its alleged Section 8(a)(1) violations. Novelis argued in motion papers, *see* ALJ Ex. 6, that such evidence could only be relevant under *Gissel* if asserted to show unfair labor practices were committed by Novelis after the election, and that introduction of such evidence for the first time during the GC's rebuttal case would eviscerate Novelis' due process rights since such allegations were not alleged as unfair labor practices in any charge, the operative pleadings or asserted during the GC's case-in-chief. The ALJ granted Novelis' motion "in part." He ruled: "There are due process concerns if the General Counsel and Charging Party use this opportunity to introduce evidence of additional unfair labor practices." ALJ Ex. 6 at 2. Seemingly adhering to this principle, the ALJ then ruled that the GC could submit "post-election evidence," but that it must "directly refute the Respondent's evidence of mitigation." *Id*. at 3.

The GC then attempted to submit documents reflecting Novelis' announcement of post-election pay raises, and restoration of unscheduled overtime, during its rebuttal case. *See* CP-Ex. 2-6; Tr. 3104-05, 3133-34, 3161-62, 3169. Despite the fact that these documents bore absolutely no relation whatsoever to Novelis' mitigation evidence, the ALJ opined that the documents might have some contextual relevance, and admitted them over objection. Tr. 3104, 3134, 3161-62, 3183-84. He instructed GC, however, that he would not consider evidence of Novelis post-election conduct for the purpose of establishing additional theories of liability **or** for the purpose of determining "whether there is a possibility of a fair rerun election." Tr. 3108-09.

The GC's claim that these documents were merely "context" evidence, was unmasked when it submitted its post-hearing brief. Specifically, in reference to the alleged post-election changes, the GC alleged: "Respondent also restored 'unscheduled overtime' in July 2014 during these proceedings. CP-Exs. 2, 3. **Although it is not alleged as a violation herein, Respondent's conduct is also unlawful**." *See* GC's Post-Hearing Brief, p. 9, n. 8. The GC further asserted that such conduct supports a bargaining order. P-64.

Unbelievably, the ALJ accepted this evidence for the very purpose he claimed he would not, noting that Novelis announced in May 2014 it would give pay raises for the following 5 years and that it would restore unscheduled overtime in January 2015. ALJ Dec. 45. He also noted that "cognizant that the atypical timing of its pay and benefits announcement would be deemed suspicious, [Marco] Palmieri told the local press that the announced changes were not related to its opposition to the union campaign." *Id*. The ALJ then expressly found that "the [GC] and [the Union] do not allege the postelection pay raise and restoration of unscheduled overtime as violations, **but contend that the action reflects continued unlawful postelection behavior by the Company**." *Id*. (emphasis added). Incredibly, he then noted that because **Novelis** "opened the proverbial evidentiary door on mitigation with letters to employees that

included an unusual mid-year announcement of a series of annual pay raises, the [GC] and [the Union] were entitled to refute the specific mitigation alleged with contextual evidence." *Id.*[76] The ALJ then specifically considered this evidence in his *Gissel* analysis and, indeed, hinged his decision to impose a bargaining order on it.

The ALJ's conclusion that Novelis should be held to a bargaining order because it granted post-election pay raises may be the most disingenuous example of "fact finding" in the case. It is emblematic of the ALJ's hackneyed handling of evidentiary matters and grossly unfair treatment of Novelis throughout the proceeding. To promise the parties on the record that he would not consider evidence of post-election uncharged misconduct, and to then base his bargaining order on it, reflects a stunningly brazen intellectual dishonesty.[77]

Aside from his intellectually dishonest handling of this evidence, precedent makes clear that the ALJ–as with virtually everything else in the case–is simply wrong to rely on the evidence in the manner in which he did. Both Board and circuit court precedent make clear that an employer's post-election conduct is only relevant to the extent it evidences **mitigating** circumstances, such as the passage of time, employee turnover, or affirmative employer conduct intended to dissipate any possible employee apprehension, which obviate the need for a bargaining order, *see e.g., Kinney Drugs,* 74 F.3d at 1432; *Peerless of America, Inc. v. NLRB*, 484 F.2d 1108, 1121 (7th Cir. 1973); *Desert Aggregates*, 340 NLRB 289, 293-94 (2003); C*omvac Int'l, Inc*., 302 NLRB 652 (1991), or as proof of aggravating **unlawful conduct** which

[76] Novelis, of course, did not offer evidence of the post-election raises; the GC and the Charging Party did. Thus, the ALJ's finding that Novelis opened the door for him to consider "contextual" evidence of unlawful behavior because the Union submitted the evidence that supposedly opened that door is spectacularly ill conceived.

[77] The ALJ's handling of this issue also unquestionably prejudiced Novelis' due process rights. In reliance on the ALJ's assurances at the hearing, Novelis did not seek to rebut this evidence, believing (as the below precedent plainly illustrates) it was irrelevant. But, the ALJ specifically relied on the post-election evidence in fashioning his remedy. His characterization of Novelis' post-election announcements plainly indicates he agreed with the GC that Novelis violated the Act after the election. The ALJ's imposition of a bargaining order under these circumstances is an evidentiary bait-and-switch of the highest order and clearly violated Novelis' due process rights.

tends to erode the possibility of ensuring a fair rerun election. *See, e.g., Chromalloy Mining & Minerals v. NLRB*, 620 F.2d 1120, 1131 n. 8 (5th Cir. 1980) ("**Unfair labor practices** occurring after the election are a different kind of subsequent event [than mitigating circumstances]") (emphasis added); *J. P. Stevens & Co. v. NLRB*, 441 F.2d 514, 521 (5th Cir. 1971), *Bakers of Paris*, 288 NLRB 991, 992 (1988); *Larid Printing*, *Inc.*, 264 NLRB 369, 371 (1982).

These cases, as well as the myriad cases addressing an employer's post-election conduct, make clear that, while an employer's lawful conduct may be relevant as evidence of mitigation, only **unlawful** conduct is relevant as proof of aggravating circumstances which tend to erode the possibility of ensuring a fair rerun election. This finding is indispensable to any determination of whether the conduct at issue renders ineffective the Board's traditional remedies, including a rerun election. In other words, **the Board is obligated to prove that an employer's post-election conduct actually violates the Act in order for evidence of that conduct to have any relevance to the *Gissel* analysis**. If there is no violation, then evidence relating to an employer's post-election conduct proves nothing material to a determination that a rerun election is an inappropriate remedy under *Gissel*. Here, this cannot be done because to conclude Novelis engaged in post-election unfair labor practices would be to find Novelis guilty for conduct not alleged in the pleadings and against which Novelis was not permitted to mount a defense.

Importantly, the lawfulness of the post-election changes was never placed at issue. There are no allegations in the Complaint of any unfair labor practices after the election other than Abare's demotion. The Region investigated this matter and determined the scope of the Complaint, and the alleged unfair labor practices. If the GC wanted to expand the scope of the Complaint to challenge the lawfulness of Novelis' post-election change, it could have done so before closing its case. It did not.

At the hearing and in its briefs, Novelis warned it would be an egregious violation of its

due process rights to allow the GC and Charging Party to elicit evidence of such conduct and argue after the close of the record that evidence of Novelis' allegedly "unlawful" post-election conduct should be considered as part of the determination of the appropriate remedies under a *Gissel* analysis. *See* R-Br. at 120, n. 54; Tr. 3105-09. As predicted, the GC and Charging Party made just that argument in their briefs, and the ALJ unbelievably accepted the argument despite his ruling on Novelis' motion and his assurances to the contrary.

In the end, the ALJ's handling of the "likelihood of recurrence" prong of *Gissel* worked an extraordinary offense to Novelis' due process rights. *See Lamar Adver. of Hartford*, 343 NLRB 261, 265 (2004) (finding that to satisfy the requirements of due process, the Board "must give the party charged a clear statement of the theory on which the agency will proceed with the case ... [and] may not change theories in midstream without giving respondents reasonable notice of the change"). The Board cannot uphold the ALJ's bargaining order based on evidence Novelis granted post-election benefits to employees.[78]

4. The ALJ Erred In Rejecting Evidence Novelis Remediated The Potential Effects Of Any Alleged Unfair Labor Practices

Novelis took significant steps to remediate the effects of any alleged unfair labor practices, further supporting a conclusion that traditional remedies would be effective. The ALJ rejected this evidence out of hand, observing that none of Novelis' actions were sufficient to "cure unlawful conduct." ALJ Dec. 68. But, Novelis did not offer this evidence to prove that it repudiated any unlawful actions it may have taken under the Board's standard in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), which deals with circumstances under which an employer can avoid liability for what would otherwise be unlawfully coercive conduct.

[78] The lone case the ALJ cited in support of his acceptance of the GC's post-election misconduct evidence is *Tipton Electric Co*., 242 NLRB 202 (1979). In that case, the Board accepted evidence of post-election misconduct in its bargaining order analysis. But that is because the GC charged and proved the misconduct as an unfair labor practice. Once again, the ALJ's citations come nowhere close to supporting the actions he took in this case.

Instead, Novelis offered the evidence to demonstrate that even if liable, a bargaining order is unnecessary.

Such evidence is highly relevant to whether the effects of any unfair labor practices linger under *Gissel*. In that regard, the evidence shows Novelis remediated (not repudiated) the effects of many of those actions. Foremost in this regard, both Smith and Martens sent correspondence to all Novelis employees in June 2014 addressing the GC's allegations that they made threats during the 25th hour meetings. *See* R-Exs. 54, 56. Both letters were unequivocal and striking in their breadth and specificity. They clear up any conceivable confusion an employee may have had regarding the meaning of Martens' and Smith's campaign speeches. Going forward, employees can have no legitimate reason to believe Novelis actually would close the plant, lay people off, or reduce benefits solely because of a Union election victory.

The ALJ erred in rejecting the letters' relevance to the *Gissel* analysis on the premise that Novelis did not satisfy *Passavant*. *See Kinney Drugs,* 74 F.3d at 1432 (refusing to enforce bargaining order where Board failed to consider mitigating effect of letter sent by employer after committing alleged hallmark violations: "The NLRB concluded that the November 19 letter was an ineffective repudiation because it was not categorical, but the NLRB erred in failing to consider the letter's substantial mitigating effect"); *Century Moving*, 683 F.2d at 1093.[79]

Novelis further remediated the effects of all potential unfair labor practices when Smith, accompanied by a Board agent, read the entirety of Judge Sharpe's decision and order for injunctive relief in the 10(j) proceeding in a series of employee meetings. *Novelis Corp.*, 2014 WL 4384980 (N.D.N.Y. Sept. 4, 2014); Tr. 2241, 2322, 2451, 2503. Following the reading,

[79] Bro and Sheftic, two figures in the GC's theory of the case, no longer work at Oswego Works. *See* Tr. 686-87, 704-05, 2878-79; *see also* Tr. 754, 1044. The removal of supervisors who allegedly contributed to the commission of unfair labor practices is a factor that should be taken into consideration when determining whether to issue a bargaining order. *See, e.g.*, *Cogburn Health Ctr., Inc. v. NLRB*, 437 F.3d 1266, 1274-75 (D.C. Cir. 2006); *NLRB v. Heads & Threads Co., A Div. of MSL Indus.*, Inc., 724 F.2d 282, 289 (2d Cir. 1983).

Novelis posted and emailed the order throughout the plant and mailed the order to every bargaining unit employee. That order addresses all of the Board's allegations in this case. Tr. 1840-42, 2142-43, 2173-5, 2930-31.

The ALJ rejected the reading of the 10(j) order as a relevant consideration, noting the Board has held compliance with court orders "does not actually remedy unfair labor practices, but rather returns parties to the status quo ante pending disposition by the Board." ALJ Dec. 68. However, the Board itself recognizes employer steps that dissipate the impact of unfair labor practices may diminish the need for a *Gissel* bargaining order. *Masterform Tool Co.*, 327 NLRB 1071, 1072 (1999) (concluding bargaining order not warranted where the employer's layoff of union supporters was mitigated by the reinstatement), *Riveredge*, 264 NLRB at 1096 n. 6 (holding misrepresentations of Board actions are not objectionable and acknowledging that such misrepresentations may be cured by corrective communications).

Ultimately, "[t]he issuance of a bargaining order is proper only if, after reviewing all relevant circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, the Board may reasonably conclude that the employees will be unable to exercise a free choice in an election." *J. Coty Messenger Servs., Inc.*, 763 F.2d at 100 (emphasis added). Evidence of an employer's communications to employees to clarify and/or cure conduct that could be perceived as unlawful is directly relevant to the impact of the conduct on employees and whether employees "continue to feel the effects of the ULPs." *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 85 (2d Cir. 1994).

C. It Is Clear The ALJ Ordered Bargaining To Penalize Novelis

Since the record does not support a finding that traditional remedies would be inadequate, the ALJ's order for bargaining serves only one purpose: to punish Novelis for allegedly committing unfair labor practices. The Board, however, lacks the authority under the Act to

penalize, its orders can only remediate the effects of labor violations. Accordingly, the ALJ exceeded the Board's powers under the Act by ordering Novelis to bargain with the Union.

Section 10(c) of the Act states that the Board, upon a finding of unfair labor practice violations, may issue: "an order requiring [one who commits an unfair labor practice] to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Thus, Board orders must be related to the proven unlawful conduct. *Local 60, United Bhd. Of Carpenters v. NLRB*, 365 U.S. 651, 655-56 (1961). The Board cannot punish violations of the Act, in part, because "[p]unitive sanctions are inconsistent ... with the remedial philosophy of the NLRA." *Wis. Dep't of Indus. v. Gould, Inc.,* 475 U.S. 282, 288 n. 5 (1986). In this regard, it is not enough for the Board to justify a punitive order on the grounds it would deter future misconduct, because "if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940) (*cited by BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002)).[80]

Here, the ALJ clearly did not analyze whether imposition of a bargaining order on this record would actually be "remedial" in nature. If anything, the ALJ's commentary on why bargaining is necessary suggests he **did** believe Novelis should be punished and that his order is based on that belief. ALJ Dec. 69. The ALJ's belief that Novelis was "clearly emboldened by how it peeled away union support with its unlawful tactics during the election" and that it would be "pleased" with a rerun election, which he proclaimed "is not to be," plainly shows the ALJ believed Novelis had flaunted the legal process by denying the allegations in this case while

[80] Federal courts have been reluctant to enforce bargaining orders where evidence of the *Gissel* factors is lacking and there is an indication the Board ordered bargaining to punish the employer or deter future misconduct. *See, e.g., Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156, 1163 (7th Cir. 1990); *Am. Spring Bed Mfg. Co*., 670 F.2d at 1247-48; *NLRB v. Ship Shape Maint. Co.*, 474 F.2d 434, 444 (D.C. Cir. 1972).

simultaneously announcing post-election pay raises. Again, that the ALJ even considered evidence of uncharged, post-election misconduct as justification for a bargaining order trammels on Novelis' due process rights and runs contrary to Board precedent. But it also establishes beyond question that the ALJ's "remedy" was ordered to punish Novelis for such conduct and to deter similar recriminations in the future.[81] The ALJ's bargaining order is punitive, inconsistent with the remedial philosophy of the Act and exceeds the Board's authority. The Board cannot uphold the order on this record without violating the Act.

D. The ALJ Erred In Finding That The Union Held Majority Status

Finally, the ALJ should not have granted a bargaining order because the Union did not enjoy legitimate majority support. The record establishes union supporters engaged in a widespread pattern of misrepresentation in obtaining union authorization cards. The ALJ, however, discounted this evidence based on his apparent misunderstanding of the relevant legal standard. He compounded that error by making numerous erroneous evidentiary rulings that prevented the development of a complete record and allowed the admission of unreliable, unauthenticated and/or untrustworthy evidence.

1. The ALJ Erred In Failing To Find Misrepresentation By Card Solicitors

Under the Board's *Cumberland Shoe* doctrine, "if the card itself is unambiguous (i.e., states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election."

[81] On this record, upholding the ALJ's bargaining order relief would substitute the Union's preferred outcome over the protected Section 7 choice made by the majority of employees who voted against union representation. This is especially true where numerous employees independently and actively campaigned against the Union long before Novelis' alleged hallmark violations ever took place. The Board cannot ignore the action of these employees and take them into consideration when analyzing the necessity of a bargaining order. If it does not, the Board would fail to fulfill its duty under the Act: "[B]efore we will enforce a bargaining order, we must be able to determine from the Board's opinion ... that it gave due consideration to the employees' section 7 rights, which are, after all, one of the fundamental purposes of the Act." *People Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 46 (D.C. Cir. 1980).

Gissel, 395 U.S. at 584. The Board looks to "whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election." *Levi Strauss & Co.*, 172 NLRB 732, 735 (1968); *see, e.g., Bookland, Inc.*, 221 NLRB 35, 35-36 (1975) (Board will invalidate cards if signer told purpose is to provide employee with additional information).

This precedent establishes that whether the card signer does, or does not, read the card before signing is unimportant; indeed, the Board presumes the signer does so. What is important, rather, is whether the solicitor causes the signer to disregard the language on the card through representations the card will be used for purposes other than those reflected on the card. It also establishes that admission into evidence of the conversations between solicitor and signer is a critical prerequisite to making the determination *Cumberland Shoe* requires.

The ALJ's evidentiary rulings, however, prevented a complete record on a multitude of card solicitations. First, the ALJ refused to allow what he viewed as "hearsay" testimony about the substance of card solicitations. He would not allow Novelis to ask GC witnesses what questions they received from employees they solicited. *See, e.g.*, Tr. 226-34, 1294. Novelis was not seeking to offer testimony about the questions asked by solicited employees for their truth. Instead, it sought to establish what each solicitor was asked in order to determine how he or she answered the questions. Such evidence plainly would not have been hearsay and is the only evidence that could have helped establish whether the dictates of *Cumberland Shoe* were followed.

The ALJ's misunderstanding of this standard resulted in myriad other errors. For example, he refused to allow questions regarding: 1) whether the solicitor even knew how to pronounce the name of an employee from whom he alleges he obtained a signature; 2) whether employees who were approached to sign cards already knew the purpose of a union authorization

card prior to the approach; 3) the card solicitors' understanding as to why the Union needed union card signatures; 4) what card solicitors communicated to employees regarding the purpose of union authorization cards; 5) whether a card solicitor recalled the gender of an employee from whom he claims to have obtained a signature; and 6) what questions card solicitors received from employees when approaching them to sign union cards. Tr. 211, 234-35, 819-20, 871, 1294, 1319, 1323-24, 1436, 1491-92. The ALJ's preclusion of such testimony effectively prevented Respondent from making its case on this issue.

In addition, throughout the hearing, dozens of employees testified they were told signing an authorization card would do nothing more than entitle the signer to receive information about the Union, would be used only to get an election, or would not count as a vote for the Union. *See* Section I.C. At least eighteen card solicitors – including many who testified for the GC – were accused of misrepresenting the purpose of authorization cards. This testimony should have called into question the legitimacy of all of these individuals' card solicitations.

The ALJ, however, discounted this evidence and relied instead on a host of factors which have no bearing under *Cumberland Shoe*. For example, the ALJ found cards were legitimately solicited for the following reasons: a) the signer read the card before signing (ALJ Dec. 13); b) the signer claimed not to have read the card before signing, which the ALJ rejected without meaningful explanation (ALJ Dec. 13-14); c) the signer could not recall where he signed the card (ALJ Dec. 13); d) the signer had time to "contemplate the consequences" of signing a card (ALJ Dec. 15); e) signers' testimony regarding the card transaction was limited or brief (ALJ Dec. 18); and 6) no reason provided at all. ALJ Dec. 14. None of these factors have any bearing on whether the employees at issue were misled into signing during the same instances of solicitation.

The ALJ committed a number of other errors. For example, the ALJ seemingly held it

against Novelis that witnesses provided "mere snapshots" of the conservations held during the card solicitation process, in that witnesses only provided "short, rote responses." ALJ Dec. 64. Novelis' witnesses would have been more than able to elaborate on the details of the card solicitation interactions, but it was the ALJ himself who preluded such testimony based upon sustained objections grounded in ridiculous hearsay and relevance rulings, which Novelis excepts to in full. *See, e.g.*, Tr. 226-34, 234-35, 819-20, 871, 1233, 1294. Further, despite his admonition that the parties were in "federal court" (Tr. 72), the ALJ refused to allow Novelis to elicit non-hearsay testimony from dozens of witnesses regarding conversations they had about the meaning of union cards – evidence that is indisputably relevant and admissible under Gissel – on the grounds that he is "not a fan of that particular approach wherein statements are not being offered for the truth of the matter asserted." Tr. 936-37. This spectacular misinterpretation of the hearsay rule substantially impeded Novelis' ability to defend itself.

The ALJ also failed to consider testimony impugning the credibility of several of the GC's card solicitor witnesses. Many card solicitors could not recall the following details about particular cards: 1) whether they had even met the employees from whom they obtained union card signatures; 2) the date upon which they obtained union card signatures; 3) the location upon which union card signatures were obtained; 4) whether anyone else was present when certain union card signatures were obtained; 5) whether the solicitor approached certain groups of employees individually or collectively; 6) what they communicated as to the purpose of union authorization cards; 7) why they did not provide their witness signature on certain cards; and 8) the gender of employees from whom they received card signatures. [82]

Moreover, many witnesses, including Abare, Martinez, and Raymond Watts, provided

[82] Tr. 200-04, 542, 549, 811-12, 813, 815, 817-18, 819, 898-00, 1076, 1127, 1231, 1231, 1238, 1239, 1306-15, 1317-18, 1321-22, 1446, 1494-95.

inconsistent testimony regarding critical aspects of their card solicitations. Martinez provided an affidavit in which he claims to have told Mark Delong that signing a card was to get more information about the Union, but at the hearing testified that he told Delong that signing a card was for union representation. Tr. 1213-14. Martinez also testified that he told Robert Loughrey that the purpose of signing a union card was to hear more information about the Union, but on redirect examination testified that he told employees that the cards were for union representation and to read the front and back of the card. Tr. 1616, 1218-19. Abare testified that everyone he solicited read the card before signing, whereas his affidavit states that only most read the card before signing. Tr. 539-40. Abare ultimately admitted that not everyone who signed the card read it before signing. Tr. 541.[83] Ray Watts provided in his affidavit that he passed out union cards to coworkers whereas during his testimony at the hearing, he denied passing out cards. Tr. 1300. Given this inconsistent testimony, the ALJ's willingness to find these witnesses credible as to all of the cards they claimed to have witnessed is dubious.

2. The ALJ Erred In Rejecting Security Records Which Clearly Refuted Testimony From GC's Witnesses

The ALJ failed to properly consider security gate records admitted through Daniel Delaney, the plant's site security manager. The security records established that card solicitors Lori Sawyer, Abare, Melanie Burton, Ray Watts, and Spencer provided inaccurate testimony as to the dates and locations of particular card signings they claim to have witnessed. Despite finding the security records to be accurate and reliable (ALJ Dec. 14), the ALJ dismissed their significance by authenticating the cards at issue merely through a signature comparison. In the

[83] As if a judge's real-time comprehension of a litigant's strategy is a prerequisite to preserving that strategy, the ALJ erred in ruling that Novelis "waived" its ability to assert that the Union's primary card solicitor (Abare) was a statutory supervisor, notwithstanding the facts that: (1) a challenge to a union's claim of majority support has nothing to do with unfair labor practice liability and therefore is not even a "defense" capable of being "waived," and (2) he conceded that he was unaware that Novelis began to elicit evidence of Abare's supervisory status during the hearing, then refused to permit further evidence on the point simply because he was not "under the impression that that was an avenue that you were pursuing." Tr. 3028-29.

face of such fundamentally inaccurate testimony, the 20 cards[84] at issue should not have been authenticated, especially through the ALJ's signature comparison exercise.[85]

3. The ALJ Erred In Permitting The Authentication Of Any Cards Testified To By Admitted Perjurer Ridgeway

The ALJ's crediting of Ridgeway's testimony would be a bad joke if it did not actually happen. Ridgeway blatantly lied in an affidavit submitted in the Section 10(j) proceeding in federal district court (*See* Section I.F.2.). At the ALJ hearing, Ridgeway lied again by testifying that he witnessed employee Mike Niver sign a union authorization card. Tr. 128-29. Niver, however, testified that John Gray (not Ridgeway) approached him to sign the authorization card (Tr. 1631) and that Ridgeway was not present at the time of his signing of the card. Tr. 1638-39. Given Ridgeway's willingness to lie multiple times under oath, the ALJ erred in crediting Ridgeway as to any of the 15 cards he "witnessed."[86]

Additionally, the ALJ erred in failing to consider significant record evidence which established that Ridgeway engaged in a practice of misrepresenting the purpose of authorization cards at union meetings. The testimony of witnesses David Bouchard, Zachary Welling, and Timothy Southworth demonstrated that Ridgeway stated at union meetings that signing an authorization card solely meant that employees could receive more information about the union.[87] Tr. 1684, 2787, 2960. The ALJ, however, erroneously discredited their testimony. The

[84] Shockingly, Spencer accounts for 15 of the 20 instances where testimony conflicts with the security records. A proper consideration of the sheer volume of Spencer's untruthful testimony would have not only resulted in the rejection 15 cards he claimed to have witnessed, but would have also cast an overwhelming shadow on Spencer's overall credibility regarding his card transactions. Indeed, the ALJ recognized that Spencer was "not entirely credible" as to where he obtained card signatures, but he inexplicably proceeded to independently authenticate the controversial cards by signature comparison. ALJ Dec. 14.

[85] Tr. 549-50, 746, 959, 961, 964, 965, 967, 968-69, 971, 973, 975, 980, 982-83, 1008, 1302, 1318, 2635, 2638, 2639, 2640, 2646, 2641, 2642, 2643, 2644.

[86] The ALJ credited Niver's testimony that Gray, and not Ridgeway, witnessed Niver's card signing, and yet, the ALJ failed to count this against Ridgeway. ALJ Dec. 12.

[87] The GC did not rebut this evidence, as its rebuttal witnesses admitted that either they did not hear everything Ridgeway said, could not recall everything Ridgeway said, were not consistently in Ridgeway's presence throughout the meetings or left the meetings immediately after their conclusion. Tr. 3114-16-, 3139-40, 3164, 3171-72.

ALJ found that because Bouchard and Southworth testified that Ridgeway discussed the union representation process or the Union's desire to represent the bargaining unit, the cards were valid. ALJ Dec. 12. But, the fact that Ridgeway generally discussed the representation process or a desire to represent employees has nothing to do with whether he misrepresented the purpose of the cards.

4. The ALJ Erred In Finding Unwitnessed Cards Authenticated

The ALJ permitted the GC's use of highly suspect "authentication" techniques which resulted in the improper admission of 43 uninitialed cards into evidence. In preparing the card solicitors' Jencks affidavits, the Region and the GC provided witnesses with a preselected group of unwitnessed cards, assigned them to a witness, and had the witness review only those cards and "attest" under oath that they solicited those unwitnessed cards shown exclusively to them. Essentially, the witness was coached by the Region and the GC to attest to a predetermined set of unwitnessed union cards by substituting its own "recollection" for those of the witnesses. The ALJ permitted unwitnessed cards to be admitted through Brian Wyman, Ray Watts, and Mike Clark, each of whom admitted that the cards they attest to witnessing were preselected for them by the GC. Tr. 1108, 1289, 1475-76.

Such suspect pre-hearing activities manifested in incredible fashion at the ALJ hearing, with the ALJ surprisingly admitting 19 unwitnessed cards through Abare. Specifically, Abare was permitted to exhaust his "recollection" an excessive amount of times by referring to union cards that were already in evidence and by referring to his Jencks affidavit which included all of the employees whose card signatures he claims to have witnessed, including the preselected, unwitnessed cards. Tr. 357-85. When Abare could not recall any other names at the end of this process, the GC was permitted to read into the record the remaining uninitialed cards listed in

Abare's Jencks affidavit through "past recollection recorded."[88] Tr. 429-30. Obviously, this method for authenticating uninitialed cards was improper, as card solicitors were provided with a preselected set of cards that they were coached to recollect, and with regards to Abare, he was given multiple chances to "exhaust" his "memory" by referring to his Jencks affidavit which included those very preselected cards. The GC's authentication of cards should have complied with the Federal Rules of Evidence, given its critical role in determining majority status. *See* 29 U.S.C. § 160(b) (Board proceedings "shall, so far as practicable, be conducted in accordance with the [federal] rules of evidence"). The authentication method used by the GC and approved the ALJ contravenes evidentiary principles in that Union witnesses were not required to identify the unwitnessed cards they supposedly witnessed, but were instead spoon-fed cards to identify.

5. The ALJ Erred In Admitting Any Cards Based Upon A Signature Inspection

The ALJ engaged in his own signature comparison of 39 uninitialed cards which were unaccompanied by any witness testimony. ALJ Dec. 11. The ALJ should have refused to conduct a signature comparison exercise given the avalanche of record evidence supporting card misrepresentations along with significant credibility issues in this case. The ALJ should have been even more hesitant to engage in such analysis given the highly dubious process the GC employed in its attempt to authenticate the uninitialed cards through Union witnesses. Even if, however, it was appropriate for the ALJ to engage in a signature analysis of the unwitnessed cards, there was no analytical basis to authenticate the cards of John Barbur, Timothy Bulger, George Geroux, William Mitchell, Joshua Shortslef, and Kevin Tice, as the card signatures of those employees were not reliably similar to the exemplars provided. GC-Ex. 71(1), (4), (9), (13), (15), GC-Ex. 72(B), (C), (J), (U), (EE), (LL).

[88] The GC's initial method was to show Abare each card one-by-one to attest to his witnessing the transaction. Tr. 326, 329. Even the ALJ expressed his discomfort with the inherently leading manner of that method. Tr. 343-44.

V. CONCLUSION

It is rare that an ALJ reaches factual findings and legal conclusions as comprehensively misguided and brazenly biased as did the ALJ in this case. The ALJ's decision should be reversed, and the evidence indicates that complaint should be dismissed in its entirety. To the extent the Board finds remand necessary, the matter should not be remanded to the current ALJ due to his bias against Novelis and employees who oppose unionization.[89]

Respectfully submitted this 3rd day of April, 2015.

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[89] *See, e.g.*, *CMC Elec. Constr. & Maint., Inc.*, 347 NLRB 273 (2006).

CERTIFICATE OF SERVICE

I certify that on this 3rd day of April, 2015., I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served by e-mail on the following parties of record:

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