No. 16-3076

No. 16-3570

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOVELIS CORPORATION, Petitioner – Cross-Respondent,

JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, AND ANDREW DUSCHEN, Intervenors,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent – Cross-Petitioner,

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

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

PAGE PROOF PRINCIPAL BRIEF FOR PETITIONER/CROSS-RESPONDENT NOVELIS CORPORATION

Kenneth L. Dobkin
NOVELIS CORPORATION
3560 Lenox Road
Suite 2000
Atlanta, GA 30326
Telephone: 404-760-4000
Facsimile: 404-760-0137
ken.dobkin@novelis.adityabirla.com

Kurt A. Powell
Robert T. Dumbacher
HUNTON & WILLIAMS LLP
Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308
Telephone: 404-888-4000
Facsimile: 404-888-4190
KPowell@hunton.com
RDumbacher@hunton.com

Counsel for Petitioner/Cross-Respondent Novelis Corporation

CORPORATE DISCLOSURE STATEMENT

Petitioner/Cross-Respondent Novelis Corporation is an indirect wholly-owned subsidiary of Novelis Inc., a Canadian corporation. Novelis Inc. is an indirect wholly-owned subsidiary of Hindalco Industries, Ltd., a company based in India whose stock is publicly traded on the Bombay Stock Exchange. Hindalco is part of the Aditya Birla Group, an Indian company.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF JURISDICTION

Respondent/Cross-Petitioner National Labor Relations Board ("Board") had subject-matter jurisdiction over the unfair labor practice ("ULP") allegations against Novelis Corporation ("Novelis") pursuant to 29 U.S.C. §160. The Board issued its Decision and Order on August 26, 2016. Novelis filed its instant Petition for Review on September 6, 2016. This Court has jurisdiction pursuant to 29 U.S.C. §160(e) and (f).

II. STATEMENT OF THE ISSUES

The primary legal issues presented by the Petition are whether the Board erred in finding that Novelis committed the alleged underlying ULPs and whether the Board erred in issuing a bargaining order under the Supreme Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969).[1]

III. STATEMENT OF THE CASE

This is a petition for review of the Board's Decision and Order, reported at 364 NLRB No. 101 ("Decision"). The Board's General Counsel ("GC") charged Novelis with committing ULPs under the National Labor Relations Act ("the Act") related to a union campaign by the United Steelworkers ("Union") at Novelis' aluminum manufacturing facility in Oswego, New York in early 2014. A majority voted against unionization. Following a hearing, an Administrative Law Judge ("ALJ") issued a decision and recommended order on January 30, 2015, finding

[1] A detailed list of issues is located in Novelis' Form C-A. Dkt. 22.

Novelis committed ULPs and recommending that a *Gissel* bargaining order be imposed.

Novelis and Employee Intervenors (employees opposed to union representation) appealed to the Board. Novelis also filed multiple motions to supplement the record with evidence of changed circumstances, further showing a bargaining order is unnecessary and improper. The Board denied Novelis' motions.

On August 26, 2016, the Board issued its Decision. The Board adopted virtually all of the ALJ's decision, finding Novelis violated the Act and a bargaining order was warranted. Novelis petitions for review of the Board's Decision, and the Board cross-petitions for enforcement. Case No. 16-3570.

IV. STATEMENT OF FACTS

A. Novelis' Business And Operations

Novelis produces rolled aluminum. R-Ex. 285; Tr. 2869. Its Oswego plant has never been unionized; however, Novelis has longstanding and successful bargaining relationships with the Union at its Indiana and West Virginia plants. R-Exs. 37, 40, 243; Tr. 2879-83.

Beginning in 2010, Novelis made significant investments in Oswego in anticipation of increased demand 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 production of treated aluminum for automotive applications. Tr. 2262, 2345-46. Novelis began construction on two CASH lines in 2011, adding more than 100 jobs. Tr. 2346-49; R-Ex. 285-12. In 2011, to avoid layoffs of 200-300 Oswego employees due to decreased demand, Novelis closed its Saguenay, Quebec plant and transitioned its production operations to Oswego. GC-Ex. 6, 3:9-4:2; R-Exs. 47, 285; Tr. 2260-62. These changes were communicated to employees in 2012, long before union activity. Tr. 2250, 2284.

In December 2013, as a result of robust customer demand, Novelis commenced construction on a third CASH line and a Scrap Receiving Facility that, upon its completion in September 2014, was the world's largest closed loop metal recycling system. R-Exs. 252, 274, 278; Tr. 1668, 1674, 2346, 2349, 2362-64. Novelis invested over $450 million in Oswego since 2010. R-Ex. 252. All of this information was communicated to the employees as events occurred. *Id.*; Tr. 1264. The physical expansion and construction of the CASH lines continued unabated during the organizing campaign. R-Exs. 252, 274, 277; Tr. 1679, 2274, 2348.

B. Novelis' Wage And Benefits Practices

In May 2013, well before union organizing activity, Novelis' corporate management announced changes to certain policies impacting Oswego, including proposed changes to Sunday premium and overtime pay policies. Tr. 513-17, 917-

21. The proposed changes were to be effective immediately. Tr. 918. Many employees, however, voiced concerns about the proposed changes. Tr. 515-17, 918-20. As a result, Novelis decided not to implement the announced changes and to maintain the same pay practices in 2013. Tr. 515-17, 920.

In December 2013, Novelis held its annual wage and benefits meetings. Tr. 257, 528, 714, 894-95. Novelis again announced its intention to discontinue the Sunday premium and overtime pay practices, this time coupled with wage increases and bonuses to offset the impact of the changes. Tr. 257-60, 528-29, 715-17, 923, 928. The employees, however, were still upset and expressed their concerns to HR Director Peter Sheftic and Plant Manager Chis Smith. Tr. 529-32, 714, 896-97, 924-27.

Plant management committed to discuss continued employee concerns with corporate headquarters and, on January 9, 2014, Novelis announced during morning meetings that based on employee feedback it would again pull back the proposed changes so that they would not become effective during calendar year 2014. GC-Ex. 16; Tr. 527, 729. There is no evidence that Novelis management had knowledge of union activity when it announced the decision.

C. The Union's Election Petition And Novelis' Lawful And Fact-Driven Campaign

Unbeknownst to Novelis at the time, a small group of employees contacted the Union on December 17, 2013 and began organizing efforts thereafter. Tr. 125-

26, 532-34, 536. As the Board found, card solicitation by union supporters took place outside the presence of Novelis managers and supervisors. Bd.-Dec. 16.

The Union filed its election petition on January 13, 2014. GC-Ex. 8. In Novelis' first employee communication, Smith 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 choice and encouraged them to get the facts, consider both sides, and ask questions. *Id.*

Pursuant to Novelis' commitment to provide employees with facts, Novelis supervisors discussed and shared with employees a series of information handouts. R-Exs. 70, 243, 244; Tr. 2355, 2982-83. The handouts focused on issues such as employees' legal rights. *Id.* Novelis provided PowerPoint presentations with factual information about the election process that emphasized that 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 also provided employees with comparative wage and benefit data from its unionized plants. R-Exs. 37, 40, 243; Tr. 1748, 2278, 2405, 2440, 2982-83; *see also* Tr. 1753-55, 1865-66, 2112.

In a letter to employees on February 14, 2014, CEO Martens recounted Novelis' investments in Oswego 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.[2] Not a single ULP allegation arises from these campaign communications distributed to Oswego employees.

D. The 25th Hour Speeches

On February 17-18, 2014, Novelis held pre-election meetings attended by about half of the workforce. Three speeches were presented by Martens, North America President Marco Palmieri, and Smith and are memorialized by video recording and unofficial transcripts. GC-Exs. 5, 6, 19, 20, 42, 43. Martens re-emphasized the substantial investments Novelis made in Oswego, including the construction of the CASH lines and redistribution of operations to Oswego following Saguenay's closure. Martens stated, "we have secured your future, your family's future, and we have done that in a collaborative sense." *Id.*

[2] It is undisputed that employees received Smith's and Martens' letters during the campaign. Tr. 1925, 1974, 2001-04, 2021-22, 2038-39, 2078, 2114-15, 2140, 2192, 2235, 2310, 2442-43, 2460-61, 2476, 2486-87, 2501.

Palmieri emphasized the favorable working conditions at Oswego, including the flexible shift schedule tailored to Oswego, and efforts to secure employee retirement through Novelis' pension plan and matched 401(k) contributions. *Id.*

Martens then spoke again to reiterate Palmieri's message and to highlight that terms in existence at Oswego, such as wages and shift schedules, are more favorable for Oswego employees than those at Novelis' unionized facilities. *Id.*

Smith then provided a PowerPoint presentation emphasizing Oswego's bright future, as evidenced by Novelis' $450 million investment and announcement of over 200 new jobs. *Id*. Smith shared a video from Ford introducing the release of the new F-150 truck to be manufactured in partnership with Novelis. *Id*. Smith reiterated Novelis' investment, the construction of the newest CASH line, the creation of new jobs, and emphasized the facility's need to achieve and deliver in the face of future challenges. *Id.* Notably, not a single employee testified to hearing a threat during these speeches, and numerous employee attendees testified they heard no threats. 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.

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

On February 10, 2014, Board Agent Patricia Petock sent Novelis a letter seeking evidence "regarding the allegations raised in the investigation of the

above-captioned matter[,]" referring to a ULP charge filed by the Union. GC-Ex. 40; R-Ex. 292.[3] The letter expressly stated that the allegations being investigated included that Novelis "announced to employees that it was restoring 1½ 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 that the Union's charge included allegations regarding Sunday premium and overtime pay policies. GC-Ex. 40; R-Exs. 66, 292; Tr. 145, 157-58, 160-62; *see also* Tr. 139-40. The Union denied filing a charge over that issue. Tr. 136-37, 139-41, 144-45, 157-58, 178-79, 947-51; *see also* GC-Ex. 201.

To prove it was telling the truth, Novelis shared Petock's letter with redactions (to obscure irrelevant information and protect the identities of those named). GC-Ex. 40; R-Exs. 66, 292; Tr. 145-46, 157-62, 903-04, 912, 951; *see also* GC-Exs. 6, 201. The Board inexplicably found Novelis' sharing of the Board's letter unlawful. Bd.-Dec. 2 n.9, 4-5.

[3] R-Ex. 292 is a composite exhibit containing the redacted and blurred forms of Petock's letter that Novelis showed to employees, and the unredacted letter later shown. *See* Resp.'s Mot. to Clarify Respondent's Exhibit 292; Tr. 160-61, 904, 912, 928, 951, 1392-99.

F. Election Results

On February 20-21, 2014, the Board conducted the secret-ballot election. Of the 599 eligible voters, 571 voted. Of the counted ballots, 287 employees voted against unionization; 273 voted for unionization. GC-Ex. 13.

G. Novelis' Clarifying Communications

In the face of allegations that they made implied threats during their 25th Hour Speeches, in June 2014, Smith and Martens sent letters to employees clarifying any possible misunderstandings regarding their comments. R-Exs. 54, 56. Both letters were unequivocal. Smith made clear he did not, and would not, make any threats to eliminate jobs, or predict any loss of business if the Union was elected. R-Ex. 54. Martens made clear he never threatened to close Oswego and that he mentioned the closure of the Saguenay plant simply to emphasize Novelis' commitment to Oswego. R-Ex. 56. Martens also made clear he did not threaten a reduction in wages or benefits. *Id*.

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

Roughly six weeks after the election, Novelis received complaints about a Facebook post by employee Everett Abare (GC-Ex. 25(b); Tr. 2884), who was a Crew Leader, a plant-wide Crane Trainer, and the Shift Captain on Oswego's Fire Department and EMT squads.

As the Board found, 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. Bd.-Dec. 32. Many times, Abare was the most senior leader on shift. Tr. 494. As a Crane Trainer, Abare trained 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 in charge of first-responder activities for A-Shift. Tr. 248, 252, 509-11, 2689-91. To use Abare's own words: he was "the commander of the fire department." Tr. 248.

Novelis' investigation revealed that on March 29, 2014, Abare posted 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); Tr. 2884-86.

Abare testified that, at the time of his post, he was at home on a Saturday paying bills, no one asked him to make the post, he made the post of his own volition, and it was not an immediate reaction to the election. Tr. 472-73, 568-69, 578.

As a consequence of Abare's misconduct, Novelis removed Abare from his leadership roles, although he continued employment without interruption. Tr. 2896-97. Abare was informed that the decision was not permanent, and depending on how he handled the decision, he could be reinstated to his roles. Tr. 470-71. Abare's Crew Leader replacement was a vocal union supporter. Tr. 885-87, 892.

I. 10(j) Proceedings

On June 25, 2014, the Board petitioned the District Court for the Northern District of New York for an injunction under Section 10(j) of the Act, seeking, *inter alia*, an interim bargaining order. *Ley v. Novelis Corp.*, Case No. 5:14-cv-775-GLS-DEP, Dkt. 1 (N.D.N.Y.). On September 4, 2014, the District Court found there were a "host of disputed facts" and that "reasonable minds could differ regarding some of the factual conclusions drawn by the NLRB." 2014 WL 4384980, *4. But, in light of the deferential standard to be applied, the District Court granted the Board's request for a cease and desist order, which included the restoration of Abare to his former positions, and the reading and posting of the order. *Id.*, *7. The District Court denied the interim bargaining order, recognizing that employees were "obviously sharply divided over the issue of unionization." *Id.*[4]

[4] The District Court noted it was "troubled" by the affidavit of James Ridgeway (Professional Union Organizer) and was concerned that the GC "all but

It is undisputed that Novelis fully complied with the order. Bd.-Dec. 8 n.18. Specifically, Smith, accompanied by a Board agent, read the entire decision and order in a series of employee meetings. Tr. 2241, 2322, 2451, 2503. Following the reading, Novelis restored Abare to his former positions and posted the order throughout the plant and emailed and mailed it to employees. Bd.-Dec. 8 n.18; Tr. 1840, 2143, 2174, 2930-31. That order addresses all of the Board's substantive allegations here. 2014 WL 4384980, **7-8.

V. STANDARD OF REVIEW

Appellate review of a Board decision "does not function as a mere 'rubber stamp.'" *Laborers' Int'l Union of N. Am. v. NLRB*, 945 F.2d 55, 58 (2d Cir. 1991). In reviewing the Board's factual findings, this Court determines whether they are supported by "substantial evidence" in light of the record as a whole. *NLRB v. Grease Co.,* 567 F.2d 531, 533 (2d Cir. 1977). "'Substantial evidence' means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *NLRB v. Quinnipiac College*, 256 F.3d 68 (2d Cir. 2001) (internal quotations and citations omitted).

---

admitted a fabrication or embellishment by Ridgeway" and yet still relied on parts of his affidavit. *Id.*, *4 n.3.

In reviewing the Board's legal conclusions, this Court determines whether they have a "reasonable basis in law." *Id.* The Court reviews Board application of law to facts *de novo*. *Beverly Enters., Inc. v. NLRB,* 139 F.3d 135, 140 (2d Cir. 1998). The Court reviews the Board's evidentiary rulings for abuse of discretion. *NLRB v. Domsey Trading Corp.*, 636 F.3d 33, 37 (2d Cir. 2011).

Imposition of a bargaining order "is an extraordinary and drastic remedy, is not favored, and should only be applied in unusual cases." *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 99 (2d Cir. 1985). Board justifications for bargaining orders are "closely reviewed" for adequate explanation and proper analysis. *NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 866 (2d Cir. 1984); *see also J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83-85 (2d Cir. 1994); *J. Coty,* 101.

VI. SUMMARY OF ARGUMENT

The Board's decision to impose a bargaining order contradicts long-standing Second Circuit law and is unsupported by the record. This is not a case where an employer engaged in egregious misconduct deserving of the most extreme remedy in labor law. Indeed, the facts show:

- Not a single instance of employee discipline or discharge occurred prior to the election;
- There were no threats of plant closure or even an allegation that Novelis made any direct threats during the campaign;

- Novelis engaged in numerous written communications about bargaining and unions, and not a single ULP allegation arises from these communications;

- Not a single witness testified to hearing a threat, and in the ALJ's words, a "deluge" of employees testified that they never heard or remembered threats;

- Novelis fully complied with the 10(j) order entered by the District Court and implemented special remedies sought by the GC in that proceeding;

- For nearly two and a half years since, there is not a single allegation that Novelis violated that order, and there is no evidence that the remedies sought and obtained have been ineffective;

- CEO Martens and Plant Manager Smith, the two primary alleged wrongdoers, are no longer employed by Novelis; and

- At least 255 new employees have been hired since the election occurred almost three years ago.

The ALJ's results-oriented decision was based upon layers of assumptions, cherry-picked evidence, and flawed legal analyses. To be sure, the Board attempted to repair some of its flaws, but it largely rubber-stamped his ruling, finding three "particularly serious violations" purportedly justifying a bargaining order. The Board's conclusions as to these violations cannot be upheld because: (a) as to the conferral of benefits allegation, the GC did not come close to carrying its burden of proving Novelis had knowledge of union organizing when it announced that Sunday premium and overtime pay policies would remain the same in 2014; (b) as to the 25th Hour Speech threats allegation, the Board found threats

where none existed and completely ignored the context of the statements; and (c) as to the unlawful demotion allegation, the ALJ and Board refused to consider and permit Novelis to introduce evidence that even if Abare had engaged in protected activity through his Facebook post (he did not) of which Novelis was aware (it was not), his statutory "supervisor" status was dispositive.

Even if Novelis engaged in every alleged ULP, the Board's analysis still violates the Second Circuit's longstanding requirements for enforcing a *Gissel* bargaining order, the most extreme and disfavored remedy in labor law. The Board improperly ignored and rejected a wealth of evidence (including the evidence set forth above) showing that the issuance of a bargaining order is improper under Second Circuit precedent.

Simply put, the Board's stubborn refusal to comply with long-standing precedent and its attempt to impose unionization by fiat rather than through an election cannot be upheld.

VII. ARGUMENT

A. Novelis Did Not Unlawfully Confer Benefits

The Board ruled Novelis unlawfully conferred benefits to employees on January 9, 2014 by announcing the rescission of its plan to change Sunday premium and overtime pay practices. The Board's finding is fatally flawed.

The GC bears the burden of proof to establish that Novelis knew its employees were organizing when it made the announcement. The record is devoid of such evidence. The GC elected not to call several high-level managers it subpoenaed. The GC then avoided the subject with the managers who did testify.

To fill this gaping hole in the GC's case, the ALJ found "circumstantial evidence" that Novelis had knowledge of organizing when it made the announcement. The ALJ's finding has no evidentiary support and instead is based on speculation that Novelis must have known about the Union meetings and card-signings before January 9. The ALJ's conjecture, however, is refuted by testimony from the GC's own witnesses that managers were never present at Union meetings and his finding that card-signings took place outside management's presence. The ALJ also tethered snippets of testimony that employees "might" seek to unionize in the future. This does not constitute "substantial evidence" of knowledge. What's more, it improperly shifted the burden of proof to Novelis. The ALJ's evidentiary alchemy, adopted by the Board, blatantly disregards precedent.

The ALJ also ignored the only evidence establishing Novelis' motive for its January 9 announcement. This evidence shows Novelis' motive was unrelated to the Union's organizing activity. Instead of considering the only evidence presented, he inferred Novelis' motive was improper, again erring.

1. No Evidence Exists That Novelis Knew Of Organizing Before Its January 9, 2014 Announcement

For a grant of benefits to be unlawful, the employer must have "knowledge that the Union had begun organizing efforts among subject employees when the benefits were promised." *Hampton Inn Ny—JFK Airport*, 348 NLRB 16 (2006). An employer does not violate the Act by "improv[ing] working conditions in an attempt to reduce the general appeal of unionization when no union is actively organizing." *Id*., 17. To find a grant of benefits unlawful, the Board must find the employer "intended to interfere with actual union organizational activity among its employees." *Id*., 18. Merely wanting "to stay one step ahead of unionization" is not unlawful. *Id*. (*quoting NLRB v. Gotham Indus*., *Inc*., 406 F.2d 1306, 1310 (1st Cir. 1969)).

"Talk of a union," without more, does not amount to "actual union organizational activity." Indeed, an employer does not violate the Act by "making … promises even if it thought that such a campaign might begin at some point in the future." *Id.*, 18. Instead, "the situation must have sufficiently crystallized [among employees] so that some specific orientation exists." *Id*. (*quoting Gotham*, 1310).

Although the GC failed to elicit testimony that Novelis knew of the Union's organizing campaign prior to January 9, the ALJ divined that Novelis was aware of

organizing prior to its announcement. He based this finding on four factors, each more fantastic than the next:

> (1) Smith "did not dispute" a statement made in Union Organizer Ridgeway's January 9 letter to Smith that **"[a]s you are aware**, the [Union has] been asked by a majority of your employees to represent them for the purposes of collective bargaining."
>
> (2) Hourly employees who were "anti-union" participated in Union meetings in late December and early January;
>
> (3) Employees, including crew leaders, signed authorization cards prior to January 9;[5]
>
> (4) There were "warnings by employees to [] Sheftic and at least one supervisor that employees might reach out to a union."

Bd.-Dec. 22, 35.

Although the Board ratified the ALJ's conclusion, it recognized two of the four "circumstances" the ALJ relied upon were unsustainable. First, even the Board could not condone the ALJ's absurd finding that Smith's failure to "dispute" the phrase "as you are aware" in Ridgeway's letter meant he was "aware" of organizing prior to receiving the letter. Bd.-Dec. 2 n.7. Second, the Board declined to rely on the ALJ's finding that solicitation of Crew Leaders was circumstantial evidence Novelis knew of organizing. *Id.* On the other hand, the Board adopted the ALJ's finding that the general card-signing drive was evidence

[5] The ALJ mischaracterized Novelis' position. Novelis did not contend every Crew Leader is a supervisor under the Act. Novelis did argue Abare was a statutory supervisor based on his unique responsibilities. *See infra*, Sections VII.C., VII.G.2.a.

of knowledge. *Id*. The remaining grounds for the ALJ's ruling are woefully inadequate to support the conclusion Novelis was aware of "actual union organizing activity" prior to January 9.

a. Anti-Union Employees' Attendance At Union Meetings

The ALJ's finding of Novelis' knowledge based upon "the participation of [non-supervisory] anti-union employees at the organizing meetings in late December and early January" (Bd.-Dec. 35) is truly indefensible. There is no evidence even suggesting Novelis managers knew about these meetings. No witness testified that: Novelis was aware of the Union's off-site organizing efforts; anyone notified management about Union meetings; employees' comings and goings were any different from other days; or any supervisor paid attention to employees' off-hours movements on those days. Finding that Novelis had knowledge of union activity because hourly, non-management employees, some of whom opposed the Union, attended Union meetings is blatant speculation and insufficient to establish knowledge. *Hampton Inn*, 17.

It bears repeating that despite subpoenaing several Novelis management officials, the GC chose not to address this required element. As the caselaw makes clear, it was not Novelis' burden to disprove knowledge; it was the GC's burden to establish it. Indeed, the Board in *Hampton Inn*, 17, rejected the ALJ's speculative finding that management noticed union activity:

> The judge speculated that management would have noticed the number of employees going to the Radisson Hotel for the offsite meetings … However, there is no testimony that the comings and goings of employees during their non-work time on these days were any different from those of any other day, or that the Respondent paid any attention to its employees' off-hour movements. In sum, the judge's speculation about the Respondent's knowledge does not substitute for the required proof.

This is exactly what the ALJ did here. He substituted speculation for evidence, improperly shifting the burden of proof to Novelis.

b. Employee Card-Signing Drive

Perhaps equally stunning is the Board's ratification of the ALJ's finding that the general existence of an employee card-signing drive prior to January 9 constitutes circumstantial evidence of knowledge. Bd.-Dec. 35. The ALJ himself found that "[c]ard solicitation by union supporters took place outside the presence of company managers and supervisors" (Bd.-Dec. 16), and the Board left this finding undisturbed.[6] Indeed, not one of the 39 employee witnesses called by the GC testified that any Novelis manager was present for, observed, was made aware of, or otherwise knew about card solicitations.

[6] This finding is consistent with the mountain of testimony on the point. Bd.-Dec. 16, n.26; Tr. 222-237, 534-563, 658-60, 690-91, 782-83, 800-02, 811-824, 845-55, 861-62, 863-67, 877-83, 1225-41, 1251-54, 1282-1324, 1683-85, 1742-45, 1802-06.

c. "Warnings" That Employees "Might Reach Out To A Union"

As discussed above, the Board's findings that employer knowledge can be inferred based on anti-union hourly employee participation in Union meetings and the general existence of card-signing must be rejected. This leaves a single factor as "circumstantial evidence" of knowledge: the ALJ's finding that "warnings by employees to [HR Manager] Sheftic and at least one other supervisor" that "employees might reach out to a union." Bd.-Dec. 35.

The first of the two "warnings" is based on purported employee comments during the December 16, 2013 meeting attended by Sheftic. At the outset, the ALJ's findings regarding this meeting were in error since he excluded as inadmissible hearsay the testimony that an employee mentioned the possibility of reaching out to a union during the meeting. Tr. 261. No other evidence exists that any employee said anything about unions during the meeting. *Id.* Obviously, a factual finding cannot be based on excluded evidence and this was the exclusive foundation for the ALJ's finding regarding the December 16 meeting.

Regardless, it is undisputed that union organizing had not begun on December 16. The ALJ specifically found that employees contacted the Union and kicked off the organizing meeting after the December 16 meeting. Bd.-Dec. 15. Thus, testimony regarding a mere possibility of employees reaching out to a union,

before they actually did, is evidence of nothing, as employees always could "possibly reach out to a union."

The other "circumstantial evidence" relied upon by the ALJ relates to his finding that, sometime in December 2013, "an employee, Dennis Parker, told his supervisor, Bryan Gigon … that the announced changes to wages and benefits had caused employees to consider union affiliation." Bd.-Dec. 16. Parker's statement that employees "might reach out to a union" is not evidence of employer knowledge of crystalized union activity.

Further, no evidence exists that Gigon, a low-level supervisor (whom the GC did not call as a witness), shared Parker's statement with any management member. One vague statement in a 1.5 million square foot facility to a low-level supervisor cannot impute knowledge to Novelis. *See Gestamp S.C., L.L.C. v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014) (finding supervisors' knowledge of employees' union activity is not imputed to employer); *Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 685 (7th Cir. 2000) ("Automatically imputing [a foreman or supervisor's knowledge of an employee's union activities] to a company improperly removes the GC's burden of proving knowledge"); *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, Parker's testimony that the conversation took place sometime in "December of 2013" (Tr. 768) does not establish whether the meeting occurred before or after the Union's organizing efforts began. The ALJ's assertion that Parker's "warning" was in response to "announced changes to wages and benefits" (Bd.-Dec. 16, 35), is unconvincing, as employees first learned of the proposed changes in May 2013. GC-Ex. 16; Tr. 513-17, 919-21. Without additional evidence that actual organizing was underway, the conversation proves nothing. *Hampton Inn*, 17.

Finally, Parker's vague assertion is not indicative of actual union activity. To prove employer knowledge, '"the situation must have sufficiently crystallized so that some specific orientation exists."' *Id*., 18 (*quoting Gotham*, 1310). The possibility that employees "might reach out to a union" falls far short of this threshold.

If an employer's motive is questioned any time employees express the mere possibility of union activity, the employer's ability to effectuate even basic business decisions would be chilled. *Id.* ("if … correctly anticipating union activity was sufficient to establish [a violation]," employers would be prohibited from taking any steps to "diminish[] the appeal of unionization generally"). Parker's alleged statements are not "circumstantial evidence" Novelis knew of union organizing.

2. The Board Ignored Evidence Of Novelis' Lawful Motivation

The ALJ also disregarded evidence that Novelis' motivation for the January 9 announcement was lawful. An allegation that an employer conferred benefits to discourage organizing requires specific evidence of employer intent of inducing employees to vote against the union. *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). This analysis is motive-based. *Hampton Inn*, 18 n. 6.

Here, the only evidence of motive is a letter from Smith that was introduced by the GC and actually proves Novelis' conduct was lawful. GC-Ex. 16. That letter makes clear that Novelis was engaged in dialogue with its employees concerning the policies since May 2013. *Id.* Novelis shared information, answered questions, and listened to employee concerns relating to those practices. *Id.* At its wage and benefit meetings in December 2013, Novelis committed to respond to employee concerns by mid-January. *Id.* Novelis communicated those concerns to its corporate partners, and, in response to those concerns, Novelis decided to maintain the status quo. *Id.* Testimony from the GC's witnesses validates this explanation – that Novelis' decision was based on its continuing dialogue and employee feedback on these issues. Tr. 515, 527, 919. More importantly, there is not a shred of contradictory evidence regarding Novelis' motives.

The ALJ and Board ignored these unrefuted facts and made no substantive findings as to Novelis' motive. Instead, the ALJ admonished Novelis for not providing manager testimony about its decision, drawing "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." Bd.-Dec. 23, 34. By substituting inference for evidence, the ALJ again erred.[7]

As no evidence (let alone substantial record evidence) exists to support the GC's allegation, it was improper for the Board to "infer" a violation.

B. Novelis' 25th Hour Speeches Were Lawful

The Board concluded Martens and Smith made implied threats of job loss, loss of business, reduced pay and more onerous working conditions, and "disparaged" the Union during three 25th Hour speeches. It is noteworthy that the Board found the speeches contained implied threats. Bd.-Dec. 5, 35, 36. Thus, the context of the statements is critical in reviewing the statements and balancing Novelis' free speech rights with its obligation not to threaten employees.

The Board's one-sided and misleading analysis of the speeches obliterates any semblance of balance between these rights. Its findings threaten to destroy

[7] Further, the GC presented no evidence Novelis "conferred" a benefit, as no witness testified the changes were actually implemented. Tr. 517, 718. While the GC subpoenaed myriad Company records and could have asked for pay stubs, or could have asked witnesses whether Novelis actually implemented the changes, it did not. The Board cannot rely on inferences over actual evidence.

employers' free speech rights and eliminate persuasive speech from a union campaign. The Board's construction here cannot coexist with the First Amendment.

1. The Speeches Must Be Viewed Against The Background Of The Act's Commitment To Open Debate And Free Speech

Both the Constitution and Section 8(c) of the Act safeguard employers' use of non-coercive speech about labor-relations issues. *Gissel,* 1941 ("employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed"). Indeed, Congress was so intent on promoting open debate about labor-management issues that it codified employer free speech rights by enacting Section 8(c) through the Taft-Hartley Act. 29 U.S.C. § 158(c)). As recognized by the Supreme Court, the protection of employer speech in Section 8(c) "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); *see also NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) ("[S]ection 8(c) not only protects constitutional speech rights, but also serves a labor law function of allowing employers to present an alternative view and information that a union would not present."); *NLRB v. K&K Gourmet Meats*, 640 F.2d 460, 465 (3d Cir. 1981) (The "protective cloak of section 8(c) … operates to ensure an effective exchange of information from both union and management in the sphere of labor relations.")

In determining whether campaign speech violates the Act, the Supreme Court analyzes whether employer predictions regarding potential consequences of unionization are based on fact, or mere conjecture:

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

Gissel, 1942.

Significantly, before the Board can analyze whether an employer's comments about potential effects of unionization is a threat, it must find the employer actually made a "prediction." This is not a mere formality. Indeed, the scenarios in which an employer might express its views on unionization without "predicting" anything are limited only by the imagination.

Further, statements of objective facts are protected by the First Amendment and the Act. *See Gissel*, 617; *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 944 (3rd Cir. 1980); *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 750-53 (5th Cir. 1979). Further, "(a)n employer may oppose unionization of its workforce and in doing so enjoys free speech protection under section 8(c) of the NLRA, which allows the employer to express any views, arguments, or opinion in any form without

committing [a ULP] provided that such expression contains no threat of reprisal or force or promise of benefit." *Beverly Enters.,* 140 (*quoting Kinney Drugs, Inc. v. NLRB,* 74 F.3d 1419, 1428 (2d Cir. 1996)); *see also Laborers' Dist. Council v. NLRB*, 501 F.2d 868, 878 (D.C. Cir. 1974).

In sum, the speeches must be considered "against the background of a profound … commitment to the principle that debate … should be uninhibited, robust, and wide-open[.]" *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

2. The Board Ignored The Overall Context In Which The Speeches Were Made

The Board must assess "all of the circumstances in which the statement[s] [are] made" in determining whether they violate the Act. *Electrical Workers Local 6*, 318 NLRB 109 (1995); *see also Arch Beverage Corp.*, 140 NLRB 1385, 1387 (1963). One of the Board's greatest failings in its analysis was its disregard of Novelis' massive economic investment in Oswego, one which literally and figuratively engulfed employees. Novelis invested approximately $450 million in Oswego since 2010, reflecting both a tremendous physical expansion and a symbolic effort to become a global leader in aluminum production, with Oswego as the focal point. R-Exs. 47, 252, 274, 285.

Novelis' decision to build a third CASH line, costing over $200 million, was announced in the months leading up to the campaign. Construction began one month before the campaign and continued uninterrupted. R-Exs. 252, 274; Tr.

1668, 2346. Novelis also began construction of a $150 million Scrap Receiving Facility a month before the campaign, and construction continued. Tr. 2362-64, 2372; *see also* R-Ex. 278; *compare Homer D. Bronson Co.*, 349 NLRB 512 (2007) (employer predicted adverse consequences of unionization and then removed machines from the production floor).

Further, Novelis announced in December 2013 that it was creating 90 additional jobs at Oswego to staff the new CASH line. R-Exs. 252, 274; Tr. 1668, 2346-47. All of this information was evident and communicated to employees. R-Exs. 252, 274, 277; Tr. 1679.

During the 25th Hour speeches themselves, Smith and Martens reiterated Novelis' commitment to Oswego and its expectation for immense growth and success. GC-Exs. 6, 20, 43. Martens also sent a letter to employees' homes prior to the election in which he explained the objective facts regarding the decision to make Oswego its flagship of the future, and stated unequivocally that the plant's future was "secure." R-Ex. 47.

Given such overwhelming evidence of a positive future in Oswego and the repeated communication of that secure future to employees, the Board's finding that employees would have viewed any comments made during the speeches as implied threats is willfully tone deaf to the reality on the ground. The Board's interpretation requires the listener to conclude that Novelis would make the

irrational decision to abandon its $450 million investment in Oswego (not to mention its greatest growth opportunity in company history) by shrinking the very workforce responsible for executing that growth merely because of a union election. How, exactly, does the Board think Novelis would have done this? By scrapping its new, $200 million CASH line and the strategic future of the Company? By canceling its plans to add 90 jobs, much less cut existing jobs? This is inconceivable.

The Board's decision to ignore this evidence and substitute its own cherry-picked interpretation of the speeches is inappropriate and contrary to common sense and the actual experience of employees who heard no threats (*see supra*, Section IV.D; I-Ex. 2).

3. The Finding That Martens Threatened Job Loss Is Refuted By The Evidence

The Board amended the ALJ's finding that Martens implicitly threatened employees with plant closure, instead finding that his statements were "more accurately described as threats of job loss[.]" Bd.-Dec. 2 n.8. The Board, however, failed to explain how Martens' comments constituted threats of job loss when he never made any statement about reducing Oswego's employment levels and instead made positive comments about Oswego's future and growth, including the statement that "we're here to secure your future forever." GC-Ex. 6. Indeed, the only comment Martens made about a loss of jobs was his mention of a

historical fact benefitting Oswego – that production was moved to Oswego from Saguenay, resulting in job losses at Saguenay. Martens never connected or attributed this historical fact to a union. Instead, he explained the business reasons for moving the production to Oswego, which also had been communicated to employees in 2012. GC-Exs. 6, 2-5; 20, 2-3; 43, 3-5; Tr. 2250, 2284.

For Martens' comments to be considered a threat of job loss, there first has to be a prediction of job losses. Without such a prediction, there is no threat. *See Gissel*, 1942; *Beverly Enters.,* 140. No such evidence exists here. Second, even if there was some prediction or implication of future job losses, the prediction must be connected to a union's presence. Again, the record is devoid of such evidence. *See United Food and Commercial Workers Union Local 204 v. NLRB*, 506 F.3d 1078, 1083-84 (D.C. Cir. 2007) (affirming Board's conclusion that employer did not make unlawful threat when it "related indisputable historical facts without ever explicitly linking previous plant closures to the [Union]"). Martens' explanation of the business reasons for moving production to Oswego, none of which involved the presence or absence of a union, is not unlawful.

The characterization of Martens' decision to close Saguenay and transition its operations to Oswego as merely "personal" is contradicted by the record. In each of the speeches, and as previously communicated in his February 14 letter (R-Ex. 47), Martens communicated objective business reasons for Novelis'

unprecedented investments in Oswego, its shifted focus to automotive manufacturing, and the resulting need to maintain and grow Oswego's employment levels. GC-Exs. 6, 2-5; 20, 2-5; 43, 3-7. The Board disregarded these facts, misleadingly stating that "in [Martens'] own words," his past decisions involving the Saguenay location "had not been based on objective criteria[,]" and that "employees were led to believe that he would base future decisions at Oswego on subjective criteria, such as the presence of a union." Bd.-Dec. 35. Martens, however, never made any statement that decisions about Oswego's future would be based on subjective criteria, he never mentioned the possibility of plant closure or job loss at Owego, and he never connected plant closure or job loss to a union's presence. The supposed coercive effect of Martens' comments is wholly dependent on a mischaracterized, unsupported, and slanted construction.

For example, the Decision leaves the impression that Martens told employees he made a "personal" decision to close Saguenay to save jobs at Oswego and then immediately told them that unionization at Oswego would force him to make "business decisions" about its future. Bd.-Dec. 35. In reality, Martens' "business decision" comments followed a separate, unchallenged presentation by Palmieri and were completely unrelated to Saguenay. Instead, Martens' "business decision" comments were focused on a comparison of Oswego employees' terms and conditions with those at Novelis' Fairmont and Terre Haute

facilities, where Novelis has long-standing relationships with the Union. GC-Exs. 5, 6, 19, 20, 42, 43. From any objective interpretation, Martens' comments regarding "business decisions" referred to the collective bargaining process at Novelis' unionized locations, not to job loss.

Thus, employees never heard Martens' supposed "sophisticated ploy" in continuous sequence, as the Board suggests. Bd.-Dec. 35. To have perceived Martens' statements as the Board does, employees would have had to connect unrelated statements made in separate speeches interrupted by a separate presentation by a different speaker. The Board's inference that by these statements, "employees were led to believe that [Martens] would base future decisions at the Oswego plant on subjective criteria, such as the presence of a union[,]" is a blatant example of the Board disingenuously piecing together unrelated comments (in a way no witness who actually heard the presentations would do or did[8]) in an attempt to reach its desired outcome. *See Woodbridge Foam Fabricating, Inc.*, 329 NLRB 841, 842 (1999) (finding fault with dissent for giving "too much weight to … [an] extrapolated section of the speech without considering the entire context of that speech"). This splicing together of unrelated comments should not be countenanced.

[8] Over 100 employees testified. As previously noted, none testified to hearing or remembering any threats, and of the numerous employees asked, all stated that they did not remember hearing any threats. *See* Section IV.D.

4. The Finding Of Threats Of Reduced Pay And Benefits Is Not Supported By Substantial Evidence

The finding that Novelis threatened to reduce pay and benefits is equally unsustainable. During each speech, Martens noted that Oswego employees enjoy higher wages and greater scheduling flexibility than their unionized counterparts. GC-Exs. 6, 7-10; 20, 9-12; 43, 10-14. These factual observations are not a "prediction" of anything under *Gissel* and cannot constitute a threat.

Even assuming *arguendo* that Martens' comments somehow implied a regressive bargaining posture, as the Board 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 campaign's outset, Novelis lawfully communicated that if the Union was elected, all wages, benefits and working conditions would be subject bargaining, 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. Wages, benefits and working conditions under union contracts at Novelis' Fairmont and Terre Haute plants also were discussed. R-Exs. 37, 40, 243; Tr. 1748, 2278, 2405, 2440, 2983. And, as confirmed by testimony from numerous employees, the Oswego workforce was well-educated, long before the 25th Hour meetings, on the collective bargaining process, and was well-aware of comparisons to Novelis' unionized facilities. 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.

Accordingly, Martens' comments were unquestionably lawful. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) (finding challenged statements lawful "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").

5. The Finding Of Threats Of More Onerous Working Conditions Is Not Supported By Substantial Evidence

The Board's finding that Martens and Smith threatened the loss of employees' flexible work schedules (Bd.-Dec. 36) represents another inexplicable departure from their actual statements. In fact, it is unclear what portion of Smith's statements could even be considered such a threat, as he never mentioned employee work schedules in any speech.

No reasonable employee could have perceived a threat to work schedules given Novelis' express assurances they would remain unchanged. Martens emphasized that Oswego had more scheduling flexibility than Novelis' unionized facilities, that such flexibility was unique for a plant of its size, and that Novelis wanted employees to have this flexibility. GC-Exs. 6, 7:21, 8:22-9:3; 20, 10:4-9, 11:7-10; 43, 12:21-22. Martens' point was confirmed by Palmieri, who assured employees that Novelis had no interest in changing employees' schedule, and made clear that any changes to that schedule would be the result of customers'

demands – not unionization. GC-Exs. 6, 5:20-24; 43, 8:3-9; 20, 7:14-24. Martens then re-emphasized Palmieri's assurances. GC-Exs. 6, 7:22-25; 20, 10:4-6. And, he made clear Novelis was willing to provide such flexibility, not because of the lack of union presence, but because Novelis had confidence in the employees' ability to "work at a [world-class] level." GC-Exs. 6, 8:9-13; 20, 11:4-7; 43, 12:17-13:3.

6. The Finding Of Prediction Of Loss Of Business Is Not Supported By Substantial Evidence

The Board's finding that Smith implied that unionization would result in business loss similarly disregards his actual statements. Smith's comments do not remotely predict loss of business, particularly given his repeated comments about the growth of business at Oswego. GC-Exs. 6, 16:15-19, 16:21-17:11; 20, 26:15-18; 43, 15:22-16:5.

At most, Smith's comments convey his opinion that Novelis' ability to meet customer expectations could be impacted by any number of challenges. Smith noted the operational safety challenges resulting from ongoing construction, the rigorous standards imposed by its customer contract for a product never previously produced in Oswego, employees working with new equipment, and unanticipated presence of domestic competition. GC-Exs. 6, 12-14; 20, 14-17; 43, 16-20. These are all objective challenges to Novelis' ability to meet its contractual obligations and have nothing to do with a union.

In this vein, Smith told employees 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. GC-Exs. 6, 15:9-13; 20, 19:2-6; 43, 20:21-21:3.[9] Smith noted the Union's limited knowledge of Oswego's operations and that it had no understanding of Novelis' global automotive strategy. GC-Exs. 6, 14:25-15:8; 43, 20:9-20. These statements were objective and perfectly lawful. *Kinney Drugs*, 1429; *NLRB v. River Togs, Inc.,* 382 F.2d 198, 202 (2d Cir. 1967); *see also 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").

7. The Communication Of The Board's Own Letter Was Not Unlawful

The Board also found that Novelis unlawfully "disparaged" the Union through its communications concerning Board Agent Petock's letter. Novelis' actions were not unlawful because it merely communicated Petock's words. Petock's letter needs no interpretation. Its meaning is clear. Martens merely

[9] The testimony of the GC's own witnesses supports the "objective fact" that employees were distracted leading up to the election. Tr. 527, 777-78, 920.

informed employees that Petock's letter contradicted the Union's claims about the allegations it made in its charge.

The Board's attempt to suppress Novelis' right to share the content of the Board's own letter is mystifying and offends the protections of Section 8(c) and the First Amendment. If Novelis cannot communicate facts countering false statements made by the Union, then it cannot speak at all. *Kinney Drugs*, 1429 ("The labor laws do not suppress one side of the debate.").

Faro Screen Process, Inc., 362 NLRB No. 84 (2015), relied upon by the Board, is easily distinguished because the underlying facts are dramatically different. There, the employer sent a letter to employees justifying its unlawful actions and knowingly mischaracterized the Union's position. *Id.*, 2 n.5. Novelis simply communicated the content of the Board's letter and assumed that when the Board represented the Union's charge included certain allegations, it was telling the truth.

The Board's *Virginia Concrete* decision, 338 NLRB 1182 (2003), however, is directly on point. There, the employer told employees about the union's charge and claimed that, if the union was successful, it "would result in employees losing the wage increase." *Id.*, 1186. The Board held that the employer's statements about the union's charge and the potential remedy were no different than any other misleading campaign statement: "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 union's leaflet misrepresenting Board action not unlawful); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982) (Board will not probe into truth or falsity of parties' campaign statements). Likewise, at most, Smith's and Martens' comments are mere unintentional misstatements of Board law at most.

The Board erroneously concluded Novelis' actions were unlawful because they were "accompanied by an altered Board document." Bd.-Dec. 37. This finding is misleading and elevates form over substance. It is undisputed that Novelis minimally redacted Petock's letter for relevance and privacy purposes and subsequently disclosed the unredacted version to ensure clarity. Bd.-Dec. 36. The Board has held that for a physical alteration to be objectionable, "the misuse of the Board's documents [must] secure an advantage." *Riveredge*, 1095. Here, it is undisputed that Novelis fully disclosed Petock's letter prior to the election. As such, there was no "misuse" and certainly no misuse that secured an "advantage."[10] Accordingly, Novelis' statement regarding the Union's charge cannot be unlawful.

[10] The Board cites no evidence for its finding that Novelis' use of the letter was "clearly calculated to mislead employees" (Bd.-Dec. 2 n.9), because none exists.

It is remarkable that the Board is attempting to use the simple communication of its own letter to overturn an election.

C. Novelis Lawfully Demoted Abare From Leadership Positions For Calling Co-Workers "Fucktards" And Telling Them To "Eat Shit"

In concluding that Novelis unlawfully demoted Abare from his leadership positions after his profane and offensive Facebook post, the Board erred not only by failing to permit Novelis to introduce evidence regarding Abare's supervisory status, but also in finding Abare's post "protected" under the Act.

1. The Board Erred In Refusing To Permit Novelis To Adduce Evidence Regarding Abare's Supervisory Status

A finding that Abare was a "supervisor" under the Act would dispose of this allegation because the Act does not protect supervisors. *NLRB v. Meenan Oil Co.,* LP, 139 F.3d 311, 320 (2d Cir. 1998).[11]

[11] Under the Act, a "supervisor" includes those with authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. §152(11). Throughout the hearing, Novelis attempted to elicit testimony establishing Abare's supervisory status, including questioning Abare extensively about his duties and responsibilities and eliciting his testimony demonstrating significant authority to train and direct others' work and perform staffing functions. Tr. 492-512. As will be explained below, Abare's supervisory status is also a threshold issue in determining whether a bargaining order possibly could be issued.

During Novelis' case-in-chief, the GC moved to preclude such evidence despite the fact that it previously elicited such evidence in its case. ALJ-Ex. 5(A); Tr. 246-56. The ALJ ruled Novelis "waived" the supervisory defense by failing to plead it as an affirmative defense. ALJ-Ex. 5. This finding is wrong. Novelis' Amended Answer added the defense: "[Novelis] did not take any adverse action against any employee under the Act." GC-Ex. 1(jj). This defense is an obvious reference to the Act's definition of "employee." *See* 29 U.S.C. §152(3) ("The term 'employee" … shall not include any individual employed … as a supervisor."). Because Abare's demotion was the only discipline at issue, there is no possible purpose for this defense other than to challenge Abare's status as an "employee" under the Act.

Even if the ALJ were confused about Novelis' position, the appropriate remedy was to permit Novelis to amend its answer rather than barring Novelis from proving supervisor status. *See Operating Eng'rs Local Union No.* 3, 324 NLRB 1183, 1186-87 (1997) (allowing employer to amend answer to include supervisor challenge even though not raised before hearing). At a minimum, the Board's improper refusal to permit evidence of Abare's supervisory status should result in a remand on the issue.

2. Even If Abare Was An Employee, His Demotion Was Lawful[12]

a. Abare's Conduct Was Not Concerted

An employee's speech is concerted if "it is engaged in with the object of initiating or inducing group action." *NLRB v. Caval Tool Div.*, 262 F.3d 184, 190 (2d Cir. 2001); *see also Meyers Indus., Inc. II*, 281 NLRB 882, 884 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987). An employee's expression of personal sentiments without more does not amount to concerted activity. *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005) (personal statements "are not the sort of concerted activity which the statute protects."); *Pelton Casteel, Inc. v. NLRB*, 627 F.2d 23, 28 (7th Cir. 1980) ("[P]ublic venting of a personal grievance, even a grievance shared by others, is not a concerted activity.").

Abare griped about his paycheck. His post did not seek to initiate or induce coworkers to engage in group action. Confirming this, Abare expressly testified he was not acting on behalf of or as a representative of other employees in making the post and that he was expressing his own, individual frustration. Tr. 468, 472, 568-69. Notwithstanding Abare's own testimony, the Board found Abare's post concerted simply because it referenced the election. Bd.-Dec. 40. Merely

[12] The Board found the ALJ improperly applied the *Wright Line* motivation test. Bd.-Dec. 2, n.12. Had motivation been relevant, the ALJ ignored the GC's failure to offer any evidence establishing Novelis harbored anti-union animus towards Abare. Indeed, Abare received a favorable performance review merely weeks after the election. GC-Ex. 21; Tr. 586-88.

referencing a past election does not cloak Abare's profanity-laced rant with concerted status. *Pelton Casteel,* 28.

The Board's conclusion that 11 employees viewed, "liked," and "commented" on this post, therefore making it concerted (Bd.-Dec. 40), is flatly contradicted by the evidence. The only evidence of who "liked" Abare's post shows Abare only had three Novelis Facebook "friends," and none "liked" Abare's post. GC-Ex. 25; Tr. 473-74. Similarly, only one employee – Spencer – commented on Abare's post, indicating his intent to resign from Novelis.

Further, Novelis' decision to demote Abare could not have been motivated by alleged concerted activity, because it had no knowledge of any co-worker "likes" to his post. *NLRB v. Office Towel Supply Co.*, 201 F.2d 838, 840 (2d Cir. 1953) (discharge of employee without knowledge of concerted nature of activity does not violate Act); *Philips Indus.*, 295 NLRB 717, 718 (1989) ("An employer cannot be motivated by facts of which it is not aware."). It is undisputed that GC-Ex. 25 (the version with "likes") was not the version of the post relied upon by Novelis. Indeed, Abare testified that GC-Ex. 25 was not created until after his demotion. Tr. 480. Abare admitted GC-Ex. 25(b) was the version Novelis relied upon in demoting him. Tr. 478-480, 2885, 2890. GC-Ex. 25(b) did not show who "liked" Abare's post. Thus, Novelis had no knowledge of the (alleged) concerted nature of Abare's post.

b. Abare's Conduct Was Not Protected

In analyzing Abare's Facebook post, the ALJ described it, charitably, as a "critique of his wages and coworkers who voted against the Union." Bd.-Dec. 32. This ignores the actual post and its circumstances. Abare chose to personally attack his fellow employees, referring to them as "fucktards," and telling them to "eat shit." The Board has been repeatedly criticized for attempting to shield "far too" much misconduct as within the Act's protection. *Earle Indus., Inc. v. NLRB*, 75 F.3d 400, 405 (8th Cir. 1996) ("The Board's conception of 'leeway' for misconduct is far too blunt an instrument when applied without regard to the situation in which the misconduct took place."). Using the word "fucktard" (which refers to "retarded" people) and telling employees to "eat shit" should not be protected by the federal government, particularly when a leader directs such comments at fellow employees.[13]

[13] The Board improperly relied on *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014). Bd.-Dec. 2-3 n.12. There, the parties disputed whether the speech was defamatory and disparaging under the Supreme Court's *Jefferson Standard* and *Linn* decisions on employee disloyalty. *Id.*, *1, 4. Novelis agrees this is not a disloyalty case. Abare's post was discriminatory and threatening to co-workers over whom he had leadership and safety responsibilities. That is an entirely different, legitimate employer concern, and the Board failed to recognize it. *Seneca Foods*, 244 NLRB 558, 558-59 (1979) (employee's harassment of other employees distracted workers and created a potentially dangerous situation because distracted employee operated dangerous machinery; conduct held not protected).

D. The Board Erred In Concluding That Novelis Engaged In Minor Violations

Out of 600 bargaining unit employees, a huge supervisory staff and a six-week organizing campaign that included thousands of management-employee interactions, the GC, after months of investigation, presented evidence of only four brief conversations in which lower-level supervisors allegedly made unlawful comments. The Board erroneously determined that innocuous encounters involving a handful of Novelis supervisors and employees violated the Act. To wit:

- The Board concluded Andrew Quinn solicited the grievances of three employees (Bd.-Dec. 39), but failed to consider that prior to the campaign, Quinn had a consistent practice of visiting employees on the shop floor. Tr. 2925; *Maple Grove Health Care Ctr.,* 330 NLRB 775 (2000) (employer may rebut implied promise allegation by establishing it had past practice of soliciting grievances). Further, the two testifying employees did not testify what Quinn allegedly promised to make better. Tr. 768, 1507-09.

- The Board ruled that Craig Formoza unlawfully threatened Al Cowan with layoff if the Union won. Bd.-Dec. 2 n.11, 39. The Board failed to consider that neither Formoza nor Cowan knew what an S-21 schedule (the basis of the alleged threat) is, and Formoza never asked Cowan about his seniority status. Tr. 651-53, 2377.

- The Board adopted the ALJ's misinterpretation of two meetings in which low-level supervisor Jason Bro explained the voting process to a small group of employees. Bd.-Dec. 2 n. 11, 39. Regarding the first meeting (January 23), the Board failed to consider, as pro-union employees admitted, that Bro never told those employees how to vote, nor did he ask them how they were going to vote (Tr. 680, 752, 1041), or that Bro permitted employees to

aggressively question his math during the presentation.[14] Tr. 668-69, 678-79, 1015, 1040. Further, the Board failed to consider that no employee testified Bro told them they would lose their jobs if Oswego unionized. Regarding the second meeting (January 30), the Board ignored that Bro's presentation educated employees on voting procedure, and the light-hearted exchange between Bro and Leo Rookey dispelled any implication of a coercive environment.[15] Tr. 705, 1423-25.[16]

- The Board concluded that a few low-level managers discriminatorily removed union literature from limited areas of the plant. Bd.-Dec. 2 n. 10, 37-38. But, no evidence exists that supervisors permitted anti-union propaganda to remain posted at the expense of pro-union propaganda. Indeed, Bro instructed an anti-union employee to return pro-union literature that he had removed. Tr. 1957-58.[17]

---

[14] *Roma Baking Co.*, 263 NLRB 24 (1982), cited by the ALJ, involved unlawful interrogation, threats of plant closure, threats of job loss, futility of union organization, and threats of forced acceptance of unwanted changes in working conditions. The same cannot be remotely said about Bro's alleged conduct.

[15] For example, Rookey testified he asked Bro how to vote if he wanted a union; Bro responded "yes," to which Rookey replied "You heard him, boys, vote 'yes.'" Tr. 1425. Rookey was not disciplined for telling Bro "that if we [don't] get a union here we [are] going to take it in the ass." Tr. 1424. The ALJ made a leaping assumption that because one employee (who did not testify) remained silent, Bro created a coercive environment. Bd.-Dec. 39.

[16] The ALJ's characterization of Abare's Facbeook post as a "critique" as compared to his characterization of Bro's "how do you vote" presentation as a "bombardment" and an "anti-union" rant (when not one employee who was in the room characterized it as such) is yet another example of the ALJ's results-orientated shading of the evidence.

[17] The ALJ found numerous references to the distribution of pro-union literature throughout the plant. Bd.-Dec. 24, n.85. That the GC alleges a handful of incidents arising from an environment where pro-union literature was indisputably prevalent undermines its argument that Novelis engaged in discriminatory distribution practices. 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.

Even if any aspect of these encounters could be considered unlawful, the *de minimis* number and nature of these alleged events in the context of a union campaign involving thousands of employee communication events do not warrant a finding that they amount to ULPs. *NLRB v. Garland Corp*., 396 F.2d 707, 709 (1st Cir. 1968) (finding three isolated incidents of alleged unlawful acts insufficient to support ULP finding in large plant where employer had policy of noninterference with employee choice). Certainly, none of these isolated incidents warrant justifying a bargaining order that forces the Union on employees who voted against unionization.

E. The Board Erred In Finding Novelis' Solicitation And Distribution Policy Unlawful

The Board concluded that Novelis' solicitation and distribution policy (the "Policy") (GC-Ex. 2) was unlawfully vague as to email use. Bd.-Dec. 2, 37. The Policy, however, is lawful under *Register-Guard*, 351 NLRB 1110, 1114 (2007), the established standard at the time the record closed, because its restrictions on use of Novelis' email system were non-discriminatory. ("[T]he Board has consistently held that there is no statutory right … to use an employer's equipment or media, as long as the restrictions are nondiscriminatory."). Despite this, the Board retroactively applied its new standard announced in *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014), which was decided over a month after the record closed. This retroactive application constitutes manifest

injustice and violates Novelis' due process rights, particularly where the Board attempted to partially justify a bargaining order upon this violation.

F. The Board Erred In Finding Novelis' Social Media Standard Unlawful

The Board erred in finding that Novelis' Social Media Standard ("Standard") (GC-Ex. 26), contained language that employees reasonably could construe as prohibiting the exercise of Section 7 rights. Bd.-Dec. 7, 39-40. No evidence exists that the Standard was promulgated in response to union activity or applied to restrict the exercise of Section 7 rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). In determining whether a challenged rule is unlawful, the Board "must … not presume improper interference with employee rights." *Id*., 646. Here, the Standard applied only as permitted by applicable law. GC-Ex. 26.

Further, Novelis implemented the Standard for legitimate business reasons (*id.*), and there is no evidence Novelis used the Standard to prevent employee communications regarding unionization or the election. *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.").

G. The Board Failed To Justify The Extraordinary Remedy Of A Bargaining Order

1. The Second Circuit Recognizes A Bargaining Order Is An Extreme Remedy That Is Dangerous Because It May Impose Unionization Against Employee Wishes

A core principle of our labor law system is employee free choice expressed through secret-ballot elections. "The issuance of a bargaining order is a rare remedy warranted only when it is clearly established that traditional remedies cannot eliminate the effects of the employer's past [ULPs]. An election, not a bargaining order, remains the preferred remedy. This preference reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise." *J.L.M.,* 83 (internal citations and quotations omitted); *see also J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 153-54 (2d Cir. 1981) ("[A] rerun election and not a bargaining order is the preferred remedy for employer misconduct which taints a union election."); *Grandee Beer Distrib., Inc. v. NLRB*, 630 F.2d 928, 934 (2d Cir. 1980) ("[A] bargaining order is an extraordinary remedy which should only be applied in unusual cases in the great majority of cases."); *NLRB v. Desert Aggregates*, 340 NLRB 289, 294 (2003).

"It needs saying that, in a union representation election, the NLRB has no vote." *Kinney Drugs,* 1432. All "too often … the Board has looked upon a bargaining order as a convenient remedy for minor violations when traditional

remedies could be equally as effective and still preserve for employees their statutory right to select their exclusive bargaining agent by a democratic process in an open election." *K&K Gourmet Meats*, 469 n.4.

Because a bargaining order is a drastic remedy, this Court has imposed stringent requirements for bargaining orders. Under Second Circuit precedent, a bargaining order cannot be upheld when:

- The Board assumes misconduct affected election results without analysis or consideration of any actual evidence of impact or other objective evidence. *Kinney Drugs*, 1431.[18]
- The Board assumes "lingering effects" of ULPs when the evidence shows no such effects. *NLRB v. Pace Oldsmobile, Inc*., 739 F.2d 108, 111-12 (2d Cir. 1984) (refusing to enforce bargaining order where Board relied on unsupported assumptions and speculation of lingering coercive effects and engaged in superficial analysis); *Grandee Beer,* 934 (refusing to enforce bargaining order where Board inferred inhibitory effects based only on violations and severity and failed to analyze question of recurrence).
- The Board assumes dissemination of ULPs to the workforce without actual evidence of dissemination. *NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228, 231 (2d Cir. 1983) ("We will not presume such dissemination when the issue concerns the possibility of holding a fair election."); *J.J. Newberry*, 153 (violations could not support issuance of bargaining order where "there is no evidence that the violations were ever communicated to other employees").
- The Board refuses to consider an employer's remedial measures. *Kinney Drugs*, 1432 (refusing to enforce bargaining order where Board failed to consider mitigating effect of employer's letter sent after committing alleged hallmark violations); *J. Coty*, 100 ("The issuance of a bargaining order is proper only if, after reviewing all

[18] *See also Be-Lo Stores, Inc. v. NLRB*, 126 F.3d 268, 280 (4th Cir. 1997).

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.").

- The Board refuses to consider changed circumstances, such as employee turnover, the hiring of new employees and the departure of key management accused of committing ULPs. *See, e.g., NLRB v. Heads & Threads Co.,* 724 F.2d 282, 289 (2d Cir. 1983) (denying enforcement of bargaining order due to Board's failure to consider changed circumstances) ("A mandatory part of the required analysis relates to events occurring after the [ULPs] were committed but which are relevant to the question of whether a free and fair election is possible. Even in the case of serious and coercive [ULPs], mitigating circumstances subsequent to the unlawful acts, such as employee turnover or new management, may obviate the need for a bargaining order."); *see also Windsor Indus*., 865.

Here, the Board failed to satisfy not just one, but all of these fundamental legal requirements. In ignoring this Court's repeated directives to apply *Gissel* sparingly, it found — with little to no meaningful analysis — that Novelis' alleged misconduct rendered the possibility of a fair second election impossible.

The Board relied on exaggerated inferences to justify a bargaining order and failed to acknowledge the evidence completely absent in this case. No employees were disciplined or discharged prior to the election, no threats of plant closure occurred, and no express threats were found. Indeed, after months of investigation and a lengthy hearing with over 100 witnesses, the GC did not present a single witness who testified to hearing any threats, of being coerced, or being scared to vote for the Union. In contrast, Novelis presented a "deluge" of employee

testimony that Novelis ran a fair, respectful campaign without threats or intimidation. Bd.-Dec. 23 n.79.

To reach its desired result, the Board rejected or refused to consider evidence showing that the Union lost the election for entirely lawful reasons and that even if unlawful conduct occurred, traditional remedies are appropriate. The Board turned a blind eye to the ALJ's refusal to allow Novelis to introduce evidence showing a bargaining order is unwarranted. Moreover, the Board simply assumed, without any record support, that the alleged ULPs were both pervasive and that their effects linger.

Simply put, imposition of a *Gissel* remedy in this case is not a "remedy" at all, but a results-oriented fiat by the Board which destroys employee free choice. This Court should reject the bargaining order.

2. The Board Erred In Upholding The ALJ's Flawed Majority Support Finding

As a threshold issue, "[t]he Board must first establish that there existed majority 'employee sentiment once expressed through cards' in favor of the union.'" *Kinney Drugs,* 1431.

The ALJ made several patently unreasonable rulings enabling him to find majority status.[19] Most notably, he accepted 57 authorization cards solicited by a

[19] In the context of a card-signing campaign characterized by a widespread pattern of misrepresentation by solicitors, the ALJ made erroneous evidentiary

statutory supervisor, Crew Leader Abare, which, if invalidated, would have precluded a finding of majority support and a bargaining order. The ALJ barred Novelis from litigating Abare's supervisory status because he found it "waived" this argument. The Board compounded this error by rubber-stamping his ruling.

a. The 57 Authorization Cards Abare Solicited Should Have Been Invalidated Due To His Supervisory Status

When evaluating majority support, the Board does not consider authorization cards solicited by supervisors. *Reeves Bros., Inc.*, 277 NLRB 1568, n.1 (1986) (accepting cards solicited by supervisors is "at odds with the Board's longstanding policy of rejecting cards directly solicited by supervisors"); *Sarah Neuman Nursing Home*, 270 NLRB 663 n.2 (1984).

In *Harborside Healthcare, Inc*., 343 NLRB 906, 906 (2004), the Board held that "[card] solicitations [by supervisors] are inherently coercive absent mitigating circumstances." The Board noted that supervisory participation in card-solicitations "has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not," since the employee may fear that "the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Id*.

---

rulings allowing the admission of unreliable evidence. For instance, the ALJ permitted the GC's use of highly suspect "authentication" techniques which resulted in the improper admission of uninitialed cards into evidence. Tr. 342, 344. Further, the ALJ ignored Novelis' security gate records which establish that several card solicitors were not telling the truth about the circumstances surrounding their card-signing solicitations. Bd.-Dec. 42-43.

Counting such cards toward a union's putative majority status "can paint a false portrait of employee support during [the union] election campaign." *Id*., 912; *see also Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2007) (coercion also possible where "employees had reason to believe that whether they signed a card would become known to [a pro-union] supervisor").

From the outset, Novelis attempted to develop evidence that the Union did not achieve majority status. Early in the GC's case, Abare testified he solicited "at least sixty cards." Tr. 308. The ALJ found 57 cards were either signed by Abare as a witness or signed and returned to him. Bd.-Dec. 17. On cross-examination, Novelis, without objection, questioned Abare about the time, place, manner and individuals involved in his solicitations. Tr. 542-563. It also questioned him extensively about his duties and responsibilities as a Crew Leader and elicited testimony from him demonstrating his significant authority to train and direct the work of others and to perform staffing functions. Tr. 492-512. It also elicited testimony from Novelis' Fire Chief regarding Abare's duties as a Fire Captain, again without objection. Tr. 2687-93.

Novelis then sought to introduce additional evidence in its case-in-chief that Abare had "by far" the most operational responsibility of any Crew Leader in the Cold Mill and possibly the entire plant. Tr. 3043-44. Indeed, during nine of his

fourteen working days monthly, Abare managed his crew and the Cold Mill without higher-level management present. Tr. 3047.

Novelis also attempted to show Abare engaged in many other supervisory tasks, including:

- Managed day-to-day execution of the production schedule and operations plan for his department;
- Attended daily production meetings with department managers and developed his shift production schedule;
- Assigned and directed employee work;
- Exercised independent judgment and discretion in determining how best to accomplish daily production goals;
- Recommended employee discipline;
- Participated in performance evaluations of employees;
- Had authority to recommend (or refuse to recommend) employees for skill-based pay assessments;
- Recommended assignments for specific employees based on his assessment of their respective skills, strengths and weaknesses;
- Was one of two employees certified to train workforce on crane operation; and
- Participated in leadership training.

Tr. 3041-43, 3047, 3049, 3066, 3071.

This evidence easily would have established Abare's supervisory status and that the 57 cards he solicited were invalid under *Harborside*. Such a finding would destroy the Union's card majority, because only 294 cards remain valid after

subtracting the cards improperly solicited by Abare. *See* Bd.-Dec. 1,17. In a bargaining unit of 599 employees, this does not establish majority support.

Catching on to this, the GC moved to preclude Novelis from introducing similar evidence of Abare's supervisory status and from raising further challenge to the Union's card majority based on that status. ALJ-Ex. 5(A). Incredibly, the ALJ granted the GC's motion, ruling: (a) Novelis "waived" the "affirmative defense" that Abare was a supervisor because the parties' pre-election stipulation allowed Crew Leaders to vote in the election; and (b) allowing the evidence would prejudice the GC's case. ALJ-Ex. 5.[20]

Ironically, the Board's Decision is littered with findings of fact suggesting Abare was indeed a supervisor. Bd.-Dec. 32 (finding 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").

[20] As the hearing unfolded, the ALJ sent mixed signals as to whether Novelis actually "waived" its "defense." While rejecting Novelis' evidentiary proffer for supervisor Greg DuFore, the ALJ noted that as he was "reviewing the cross-examination of [] Abare . . . there was questioning and testimony elicited with respect to [] Abare's responsibilities as a crew leader, so you can certainly hang your hat on that." Tr. 3053. Of course, the ALJ did not allow Novelis to "hang its hat" on anything.

The Board did not directly address the question of supervisory taint. Bd.-Dec. 1, n.3. It is not a surprise that the Board did not want to draw attention to the ALJ's handling of this issue, which was untenable.

b. Novelis Cannot "Waive" A Challenge To Majority Status

The ALJ's ruling that Novelis "waived" its challenge to majority status because it did not plead Abare's supervisory status as an "affirmative defense" improperly conflates Novelis' challenge to the Union's card majority with its defense to the unlawful demotion allegation. At risk of highlighting the obvious, they are two different things.

Proving the Union did not achieve majority status will not absolve Novelis of liability for any alleged violation. What it will do is limit the possibility of a bargaining order remedy. None of the cases cited in the ALJ's ruling (ALJ-Ex. 5), support the premise that an employer can "waive" the right to challenge majority status; each involves supervisory status as a defense to specific ULP allegations. Novelis is aware of no case in which the Board treated an employer's challenge to a claim of majority status on the basis of supervisor participation in card-signings as "waived." The reasons for this are simple — a challenge to majority status is not an affirmative defense, and there is no way for an employer to know who solicited union cards until the GC presents such testimony.

Thus, evidence of Abare's supervisory status as it relates to supervisory taint is not a "defense" capable of being "waived" to begin with. That is why the Board has long held that an employer challenge to the validity of union cards is timely raised during cross-examination of a card-solicitor or by calling card-signers, which is exactly what Novelis did. *See Montgomery Ward & Co., Inc*., 253 NLRB 196 (1980) (card challenges "timely raised by, inter alia, cross-examination of the authenticating witness or the production of the card signer's direct testimony"), *enf'd in part*, 668 F.2d 291 (7th Cir. 1981), *supplemented* 267 NLRB 900, n.2 (1983) (reaffirming principle that validity of authorization cards can be timely raised via cross-examination of card-solicitor or direct examination of card-signers). And even if Novelis "waived" its right to raise a supervisory defense to the unlawful demotion allegation (as discussed in Section VII.C.1, it did not), that has nothing to do with the issue of card majority support, which is a prerequisite for a bargaining order.

c. Pre-Election Stipulations Do Not Bar Subsequent Litigation Of Supervisory Status

The ALJ ruled the parties' pre-election stipulation allowing Crew Leaders to vote "barred" litigation of Abare's status. But, the Board has held that an election stipulation does not preclude later litigation of employee status. *See, e.g*., *The Oakland Press Co*., 266 NLRB 107, 108 (1983) ("a preelection agreement wherein, as here, an employer stipulates that certain individuals are not supervisors

… does not stop the employer from subsequently contesting their status"); *Insular Chemical Corp.*, 128 NLRB 93 (1960) (rejecting GC's argument against invalidation of cards solicited by alleged supervisors on grounds they voted in election without challenge). The Board has even ruled that findings of fact regarding an employee's supervisory status made during a representation proceeding do not resolve the issue in a ULP proceeding. *Leonard Niederriter Co., Inc.*, 130 NLRB 113, 115 n.2 (1961). "[T]he Board cannot ignore its own relevant precedent but must explain why it is not controlling. Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *Trump Plaza Assocs. v. NLRB,* 679 F.3d 822, 827 (D.C. Cir. 2012)

The ALJ ignored all of this precedent and suggested the Board's holding in *Oakland Press* was "later clarified" by decisions holding that an employer "is bound by an election agreement which stipulates supervisory status." ALJ-Ex. 5. None of the cases cited by the ALJ hold any such thing, as they dealt only with supervisory challenges within the representation context and not the ULP context. *See, e.g., Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) (challenge to election based on department supervisors voting rejected because party stipulated to whole department in election agreement); *Premier Living Center*, 331 NLRB 123 (2000) ("an employer may not challenge the validity of a union's certification

based on a belief that unit members are statutory supervisors if it failed to raise the issue during the representation proceeding"); *I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922-23 (1997) (employer barred from challenging validity of union's certification based on supervisory inclusion in bargaining unit where it withdrew same challenge and consented to election during representation proceeding).[21]

d. The ALJ's "Prejudice" Finding Is Groundless

Finally, the ALJ's exclusion of the evidence because it might "prejudice" the GC is at best misguided. Novelis, not the GC, is the party prejudiced by his ruling. The ALJ shut down Novelis' legitimate challenge to the Union's card majority based on a slapdash reading of cases that do not even arguably support his ruling. In a case in which the GC is seeking the most drastic remedy available under federal labor law, the ALJ was obligated to ensure a complete record, and the Board in turn was obligated to hold him to the task.

The GC clearly opened the door as to Abare's supervisory responsibilities when it elicited his testimony about his duties and responsibilities. Tr. 246-56. Novelis then elicited additional testimony from Abare on cross-examination,

[21] The ALJ doubled-down on his mistaken read of Board law when denying Novelis' motion for reconsideration. ALJ-Ex. 5(D); Tr. 3023. In doing so, he relied on *Flex-N-Gate Texas, LLC,* 358 NLRB 622 (2012). However, in *Flex-N-Gate*, the ALJ received evidence relevant to supervisory status and fully considered and ruled upon it. *Id.*, 633-35. *Flex-N-Gate* in no way supports the ALJ's conclusion that a party is barred from raising supervisory status based on a previous election stipulation.

without objection, demonstrating his authority to train and direct the work of others and to perform staffing functions. Tr. 492-512. The notion that Novelis sprung this challenge on the GC late at trial is nonsense.

Even if the GC's contention that it was unaware Novelis was pursuing this issue is credible, the GC easily could have attempted to introduce rebuttal evidence, including from Abare, his co-workers (many of whom testified), and Novelis management in its rebuttal case. Indeed, the GC announced that intention during trial. Tr. 2825.

The Board's failure to correct the ALJ's clear mistakes or even consider Novelis' *Harborside* argument is plain error. Accordingly, the finding of majority status should be overturned or, at a minimum, remanded to permit Novelis the opportunity to fully litigate the issue. *See Domsey Trading*, 37 (denying enforcement and remanding to Board for refusing to consider evidence relevant to immigration status defense).

3. The Board Improperly Rejected And Refused To Consider Evidence Showing That A Bargaining Order Is Both Improper And Would Eviscerate Employee Rights

Even if the Union could claim a valid card majority, the Board still profoundly erred in issuing a bargaining order. To reverse the election results through a bargaining order, the Board must establish, among other things, that "the employer's [ULPs] undermined the union's majority strength[.]" *Kinney Drugs,*

1431. Thus, the context in which the alleged ULPs arose and the extent to which they affected the Union's majority status is critical to the *Gissel* analysis. *See, e.g., NLRB v. Amber Delivery Service, Inc.*, 651 F.2d 57, 70 n.18 (1st Cir. 1981) (dissipation of majority status caused by lawful means is "a relevant factor bearing on the propriety of such an order"); *M.P.C. Plating, Inc. v. NLRB,* 912 F.2d 883, 888 (6th Cir. 1990).

a. The Board Improperly Excluded Evidence Showing That The Union's Own Conduct And Employees' Independent Campaign Against The Union Caused It To Lose The Election

Novelis attempted to introduce evidence that the Union's tactics were a turnoff to employees and that a large group of bargaining unit employees conducted an independent campaign against the Union directly contributing to the Union's loss.[22] This evidence was plainly relevant to the question of causation.

The ALJ, however, rejected all attempts to introduce evidence that other factors undermined the Union's support.[23] He struck proffered testimony from numerous employees who shared their previous union experiences and opinions

[22] The Employee Intervenors, who exercised their rights to oppose unionization, also sought to present such evidence but were precluded from doing so. Tr. 54-57.

[23] The Board rejected Novelis' exceptions and arguments on these issues out of hand. Bd.-Dec. 1 n.3.

with scores of co-workers during the campaign.[24] For example, the ALJ rejected evidence that:

- Rob Darling shared his family's negative experiences and his opinion that unions "don't always make things better." Tr. 1797.
- Dean White shared his negative experience in his prior union membership with "several dozen of his co-workers." Tr. 1988.
- Richard Farrands shared his personal views, based on his family's experiences, of "the disadvantages of unionization with interested co-workers during the course of the campaign. He believe[d] that his efforts persuaded some of his co-workers and caused them to no longer support the union[.]" Tr. 2103.
- Jim Grant shared his "significant negative experiences" with the Union at the nearby Huhtamaki plant. Tr. 2225.
- Mark Raymond "had never seen anything positive from his experience in a union represented plant and he shared this information with his co-workers." He believes "that the company won the election in large part because of efforts of people like himself who talked to people about their views and provided them with facts about the union in a non-threatening manner[.]" Tr. 2291.
- Kyle Kimball "discussed his experiences at Penn Bakery with other Novelis employees, specifically telling his coworkers that a union couldn't help them and that it's possible that they could wind up with less, as a result of the bargaining, basing that on his prior experience." Tr. 2323.

The ALJ also excluded testimony that Union supporters harassed and disparaged anti-union employees and that employees were aware that other local union plants had closed. Tr. 1828-32, 1842, 1988-89, 2103, 2209-10, 2579, 2753.

[24] *See also* Tr. 1628, 1717, 1842-43, 1948, 2027, 2124-26, 2151-52, 2208, 2242, 2341, 2432-34, 2453, 2465-66, 2480-81, 2494-95, 2510-11, 2568-69, 2698-99, 2720, 2731-32, 2747, 2752, 2995-99, 3000-12.

He barred evidence of offensive (including racist) and cartoonish Union campaign paraphernalia and evidence of the Union's (including its organizer Ridgeway's) unbecoming conduct. For example, the ALJ excluded evidence that:[25]

- John Bugow "was turned off by the Union's campaign" and felt that the "Union … alienated people like him by doing things like … Ridgeway writing the word, "Liar" on a Company document at one of the meetings." Tr. 1869.

- Farrands believed that Ridgeway "engaged in … disgusting behavior during the meetings … which further hardened Mr. Farrands' view that unionization would not be in the best interest of the employees[.]" Tr. 2103.

- Dan Cartier believed the Union was "misleading during the course of the campaign." Tr. 2125. He attended a Union meeting that became "a yelling and screaming match," and a second union meeting which he viewed "as being a bunch of union propaganda and promises that he was not impressed with." *Id.*

- John Whitcomb decided to oppose the Union after attending a Union meeting where people were drinking alcohol and Ridgeway admitted, after making promises and being challenged on those promises, that "he couldn't guarantee anything[.]" Tr. 1899.

- Jon Storms attended a meeting in Fulton which "made him want to vote no even more, because he believed the union was ignorant about pertinent subjects. He was turned off by a comment Mr. Ridgeway

[25] R.-Exs. 107, 111, 113,115, 116, 117, 119, 121, 123 (sample of offensive/cartoonish union literature); *for additional examples of employees being turned off by the Union's conduct, see* Tr. 1758-64, 2125, 2179-80, 2226, 2241, 2292, 2433, 2451-52, 2464-65, 2495, 2535-36, 2568-69, 2579, 2681, 2699-2700, 2709, 2731, 2738-39, 2752-53, 2998-99, 3002-10. The ALJ also refused to allow Novelis to question Union representative Jack Vanderbaan about employee interactions with the Union. Tr. 1561, 1563-64, 1569, 1572, 1574, 1581-82, 1585-97.

made during the meeting that not voting for the union would be the biggest mistake of his life." Tr. 1939.

- Fred Zych "found the union's tactics during the course of the campaign to be unprofessional and annoying. … [T]hey contacted him on at least six different times and spoke to him in an aggressive tone about why he needed to support the union. … [T]hey also came unsolicited to his home on a number of occasions and … both he and his wife were unhappy about these home visits. …[He also found that] the union literature that was distributed at the plant and also sent to his home contained what he viewed as outrageous accusations and information about the company." Tr. 2053-54.

- Robert Wise "found that the Union literature that he reviewed was disrespectful and misleading. He believes that the Union's campaign materials turned people off." Tr. 2481.

- Kimball "very much hoped Ridgeway would not represent Novelis employees, because he was not representing the Union well, during the meeting. And Mr. Kimball thought he was an idiot. Mr. Kimball conducted independent research of Mr. Ridgeway and discovered that Mr. Ridgeway had been censured during his time as a traffic judge." Tr. 2323.

The ALJ also refused to admit testimony that employees believed that Novelis ran a fair and evenhanded campaign, did not make any threats, and did not affect the way they voted (Tr. 1900, 1939, 1989, 2009, 2054, 2126, 2182, 2226, 2292, 2324, 2434, 2453, 2466, 2495, 2536, 2720, 2753, 2998-99, 3001-03, 3005, 3007, 3011-12); employees believed they could vote their true feelings in a second election (Tr. 1939, 2028, 2054, 2104, 2126, 2152, 2226-27, 2434, 2511, 2699, 2739); and it would be unfair to saddle them with a Union they did not want. Tr. 1843, 1900, 1989, 2126, 2153, 2181, 2292, 2324, 2466, 2496, 2569, 2709, 3007, 3011). *See also* I-Ex. 2.

This testimony would have shown that objective factors other than Novelis' conduct affected the election's outcome.[26] The ALJ's exclusion of such evidence as "subjective" and irrelevant totally missed the point. The evidence may not be relevant to underlying liability, but it is relevant to the analysis this Court requires before it will uphold a bargaining order. The ALJ and Board ignored (or misunderstood) that this testimony was introduced to show that employees did not know about, or were not impacted by, alleged unlawful conduct.

Likewise, the employee-led anti-union campaign was direct evidence of employees exercising their Section 7 rights and was relevant in analyzing whether a bargaining order would infringe those rights. *See Kinney Drugs*, 1432 (bargaining order unwarranted where Board failed to consider "other circumstances that bear upon fairness: the turn-over in the unit … and the thin

[26] In part due to the uncertainty of authorization cards, unions typically lose support between card-signing and elections. *See Montgomery Ward & Co., Inc. v. NLRB*, 904 F.2d 1156, 1162-63 (7th Cir. 1990) (Easterbrook, J., concurring) ("On average 18% of those who sign authorization cards do not want the union. They sign because they want to mollify their friends who are soliciting, because they think the cards will get them dues waivers in the event the union should prevail, and so on. . . . On average, then, we expect to see-and do see-substantial slippage between the cards and the votes . . . When unions get between 50% and 70% of the cards, they win only 48% of the elections." (*citing* Getman, Goldberg & Herman, *Union Representation Elections: Law and Reality* (1976)); *see also K&K Gourmet Meats,* 469 n.4. ("Cards have inherent uncertainties and risks attached to them."); *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1371 (7th Cir. 1983) (card majority "has little significance"). Here, even assuming cards were not obtained through fraud, the Union's support from card-signing to the election slipped within an expected range.

margin of the vote"); *Skyline Distribs. v. NLRB*, 99 F.3d 403, 410-11 (D.C. Cir. 1996) (bargaining order not enforceable where Board failed to consider employee free choice).

Given the GC's obligation to prove that unlawful conduct undermined Union support, evidence that other factors caused the Union to lose support was directly relevant, and it was error to exclude it. At a minimum, this should result in a remand for consideration of such evidence.

b. The Board Improperly Excluded Changed Circumstances Evidence

This Court has stated in no uncertain terms that, "[b]y now, it should be perfectly clear to the Board that it must show that the bargaining order is appropriate when it is issued, not at some earlier date." *J. Coty*, 101 (internal quotation omitted); *see also HarperCollins San Francisco v. NLRB,* 79 F.3d 1324, 1332-33 (2d. Cir. 1996) (Board "once again flouted the mandates of this Circuit and … ignored our consistent holdings that 'events subsequent to the employer's violations such as the passage of time and the substantial turnover of employees, are relevant and important factors which should be considered' in an effort to assess the possibility of a free and uncoerced election under current conditions") (*quoting Marion Rohr*, 231).

Novelis presented evidence during the hearing it hired approximately 50 additional employees into the bargaining unit between the election and October

2014. Bd.-Dec. 12 n.5; Tr. 2874-75. Novelis also moved to reopen the record after the hearing (Resp. Mot. to Reopen, 6/5/2015; Resp. Mot. Supplementing Request to Reopen, 1/27/16; Resp. Mot. Further Supplementing Request to Reopen, 8/16/16), seeking to introduce evidence that:

- Martens left Novelis in mid-April 2015, which was widely-reported in the media and shared with Oswego employees.
- Smith left Novelis in April 2016, which was shared with Oswego employees.
- Supervisor Bro, accused of minor allegations, left Novelis in August 2015.
- Between February 2014 and August 10, 2016, 255 new employees were hired into the bargaining unit and 84 eligible voters left the unit.
- In December 2014, Oswego commissioned its $48 million recycling facility.
- In February 2015, Oswego accelerated recruiting and hiring of workers to run its third CASH Line and continues to advertise and hire for positions.

The widely-known departures of Martens and Smith strongly militate against a bargaining order. *Windsor Indus.*, 865 (recognizing that employee turnover and new management may obviate need for bargaining order); *Cogburn Health Ctr., Inc. v. NLRB,* 437 F.3d 1266, 1274-75 (D.C. Cir. 2006) (denying bargaining order where Board improperly discounted departure of two prominent executives significantly responsible for alleged ULPs); *Flamingo Hilton-Laughlin v. NLRB*,

148 F.3d 1166, 1172-73 (D.C. Cir. 1998) (denying bargaining order and remanding due to Board's failure to assess employee turnover and management changes).

Additionally, evidence of Novelis' aggressive hiring for the new CASH line, and the opening of a $48 million recycling facility, directly refutes the Board's claims that employees listening to Martens' speeches would have feared job cuts and amply demonstrates that Novelis would not possibly laid off employees simply because the Union won.

Further, as Novelis repeatedly reminded the Board, employee turnover must be considered. *J.L.M.*, 84 ("Despite our repeated pronouncements that we consider turnover a relevant consideration militating against the issuance of a bargaining order, turnover has been conspicuously absent from the Board's analysis in these types of cases. Other circuits have similarly faulted the Board's analysis of these types of cases.") (citing cases). Here, the Board rejected evidence that by August 2016, 84 of 599 eligible voters were no longer employed in the bargaining unit, and that the bargaining unit had added approximately 42.5% new employees with 255 hires.[27] Any potential lingering effects of the alleged ULPs are vastly decreased given these numbers. *Id.* ("where a significant number of employees who witnessed the Company's ULPs have moved on, the chances for a fair election may vastly increase") (41% turnover rate persuasive); *Marion Rohr*, 231

[27] As of January 17, 2017, 310 employees have been hired into the bargaining unit, and 93 were no longer employed in the bargaining unit.

(35% persuasive); *NLRB v. Chester Valley, Inc.,* 652 F.2d 263, 273 (2d. Cir. 1981) (34% persuasive). Further, "the issuance of a bargaining order in the face of significant employee turnover risks unjustly binding new employees to the choices made by former ones[.]" *J.L.M.,* 84.

The passage of time, over three years, and the absence of any subsequent ULPs, also militate against a bargaining order. *J.L.M.*, 85; *Cogburn*, 1275; *HarperCollins*, 1333. As the D.C. Circuit has observed, "[t]ime *is* a factor that should be considered by the Board, along with employee and management turnover." *Cogburn*, 1275. "[W]ith the passage of time, any coercive effects of [a ULP] may dissipate, employee turnover may result in a work force with no interest in the Union, and a fair election might be held which accurate reflects uncoerced employee wishes as of the present time." *Id.*

Despite the relevance, the Board denied Novelis' motions and refused to consider any of the evidence. Bd.-Dec. 6 n.17. The Board's failure even to consider evidence of changed circumstances is fatal to its order. *See, e.g., J. Coty*, 101; *J.L.M.*, 84-85; *Pace,* 110-12.

Although any one of the errors above would be sufficient reason to overturn the bargaining order, the cumulative effect of the Board's refusal to admit and consider evidence directly bearing on the appropriate remedy destroys the rights of the many employees who actively campaigned against the Union and the hundreds

of new employees who should not have a union forced on them. The Board cannot ignore the interests of employees when analyzing the necessity of a bargaining order, or else it fails to fulfill its duty: "[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).

4. The Board's Superficial Attempt To Justify A Bargaining Order Contravenes Second Circuit Law

Apart from the Board's refusal to consider or admit relevant evidence, the record does not remotely satisfy the factual prerequisites for a bargaining order. The Board failed to establish, or even analyze, the factors necessary to justify remedial bargaining. Rather, it engaged in a superficial analysis that conflicts with Second Circuit precedent.

a. The Board Failed To Substantiate Its Finding That Traditional Remedies Would Be Insufficient

This Court has explained that a bargaining order is "only proper if, after an objective review of all of the relevant surrounding circumstances, including the nature of the employer's misbehavior and any later events bearing on its impact on the employees, it may reasonably be concluded that the employees will be unable to exercise a free choice in a Board-supervised rerun election." *NLRB v. Jamaica*

Towing, Inc., 632 F.2d 208, 212 (2d. Cir. 1980). "[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[.]" *Pace*, 110; *see also HarperCollins*, 1332 ("The mere recitation of [ULPs] accompanied by a conclusory statement that the possibility of conducting a fair rerun election by use of traditional remedies is slight, does not satisfy the NLRB's responsibility to analyze the attending circumstances.").

Thus, the Board cannot simply find that the ULPs are serious and then infer the impossibility of a fair election. This Court has repeatedly criticized the Board for its superficial and conclusory analyses in *Gissel* cases and for "indulging in its 'well-established preference for issuing a bargaining order'" without proper consideration of relevant evidence. *J. Coty*, 100-01 (refusing to enforce bargaining order where Board relied on conclusory statements and failed to undertake proper analysis or consider subsequent events); *Pace,* 111-12 (refusing to enforce bargaining order where Board relied on unsupported assumptions and speculation and engaged in superficial analysis); *Grandee Beer*, 934 (refusing to enforce bargaining order where Board inferred inhibitory effects based only on the violations and severity and failed to analyze question of recurrence).

Here, the GC presented no evidence on the need for a bargaining order. It therefore was impossible for the Board to address the factors this Circuit requires

before it will enforce a bargaining order. Since the record contains no evidence remotely suggesting a bargaining order is necessary, the Board's conclusion that serious violations occurred cannot substitute for what is conspicuously absent from the record – actual evidence addressing the *Gissel* factors.

But, it gets worse. The Board also ignored the evidence addressing the *Gissel* factors that did make it into the record. That evidence was advanced by Novelis, and it showed traditional remedies would be sufficient even if Novelis had committed every ULP alleged. As previously noted, the Board also excluded a mountain of evidence further supporting traditional remedies.

The Board has been told time and again that this approach to bargaining order analysis is improper. *See, e.g., HarperCollins*, 1332; *J. Coty*, 100. Yet, the Board persists in its disregard for the standards established by federal courts that properly recognize the *Gissel* remedy for what it is – an extraordinary remedy reserved only for the most egregious cases. To be sure, the Board attempted to dress up its non-analysis with incomplete recitations of applicable standards and unsupported conclusory statements. But, the alleged violations simply do not support a bargaining order, and no amount of speculation and conjecture can allow the Board to meet Second Circuit precedent.

b. The Record Does Not Establish The Alleged ULPs Impacted The Election Outcome

The GC made no effort to prove Novelis' alleged misconduct impacted the election results. Only a single witness, Ridgeway, testified that Novelis cost the Union the election, and his testimony only 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' actions. No one claimed attendance at union meetings dropped, the volume of union literature in the plant decreased, or other expressions of support for the Union dried up. Moreover, no employee claimed that any alleged action affected how they voted or chilled their support for the Union.[28] In fact, the only evidence presented on this point shows a "significant percentage" of Oswego employees continued to support the Union based on the Union's own post-election communications. R-Ex. 238; Tr. 1614-15.

In contrast, there was a "deluge" of employee testimony that they never heard any management member make a threat during the campaign. Bd.-Dec. 23 n.79 (collecting cites); *see also* I-Ex. 2. As discussed above, employees'

[28] The Board's finding that Novelis' January 9 announcement "clearly had an impact on employees, with some requesting that their Union authorization cards be returned to them" (Bd.-Dec. 23), is baseless. Despite this "finding," the ALJ stated in the next breath that "no evidence [exists] as to the total number of authorization cards requested and returned," and he acknowledged that only one employee, Wise, requested his card back. *Id*., n. 83. The GC failed to determine why he requested his card back.

perception of whether Novelis made threats may not be relevant to Novelis' liability, but it is highly relevant to whether the threats, if made, impacted the election's outcome. *Chester Valley,* 273 ("[T]he impressive amount of testimony by employees who did not even recall the statements which were found to constitute [ULPs] suggests that the effects of those practices would be minimal."). Thus, the only evidence of impact, unrebutted, shows Novelis' actions had no negative effect on election conditions.

The Board, however, failed to acknowledge the GC's dearth of evidence and did not even mention, let alone consider, the testimony of employees who suggested the impact of Novelis' actions was nonexistent. The Board did not even pretend to pay lip service to Novelis' or the Employee Intervenors' evidence by considering it. It was as if this record evidence does not exist.

Instead, the Board simply recounted each alleged ULP, lacing its analysis with unsupported assumptions such as, "once [Novelis] restored these benefits, it is likely that many employees no longer saw a need for such representation[;]" and "because threats of plant closure and other types of job loss are among the most flagrant of [ULPs], they are likely to persist in the employees' minds for longer periods of time than other unlawful conduct, and are particularly likely to destroy the chances of a fair re-run election." Bd.-Dec. 4, 5. The conclusion that Novelis' alleged threats are "more likely" to "destroy" election conditions is based on zero

evidence and is actually contrary to the evidence. As stated, the employees who did address this issue stated they never heard Novelis make threats. Thus, the only evidence suggests the impact of any alleged threat, occurring three years ago, has long since dissipated (if it ever existed).

c. The Board's Pervasiveness Findings Are Unsupportable

Unlike *Gissel* Category I cases, which involve "outrageous and pervasive" ULPs, Category II cases involve "less extraordinary cases marked by less pervasive practices." *Gissel*, 613-14. The Board's observation that this is a Category II case is tantamount to a concession that the ULPs at issue are not inherently pervasive. Thus, the GC needed to prove the effects of the alleged ULPs actually were pervasive. *Jamaica Towing*, 213.

Although the GC presented no evidence of pervasiveness, the Board relied on "three particularly serious violations" that it claimed "are likely to remain in the employees' minds and make it extremely unlikely that a fair re-run election could ever be had." Bd.-Dec. 4. But, substantial evidence does not establish these alleged violations "are likely" to remain in the vast majority of employees' minds.

25th Hour Speeches. Smith's and Martens' speeches carry far less weight than the Board asserts. Only 250-300 employees in total attended any meeting – 100 at the first meeting held on the CASH line, and 75-100 at each of the two

meetings held in the cafeteria. Tr. 2928.[29] Further, the GC offered no testimony that attendees shared what they heard with co-workers who did not attend. Thus, approximately half of the workforce did not attend any 25th Hour speech.

The Board rejected these inconvenient facts, surmising that even if only 250-300 employees attended a meeting, there was "no difficulty finding that unlawful threats made to this number of employees are pervasive." Bd.-Dec. 5 n.16.[30] Half of anything is not "pervasive" under any accepted definition. "[T]o be considered 'pervasive,' a company's [ULPs] must, as the word connotes, be felt throughout all, or virtually all, of the bargaining unit." *Be-Lo Stores*, 280. The Board cannot simply presume the alleged threats were disseminated among employees. *Marion Rohr*, 231 ("We will not presume such dissemination when the issue concerns the possibility of holding a fair election."); *J.J. Newberry*, 153 (unlawful interrogations could not support issuance of bargaining order where "there is no evidence that the

[29] The testimony from GC witnesses confirms that approximately half of the bargaining unit attended a meeting. Tr. 1257 (60-80 attended first meeting); Tr. 900-01 (120-155 attended second meeting); Tr. 441-42 (100 attended third meeting). Corroborating this evidence, Novelis' credited security gate records indicate many employees were not present on February 17-18, 2014. Ex. R-282; Tr. 2647-48; *see also* Tr. 1764-65, 2743 (employee testimony they did not attend any speech). This evidence belies the Board's finding that the meetings were "mandatory" and "attended by all employees." Bd.-Dec. 5 n.16, 26, 35.

[30] If this were not enough, employees testified that it was difficult to hear the speakers during the first meeting on the CASH line, because production machines continued running. Tr. 1267-68, 2929. Thus, it is questionable whether many employees who attended the first meeting even heard the statements. The Board ignored this evidence.

violations were ever communicated to other employees"). Moreover, while the Board recognized that the alleged threats were merely implied (not explicit) (Bd.-Dec. 5), it failed to recognize that implied threats are "less likely to have a strong and lasting effect." *Chester Valley,* 273.

The Board also ignored the "deluge" of testimony that employees never heard any threat. Bd.-Dec. 23 n.79. This is powerful evidence that any unlawful statements were not pervasive and had little or no impact on election conditions. *Chester Valley,* 273. Instead of even mentioning this evidence, the Board mused in conclusory fashion that threats "are likely to persist in the employees' minds for longer periods of time[.]" Bd.-Dec. 5. This was plain error. *Pace*, 111-12 (refusing to enforce bargaining order where Board failed to analyze in depth factors militating against bargaining order and instead relied on unsupported assumptions).

Finally, the 255 employees hired from the time of the election in February 2014 through August 10, 2016 (and 55 additional employees from August 10, 2016 through January 17, 2017) have not been affected by any statements made at the meetings.[31] *See Pace*, 111-12 (improper for Board to ignore turnover and assume that ULPs would be topic of discussion and repetition among both old and new employees).

[31] No evidence exists any employee has shared any alleged threat with any other employee.

Restoration of Benefits. No evidence exists that any employee was affected by Novelis' decision not to implement changes to Sunday premium and overtime pay practices, as no witnesses testified they began to lose these benefits at any point between the time Novelis originally announced these planned changes in May 2013 and when it announced the decision to not proceed on January 9, 2014.

Further, there is not a shred of evidence to support the Board's assumption that "it is likely that many employees no longer saw a need" for Union representation.[32] No witnesses even hinted this announcement led to anyone concluding a union was no longer necessary. It is undisputed the election was close and many employees continued to support the Union after the election. GC-Ex. 13; R-Ex. 238; Tr. 1614-15; s*ee Red Oaks Nursing Home, Inc. v. NLRB*, 633 F.2d 503, 510 (7th Cir. 1980) ("[T]he most compelling evidence that a bargaining order was not warranted is the clear evidence in the record that the employer's [ULPs] did not drive the employees directly involved to abandon the union."); *Pace,* 111 (pro-union activity after ULPs should have been considered as indicia that employees were not intimidated by misconduct and that fair election was realistic possibility). Furthermore, the hundreds of employees hired after the

[32] In *MEMC Elec. Materials, Inc.*, 342 NLRB 1172 (2004), cited by the ALJ, 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 previous levels through a series of bonus payments, including one bonus payment just days before the election. The facts here are not remotely similar.

election could not have been impacted by a so-called "restoration" of benefits. *Id.,* 112.

Abare's Demotion. There is no evidence Abare's demotion, even assuming it was unlawful, continues to impact the bargaining unit. The Board was not entitled to presume impact, particularly where Abare was reinstated for more than two years under the 10(j) Order. *Pace,* 111 (Board should have considered reinstatement of fired employees when determining impact of prior refusal to reinstate and demotion of strikers).

Additionally, the evidence does not support the Board's finding that Abare's demotion was "widely-known." In this regard, only a few employees working in the massive Oswego facility testified they were ever aware Abare was demoted prior to the reading of the 10(j) Order, at which time they learned he was reinstated. Tr. 1982-83, 3131-32, 3151, 3155-56. Again, the Board cannot presume everyone knew about his demotion.[33] *Pace*, 112 (Board erred by assuming employees would discuss ULPs and making "no attempt to determine if the [ULPs] continued to have an actual chilling effect on the possibility of a fair

[33] Although there is no evidence to show that Abare's demotion was "widely-known," there is evidence showing that his reinstatement was "widely-known." By the Board's logic, if Abare's demotion is "likely" to be remembered by employees, then so should his almost immediate reinstatement. For the Board to pretend as if Abare's reinstatement never occurred creates a fantasy-land for the Board to justify whatever conclusions it desires.

and free election"); *Grandee Beer*, 934 (inference of inhibitory effects of ULP improper).

The caselaw cited by the Board does not support its conclusions. For example, the Board cited this Court's *Jamaica Towing* decision for the premise that Abare's demotion was particularly "likely" to destroy the chances for a fair re-run election. Bd.-Dec. 5. In *Jamaica Towing*, 213, this Court focused on "[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 that such violations are "likely to have a lasting inhibitive effect on a substantial percentage of the workforce." In contrast, the Court held that the "threat of plant closure," while serious, may not support a bargaining order where a "lack of proof of pervasiveness exists."[34] *Id*. Likewise, the Court held that the discharge of a union adherent, even if a "completed act," may not support a bargaining order where the discharge was unknown to most employees. *Id.* Accordingly, this Court refused to enforce the bargaining order. *Id.*

Here, Abare was merely demoted from leadership positions (without evidence of widespread knowledge), replaced by a vocal union supporter, and then reinstated a few months later. Under *Jamaica Towing*, the Board needed to

[34] The Board did not find threats of plant closure. Bd.-Dec. 2 n.8.

identify "proof" of the negative impact of Novelis' alleged misconduct. It was not free to assume it.

Cumulative Impact of Other Violations. The Board also relied on the purported cumulative impact of other alleged ULPs, which it termed "numerous and serious." Bd.-Dec. 5-6.[35] Without any evidence of how these lesser violations impacted employees, much less the "long-lasting untoward" impact required to support a bargaining order, the Board found in conclusory fashion that "many" of the violations "directly affected the entire bargaining unit." Bd.-Dec. 45. This finding is not supported by substantial evidence.

First, out of a 600 employee bargaining unit, and a 50 person operations supervisory staff, the Board relied on only four minor and isolated examples of alleged supervisor misconduct (involving only a handful of employees), none of which was remotely "pervasive." In contrast, Novelis held dozens of meetings to share information about election details, the collective bargaining process and Novelis' position on unionization, without any allegation these communications

[35] The Board identified other purportedly unlawful statements by Martens and Smith. Bd.-Dec. 5-6. This "lesser misconduct" does "'not support a bargaining order absent serious and long-lasting untoward effects on employees,'" *Kinney Drugs,* 1428-29 (*quoting Chester Valley*), which clearly has not been shown here. *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.").

were unlawful. R-Exs. 70, 77, 243; Tr. 1639-44, 1686-89, 1745-53, 1863-64, 2004, 2016, 2034-36, 2099-2100, 2107-09, 2136-38, 2437-40, 2703-04, 2787. The Board brushed this evidence aside, opining that "discriminatory actions committed by supervisors were likely to leave an impression sufficient to outweigh the general good-faith assurances issued by management." Bd.-Dec. 44. Again, this finding is not supported by any evidence and does not support a bargaining order. *J. Coty*, 100 ("Simply 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."). There is no testimony that employees did not believe the myriad assurances from Novelis that they should vote their true feelings and Novelis would bargain with the Union in good-faith. And, as no evidence exists that any alleged violations were disseminated among employees, the Board was not entitled to presume it. *Marion Rohr*, 231 ("We will not presume such dissemination when the issue concerns the possibility of holding a fair election"); *J.J. Newberry*, 153.

The Board likewise found that Quinn's alleged solicitation of grievances during a small group conversation 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." Bd.-Dec. 45. This assertion is indefensible, particularly given the case cited as support, *Teledyne Dental Products Corp*., 210

NLRB 435 (1974). In *Teledyne*, the plant manager, in response to union activity, solicited employee grievances in employee meetings, later persuaded employees to list their demands, and then implemented them. Here, Quinn talked to three out of 599 employees and gave them nothing. Further, no evidence exists those employees reported their conversation to anyone else. Equating Quinn's actions with those of the plant manager in *Teledyne* is nonsensical.

The Board further erred in determining that Novelis' enforcement of its solicitation and distribution policy supported a bargaining order. The record demonstrates, and the Board acknowledges, that employees regularly and freely distributed both pro-union and anti-union literature (as they preferred) throughout the plant. Bd.-Dec. 16. While 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, the witnesses questioned on these issues testified that pro-union literature was distributed throughout the plant and many had never seen it taken down. *See supra*, n.17. Bro, who is alleged to have told a small group of employees they could not have union literature in working areas, is acknowledged by the GC's 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 anti-union employee that Bro told him pro-union literature could be distributed

in break areas and instructed him to return removed pro-union literature), 2073-75 (pro-Company supporter told by management not to use Novelis equipment or Company time after sending email opposing unionization).

In sum, the "other" alleged ULPs upon which the Board relied were not pervasive in nature. Further, absolutely no evidence exists, let alone substantial evidence, that these instances caused "serious and long-lasting untoward effects on employees." As such, they do not support the imposition of a bargaining order. *Kinney Drugs,* 1429.

d. The Board's Likelihood Of Recurrence "Analysis" Is Based On No Evidence

The Board also erred by failing to analyze the likelihood Novelis would commit ULPs in the future. *Grandee Beer,* 934 (refusing to enforce bargaining order because "record reveal[ed] neither a lingering inhibitory effect, nor a likelihood of recurrence").

Novelis has no history of ULPs. Nothing indicates Novelis would refuse to honor the results of a second election. In fact, the only evidence supports the opposite conclusion. Novelis has long-standing relationships with the Union in other facilities and has successfully negotiated union agreements at those facilities. R-Exs. 37, 40; Tr. 2879. Further, Novelis' lawful campaign communications and activities outweigh its allegedly unlawful ones by an overwhelming margin, which shows that the alleged unlawful actions were isolated and, hence, unlikely to recur.

Finally, no evidence exists that Novelis will discipline or discharge union supporters in the future. Novelis' temporary demotion of Abare from leadership positions for his offensive post is the only discipline allegation, and Abare has been restored to the positions. Moreover, it is undisputed that Novelis fully complied with the 10(j) Order and that no employee testified they feared retaliation by Novelis for any action taken during the campaign.

As with the other aspects of its *Gissel* "analysis," the Board failed to mention, much less consider, these facts. The closest the Board came to addressing the likelihood of recurrence was its finding that Novelis' demotion of Abare after the election demonstrated "continuing hostility toward the employees' exercise of their Section 7 rights" and was "strong evidence" that "its unlawful conduct will persist in the event of another organizing campaign." Bd.-Dec. 5. However, when considering this lone incident almost three years ago, it is clear there is not substantial evidence of likelihood of recurrence. *Pace,* 111-12.

The sole case relied upon by the Board, *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999), is inapposite. *M.J. Metal* involved a small bargaining unit of approximately 15 employees. *Id.* Just three days after the Union requested recognition, the employer discharged two union supporters; three days after the election, the employer discharged two additional union supporters. *Id.* In addition,

the employer disregarded employees' rights not to be coerced during preparation for proceedings before the Board. *Id.*

The Board's reliance on one post-election demotion (out of 600 employees) for crude and insensitive behavior and one Board case involving discharges of nearly one-third of the bargaining unit is insufficient to support a finding that Novelis is likely to act unlawfully in the future, particularly in the face of overwhelming evidence to the contrary.

e. The Board Failed To Properly Consider Novelis' Remediation Evidence

Employer clarifying communications are directly relevant to the bargaining order inquiry. *Kinney Drugs*, 1432. Smith's and Martens' June 2014 letters clear up any conceivable confusion an employee could have had about their speeches. R-Exs. 54, 56. Going forward, employees could not reasonably believe Novelis would lay people off, reduce benefits, or otherwise retaliate if employees unionized.

The Board summarily rejected this evidence, claiming none of Novelis' actions were sufficient to "cure [its] past violations," Bd.-Dec. 45, under its *Passavant* standard. But, Novelis did not offer this evidence to prove it effectively repudiated ULPs under *Passavant*, which concerns the standard for avoiding liability for unlawful conduct. Instead, Novelis offered the evidence to demonstrate that even if liable, a bargaining order is unnecessary and

inappropriate. The evidence shows Novelis remediated the effects of alleged threats and any effects do not linger. *Kinney Drugs,* 1432; *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1093 (7th Cir. 1982).

Novelis further remediated the effects of all potential ULPs when Smith, accompanied by a Board agent, fully complied with and read the 10(j) Order in a series of employee meetings. *Novelis Corp.*, *8; Bd.-Dec. 8, n.18; Tr. 2241, 2322, 2451, 2503. The Board rejected the reading of the 10(j) Order as a relevant consideration on the ground that compliance with court orders "does not actually remedy" ULPs. Bd.-Dec. 45. This ruling directly contravenes prior Board statements that employer steps to dissipate the impact of ULPs may diminish the need for a bargaining order. *See, e.g., Masterform Tool Co.*, 327 NLRB 1071, 1072 (1999) (bargaining order not warranted where employer's layoff of union supporters was mitigated by reinstatement).

The Board has long held traditional remedies, particularly public notice readings, are an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *U.S. Serv. Indus., Inc.,* 319 NLRB 231, 232 (1995); *see also N. Mem'l Health Care*, 364 NLRB No. 61 (2016) (ordering public notice reading "[t]o dissipate as much as possible any lingering effect of [] Respondent's serious and wide-spread [ULPs] and enable employees to exercise their Section 7 rights free of coercion … "). Indeed, the Board's GC

recognizes that the public reading remedy is "designed to eliminate these coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights." Memorandum GC 11-01, 2010 WL 7141477, *2 (Dec. 20, 2010).

The Board's disregard of the clarifying letters and the public reading of the 10(j) Order was an abuse of discretion. Without proper consideration of this evidence, the Board's analysis was once again incomplete.

VIII. CONCLUSION

Novelis respectfully requests the Court grant its Petition for Review and vacate the Board's Decision and Order. At a minimum, Novelis requests that the case be remanded with a directive to allow Novelis to introduce and litigate the improperly-excluded evidence. Finally, if the Court finds that Novelis engaged in any ULPs, Novelis requests that the Court vacate and refuse to enforce the Board's bargaining order (Bd.-Dec. 8-9 (Order Section 1(q), (2(e))).

Respectfully submitted, this 17th day of January, 2017.

/s/ Kurt A. Powell
Kurt A. Powell
Robert T. Dumbacher
HUNTON & WILLIAMS LLP
Bank of America Plaza, Suite 4100
600 Peachtree Street, NE
Atlanta, GA 30308
Telephone: 404-888-4000
Facsimile: 404-888-4190
Email: KPowell@hunton.com
RDumbacher@hunton.com

Counsel for Petitioner/Cross-Respondent
NOVELIS CORPORATION

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) and the Court's order (Dkt. 88) because this brief contains 20,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2010 in proportionally spaced, 14-point Times New Roman.

/s/ Kurt A. Powell
Kurt A. Powell
Counsel for Novelis Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Second Circuit Court of Appeals NextGen CM/ECF filing system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

Usha Deheenan
Kellie J. Isbell
National Labor Relations Board
1099 14th Street
Washington, DC 20570

Linda Dreeben
National Labor Relations Board
Appellate and Supreme Court Litigaiton Branch
1015 Half Street, SW
Washington, DC

Richard Brean
Daniel M. Kovalik
United Steelworkers of America
Room 807
5 Gateway Center
60 Boulevard of the Allies
Pittsburgh, PA 15222

Brian J. LaClair
Kenneth L. Wagner
Blitman & King LLP
Franklin Center, Suite 300
443 North Franklin Street
Syracuse, NY 13204

Thomas G. Eron
Bond, Schoeneck & King, PLLC
1 Lincoln Center
110 West Fayette Street
Syracuse, NY 13202

This 17th day of January, 2017.

/s/ Kurt A. Powell
Kurt A. Powell
Counsel for Novelis Corporation