Ozburn-Hessey Logistics, LLC *and* United Steelworkers Union. Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635

May 2, 2013

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On May 15, 2012, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief.

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

As recounted by the judge, this is the third in a series of cases involving the Respondent's unlawful attempts to thwart its employees' efforts to secure union representation. In 2009, the Union began an organizing drive at the Respondent's Memphis, Tennessee facility, the same facility involved in this case. That organizing drive led to a representation election in March 2010, which the Union lost. The Respondent's antiunion campaign yielded two Board decisions finding that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act from late 2009 to early 2010.[3] In addition, the Acting General Counsel obtained an injunction under Section 10(j) of the Act ordering the Respondent to reinstate or make whole several unlawfully disciplined employees, including Carolyn Jones, the discharged employee in this case. See *Hooks v. Ozburn-Hessey Logistics*, 775 F.Supp.2d 1029 (W.D. Tenn. 2011).

The present case involves similar alleged misconduct preceding a July 27, 2011[4] election, which the Union won by a vote of 165 to 164, with 14 challenged ballots. The judge found, and we agree, that the Respondent unlawfully confiscated union materials, conducted surveillance of protected activity,[5] interrogated employees,[6] created an impression of surveillance,[7] threatened employees, and discharged employee Carolyn Jones for engaging in protected activity. For the reasons discussed below, we also agree with the judge's findings that the Respondent committed additional violations of the Act. Finally, as discussed below, we shall direct the Regional Director for Region 26 to count six ballots challenged in the election, to certify the Union as the employees' representative if the revised tally of ballots shows that the Union received a majority of the votes, and, if not, to conduct a rerun election.

1. We also agree with the judge's finding that, at a June 28 captive-audience meeting, Director of Operations Phil Smith unlawfully invited supporters of the Union to quit. In the course of that meeting, employee Tondra Mitchell, who opposed the Union, openly asserted that if union supporters were so unhappy, then they should seek other employment. Director of Operations Smith replied, "Exactly [or My point exactly], that's what I'm talking about."

The judge's finding rests on settled law that an employer's statement that prounion employees should quit constitutes an implicit threat that unionization is incompatible with continued employment and that union supporters will be discharged.[8] In addition, the Board has

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] As described in the amended remedy section set forth below, we shall modify the judge's order to conform to our standard remedial language and to comply with our recent decision in *Latino Express, Inc.,* 359 NLRB 518 (2012).

[3] See *Ozburn-Hessey Logistics, LLC,* 357 NLRB 1456 (2011) (*Ozburn I); Ozburn-Hessey Logistics*, *LLC*, 357 NLRB 1632 (2011) *(Ozburn II)*. The judge in *Ozburn I* upheld the union's objections and recommended that the first election be rerun, but the union withdrew its first petition before the case was decided by the Board. 357 NLRB 1456 fn. 1.

[4] All dates below are in 2011, unless otherwise specified.

[5] In finding that management officials conducted unlawful surveillance of union supporters while they were distributing literature in the Respondent's parking lot on May 25, we note in particular that it was highly atypical for such officials to appear in sequence and to linger in the parking lot as they did on that occasion. See, e.g., *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007).

[6] Because the finding of a violation would be cumulative and would not affect the remedy, we find it unnecessary to pass on the allegation that Senior Employee Relations Manager Shannon Miles unlawfully interrogated employee Kedric Smith, as found by the judge.

[7] The judge found that Human Resource Assistant Sara Wright's unlawful interrogation of employee Sharon Shorter—concerning whether union supporter Glenora Rayford had approached Shorter "on the floor" to discuss the Union—also created an impression of unlawful surveillance. We agree, particularly given Wright's failure to specify to Shorter how she learned of Shorter's conversation with Rayford. See, e.g., *McClain & Co.,* 358 NLRB 1069, 1072 (2012). Moreover, the Respondent has not argued or shown that Shorter reasonably should have assumed that Wright had learned of her conversation with Rayford by some lawful means.

[8] E.g., *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006);

held that an employer's endorsement or ratification of an employee's antiunion conduct makes the employer itself liable for that conduct.[9] Here, Director of Operations Smith's express endorsement of Mitchell's comment that union supporters should quit effectively made that comment Smith's own, and thus chargeable to the Respondent.[10]

2. The judge found that the Respondent unlawfully issued employee Jennifer Smith a written final warning in retaliation for her prounion activity. Again, we agree with the judge. Jennifer Smith was an open supporter of the Union. On June 8, she had an argument with employee Stacey Williams, who openly opposed the Union, over the whereabouts of certain supplies. Williams later complained to the Respondent that Jennifer Smith had called him a "house nigger" during that argument. The next day, the Respondent issued Jennifer Smith a written final warning, which asserted that she had "called Stacey a 'house n****r' . . . in violation of [the Respondent's] anti-harassment and non-discrimination policy."

Applying *Wright Line*,[11] the judge found that the Acting General Counsel established that Jennifer Smith's union activity was a motivating factor in the Respondent's decision to discipline her. The judge further found that the Respondent's asserted basis for disciplining Jennifer Smith—her alleged statement to Williams—was a pretext. In this respect, the judge credited Jennifer Smith's testimony, as well as that of other employee witnesses, that she did not use a racial slur against Williams. The judge inferred from this finding, as well as the considerable evidence of the Respondent's antiunion animus, that the Respondent's discipline of Jennifer Smith was unlawful.

We agree with the judge's conclusion that the discipline was unlawful. In doing so, we emphasize the following additional circumstances that support his finding of a violation. First, the record establishes that the Respondent's purported belief that Smith used a racial slur was not reasonable. In charging Jennifer Smith with misconduct, the Respondent ignored the testimony of two witnesses who did not hear Smith use a racial slur and relied on the one witness, Shirley Milan, who supported Williams' accusation against Smith. The Respondent's reliance on Milan while ignoring the other witnesses was unreasonable: the Respondent knew that Milan had previously made a false accusation of her own against Smith.

Second, there is credited evidence in the record that the Respondent did not believe that the use of racial slurs merited discipline. The judge's findings regarding the Respondent's unlawful discharge of prounion employee Carolyn Jones establish that the Respondent was highly inconsistent in its response to racial slurs. Shortly after disciplining Jennifer Smith, the Respondent again invoked its antiharassment policy in discharging Jones. Although the judge found that Jones did use a racial epithet when confronting an antiunion employee, the judge found that the Respondent's decision to discharge Jones in part for that misconduct was "deeply inconsistent with [the Respondent's] willingness to overlook the several grossly offensive statements made by [Director of Operations] Phil Smith, a high-level supervisor, to subordinate employees." It thus appears that the Respondent was using its antiharassment policy to target union supporters, further corroborating the judge's finding of pretext in Jennifer Smith's case. Indeed, in all the circumstances presented here, even assuming the Respondent reasonably believed that Smith had used a racial epithet, we would find that the Respondent could not and did not establish that it would have disciplined her in the absence of union activity.

3. As stated, we also adopt the judge's resolutions of the 10 remaining ballot challenges.[12] We also agree, for the reasons stated by the judge, that the Respondent's election objections lack merit.[13] Further, as discussed below, we agree that certain of the Union's objections have merit and will justify overturning the election result if the Union loses its majority when the challenged ballots found eligible are counted.

In determining whether the second election result should be set aside based on the Union's objections, the judge considered some of the unlawful conduct the Respondent committed before June 14, when the Union filed the second election petition. In this respect, the

Paper Mart, 319 NLRB 9, 9 (1995); *Roma Baking Co*., 263 NLRB 24, 30 (1982).

[9] See, e.g., *Airtex*, 308 NLRB 1135, 1142 (1992) (manager repeated antiunion employee's statement that union supporters would be "weeded out"); cf. *Group One Broadcasting*, 222 NLRB 993, 993, 997 (1976) (supervisor emphatically agreed with antiunion employee's statement that union supporters should be fired).

[10] Although the fact is not necessary to our finding, this was not the first time that Smith had unlawfully pressured a union supporter to quit. See *Ozburn II*, supra, 357 NLRB 1632, 1649.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] Fourteen ballots were challenged. The parties agreed at the hearing not to count four of them. Of the remaining 10 challenges, there are no exceptions to the judge's overruling of 2 (team leads Brenda Stewart and Tammy Stewart), and we agree with the judge's findings as to the remaining 8 for the reasons stated in his decision.

[13] In dismissing the Respondent's objection that Keith Hughes, a union supporter, threatened to rip an antiunion shirt off of the employee wearing it, we do not rely on the judge's finding that even if Hughes had been shown to have committed the alleged misconduct, the Respondent "mitigated" its impact by punishing Hughes.

judge relied on Board precedent establishing that, where the Board orders a rerun election because of objectionable conduct, the critical period for the rerun election commences on the date of the first election. We find it unnecessary, however, to rely on the Respondent's prepetition misconduct in this case. We rather find that the Respondent's postpetition misconduct was more than sufficient—particularly considering the one-vote margin of the election result[14]—to justify rerunning the election in the event that the Union loses its tentative majority after all eligible ballots are counted. That postpetition misconduct included the unlawful discharge of Jones, one of the strongest union supporters; the unlawful confiscation of union material on June 22; Director of Operations Phil Smith's express endorsement of a comment at the June 28 captive audience meeting that union supporters should quit; Director of Operations Smith's unlawful threat against Keith Hughes, made in public at the conclusion of the July 14-captive audience meeting, that "I'm going to get you on subordination and get you out of here"; the Respondent's threats at other captive-audience meetings that if the employees unionized it would "bargain from scratch" and employees would lose benefits; and the Respondent's distribution of antiunion T-shirts to employees in the unit. These incidents impaired the laboratory conditions necessary for a fair Board election.

In sum, we will direct the Regional Director to open and count the challenged ballots of four unlawfully discharged discriminatees (Gloria Kurtycz, Jerry Smith, Renal Dotson, and Carolyn Jones) and of two team leads (Brenda Stewart and Tammy Stewart). We find the other challenged ballots ineligible for the reasons stated by the judge. If the revised tally of ballots shows that the Union received a majority of the votes, the Regional Director will be directed to certify the Union as the employees' representative. If the Union did not receive a majority of the votes, the Regional Director will be directed to conduct a rerun election.

AMENDED REMEDY

In remedying the Respondent's unfair labor practices, the judge ordered the Respondent to permit a Board agent to read the remedial notice aloud to unit employees, at the facility, during working time, and in the presence of Senior Vice President of Operations Randall Coleman and Director of Operations Phil Smith, both of whom figured prominently in the violations found herein. Given the multiple violations committed by the Respondent in *Ozburn I, Ozburn II*, and this case, we agree with the judge that a notice reading remedy is appropriate.[15] A reading of the notice will help to assure employees that they may freely exercise their Section 7 rights in the future. We will conform this requirement, however, to our established practice of affording a respondent the option to have its managers, here Coleman and Smith, read the notice aloud to employees in the presence of a Board agent.[16]

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC (OHL), Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline and other unspecified reprisals if they engage in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Creating the impression that employee union activities are under surveillance.

(e) Confiscating union materials and related documents from employee break areas.

(f) Telling employees who support the Union to resign.

(g) Terminating, issuing final warnings, or otherwise disciplining employees for engaging in union activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer Carolyn Jones full reinstatement to her former job or, if such job no longer exists, offer her a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Carolyn Jones whole for any loss of earnings and benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section

[14] E.g., *BCI Coca-Cola*, 339 NLRB 67, 69 (2003).

[15] See *Jason Lopez' Plant Earth Landscape*, 358 NLRB No. 46, slip op. at 1–2 (2012); *U.S. Service Industries*, 319 NLRB 231, 232 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997).

[16] E.g., *Marquez Brothers Enterprises*, 358 NLRB 509, 510–511 (2012).

In addition, in accordance with our recent decision in *Latino Express*, 359 NLRB 518 (2012), we shall order the Respondent to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. Last, the Respondent has not excepted to the judge's inclusion of a broad cease-and-desist order, which we find appropriate in any event.

of this decision.

(c) Reimburse Jones an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against her.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Jones, it will be allocated to the appropriate periods.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to Carolyn Jones' unlawful discharge, and Jennifer Smith's unlawful final warning, and within 3 days thereafter notify them in writing that this has been done and that their discipline will not be used against them in any way.

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

(g) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by OHL's authorized representative, shall be physically posted by OHL and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by OHL to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, OHL has gone out of business or closed the facility involved in these proceedings, OHL shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since April 11, 2011.

(h) Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the unit employees by Randall Coleman and Phil Smith in the presence of a Board agent, or, at the Respondent's option, by a Board agent in those officials' presence.

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

DIRECTION

IT IS DIRECTED that the Regional Director for Region 26 shall, within 14 days from the date of this Decision, Direction, and Order, open and count the ballots of Gloria Kurtycz, Jerry Smith, Renal Dotson, Carolyn Jones, Brenda Stewart, and Tammy Stewart. The Regional Director shall then serve on the parties a revised tally of ballots and, if the Union has been designated by a majority of the votes counted, issue a certification of representative. If the Union has not been so designated, IT IS HEREBY ORDERED that the election conducted on July 27, 2011 be, and hereby is, set aside. The Regional Director is directed to conduct a new election when, in his discretion, a fair and free election can be held.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with discipline and other unspecified reprisals because you support the United Steelworkers Union (the Union) or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT engage in surveillance of your union activities.

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

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

WE WILL NOT confiscate union materials and related documents from employee break areas.

WE WILL NOT tell employees who support the Union to quit.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you support the Union or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Carolyn Jones full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Jones whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Carolyn Jones and the unlawful written final warning to Jennifer Smith.

WE WILL, within 3 days thereafter, notify Carolyn Jones and Jennifer Smith in writing that this has been done and that the discharge and final warning will not be used against them in any way.

WE WILL hold a meeting or meetings at the facility, during working hours, at which this notice will be read aloud to you by Randall Coleman and Phil Smith (or the current senior vice president of operations and director of operations), in the presence of a Board agent, or by a Board agent in those officials' presence.

OZBURN-HESSEY LOGISTICS, LLC

William Hearne and *Linda Mohns, Esqs.,* for the Acting General Counsel.

Ben Bodzy and *Stephen Goodwin, Esqs. (Baker, Donelson, Bearman, Caldwell & Berkowitz, PC),* for the Respondent.

Glen Connor, Esq. (Quinn, Connor, Weaver, Davies & Rouco, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Memphis, Tennessee, over the course of 7 days during October and November 2011.[1] On June 10, the United Steelworkers Union (the Union) filed the original charge involved herein. The resulting consolidated complaint (the complaint) alleged that Ozburn-Hessey Logistics, LLC (the Company, OHL, or Respondent) repeatedly violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

In addition to the above-described charges, the Union and OHL filed several objections and challenges to a representation election, which was held on July 27. These objections and challenges were based upon the same evidentiary record as the complaint and were, as a result, heard simultaneously.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, OHL, a limited liability company, with an office located in Brentwood, Tennessee, and a major warehouse hub located in Memphis, Tennessee (the facility), has provided transportation, warehousing, and logistics services. Annually, in conducting its operations, it purchases and receives at the facility goods valued in excess of $50,000 directly from points located outside of Tennessee. Based upon the foregoing, OHL admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

OHL provides integrated supply chain management solutions; including transportation, warehousing, freight forwarding, and import and export consulting services. Its clients include various apparel, chemical, electronics, retail, automotive, food, and publishing concerns. It, consequently, operates numerous distribution and warehousing centers throughout the United States, including the facility at issue herein.

B. Prior Litigation and Organizing Efforts

This hearing involves the Union's ongoing efforts to organize OHL's employees. This litigation represents the third installment in a trilogy of cases involving the parties. The earlier trials concerned many of the same issues involved herein.

1. First hearing

The first hearing, which was held in early 2010, involved numerous allegations that OHL violated Section 8(a)(1) and (3). In this case, the administrative law judge, and subsequently the Board, found that OHL repeatedly violated the Act. (ALJ Exh. 1); *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011) (*Ozburn I.)*

2. First election

On March 16, 2010, the Board conducted an election at the facility, which the Union lost by a wide margin. (ALJ Exh. 2.) The Union subsequently filed objections to the election, and asserted that OHL's unlawful actions tainted the election. The-

[1] All dates herein are in 2011, unless otherwise stated.

se objections were sustained by the administrative law judge, who ordered a rerun election. (Id.)

3. Second hearing

The second hearing, which occurred in late 2010, involved voluminous allegations that OHL again violated Section 8(a)(1) and (3). (ALJ Exh. 2.) In this case, the administrative law judge, and subsequently the Board, found that OHL repetitively violated the Act. *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456 (2011) (*Ozburn II*).[2]

4. The 10(j) Injunction

In light of the seriousness and magnitude of the violations involved in the first two hearings, Region 26 of the Board filed a Petition for Temporary Injunctive Relief in the United States District Court for the Western District of Tennessee on August 10, 2010. (GC Exh. 4.) On April 5, a Petition for Temporary Injunctive Relief (the Injunction) was granted. (Id.)

C. April 11—Confiscating Union Materials

Sandra Hayes, a former employee, testified that, on April 11, she, Glenora Rayford and Helen Herron placed copies of the Injunction in a break area.[3] She related that she later observed Supervisor Eric Nelson remove the Injunctions from the break area. She recollected that she responded by telephoning Union Organizer Ben Brandon, who directed her to place additional copies of the Injunction in the break area, which she did. She indicated that, thereafter, she saw Director of Operations Phil Smith discard the additional Injunctions. She averred that their actions were unusual, inasmuch as supervisors typically do not remove waste from break areas. She added that break areas are daily cleaned by a janitor, who typically stacks and leaves behind written materials for several weeks at a time.

Rayford corroborated Hayes' testimony. She said that she observed Supervisor Nelson holding wadded Injunctions. She added that, when she asked Supervisor Randy Phillips why OHL removed the Injunctions from the break area, he queried, "that trash?" She noted that she never previously saw supervisors cleaning the break area, and estimated that reading material is normally left in the break area for multiple weeks at a time. Herron corroborated Rayford's and Hayes' accounts.

Supervisor Nelson, who has since resigned, testified that literature is generally left in the break area for several days. He denied intentionally disposing of the Injunctions.

Philip Smith testified that, even though OHL employs janitors, he's fastidious about break area tidiness, and maintains a steady practice of cleaning away debris, including "empty plates, food containers, general trash, papers, magazines, Avon books [and] anything that's laying there." (Tr. 1466.) However, he steadfastly denied discarding the Injunctions.

Inasmuch as Hayes, Rayford, and Herron indicated that they saw Smith and Nelson remove the Injunctions from the break area, and Smith and Nelson denied such activity, I must make a credibility determination. For several reasons, I credit Hayes, Rayford, and Herron. First, Rayford and Herron were straightforward and plausible witnesses; they were consistent and portrayed themselves as truthful witnesses, who wanted to aid the proceeding. Second, Nelson was vague. Lastly, Phil Smith was a generally unbelievable witness, who although straightforward on direct, seemed to change his demeanor on cross, and become vastly less cooperative. He seemed to be more interested in advancing OHL's interests than being forthright. His "Mr. Clean" defense was also somewhat preposterous; it's simply improbable that a high-level manager would spend a regular part of his workday cleaning food waste and other garbage left behind by his subordinates. It is even less plausible that he would have maintained this alleged penchant for tidiness, after this practice was previously found unlawful in an earlier litigation.[4] See *Ozburn I*, supra, 357 NLRB 1632, 1638–1639. I find it probable that he was disappointed by the Injunction, saw its distribution as beneficial to the Union, and took steps to derail its dissemination.

D. April 29—Meeting in the Hewlett Packard Department

Anita Wells testified that, on April 29, she attended a captive audience meeting in the Hewlett Packard department, which was attended by 50 employees. She recollected Keith Hughes, an open union supporter, asking Senior Vice President of Operations Randall Coleman whether the Union was obligated to represent employees, who did not pay dues. She indicated that Coleman refused to answer the question and became frustrated, when Hughes refused to drop the matter. She stated that Phil Smith then walked over to Hughes and stood closely behind him for 15 minutes, in what appeared to an effort to intimidate him into silence.

Hughes testified that, when Coleman told employees that the election would occur earlier if they stopped filing charges, he queried why they should drop legitimate charges. He stated that Coleman replied that it was "his floor," and told him to be quiet. He stated that Phil Smith then approached him and hovered over him for about 15 minutes. He added that, when the meeting ended, Phil Smith threatened, "he thinks he's something special; I got something for him."

Phil Smith testified that Hughes rudely interrupted the presentation, and even mumbled and made odd noises. He acknowledged approaching Hughes, in order to confirm that he was the actual heckler, and estimated that he stood behind him at a 10 foot distance for 10 minutes. He denied uttering, "I got something special for him."

Because Hughes testified that Smith hovered over and threatened him, in response to his queries about union issues, and Smith denied such activity, I must make a credibility determination. I credit Hughes over Phil Smith. First, as noted, Phil Smith's demeanor was less than credible. Second, it is likely that Phil Smith was concerned that Hughes was under-

[2] On July 1, the Board approved the Union's request to withdraw its petition in Case 26–RC–008596, i.e., the first election petition, which, thus, rendered any connected objections moot. The Board did not, as a result, address the merits of setting aside the first election. See *Ozburn II*, 357 NLRB 1456, 1456 fn. 1.

[3] "USW Organizing Committee" was written on each copy of the Injunction.

[4] Phil Smith, ironically, confiscated the very same Injunctions that ordered him to stop "confiscating pro-union literature from break areas." (See GC Exh. 4.)

mining the captive audience meeting, and silenced him. Third, Hughes was a refreshingly forthright and well-spoken witness, who seemed to be committed to providing truthful testimony. Lastly, Hughes' testimony was corroborated by Wells, who was also credible.

E. May 11—Human Resources Department Meeting

Sharon Shorter, an open union supporter, testified that, before the July 27 election, she was summoned to Human Resource Assistant Sara Wright's office. She stated that Wright asked her about changing a doctor's appointment. She explained that she had been diagnosed with high blood pressure, and recalled Wright asking whether someone was causing her stress. She related that she forthrightly answered that she was upset about being underpaid, and believed that such frustration was causing her blood pressure issues. She said that Wright failed to accept her explanation, and followed up by asking whether someone at work was pressuring her about the Union. She indicated that Wright continued this course, and identified Rayford, a union supporter, as the possible source of her stress:

> She said, . . . "do you all talk about the Union?" I said, ". . . we have talked about the Union, but, it's during break time; we don't talk about it during work time." And then I asked her, ". . . are you concerned about my blood pressure or are you concerned about . . . Rayford coming to talk to me about the Union?" And she said, "well, oh no Sharon, it's not like that. I am concerned about your blood pressure." Then I told her, "you know [now]," [and] got up and left. And she . . . [hasn't] called me back since [to ask] about my blood pressure. [Tr. 785.]

Wright denied talking to Shorter about Rayford. She averred that their conversation was limited to her concerns about Rayford's health, and Shorter's grievance about her wages.

Inasmuch as Shorter testified that Wright questioned her about Rayford's union activities, and Wright denied such action, I must make a credibility determination. I credit Shorter over Wright. Shorter provided detailed and honest testimony; she had a vivid recollection of their discussion. I find it implausible that she would have concocted a story, which involved Wright using her blood pressure problems as a mechanism to ask her about the Union, unless it actually happened. Her apparent irritation over this exchange lent credence to her testimony. Wright, on the other hand, appeared less credible, and only provided generalized testimony about their discussion.

F. May 25—Handbilling

Carolyn Jones testified that, on May 25, she and several coworkers passed out handbills and solicited coworkers to sign authorization cards in the Hewlett Packard parking lot in the late afternoon. (See GC Exh. 6.) She recollected that, within minutes of beginning, she observed John McNamee, director of risk management, park his vehicle, exit, and then stop and linger for 7 minutes, while staring at the ground and feigning that he had lost something.

Renal Dotson testified that he saw McNamee standing a few feet away from his leafleting activity, and alternate between peering at the ground and leafletters for 4 minutes, before departing. He said that, within minutes of his departure, Coleman: exited the Hewlett Packard building; walked to his parked car and sat in it for several minutes; slowly drove to another spot; remained in his car a few more minutes; exited his car; stared at the ground outside of his car for 5 more minutes; and then, finally, reentered the building. Jerry Smith essentially corroborated Jones' and Dotson's accounts.

McNamee testified that he is responsible for security at OHL's various sites, including the Memphis facility. He said that he visits Memphis 12 times per year and was there on May 25. He stated that he parked in the Hewlett Packard parking lot, walked around his car while making a call to his spouse, and remained for several minutes. He denied watching employees' union activities, and initially even denied noticing them. (Tr. 799.) He then agreed, on cross-examination, that he saw some employees, but, denied knowing that they were union organizers. (Tr. 806.) He then changed his testimony again, and agreed that they were likely organizers. (Tr. 807.)

Coleman testified that he has observed frequent handbilling at the facility. He denied, however, observing such handbilling on May 25.

I credit Jones, Dotson, and Smith over McNamee and Coleman. First, Dotson and Smith were extremely credible, helpful, and straightforward witnesses. Second, their accounts were corroborated by Jones, who provided clear testimony. Third, McNamee was implausible and inconsistent. He first said that he never noticed the leafletters, which was implausible, given that he is a security official who would likely notice such activities. He then inconsistently recanted his testimony and said that he did observe them, but, denied that they were union organizers. He then contradicted himself again and said that they were organizers. Lastly, Coleman's recall was poor.

G. May 26—Threat Against Carolyn Jones

Carolyn Jones testified that, on May 26, in a break area, she and her coworkers were discussing potential union dues. She asserted that their discussion succeeded a captive-audience meeting, where OHL exaggerated the cost of union dues. She related that she told her coworkers that President Barrack Obama supported their right to unionize, and that, if he endorsed this right, it was worthy of their consideration. She recalled that Phil Smith then appeared, stood behind her, and said:

> [I] just had two . . . employees . . . [say] they were called stupid. [Y]ou all are the ones that are stupid because you're trying to get a Union. [Tr. 77.]

She recalled asking him whether he was referring to her, and him answering, "[I]f the shoe fits, wear it." She recalled denying that she had called anyone stupid, but, said that it was "stupid" for employees to not want a union. She related that he answered that wanting a Union was "stupid." She indicated that she then tried to end their discussion by asking, "[D]on't you have a meeting to go to?" She noted that he became irate, and warned, "[y]ou better watch your back!"

Annie Ingram, Troy Hughlett, James Bailey, and Kedric Smith corroborated Carolyn Jones' account. They observed the fracas, including Phil Smith saying that employees were "stu-

pid," and telling Jones to "watch her back." (See also GC Exh 10; tr. 1056–1057.) (See GC Exhs. 22, 58.) (GC Exh. 17.)

Phil Smith testified that employees complained to him that Carolyn Jones had proclaimed that African American people, who did not support unionizing, were stupid. He stated that he solely visited the breakroom to tell employees that OHL did not think that they were stupid. He indicated that, at some point, Jones told him that he needed to go back to work, and that he told her that she was out of line. He denied telling her to watch her back.

Given that Carolyn Jones indicated that Phil Smith threatened that she needed to "watch her back," and Phil Smith denied this statement, I must make a credibility determination, in order to resolve this dispute. I credit Jones over Smith. First, I found her testimony on this point to be credible, and the witness statement, which was created almost contemporaneously with the incident, was consistent with her testimony. Second, her testimony was corroborated by Hughlett, Ingram, Kedric Smith, and Bailey. Third, as stated, Smith was a less than credible witness. Lastly, I note that, in a break area filled with people, it is conspicuously implausible that OHL was unable to find a single witness to corroborate Phil Smith's account.

H. June 3 Interview of Kedric Smith

Shannon Miles, senior employee relations manager, testified that, on June 3, she interviewed Kedric Smith. As part of the interview, she asked:

> Has C.J. tried to solicit you for the Union while you were working on the floor (on the clock)? [GC Exh. 5 at 6.]

I. June 9 Written Warning to Jennifer Smith

1. Final warning notice

On June 9, the Company issued Jennifer Smith a final warning, which provided:

> On 6/8/2011, Stacey Williams and Jennifer Smith got into a verbal altercation wherein Jennifer called Stacey a "house n****r," . . . . This is in violation of OHL's anti-harassment and non-discrimination policy. [R. Exh. 2.]

2. Knowledge of Smith's union activities

Jennifer Smith distributed union handbills and literature, and solicited coworkers to support the Union. She testified for the Union at the prior unfair labor practice hearings. She estimated that she collected 50 signed union authorization cards. She recollected wearing union hats and shirts to work. OHL admits knowing about these activities. (GC Exh. 36; Tr. 475.)

3. Events leading to the final warning

Jennifer Smith testified that, on June 8, coworker Stacey Williams became childishly upset over several missing red pens. She indicated that, before the ruckus, she retrieved a box of red pens from the supply area. She reported that, subsequently, Williams became irate that the red pen supply had become depleted. She said that she declined to acknowledge his demand for the pen pilferer to come forward, in order to avoid a possible clash with an unstable coworker. She stated that, at some point, Williams, who is also African American, stated, "I guess I have to call the white people for you to give me those pens back." (Tr. 480.) She stated that Williams, who is vehemently antiunion, later accused her of calling him a "house nigger," in response to his tirade, which she denied. (See GC Exh. 37.)

Sheila Childress, who witnessed the altercation, testified that she did not hear Smith call Williams a "house nigger." (See GC Exh. 40.) She estimated that she stood about 30 feet from the fracas. Jerry Smith, who witnessed the incident, denied hearing Jennifer Smith use profanity. He averred that he would have heard such a comment, if it were said.

Williams testified that he was looking for a red pen and asked his coworkers for their aid. He said that, when he was met with silence, he enlisted Brad, his supervisor, to help him. He said that, when Brad arrived, Jennifer Smith relinquished several pens. He recalled her stating, "you're always starting stuff," and "[you're] nothing but a house nigger," after Brad left.

Shirley Milan claimed that she witnessed Smith call Williams a "house nigger." She averred that she stood 4 feet away, when the comment was made. (See also R. Exh. 11.) She acknowledged, on cross-examination, that she previously accused Smith of threatening her with a knife, but, that OHL found that this accusation was unfounded. (Tr. 938.) She admitted that she does not get along with Smith, whom she finds controlling.

Because Jennifer Smith, Childress, and Jerry Smith denied that Jennifer Smith called Williams a "house nigger," and Williams and Milan provided opposite testimony, I must make a credibility determination. I credit Jennifer Smith's denial. First, I found her to be an honest witness, who was cooperative during all phases of her examination. Second, her testimony was consistent with Childress' and Jerry Smith's credible accounts. Third, Williams was a confusing, hostile, and argumentative witness, whose testimony was disjointed. Finally, I found Milan, who corroborated Williams' account to be a biased witness, who previously made an unsubstantiated claim that Smith threatened her with a knife, and who also conceded that she dislikes Smith.

J. June 14—Petition for Second Election

On June 14, in Case 26–RC–008635, the Union filed a petition with the Board, which sought a new election at the facility. (U. Exh. 14.) The petition covered 300 employees. (Id.)

K. June 14—Carolyn Jones' Termination

1. Termination letter

On June 14, the *same date* that the Union's election petition was filed, Jones, a lead union organizer, was fired. Her termination letter provided:

> Effective immediately, your employment with OHL is terminated based on your violations of the OHL policies listed below. Each of these violations independently justify your termination.
>
> Violation of the company's conduct guidelines regarding failure to cooperate with an internal investigation, including: failure to be forthright, open or truthful; withholding information

> or evidence concerning matters under review or investigation; fabricating information or evidence or conspiring to do so.
>
> Violation of the company's Anti-Harassment policy through verbal conduct that denigrates or shows hostility or aversion toward an individual due to race. [GC Exh. 14.]

Senior Employee Relations Manager Miles testified that she made the decision to fire Jones. She stated that, although she initially investigated whether Phil Smith had threatened her, she concluded that he was innocent, and determined that Jones had asked employees to sign a blank sheet of paper and then fraudulently filled in a statement about the threat above their signatures. She added that, during the course of this investigation, she discovered that Jones had repeatedly called Lee Smith a "UT," an acronym for "Uncle Tom." She stated that these actions violated OHL's policies. She claimed that she decided to fire Jones on June 13, the day *before* the Union's petition was filed.

I discredit Miles' testimony; her demeanor was cagey and untruthful. She was an uncooperative witness, who often sparred during cross-examination. Her testimony was marked by extensive pauses, when faced with difficult questions, and she often failed to answer key questions. I do not, as a result, credit her contention that she was unaware that the Union had filed its petition, when she decided to fire Jones. Moreover, as will be discussed under my *Wright Line* analysis, OHL's discharge rationale was pretextual.

2. OHL's knowledge of Jones' union activities

OHL conceded that it knew that Carolyn Jones was an active union organizer. (Tr. 58; GC Exhs. 7–9.) She handbilled, solicited coworkers, and gathered 80 authorization cards.

3. Discharge reason #1—Fabricating evidence

OHL accused Jones of falsifying a statement, which described Phil Smith's May 26 threat. It alleged that she fabricated evidence by: (1) asking coworkers to sign a blank statement; (2) then fraudulently placing a statement before their names; and (3) finally, submitting the statement to OHL, in order to instigate Phil Smith's discipline.

Carolyn Jones credibly testified that, after Phil Smith told her to "watch her back," she prepared a witness statement and asked her coworkers to sign it. She indicated that the statement was signed by Troy Hughlett, Annie Ingram, Kedric Smith, and James Bailey, and, thereafter, was submitted to OHL. (See GC Exhs. 10, 12–13, 57.)

Ingram testified that she signed Jones' statement, which accurately described the incident. She stated, however, that she was later interviewed by Regional Human Resources Director Young about the incident, who gave her a blank piece of paper to sign. She stated that Young subsequently inserted text in front of her signature to create a fraudulent statement against Jones, which claimed that Jones gave her a blank statement to sign. (See GC Exh 23.) I credit her testimony on these points.

Hughlett testified that, although he did not carefully review Jones' statement, it had text, beyond signatures. He said that he trusted her account and did not need to carefully read it. He acknowledged, however, that he subsequently signed another statement, which indicated that he signed a blank statement for Jones. He disavowed the truth of this second statement and explained that he felt pressured into signing it after a lengthy examination by OHL, and solely executed it in order to end his interrogation. (See GC Exh. 18.) I credit his testimony on these matters.

Bailey stated that Jones subsequently approached him and asked him to sign a statement, which he did. (See also GC Exhs. 19–20.) He indicated, however, that, on June 6, Young summoned him to her office, and handed him a prepared statement for his signature, which he signed without close inspection. (See GC Exh 21.) The June 6 statement provided:

> James states that at the time he signed the paper was blank. He [has] never seen or read Carolyn's statement.

(Id.) He indicated that he signed the June 6 statement under duress, which was prompted by OHL's ongoing interrogations. I credit his testimony on these points.

Kedric Smith stated that, after the incident, Jones gave him a piece of paper that just had names on it, and asked him to sign it. When asked, however, "was there anything written above the signatures?" he responded;

> I couldn't tell you that because I—the only thing I focused on was the names. I didn't know that there was an actual statement behind it for the simple fact that I had just seen the names and just thought that it was a list of witnesses. So I didn't know that it was a statement on it.

(Tr. 1054.) I found his recall on these issues to be poor, and afforded his testimony little weight.

In crediting Ingram's, Hughlett's, and Bailey's testimonies, I rely upon several factors. First, their demeanors were truthful. Second, it is improbable that they would collectively invent a tale that OHL fabricated evidence against Carolyn Jones, and then risk its wrath by testifying against it, unless their accounts were truthful. At the time of the hearing, they had neither been disciplined, nor had they been identified as strong union advocates. They, as a result, had everything to lose by providing this testimony against OHL, and very little to gain. Their willingness to accept this significant risk, without any obvious evidence of benefit, enhances their credibility. Third, it is plausible that, after lengthy interrogations by the human resources department about a controversial matter involving the Union, employees could easily be coerced into signing a statement of their employer's choosing. Lastly, their accounts are consistent with the actions of an entity that has already expended tremendous resources to combat the Union's organizing drive.

4. Discharge reason #2—UT comments

a. UT Comments to Lee Smith

OHL accused Jones, who is African American, of calling Lee Smith, an African American coworker, a "UT," i.e., an "Uncle Tom."[5] OHL's Anti-Harassment Policy prohibits, inter alia, harassment based upon race, color and other protected

[5] It is undisputed that the phrase "Uncle Tom" is a racial *epithet* for a person, who is excessively subservient to perceived authority figures, and often is used to negatively describe African American persons, who are believed to be behaving subserviently to Caucasian people.

characteristics. (R. Exh. 6.) Under the policy, harassment includes:

- Epithets, slurs or negative stereotyping;
- Threatening intimidating or hostiles acts;
- Denigrating jokes . . . .

(Id.) The OHL handbook sets forth a progressive disciplinary procedure, which includes the following successive punishments: verbal warning; written reprimand; suspension; and termination. (GC Exh. 35.) The handbook further provides that termination is warranted when:

> In cases in which . . . [progressive discipline] has failed to correct unacceptable behavior or performance, or in which the performance issue is so severe as to make continued employment with OHL undesirable . . . .

(Id.)

Jones denied calling Lee Smith a "UT." (See also GC Exhs. 11, 13.) She did acknowledge, however, that the term is periodically used at the facility amongst African American employees, and that she has said it before. Dotson testified that he never witnessed Jones call Lee Smith a "UT." (See GC Exhs. 24, 59.)

Lee Smith testified that Carolyn Jones called him a "UT" several times during the spring of 2011, before he asked her on May 17 what she meant. He said that, when she answered that it meant "Uncle Tom," he was deeply hurt. He stated that he then reported her actions to human resources. He added that she began calling him a "UT," after he voiced his union opposition.

Jennifer Sims, another employee, recalled Lee Smith describing to her what occurred, when he asked Carolyn Jones what "UT" meant. She recollected this dialogue:

> He said that as he [left] . . ., Carolyn was already outside and she called him UT again. And this time he turned and asked her . . . what it meant. And she called him an Uncle Tom. And he got upset. He was like what? And so he got ready to walk away, and he turned back to her, and mentioned he wasn't an Uncle Tom, his faith isn't in a company, his faith is in God. . . . And he stormed away and told her . . . we have nothing else to discuss . . . . And he got in his truck and left. [Tr. 832.]

Because Lee Smith testified that Carolyn Jones called him a "UT," and Jones denied this statement, I must make a credibility determination. I credit Lee Smith; he was forthright and his offense appeared genuine and lasting. It is implausible that he would have concocted a story about this incident. Jones' admitted willingness to use this racial epithet against others suggests that she likely used this epithet against Lee Smith, given his open opposition to the Union.

b. Other sexually and racially-oriented comments

(I) COMPARABLE CONDUCT RECEIVING DISCIPLINE

OHL's records show that it meted out the following discipline for comparable offenses:

Employee	*Date*	*Incident*	*Discipline*
A. Burgess	1/25/2006	Usage of profanity against a supervisor	Verbal Discussion
B. Newberry	1/21/2010	Drew picture of coworker calling her "snitch #1"	Final Warning
S. Northington	4/12/2010	Called a coworker a "silly bitch"	Written Warning
K. Hughes	7/2/2010	Inappropriate language to a coworker.	Final Warning
H. Quarles	7/2/2010	Inappropriate language to a coworker.	Final Warning
R. Williams	9/1/2010	Sexual harassment of a subordinate	Written Perf. Counseling
A. Burgess	9/27/2010	Profanity at coworker, while pointing pen at him.	Discharge
K. Hughes	11/8/2010	Usage of profanity to coworkers	Three-day suspension
J. Smith	6/9/2011	Calling a coworker a "house nigger"	Final Warning
K. Hughes	8/26/2011	Told coworker that he would "rip her shirt off."	Final Warning

(GC Exhs. 25, 27, 30, 77–79; R. Exh. 2, 21.)

(II) COMPARABLE CONDUCT NOT RECEIVING DISCIPLINE[6]

Jill McNeal, an African American employee, testified that, Phil Smith, a Caucasian employee, referred to her as a "monkey on a stick," in front of Supervisor Steele. She related that this comment prompted significant laughter. She indicated that she did not report this racial slur to upper management because she thought that it would be ignored. Rayford stated that she, and most of her department, witnessed the incident. Phil Smith and Steele denied the incident.

Carolyn Jones testified that, in 2009, at a group meeting, Phil Smith called James Griffin a "faggot ass." Undenise Martin, another employee, corroborated this testimony. Phil Smith denied calling Griffin this name.

I discredit Smith's denials, and find that he used the epithets, "monkey on a stick" and "faggot ass." I found the testimonies of McNeal, Rayford, Jones, and Martin to be reliable.

L. June 22—Confiscation of Union Materials

Rayford testified that, on June 22, she placed union organizing literature in the break area. She indicated that she later observed Operations Supervisor Alfreda Owens confiscating this literature.[7] She stated that Owens solely confiscated the Union materials and left the remaining literature (e.g. Avon catalogs and newspapers) untouched. Herron corroborated her testimony. I credit Rayford's and Herron's testimony; I found each to be credible.

[6] Carolyn Jones said that 95 percent of the work force is African American and the usage of racial slurs, e.g., nigger, is commonplace.

[7] OHL's counsel credibly explained that Owens was subsequently fired, and that he was unable to subpoena her to attend hearing. (Tr. 1349.) He contended, as a result, that he was unable to rebut this testimony.

M. June 28—Captive-Audience Meeting

Jennifer Smith testified that, on June 28, OHL conducted another captive-audience meeting, where Karen White, Coleman, Phil Smith, and Young addressed 40 employees. She stated that White advocated against unionizing. She related that Coleman told employees that the Union was solely interested in their dues and would prompt a strike. She recalled that Tondra Mitchell commented that, if the union supporters were so unhappy, they should seek other employment. She stated that Phil Smith replied, "[E]xactly, that's what I'm talking about," and that Young fell over laughing. Childress and Jerry Smith corroborated her account.

Phil Smith stated that, when Mitchell asked whether union supporters should resign, he replied that "I can't answer that question." He denied encouraging anyone to resign.

Mitchell testified that, when she asked Phil Smith that, if employees were so unhappy, why don't they just leave, he solely responded that he could not answer the question. She did not recall Young laughing. Coleman testified that he recalled Mitchell's question, but, recollected Phil Smith responding that she should ask the employees. He added that he did not recall Phil Smith saying, "[m]y point exactly." He indicated that he thought that he would have remembered such a comment, if it was said. White recalled Mitchell's query, but, stated that Phil Smith told her to ask employees that question. She denied that he responded, "[m]y point exactly." Young testified that she generally recalled Mitchell's statement, but, did not remember any manager's response, and denied falling down laughing.

I credit Jennifer Smith, Childress, and Jerry Smith, who were highly credible, over OHL's witnesses. As stated, I found Phil Smith and Coleman to be less than credible.

N. July 14—Captive-Audience Meeting

Hughes testified that, on July 14, he attended a captive-audience meeting in the Hewlett Packard break area, which was conducted by White and Phil Smith. He recalled that this meeting focused on the salaries of the Union's staff. He added that, when he asked White what her salary was, she became irate and called him a "rabble rouser," and Phil Smith told him to "shut up." He recollected that, when he asked Phil Smith what he was going to do, Smith answered, "I'm going to get you on subordination and get you out of here." He averred that he then told Smith that it was an open meeting and threats were inappropriate.

Phil Smith testified that, during White's presentation, Hughes posed an unending string of questions and intentionally interrupted her. He stated that, when he politely asked him to stop, Hughes asked him whether he was going to take him outside. He indicated that he then replied that he would address the matter through OHL's disciplinary system. I credit Hughes, a highly credible witness, over Phil Smith, a witness with diminished credibility.

III. ANALYSIS

A. Independent 8(a)(1) Allegations

1. Interrogation[8]

OHL unlawfully interrogated employees. On May 11, Wright summoned Shorter to her office and asked whether Rayford was talking to her about the Union during working time. On June 3, Senior Employee Relations Manager Miles asked Kedric Smith, an employee, whether union advocate Carolyn Jones solicited him to support the Union during working time.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.

For several reasons, I find that Wright and Miles committed unlawful interrogations. First, there is an extensive history of union hostility, as demonstrated by the instant case, *Ozburn I,* and *Ozburn II*. Second, both Wright and Miles appeared to be asking questions, in order to assess whether OHL could discipline union advocates Rayford and Carolyn Jones for matters connected to their union activities. Third, both Miles and Wright are significantly higher in the corporate hierarchy than the interrogated employees. Lastly, the questioning took place in the human resource department's offices, as opposed to the warehouse floor, which likely amplified the intimidation level.

2. Surveillance[9]

OHL engaged in unlawful surveillance. On May 25, Coleman and McNamee observed Carolyn Jones, Dotson, and Jerry Smith distribute union organizing materials to employees.

An employer violates Section 8(a)(1), when it "surveils employees engaged in Section 7 activity by observing them in a

[8] These allegations are listed under pars. 9(a), 11, and 14 of the complaint.

[9] This allegation is listed under pars. 10 and 14 of the complaint.

way that is 'out of the ordinary' and thereby coercive." *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id.

Both Coleman and McNamee observed union organizers distribute leaflets to employees on May 25. Their observation lasted several minutes, took place from a close vantage point, was out of the ordinary,[10] and likely dissuaded several employees from interacting with the Union's organizers, out of fear of reprisal. Such activity violated the Act.

3. Impression of surveillance[11]

OHL unlawfully created the impression that employees' union activities were under surveillance. On May 11, Wright told Shorter that she knew that Rayford was soliciting her on behalf of the Union.

An employer creates an unlawful impression of surveillance, when reasonable employees would assume that their union activities have been monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). Where an employer tells employees that it knows about their union activities but fails to cite its information source, Section 8(a)(1) is violated because employees are left to speculate about how such information was obtained and assume that surveillance occurred. (Id. at 1296.) If an employer tells employees that it learned of their union activities from a specific employee, such comments are generally lawful, and do not lead one to assume that surveillance has occurred. *Park 'N Fly Inc.*, 349 NLRB 132, 133 (2007).

Wright commented that OHL knew that Shorter and Rayford were discussing union affairs at the facility, but, failed to identify her informant. This statement, as a result, left Shorter to speculate about OHL's information source and reasonably conclude that it was monitoring their discussions; and, accordingly, created an unlawful impression of surveillance.

4. Confiscation of union materials[12]

OHL violated the Act, when it confiscated union materials. Phil Smith, Nelson, and Owens confiscated union materials from break areas. Employees generally have the Section 7 right to possess union materials at work, absent evidence that their employer restricts possession of other personal items, or that possession of union materials interferes with production or discipline. *Brooklyn Hospital-Caledonian Hospital*, 302 NLRB 785, 785 fn. 3 (1991). An employer, thus, violates the Act by confiscating union literature and materials from employees. *Ozburn I*, supra; *Brooklyn Hospital-Caledonian Hospital*, supra. Given that there is no evidence that OHL restricted the possession of other personal items, or that the union materials at issue interfered with production or discipline, OHL's repeated confiscation was unlawful.

5. Telling union supporters to resign[13]

OHL violated the Act, when it told union supporters to resign. At a June 28 meeting, an employee posed the question that, if union supporters were so unhappy, why didn't they just quit? When Phil Smith replied, "[m]y point exactly," he invited union supporters to quit, which was unlawful. See, e.g., *Solvay Ironworks*, 341 NLRB 208 (2004).

6. Threats[14]

OHL violated the Act, when Phil Smith threatened employees. On April 29, he threatened Hughes, when he hovered over him for 15 minutes, in response to his questions about union issues, and warned that "I got something for him." See *F. W. Woolworth Co.,* 251 NLRB 1111, 1112–1113 (1980) (conduct is protected, ever where employee repeatedly and loudly insists upon speaking at a captive-audience meeting, in contravention of a direct order to cease and desist). On May 26, he threatened Carolyn Jones, when he responded to her commentary about a captive-audience meeting by stating that "she better watch her back." See *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462–463 (1995); *Trover Clinic*, 280 NLRB 6 fn. 1 (1986) ("keep a low profile" and "be quiet about it"); *Union National Bank*, 276 NLRB 84, 88 (1985) ("watch yourself"). On July 14, at a captive-audience meeting, Hughes responded to a presentation about union staff salaries, by asking White her salary, which prompted Phil Smith to threaten disciplinary action. See *F. W. Woolworth*, supra.

B. The 8(a)(3) Allegations[15]

OHL violated Section 8(a)(3), by issuing a final warning to Jennifer Smith and firing Carolyn Jones. The framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the [discharge]. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065 (2007) (citations omitted).

To meet this burden, "an employer cannot simply present a

[10] It was more than coincidental that McNamee appeared just as the leafleting began, and Coleman appeared immediately after McNamee left.

[11] This allegation is listed under pars. 9(b) and 14 of the complaint.

[12] These allegations are listed under pars. 7(a), 8, 12, and 14 of the complaint.

[13] This allegation is listed under pars. 7(d) and 14 of the complaint.

[14] These allegations are listed under pars. 7(b), (c), and (e), and 14 of the complaint.

[15] These allegations are listed under pars. 13 and 15 of the complaint.

legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000). If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

1. Jennifer Smith's final warning

OHL violated the Act, when it issued Jennifer Smith a final warning. The record demonstrates that she engaged in substantial union activity,[16] which was known to OHL.[17] The record reveals strong evidence of animus, which includes the meritorious interrogation, surveillance, impression of surveillance, threat, and confiscation of union literature allegations. An inference of animus can also be gleaned from the false rationale that OHL proffered for Smith's final warning, i.e., that she called Stacey Williams a "house nigger."[18] See *Electronic Data Systems Corp.*, 305 NLRB 219 (1991) (false discharge reasons demonstrate animus).

I find, therefore, that counsel for the Acting General Counsel has proven that: Jennifer Smith engaged in union activity; OHL was aware of such activity; and union animus was a "substantial or motivating factor" behind the final warning. Accordingly, he has met his initial burden of persuasion under *Wright Line*.

Given that I previously found that Jennifer Smith did not commit workplace crime that gave rise to her final written warning (i.e., calling Stacey Williams the alleged epithet), as well as my consideration of the many factors that led me to find animus and knowledge, I conclude that OHL's proffered reason was a mere pretext and that antiunion animus motivated its actions. Accordingly, no further analysis of its defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

2. Carolyn Jones' discharge

OHL violated the Act, when it fired Carolyn Jones. The record demonstrates that she engaged in substantial union activity,[19] which was known to OHL.[20] There is also extensive evidence of animus, which includes the 8(a)(1) violations found herein, and Jennifer Smith's unlawful discipline. I also note that animus can be gleaned from the close timing between Jones' discharge and the filing of the Union's election petition, which both occurred on the same date. See *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6 F.3d 1110 (5th Cir. 1993) (suspicious timing supports an inference of animus).

Thus, I find that counsel for the Acting General Counsel has proven that: Carolyn Jones engaged in union activity; OHL knew of such activity; and union animus was a "substantial or motivating factor" behind her firing. Accordingly, he has met his initial burden of persuasion under *Wright Line*, and I will now consider the alleged discharge reasons.

OHL's asserted discharge reasons are pretextual. It advanced two independent reasons, in support of Jones' discharge: fabrication of evidence; and violation of its racial harassment policy.

OHL's allegation that Carolyn Jones fabricated evidence connected to the altercation between her and Phil Smith on May 26 was pretextual. As discussed, it accused Carolyn Jones of fabricating a witness statement, which alleged that Phil Smith threatened her to "watch her back." First, the majority of the witnesses stated that they signed a witness statement that had text above their signatures, although they admittedly had a poor recall of the statement's contents; this deeply undercuts the fabrication allegation. These witnesses also credibly stated that OHL was so zealous in its pursuit of Carolyn Jones that it actually coerced them into signing false statements. Second, Phil Smith threatened Carolyn Jones in the manner described by her statement. Third, the statement does not appear to have been created after the fact, given that the signatures are located immediately after the text and about a third of the way down the page. I find it implausible that Jones created an after-the-fact statement, and correctly predicted where witness signatures would ultimately fit. Lastly, if OHL were genuinely motivated to address concerns about false statements, it would have also disciplined Phil Smith, who falsely denied threatening Carolyn Jones, and committed a more serious transgression.[21] Based upon the foregoing, I find that this discharge reason was pretextual.

OHL's assertion that Carolyn Jones' "UT" comments served as an independent basis for her termination is also pretextual. Although I find that Jones made the comments at issue, OHL

[16] As noted, she distributed union handbills and literature, openly encouraged coworkers to support the Union, previously testified on behalf of the Union, collected 50 signed union authorization cards, and wore union stickers, buttons, hats, and shirts.

[17] See GC Exh. 36; Tr. 475.

[18] As stated, I fully credit her denial of this allegation.

[19] Since the inception of the Union's organizing drive, Jones has distributed handbills and union organizing materials, solicited coworkers to sign authorizations cards, attended union meetings, spoke on behalf of the Union at OHL's captive-audience meetings, and obtained roughly 80 signed union authorization cards.

[20] See GC Exhs. 7–9; Tr. 58.

[21] As noted, several independent employee witnesses agreed that he threatened Jones.

addressed this offense much more severely than prior similar offenses; such disparate treatment demonstrates pretext. Specifically, in the 10 prior disciplinary actions involving profanity and racial epithets, OHL issued 8 warnings, a suspension, and a discharge; with the suspension arising from recidivism, and the discharge arising from both recidivism and a connected assault. In this case, Jones was neither a recidivist nor did she commit an assault. If OHL genuinely wanted to discipline her consistently, her misconduct would have generated the same warning that it uniformly issued to others.[22] See *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002) (disparate disciplinary treatment demonstrates pretext). Second, Carolyn Jones' firing is deeply inconsistent with OHL's willingness to completely overlook the several grossly offensive statements made by Phil Smith, a high-level supervisor, to subordinate employees.[23] Lastly, OHL's decision to terminate Carolyn Jones for this offense deviated from its progressive disciplinary system, which sets forth a lesser penalty for her violation, and allegedly espouses the merits of rehabilitation. (GC Exh. 35.)

I find, as a result, that its proffered reasons for Jones' discharge were mere pretexts and that antiunion animus motivated its actions. Accordingly, no further analysis of OHL's defenses is necessary. *Rood Trucking Co.*, supra at 898.

IV. REPRESENTATION CASE

A. Petition and Stipulated Election Agreement

On June 14, in Case 26–RC–008635, the Union filed an RC Petition seeking to represent OHL's employees. (U. Exh. 14.) On June 23, the parties entered into a Stipulated Election Agreement, whereby they agreed to allow the Board to conduct an election in the following unit:

> INCLUDED: All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operates 3, quality assurance coordinators, returns debts, and team leads employed by the Employer at [the facility].
>
> EXCLUDED: All other employe[e]s,[24] including, office clerical and professional employees, guards, and supervisors as defined in the Act.

(U Exh. 13.) As an addendum to the agreement, the parties agreed that:

> [T]he job classification of Administrative Assistant is in dispute and [will not be] place[d] in the inclusions or the exclusions of the Stipulated Election Agreement . . . . [T]he two administrative assistants Tia Harris and Rachel Maxie will vote subject to challenge by the Union . . . . If the challenged ballots . . . are determinative to the outcome of the election, the parties have agreed to resolve the matter in a post-election hearing. [U. Exh. 13A.]

B. Second Election

On July 27, the Board held an election, which the Union won by a single vote. The tally provided:

Category	Quantity
Approximate number of eligible voters	347
Number of votes cast for the Union	165
Number of votes cast against the Union	164
Number of challenged ballots	14

(U. Exh. 23.)

C. Union Objections[25]

On August 3, the Union filed 20 objections to OHL's conduct during the critical period preceding the second election, i.e., the period between the first election on March 16, 2010, and the second election on July 27.[26] (GC Exh 1(q).) Many of these objections duplicated the complaint allegations, which I have already found unlawful. The parties presented argument concerning these objections in their posthearing briefs.

1. Objection 1

Objection 1 alleged that OHL engaged in unlawful surveillance of union activities, in the manner described by the complaint. Given that I have found these allegations unlawful, this objection is valid.

2. Objection 2

Objection 2 alleged that OHL unlawfully interrogated employees. The Union contended that this objection was based upon the complaint's interrogation allegations, which I have found unlawful. Accordingly, I find merit to this objection.

3. Objection 3

Objection 3 alleged that OHL issued Jennifer Smith a written warning, in retaliation for her union activities. Given that I have found the warning to be unlawful, this objection is valid.

4. Objection 4

Objection 4 alleged that OHL conducted captive audience meetings within 24 hours of the election. This objection fo-

[22] In an effort to respond to the disparate treatment allegation, OHL offered several examples of workplace misconduct, which prompted immediate firings. These example were, however, vastly more severe than Carolyn Jones' transgression, and, thus, not comparable. (See R. Exhs. 32–33 workplace violence, theft of time, and sexually explicit misconduct).

[23] Without disciplinary consequences, and in front of several witnesses, Phil Smith brazenly called an African American worker a "monkey on a stick," and another employee a "faggot ass."

[24] Contrary to OHL's position in its brief (see R. Br. at 43 fn. 19), I find that, although the stipulated election agreement, states under the unit exclusion paragraph, "[a]ll other employers," this is a typographical error and the parties clearly excluded, "all other employees." (U. Exh. 13.) First, excluding other "employers" from a unit of OHL employees is absurd. Second, the subsequent usage of the phrase, "office clerical and professional employees, guards and supervisors" as examples of excluded personnel indisputably clarifies that the parties' meant to say "employees," as opposed to "employers." Lastly, if OHL truly believed that the exclusion was supposed to say something other than "employees," it would have explained why it meant to say "employers."

[25] At the hearing, the Union withdrew Objection 7. (Tr. 1603.)

[26] *Star Kist Caribe, Inc.,* 325 NLRB 304 (1998) (second critical period runs from first election to second).

cused on an alleged meeting between Senior Human Resources Coordinator Melissa Castillo and three employees within 24 hours of the election.

Glorina Kurtycz testified that, within hours of the election, she saw Castillo meeting with three employees in the break area. She stated that Castillo asked her for a sample ballot, which she declined to provide. Castillo testified that she attended the election, in order to offer translation for Spanish-speaking employees, but, did not recall speaking to the three employees at issue.

In general, the Board has held that employers and unions are prohibited from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427 (1953). The Board has held, however, that this 24-hour rule "was not intended to . . . prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). The Board has, as a result, explained that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period, if employee attendance is voluntary and on their own time. *Foxwoods Resort Casino*, 352 NLRB 771, 771, 780–781 (2008).

Even assuming arguendo that Kurtycz is fully credited, the Union failed to offer sufficient evidence regarding the substance of Castillo's discussion, or address whether employees voluntarily initiated the conversation on their own time. The Union has not, consequently, demonstrated that this meeting violated *Peerless Plywood*, and this objection is overruled.

5. Objection 5

Objection 5 alleged that OHL stated that, it would "bargain from scratch." Jerry Smith credibly testified that, at a June 28 meeting, Coleman made this statement:

> There's no guarantee that [I] can . . . get Mr. Brennan to sign a guarantee for benefits . . . . [W]hen you get to the bargaining table you have to start from scratch. And even though you bargain from scratch, you could already lose what you already have.

(Tr. 618.) Coleman denied these statements, and White failed to recall the specific meeting.

As a threshold matter, I credit Jerry Smith, who was a believable and straightforward witness, with a strong recall, over Coleman, who was less than credible. I also found Coleman's recollection of the relevant events to be poor. White's testimony about this issue was too general to be afforded much, if any, weight.

The Board and courts have held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context, or designed to threaten employees that existing benefits will be lost if they unionize are unlawful, inasmuch as they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.,* 336 NLRB 1119, 1119–1120 (2001). The Board has, as a result, found that statements analogous to those at issue herein were lawful in certain contexts, while unlawful in others. See, e.g., *Jefferson Smurfit Corp.,* 325 NLRB 280 fn. 3 (1998) (telling employees that benefits "could go either way" as a result of collective bargaining was lawful); *Earthgrains Co.,* supra (statement that everything was negotiable once the union was voted in was unlawful in the context of prior threats to withhold planned wage increases); *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000) (statements that negotiations would start from "scratch" were unlawful in the context of other unfair labor practices).

Given the many valid unfair labor practices and objections present herein, Coleman's comments unlawfully conveyed that employees would only achieve in bargaining "what the Union could induce the employer to restore." This objection, as a result, is sustained.

6. Objection 6

Objection 6 alleged that OHL confiscated union literature from break areas. Given that I have already found this allegation to be valid, this objection is sustained.

7. Objection 8

Objection 8 alleged that OHL aided employee union opposition by distributing antiunion T-shirts. The Union contended that such actions placed "employees in a position of having to make an observable choice that would reveal [their Union sentiments]." (U. Br. at 17.)

Jerry Smith credibly testified that, a week before the election, he observed a man loading boxes of lime green T-shirts bearing the slogan, "no means no," into Human Resources Manager Young's vehicle. Rayford credibly testified that, before the election, she observed Operations Supervisor Phillips distribute a bright blue, "I can speak for myself and no means no," T-shirt to Eric Collins, a coworker, by the lockers. She stated that she also saw a box of lime green, "no means no," shirts in Supervisor Owens' office, and saw her giving shirts to two coworkers. Such testimony was corroborated by considerable evidence of employees wearing these shirts in the facility. Given that I previously found Jerry Smith and Rayford to be highly credible, I credit their testimony on these issues. I also note that Owens was unavailable to testify to refute their accounts.

The Board has held that offering employees "vote no" buttons, T-shirts, or other paraphernalia is tantamount to an unlawful interrogation, inasmuch as it forces them to make an open declaration either for or against the Union. See *Houston Coca Cola Bottling Co.*, 256 NLRB 520 (1981). This objection is, accordingly, sustained.

8. Objections 9 and 11

Objection 9 alleged that OHL, "threatened . . . employees because of their Union activities." Objection 11 averred that OHL, "[t]hreatened employees with plant closure, reduction of work or relocation if the Union won." The Union asserted that these objections were based upon OHL's threats that it would lose customers, if employees unionized.

McNeal testified that she was told, at a captive-audience

meeting, that the Fiskars account would "pull out," if employees unionized. Although she related that such meetings were attended by Phil Smith, Coleman, and White, she did not identify who made the statement, or confirm that this statement was not employee-generated. She also indicated that Phil Smith stated that Hewlett Packard would withdraw, if employees unionized, but, similarly failed to offer much detail about the comment. I, therefore, afford her testimony concerning these statements little, if any, weight. Jerry Smith credibly testified that, at a June 28 meeting, Tammy Stewart asked White whether OHL would lose clients if it unionized, and that White solely responded that certain accounts have not, to date, renewed their contracts. He recollected that Phil Smith added that contract renewal rests within the customer's sole discretion.

It is well settled that employer predictions of adverse consequences arising from sources outside its control are required to have an objective factual basis in order to be found lawful. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617–619 (1969). In the instant case, I find that White accurately conveyed that certain clients had not yet renewed their contracts, and Phil Smith truthfully added that customers retained the final decision on contract renewal. These statements were, thus, reasonable and these objections should be overruled.

9. Objection 10

Objection 10 alleged that OHL, "[c]reated the impression of futility of selecting the Union." This objection was based upon OHL telling employees that discriminatees Kurtycz, Dotson, and Jerry Smith had been only temporarily reinstated. Such commentary was technically true at the time, given that the injunction stated that it was "temporary," until such time as the Board issued its final order. (GC Exh. 4.) This objection, thus, lacks merit.

10. Objection 12

Objection 12 alleged that OHL threatened that employees would lose benefits, if they unionized. This objection was based upon OHL's comments about the 410(k) plan.

Jerry Smith credibly testified that he attended a meeting, where Human Resources Representative Dani Bowers told employees that they could not participate in the 401(k) plan, if they unionized.[27] Rayford corroborated this testimony, which Bowers was not called to refute. I, therefore, credit Jerry Smith's unrebutted and corroborated testimony.

A company commits objectionable conduct, when it threatens that employees will "be foreclosed from participating in their current company pension [or retirement] plan," if they unionize. *Longview Fibre Paper & Packaging*, 356 NLRB 796 (2011). Bowers' comments were, as a result, objectionable.

11. Objection 13

Objection 13 alleged that OHL unlawfully fired Carolyn Jones, Stanley Jones, and Vicky Hodges, because of their union activities.[28] Given that I found that Carolyn Jones' discharge was unlawful, this component of the objection is valid.

12. Objection 14

Objection 14 alleged that OHL solicited union supporters to resign. Given that I found that this complaint allegation was unlawful, this objection is valid.

13. Objection 15

Objection 15 alleged that OHL told employees that, "they would be permanently . . . replaced, and will not be eligible for food stamps when the union called them out on strike." The Union filed to adduce any evidence supporting this objection; therefore, it is denied.

14. Objection 16

Objection 16 alleged that OHL "violated the stipulated agreement on . . . releasing of voters." Union Organizer Ben Brandon testified that, although the agreement contained a detailed release procedure, it was inconsistently followed and resulted in one department being released to vote prematurely and another released belatedly. Given that affected employees still voted, these isolated issues were de minimis, and not objectionable.

15. Objection 17

Objection 17 alleged that OHL "escort[ed] . . . discriminatees to the polls." Brandon testified that, while he did not directly observe discriminatees being escorted to the polls by security officers, he observed Carolyn Jones being admitted to the facility by security. This testimony, although credible, was insufficient to substantiate this objection.

16. Objections 18 and 20

Objection 18 alleged that OHL "created and condone[d] a hostile environment," while Objection 20 alleged that OHL, "engaged in other conduct for which the election should be set aside." Given that I have already found that several objections were valid, these catchall objections, although duplicative, are legitimate.

17. Objection 19

Objection 19 alleged that OHL destroyed the laboratory conditions of the election by allowing administrative assistants to vote. This issue will be considered under the Challenged Ballots section, and is not objectionable.

D. OHL's Objections

On August 3, OHL filed 13 objections to the Union's preelection conduct. (GC Exh 1(q).) The parties presented connected argument in their posthearing briefs.

1. Objections 1 and 2

Objection 1 alleged that the Union made, "inappropriate and inflammatory appeals to racial prejudice; whereas, objection 2 alleged that the Union made, "inappropriate and inflammatory appeals to violence." As will be discussed, these objections are meritless.

[27] I denied OHL's objection that this testimony was inadmissible hearsay. See Fed.R.Evid. 801(d)(2) (agent's admissions are not hearsay).

[28] No evidence was presented regarding Stanley Jones or Hodges; therefore, I find no merit to these allegations.

a. Inflammatory leaflet

In support of these objections, OHL cites an exhibit (R. Exh. 20), which was not offered at the hearing (see R. Br. at 45; Tr. 1201–1203), and a hearsay statement that an unnamed employee told White that the *unoffered* exhibit was distributed in the parking lot by anonymous individuals. Simply put, OHL wholly failed to substantiate this allegation.

b. "UT" comments

Although Respondent failed to raise this issue in its brief, I note that I did find that Carolyn Jones called Lee Smith a "UT," in response to his failure to support the Union. There is, however, insufficient evidence that this statement was disseminated beyond two other voters, who had already taken a strong position on the election (i.e., Jerry Smith, a staunch union supporter, and Jennifer Sims, a staunch OHL supporter). I find, as a result, that the "UT" comments were insufficient to affect the outcome of the election and not objectionable.

c. Hughes' comments

Operations Manager Vania Washington testified that, a week before the election, she heard Hughes ask Michael Guy whether he had "heard what Coleman had said during a meeting?" She said that Hughes then told him that Coleman had called union supporters, "robbers and killers."

Operations Manager James Cousino testified that, at a captive-audience meeting, Coleman read aloud a newspaper article concerning a labor dispute at another company, which involved violence. He related that, after the meeting, he heard Hughes state that Coleman had implied that OHL's employees were "thugs, gangbangers and killers." On cross-examination, however, Cousino acknowledged that the article read by Coleman described the involved union representatives as "gangbangers, thugs and killers." He surprisingly denied, however, that Coleman intentionally drew a connection between the Union involved herein and the "gangbangers, thugs, and killers" described by the article. He stated that, once he told Hughes to stop discussing the matter, he complied.

Hughes' comments were reasonable and responded to an article raised by Coleman at a captive audience meeting. OHL was obviously trying to draw a connection between the Union and the "gangbangers, thugs and killers" described by the article, in order to dissuade employees from unionizing and associating with alleged thugs. Hughes challenged this assertion in a reasonable way, and his commentary, which was isolated, was not objectionable.[29]

2. Objections 3, 4, and 9

Objections 3, 4, and 9 alleged that the Union's election observers and release personnel engaged in inappropriate electioneering. Bobby Hill, an employee and OHL observer, testified that, on July 27, he and the Union's observer released employees to vote. He indicated that, at some point, a voter told the Union's observer that "it didn't take me but 15 seconds to know how to vote," and that the Union's observer responded that he did the right thing, and offered him a "high five." He acknowledged, however, that this conversation was not witnessed by anyone, who had not yet voted.

I do not find that this postvote conversation was improper electioneering, which, by definition, needs to occur before votes are cast. These objections are, accordingly, overruled.

3. Objections 5, 6, 8, and 12

Objection 5 alleged that the Union issued, "[i]nappropriate instructions to employees not to vote." Objection 6 alleged that the Union "[told] employees that they were required to vote for the Union if they signed an authorization card." Objection 8 alleged that the Union, "[w]alk[ed] into unauthorized areas . . . to campaign to working employees on election day." Objection 12 alleged that the "Union observer display[ed] union insignia at [the] polling location by removing tape covering insignia before [the] polls closed." OHL failed to adduce any evidence supporting these objections, or raise these matters in its post-hearing brief. These objections are, therefore, denied.

4. Objections 7, 10, and 11

Objections 7, 10, and 11 alleged that the Union unlawfully threatened pro-OHL employees with reprisals. Dawn Barnhill, an employee, testified that in July, Hughes observed her wearing a shirt, which stated "no means no, and I can speak for myself," and threatened to rip it off of her. She stated that she reported the incident to her supervisor, Cousino, who confirmed her account. Hughes consequently received a final warning.

These objections are invalid. First, as noted, there is no evidence that Hughes is a union agent. Second, there is no evidence that his actions, which were isolated, were adopted by the Union or disseminated in a manner that would affect the election. Lastly, his actions were mitigated by OHL, when it disciplined him and erased any potential effect on voters.

5. Objection 13

Objection 13, a catchall objection, alleged that the Union, "[e]ngaged in conduct that interfered with employee free choice." Given that OHL's other objections were invalid, this objection is similarly overruled.

E. Challenged Ballots

The 10 challenged ballots are described below:[30]

Employee	*Challenged By*	*Reason*
Gloria Kurtycz	Company	Board Reinstatement
Brenda Stewart	Union	Supervisor
James Brewer	Union	Retired Part-time
Jerry Smith	Company	Board reinstatement
Carolyn Jones	Board	Not on list

[29] It is also debatable whether Hughes, a union supporter, was a union agent.

[30] At the hearing, the parties agreed that 3 additional voided ballots were "properly challenged . . . either because they were unclear or identified the voter." (Tr. 1701.) They also stipulated that challenge of Vicky Hodge's ballot was valid. (GC Exh. 1(q) at 2.)

Renal Dotson	Company	Board reinstatement
Rachel Maxie-Chaisson	Union	Administrative Assistant
Tammy Stewart	Union	Management
Tia Harris	Union	Management
Richard James	Union	Part-time

(GC Exh. 1(aa).)

1. Prior discriminatees: Kurtycz, Jerry Smith, and Renal Dotson

The Board affirmed the administrative law judges' decisions to reinstate Kurtycz, Jerry Smith, and Renal Dotson. See *Ozburn I*, supra; *Ozburn II*, supra. Their challenges were, therefore, invalid, and their ballots should be counted.

2. Carolyn Jones

Given that OHL unlawfully fired Jones and reinstatement is appropriate, her challenge was invalid, and her ballot should be counted.

3. Part-time employees: Richard James and James Brewer

The Union challenged their ballots, and contended that they are part-time employees, who were expressly excluded by the Stipulated Election Agreement. OHL avers that the Agreement is ambiguous regarding their exclusion, they share a community of interest with the unit, and their challenges were, accordingly, inappropriate.

The Stipulated Election Agreement provided:

> INCLUDED: ***All full time*** custodians, . . . maintenance, maintenance techs, . . . employed by the Employer.
>
> EXCLUDED: All other employe[e]s, including, office clerical and professional employees, guards, and supervisors as defined in the Act.

(U. Exh. 13) (emphasis added). James and Brewer testified that they are part-time maintenance employees, who work 15 to 18 hours per week. They do not receive the health insurance, dental, disability, life insurance, or other benefits provided to full-time employees.[31]

In *Bell Convalescent Hospital*, 337 NLRB 191 (2001), the Board held:

> It is well settled that, in reviewing a stipulated unit, the Board's function is to ascertain the intent of the parties with regard to inclusion or exclusion of a disputed voter and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. If the objective intent of the parties concerning the questioned portion of the unit description is expressed in clear and unambiguous terms, the Board will hold the parties to their agreement. In order to determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications. The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. ***Under this view, if the classification is not included, and there is an exclusion for "all other employees," the stipulation will be read to clearly exclude that classification***. The Board bases this approach on the expectation that the parties are knowledgeable as to the employees' job title, and intend their descriptions in the stipulation to apply to those job titles.

Id. at 191 (citations omitted, with emphasis added).

Part-time employees were expressly excluded by the Stipulated Election Agreement, which only included, "[a]ll full time . . . maintenance [and] maintenance techs . . . employed by the Employer," while expansively excluding, "[a]ll other employe[e]s." Given that OHL obviously knew that it employed part-time maintenance employees when it signed the Agreement, I find that James and Brewer, as part-time employees, were expressly excluded, and their challenges were valid.[32] See *Bell Convalescent Hospital*, supra, 337 NLRB at 191–192 (excluding "central supply/patient supplies/nurse aide" classification, when the title was not expressly listed under inclusions and the stipulated election agreement broadly excluded "all other employees."); *Regional Emergency Medical Services*, 354 NLRB 224, 224–225 (2009) (excluding contingent employees from the unit, when the inclusions listed full and part-time employees and the stipulated election agreement extensively excluded "all other employees.").

4. Team Leads: Brenda and Tammy Stewart

The Union challenged the ballots of Team Leads Brenda and Tammy Stewart; it asserted that they were supervisory. OHL takes the opposite stance.

a. Brenda Stewart

Brenda Stewart credibly testified that she unloads pallets, receives product from shippers, and retrieves product within the warehouse. She stated that she does not attend supervisory meetings and lacks disciplinary authority. She denied assigning work to employees.

Wayne Morton, former senior operations manager, credibly testified that Brenda Stewart is an hourly employee and team lead, who performs the same duties as other team leads, who were included in the unit. He added that she does not have a

[31] Brewer testified that employees must work over 30 hours per week, in order to receive full-time benefits.

[32] Even if the language in the agreement were ambiguous, which it is not, I find that, if OHL intended to include part-time maintenance employees in the unit, it would taken one of the following steps: inserting "and regular part-time employees" under inclusions in the agreement; agreeing that they would vote subject to challenge; or litigating their inclusion in an R-case proceeding. It is noteworthy that the parties took such a step regarding the Administrative Assistants, when they expressly stated in a side agreement that they would "vote subject to challenge." (U. Exh. 13A.) OHL's failure to take a similar step regarding part-time employees suggests that their exclusion was intentional. Lastly, assuming arguendo that OHL employs other part-time employees beyond maintenance employees, it is unclear why it neglected to also raise the inclusion of these additional part-time employees, and solely focused on maintenance employees. Its unexplained failure to encourage other part-time employees to vote, and then comprehensively litigate their inclusion is inconsistent, and suggests that OHL is more concerned with election results than the agreement's fair construction.

private office, uses a desk located on the shop floor, and is not supervisory.

Steele credibly testified that Brenda Stewart's duties include: confirming that product is unloaded; verifying that accurate data is listed on palletized product; and recording inventory on OHL's system. He stated that all team leads perform these tasks. He added that she does not transfer workers and lacks disciplinary authority.

Herron testified that Brenda Stewart is a managerial employee. However, beyond stating that she has specialized access to certain areas, she neglected to provide supporting detail.

b. Tammy Stewart

Tammy Stewart, a team lead, who works in the MAM Baby USA department, credibly denied having the authority to: assign work to team leads; recommend discipline; layoff; hire; or recall. She stated that she closes orders, "picks," "blasts," loads and unloads trucks, and receives product. Regarding assignments, she stated:

> I assign work . . . if my supervisor . . . releases the work, then I go in [the system], . . . if they run out, they will come to me if Jim is not around and I will give them more work. . . . So, however many is assigned to go out today if it's 18, then I divide those 18 up.

(Tr. 1669) (grammar as in original). She added that she equitably divides assignments, and does not consider who is better-suited for particular tasks. She averred that assignments are prioritized by the computerized inventory system by shipping date. She stated that she has a desk in the warehouse.

Steele credibly testified that he supervises Tammy Stewart, who picks, packs, ships, and closes orders. He stated that all team leads perform these tasks. He added that she does not transfer, interview, or discipline employees.

McNeal testified that Tammy Stewart is an operations supervisor. She said that Tammy Stewart determines the arrival and departure times for trucks, and schedules breaks.

Hayes testified that, when she worked in the aerosol department roughly 2-1/2 years ago, Tammy Stewart periodically filled in for the manager, conducted morning meetings, and distributed assignments. She stated that other team leads reported to Tammy Stewart, who sat behind a desk, issued orders and trained them. She related that Tammy Stewart did not scan or label inventory, took her breaks in a separate area, and had keys to the buildings.

c. Legal precedent

Section 2(11) defines a supervisor as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly 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.

The party alleging supervisory status must establish that: the disputed individual possesses at least one of the supervisory authorities delineated above; and that independent judgment is used in exercising such authority.[33] *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). "Independent judgment" is defined as judgment that is, "free of the control of others . . . [and] not . . . dictated or controlled by detailed instructions . . . [including] the verbal instructions of a higher authority." Id. at 693.

d. Analysis

For several reasons, I find that the Union has failed to show that either Tammy or Brenda Stewart were supervisory. Because the record fails to reveal any evidence that they exercise the authority to hire, transfer, suspend, layoff, recall, promote, discharge, reward, or discipline employees, or adjust their grievances, I will solely analyze their authority to assign and responsibly direct.

(I) ASSIGNING DUTIES

Neither Brenda nor Tammy Stewart exercise independent judgment, when assigning duties. The Board defines "assign" as:

> [T]he act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.

Oakwood Healthcare, supra, 348 NLRB at 689.

Regarding Brenda Stewart, the record fails to sufficiently show that she assigns work. It establishes that she solely performs the same hourly warehousing assignments performed by other hourly workers, i.e. receiving, stocking, retrieving, and shipping product.

Regarding Tammy Stewart, although I find that she assigns tasks to colleagues when they run out of work, I do not find that she exercises independent judgment in making such assignments. Her assignments are prioritized by the computer; and she provided unrebutted testimony that she never considers a worker's skills before assigning work, and robotically divides up the next series of assignments in the queue. Such activity falls short of the exercise of independent judgment. See *Sears, Roebuck & Co.*, 292 NLRB 753, 754–755 (1989).

(II) RESPONSIBLE DIRECTION

Neither Brenda nor Tammy Stewart responsibly directs employees. Such authority exists when:

> [An employee decides] what job shall be undertaken next or who shall do it, . . . provided the direction is both "responsible" . . . and carried out with independent judgment.

Oakwood Healthcare, Inc., supra, 348 NLRB at 691. "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task . . .

[33] Sec. 2(11) solely requires possession of a listed supervisory function, not its actual exercise. See *Barstow Community Hospital*, 352 NLRB 1052, 1052–1053 (2008). The fact that most of an alleged supervisor's duties involve routine tasks "does not preclude the possibility that such regular assignments require the exercise of independent judgment." *Loyalhanna Care Center*, 352 NLRB 863, 864 fn. 4 (2008).

such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." Id. at 692.

Even assuming arguendo that Brenda and Tammy Stewart direct coworkers to perform tasks, and exercise independent judgment in doing so, which it does not, the record failed to reveal evidence of "actual accountability." Moreover, the record failed to demonstrate that they were potentially subject to adverse consequences, if assignments were delayed or unsatisfactory. Accordingly, I find that they do not responsibly direct others. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

(III) CONCLUSION

Brenda and Tammy Stewart are not supervisory; they are team leads, who are included in the unit under the Stipulated Election Agreement. Their challenges are, thus, overruled.

5. Administrative assistants: Harris and Maxie-Chaisson

The Union challenged these ballots and contended that the employees are office clericals, who should be excluded. OHL avers that they are plant clericals, and should be included.

a. Harris

Administrative assistant Harris testified that she works at a desk, and spends the majority of her time using the computer. She explained that she uses the REDPRAIRIE application, which generates reports on warehouse operations and productivity. She stated that these reports are primarily disseminated to managers, who use such to determine proper staffing levels. She stated that she tracks the productivity of every employee on the warehouse floor and generates related reports. She added that she has no discretion to set productivity targets and only collects and processes data. She noted that she also uses ACCUPLUS software to perform accounts receivable and billing work. She conceded that she did not vote in the first election.

Cotton, a customer service representative, testified that Harris' office is located in an area, which requires special access and states, "authorized employees only." She related that Harris does not share the same breakroom with rank and file employees, and that she rarely observes her on the warehouse floor. She stated that operators and other members of the unit spend most of their workday on the warehouse floor. Wells and Herron corroborated Cotton's account.

b. Maxie-Chaisson

Administrative assistant Maxie-Chaisson testified that she uses the REDPRAIRIE system to track productivity. She indicated that she posts productivity reports, and explains data to employees, when asked. She explained that the REDPRAIRIE system shows managers where they can better place people and product within the warehouse. She indicated that she also performs some accounts receivable and billing work.

McNeal testified that she has never seen Maxie-Chaisson retrieving warehouse stock, shipping product, or engaging in other activities normally performed by operators. Rayford corroborated McNeal's testimony. Phil Smith testified that Maxie-Chaisson is essentially a data clerk, who is paid at a lower rate than several team leads.

c. Analysis

Harris and Maxie-Chaisson are office clerical employees, who should be excluded from the unit. Concerning the distinction between office and plant clericals the Board has held that:

> [T]he distinction between office and plant clericals is rooted in community of interest concepts. Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit. This is true even if those clericals spend as much as 25 percent of their time in the production area and have daily contact with production personnel.

Mitchellace, Inc., 314 NLRB 536, 536–537 (1994) (citations omitted).

My finding that Harris and Maxie-Chaisson are office clerical employees is based upon several factors. They work in a separate office area, and spend an extremely small percentage of their worktime on the warehouse floor. They are data clerks, who mainly sit behind a computer, prepare productivity reports and perform accounts receivable work. Their reports are primarily used by management to gauge productivity and resource allocation. On some occasions, these reports can also be used to support a discipline, transfer or layoff. Under these circumstances, their challenges are valid. See, e.g., *Mitchellace, Inc.*, supra, 314 NLRB at 536–537 (analogous data entry clerks were office clerical employees); *Virginia Mfg. Co., Inc.*, 311 NLRB 992 (1993) (analogous production control clerk, who compiled production information, kept track of inventory and raw materials, and prepared reports for management that determined daily production priorities, was an office clerical).

F. Conclusion

The 6 ballots cast by Kurtycz, Jerry Smith, Carolyn Jones, Dotson, Brenda Stewart, and Tammy Stewart should be counted. The ballots cast by Brewer, James, Harris, and Maxie-Chaisson should not be counted. The 6 uncounted ballots are sufficient in number to affect the outcome of the election, which was decided a single vote.

Union Objections 1–3, 5–6, 8, 12–14, 18, and 20 are valid. The conduct underlying these objections, much of which also violated Sections 8(a)(1) and (3), prevented employees from exercising free choice during the July 27 election.[34] Accordingly, in the event that the Union does not win the election after the 6 challenged ballots are counted, I recommend that the second election be invalidated, and that employees be permitted to vote in a third untainted election. See *General Shoe Corp.,* 77 NLRB 124 (1948); *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001).

CONCLUSIONS OF LAW

1. OHL is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of

[34] OHL's objections were, as noted, not valid.

Section 2(5) of the Act.

3. OHL violated Section 8(a)(1) of the Act by

(a) Threatening employees with discipline and other unspecified reprisals, if they engage in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Creating the impression that employee union activities were under surveillance.

(e) Confiscating union materials and related documents from employee break areas.

(f) Telling employees, who support the Union, to resign.

2. OHL violated Section 8(a)(1) and (3) of the Act by issuing a final written warning to Jennifer Smith, and by discharging Carolyn Jones, because they engaged in union or other protected concerted activities.

3. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. OHL has not otherwise violated the Act.

5. By the foregoing violations of the Act, which occurred during the critical period before the second election, and by the conduct cited by the Union in Objections 1–3, 5–6, 8, 12–14, 18, and 20, OHL has prevented the holding of a fair second election, and such conduct warrants setting aside the July 27, 2011 election in Case 26–RC–008635.[35]

REMEDY[36]

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

OHL, having unlawfully discharged Carolyn Jones, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the date of her discharge to the date of her proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily under *Kentucky River Medical Center*, 356 NLRB 6 (2010).

OHL shall also expunge from its records any references to Jennifer Smith's final warning and Carolyn Jones' discharge, give them written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for future discipline.

OHL shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB 11 (2010).

In addition to the traditional remedies for the 8(a)(1) and (3) violations found herein, OHL shall permit a Board agent to read the notice marked "Appendix" to unit employees at its facility, during work time, in the presence of Coleman and Phil Smith. A notice reading will counteract the coercive impact of the instant unfair labor practices, which were substantial and pervasive. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004). It will also foster the environment required for a final third election result, if such an election is required.

[Recommended order omitted from publication.]

[35] As noted, a rerun election is only warranted, if the counting of the challenges causes the Union to lose the second election.

[36] In the complaint, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. He also requests that OHL be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. These requests are denied, inasmuch as the granting of such remedies deviates from current Board law. See *Metropolitan Hotel Group*, 358 NLRB No. 30, slip op. at 4, fn. 4 (2012) (not reported in Board volume); *Waco, Inc.*, 273 NLRB 746 fn. 14 (1984) (holding that "[i]t is for the Board, not the judge, to determine whether . . . precedent should be varied.").