Intertape Polymer Corp. *and* United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC. Cases 11–CA–077869, 11–CA–078827, 10–CA–080133, and 11–RC–076776

May 23, 2014

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On February 20, 2013, Administrative Law Judge Robert A. Ringler issued the attached decision. The Respondent and the Charging Party each filed exceptions and a supporting brief. The Respondent also filed an answering brief.

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

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

I.

The Respondent operates a tape manufacturing facility in Columbia, South Carolina. The Union filed a petition seeking to represent the facility's production and maintenance employees. An election was held on April 26 and 27, 2012, and the tally of ballots showed 97 for and 142 against the Union. This case involves allegedly unlawful and objectionable conduct by the Respondent during the union organizing campaign.

As discussed below, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act by: (1) interrogating employee Johnnie Thames regarding his union sentiments; (2) confiscating union literature from the employees' breakroom; and (3) engaging in surveillance of employees' union activities by leafleting at the plant gate while union supporters were simultaneously handing out leaflets there.[4] We reverse, however, the judge's finding that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by threatening employees that it would be futile to select the Union as their collective-bargaining representative.

1. The interrogation of Thames

The credited evidence establishes that, during the Union's organizing drive, but before the Union filed its representation petition on March 16, 2012, Supervisor Bill Williams approached employee Johnnie Thames at his workstation and questioned Thames about his view of the Union. As Thames described the conversation, Williams "was asking me what I think about the Union, and said that . . . if you don't think it's good then, that it can hurt you, and so I didn't respond to him. I just walked away." The judge found that Williams' questioning of Thames was coercive, and thus violated Section 8(a)(1) of the Act. We agree for the following reasons.

The Board considers the following factors, among others, in determining whether questioning of this nature is unlawful:

1. whether there is a history of employer hostility to or discrimination against protected activity;
2. the nature of the information sought;
3. the identity of the questioner;
4. the place and method of interrogation;
5. the truthfulness of the employee's reply.

Phillips 66 (Sweeny Refinery), 360 NLRB 124, 128 (2014); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *NLRB v. Hotel Employees Local 11*, 760 F.2d 1006 (9th Cir. 1985). The Board also considers, when relevant, the nature of the relationship between the supervisor and the employee. Id.

Applying and balancing those factors here, we find that Williams' questioning of Thames was unlawful. Williams directly asked Thames to reveal *his* view of the

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent and the Charging Party have 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.

[3] We have amended the judge's conclusions of law consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act as found and "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and we shall substitute a narrow order, requiring the Respondent to cease and desist from violating the Act as found and "in any like or related manner." See *Hickmott Foods,* 242 NLRB 1357 (1979). Similarly, we shall delete from the judge's recommended Order the requirement that the notice be read to employees by a responsible official of the Respondent, in the presence of a Board agent. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004). We shall substitute a new notice to conform to the Order as modified.

[4] We also adopt, for the reasons stated by the judge, the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(3) by discharging Johnnie Thames and by denying Wilton Dantzler overtime opportunities.

Union.[5] Although a low-level supervisor, Williams was Thames' *direct* supervisor, reasonably tending to make the questioning that much more threatening. See, e.g., *Station Casinos, LLC*, 358 NLRB 1556, 1557–1558, 1605 (2012). Williams, moreover, offered no justification for his questioning or assurances against reprisals. See *Norton Audubon Hospital*, 338 NLRB 320, 321 fn. 6 (2002). The preexisting hostility between Williams and Thames[6] and Thames' unwillingness to answer Williams further weigh in favor of finding a violation. See *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1183 (2011). Last, we find that Williams' comment that "it can hurt you" would have exacerbated the already coercive nature of his inquiry into Thames' opinion of the Union.[7]

For those reasons, we affirm the judge's finding that Williams' interrogation of Thames violated Section 8(a)(1) of the Act.

2. The confiscation of union literature

The Respondent has a policy prohibiting distributions during working time and in working areas. Before the union campaign began, literature (e.g., newspapers, magazines, etc.) left in the breakroom remained untouched until at least the end of the workday. But after the Union filed its representation petition, supervisors monitored the breakroom much more closely and began removing all literature, including that related to the union campaign, shortly after employees finished their breaks. The Respondent's change in policy as a reaction to and countermeasure against the union campaign was unlawful. See, e.g., *Bon Marche*, 308 NLRB 184, 185 (1992).[8]

3. Surveillance of employees' leafleting

By March 2012, employees had been observed by the Respondent distributing union leaflets at the plant gate. On April 24 and 25, 2012, while union supporters were handing out leaflets to employees at the plant gate just days before the election, several of the Respondent's supervisors simultaneously distributed leaflets at that location. We agree with the judge that the Respondent's behavior was "out of the ordinary" and supports a finding of unlawful surveillance. See *Arrow Automotive Industries,* 258 NLRB 860, 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982). The presence of supervisors at the plant gate where employees arrived and left was itself unusual. See id.; *PartyLite Worldwide, Inc.*, 344 NLRB 1342, 1342 (2005). Further, management officials typically communicated with employees in meetings, and there was no evidence that, prior to the campaign, it had leafleted its own employees. As the judge found, the Respondent's supervisors could see not only the employees distributing leaflets, but also which employees accepted or rejected the leaflets, and any interactions between them.[9]

The Respondent argues that it was simply exercising its 8(c) right to communicate with its employees. But such communication is unlawful if it includes out-of-the-ordinary conduct that places employees' union activities under surveillance.

Accordingly, the Respondent's surveillance of its employees' leafleting violated the Act.

4. The threat of futility

We find merit in the Respondent's exception to the judge's finding that the Respondent violated Section 8(a)(1) and engaged in objectionable election conduct by

[5] Compare *Phillips 66*, above, 360 NLRB at 124 and 128 (finding unlawful questioning about employee's own opinion of the union) with *Temp Masters*, *Inc.*, 344 NLRB 1188, 1188 (2005) (dismissing an alleged interrogation in part because the supervisor did not attempt to obtain any individual employee's view of unionization), enfd. 460 F.3d 684 (6th Cir. 2006).

[6] On December 21, 2011, Williams disciplined Thames for arguing with him, and on March 6, 2012, upon observing Thames sleeping on the job, Williams summoned a witness because he was concerned about a possible hostile reaction from Thames.

[7] Although the Respondent committed subsequent violations of the Act, the absence of a history of employer hostility to protected activity predating the interrogation of Thames arguably weighs against finding a violation in this case. See *Temp Masters,* above; *John W. Hancock, Jr., Inc.,* 337 NLRB 1223, 1224 fn. 5 (2002), enfd. mem. 73 Fed. Appx. 617 (4th Cir. 2003). The place and method of the interrogation (an informal conversation at Thames' workstation) also arguably weighs against a finding that Williams' questioning was coercive. Compare *Morgan Services*, 284 NLRB 862, 863 (1987) (summoning employees from work to manager's office was "unusual event creating an atmosphere of unnatural formality"). We find, however, that these factors are outweighed by the remaining factors, all of which favor finding a violation.

[8] Even if the Respondent is correct that this is not the precise theory of the complaint, which alleged that the Respondent "enforced the rule . . . selectively and disparately, by prohibiting union distributions in non-work areas, while permitting nonunion distributions in non-work areas," the issue of a change in the Respondent's practice is closely related to the subject matter of the complaint and has been fully litigated. *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Significantly, the Respondent does not argue that lack of notice prevented it from introducing exculpatory evidence or that it would have altered its litigation strategy had the allegation been pleaded in this manner. Id. at 335. In these circumstances, we find it proper to affirm the judge's finding of a violation. See, e.g., *Enloe Medical Center*, 348 NLRB 991, 992 (2006).

[9] Although we attribute no relevance to which group of leafleters arrived first when, as here, the employer's activity is out of the ordinary, we note that the judge found that "[o]n some occasions, [the Respondent's] team arrived to leaflet first, while on others, the Union group first appeared."

The Respondent argues that the present case is "on all fours" with *Arrow-Hart, Inc.*, 203 NLRB 403 (1973). We disagree. Unlike here, the employer in *Arrow-Hart* was not doing anything out of the ordinary when its supervisors distributed leaflets 15 feet inside the entrance while the union distributed leaflets outside the door itself, as it was a common practice for supervisors to be in that location at that time. Id. at 405.

threatening employees that it would be futile to select the Union as their collective-bargaining representative. The judge's finding of an unlawful threat of futility was based on comments made by the Respondent's senior vice president of administration, Burge Hildreth, at a meeting with employees on March 26, 2012. The credited testimony shows that Hildreth stated that he did not have to bargain with the Union, that he could engineer a lockout and replace the employees, and that, if employees wanted to earn a higher wage, they could "get on a bus and go to California."

As the Respondent points out, the complaint alleged that Hildreth made an implied threat of discharge at the meeting, but there was no complaint allegation of an unlawful threat of futility.[10] The judge questioned counsel for the General Counsel specifically about Hildreth's comments and suggested that "it seems more like . . . futility of getting a union" and that "futility of selecting the Union" might be the more accurate allegation. Counsel for the General Counsel, however, made it clear that he was not pursuing a theory that Hildreth's comments were unlawful as a threat of futility. He stated that the General Counsel's position was that Hildreth's "get on a bus to California" statement amounted to an unlawful threat of termination. Following his exchange with the judge on the record, and notwithstanding the judge's observations, counsel for the General Counsel never sought to amend the complaint and never argued that the Respondent made an unlawful threat of futility. Under these circumstances, we find that the Respondent did not have fair notice that the judge would make findings based on this unalleged theory, and we reverse the judge's finding of a violation.[11]

II.

Having found that the Respondent committed unfair labor practices during the critical period, we also agree with the judge's recommendation to set aside the election. Specifically, the Respondent confiscated union literature, preventing employees from receiving union communications in their breakroom, and unlawfully observed not only employees distributing union leaflets, but also arriving and departing employees, who either accepted or rejected the Union's materials.[12] In these circumstances, the impact of the employer's unlawful conduct cannot be trivialized as isolated or de minimis. Rather, it falls squarely within the Board's longstanding policy to direct a new election where the unfair labor practices committed during the critical period before the election interfered with employees' free choice. See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). We shall remand this proceeding for the purpose of conducting a second election.

AMENDED CONCLUSIONS OF LAW

Delete the judge's Conclusion of Law 3(b) and reletter the remaining paragraphs.

ORDER

The National Labor Relations Board orders that the Respondent, Intertape Polymer Corp., Columbia, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union sympathies and/or support.

(b) Confiscating union materials from break areas for unlawful discriminatory reasons.

(c) Placing employees under surveillance when they engage in union or other protected concerted activities.

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

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

(a) Within 14 days after service by the Region, post at its Columbia, South Carolina facility copies of the at-

[10] The judge failed to address the complaint's implied-threat allegation, but no party has excepted to this failure or otherwise argued the merits of the allegation to the Board. Accordingly, we do not pass on the issue.

[11] See, e.g., *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (judge improperly found violation based on theory GC expressly chose not to litigate); *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992) (reversing judge's finding of unalleged violations where counsel for the General Counsel stated at the hearing that evidence of unalleged violations was presented as background), enfd. 25 F.3d 473 (7th Cir. 1994), cert. denied 513 U.S. 1080 (1995).

Member Hirozawa would adopt the judge's finding that the Respondent unlawfully threatened employees by stating that it would not negotiate with the Union, that it could lock out and replace them, and that bargaining would be futile. Even though these violations were not specifically alleged in the compliant, they are closely connected to other complaint allegations and were fully and fairly litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Contrary to his colleagues, Member Hirozawa would not find that counsel for the General Counsel made it clear that he was not pursuing a theory that the Respondent made an unlawful threat of futility. Upon questioning by the judge, the General Counsel simply stated his position that the Respondent's statement that employees would "have to get on a bus and go to California" if they wanted higher wages was an implied threat of discharge. The General Counsel's imprecise characterization of the statement did not amount to a disavowal of the theory that the Respondent unlawfully threatened that bargaining would be futile.

[12] We do not rely on Williams' unlawful interrogation of employee Thames before the petition was filed. See *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961).

tached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2012.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 11 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on April 26 and 27, 2012, in Case 11–RC–076776 is set aside and that Case 11–RC–076776 is severed and remanded to the Regional Director for Region 11 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

MEMBER MISCIMARRA, dissenting in part.

Unlike my colleagues, I would dismiss the complaint's interrogation and surveillance allegations. Also, even if the surveillance allegation had merit, I believe the instant case does not warrant setting aside the election. In these respects, therefore, I respectfully dissent.

Regarding the allegation of unlawful interrogation, I believe the General Counsel has not proven that Supervisor Bill Williams coercively interrogated employee Johnnie Thames. As my colleagues acknowledge, the place and method of questioning—an informal conversation at Thames' workstation—favor dismissal of this allegation, the Respondent had no history of hostility toward union activity, and there is no evidence that Williams posed the question to elicit information upon which to retaliate. I do not believe the nature of the information sought—Thames' general thinking about the Union—involved a matter so sensitive as to outweigh these other factors. See *Continental Industries*, 279 NLRB 920, 920 (1986) (finding that employer lawfully asked employee "what [he] thought the union could do for [him] or the people"); *St. Rita's Medical Center*, 261 NLRB 357, 361 (1982) (not unlawful to ask an older worker "what good a union could do her at her age"). Nor do I believe that Williams' "it can hurt you" comment—when viewed in context—can reasonably be interpreted as rendering the discussion coercive. After asking Thames about the Union, Williams stated, "[I]f you don't think it's good then, . . . it can hurt you." This does not reasonably support a finding that Williams was suggesting the Respondent would retaliate against Thames for supporting the Union. At most, I believe such a comment—in the absence of other evidence of coercion—constitutes a statement of opinion that is lawful and unobjectionable.

Regarding the allegation of unlawful surveillance, I disagree with my colleagues' conclusion that the Respondent's observation of employees' open leafleting activity at the company gate was "out of the ordinary" and unlawfully coercive. The Respondent had a right, under Section 8(c) of the Act, to campaign against the Union on its own property. On April 24, the Respondent's supervisors positioned themselves at the gate *well before* the employee-leafleters did. That morning, only supervisors leafleted at the gate, and that afternoon, employee-leafleters positioned themselves at the gate *after* the supervisors returned there. Consistent with their actions on April 24, supervisors returned to the gate the next morning and afternoon to distribute leaflets. There is no evidence that the supervisors knew or suspected that the employee-leafleters planned to engage in union activity at the gate on those dates. While the record shows that employees had leafleted at the gate back on March 22 and 23, there is no evidence that they did so again before the supervisors began distributing their leaflets on April 24. There is no evidence that supervisors located themselves at the gate to spy on employees' union activities. Under these circumstances, I would find that the supervisors' observation was incidental to their lawful activities, not out of the ordinary or coercive, and I would dismiss the surveillance allegation.[1]

[13] 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."

[1] I do not agree with my colleagues' attempt to distinguish *Arrow-Hart, Inc.*, 203 NLRB 403 (1973). Although my colleagues suggest it was a common practice in *Arrow-Hart* for supervisors to be present near the entrance door, there is no indication in *Arrow-Hart* that supervisors had a preexisting practice of spending significant periods near the entrance distributing literature (which the supervisors did during the period leading up to the election). The judge, whose decision the Board adopted, did not dismiss the surveillance allegation because of a past

Finally, even if the surveillance allegation had merit, I believe the record would still warrant certifying the election results here, without setting the election aside. Under extant law, unfair labor practices do not warrant setting aside an election where the conduct is "so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results." *Long Drug Stores California*, 347 NLRB 500, 502 (2006) (internal quotation marks and citations omitted); see also *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). In my view, it is not possible to conclude that the Respondent affected the lopsided outcome of this election (97 for and 142 against the Union) by expediting the cleanup of a break room that, at most, involved the removal of certain material for several hours on 2 days approximately 1 month before the election. The record demonstrates that employees had many other opportunities to campaign and read union literature, the vote margin was wide, and there is no evidence that more than a single employee knew of the Respondent's action.

Likewise, I do not believe the record supports a finding that the Respondent's alleged surveillance of open leafleting could have affected the election results. It is implausible to suggest that employees changed their votes during a secret-ballot election merely because several supervisors, in the course of exercising their own right to communicate the Respondent's views about unionization, witnessed certain individuals engaging in the open activity of distributing or accepting campaign literature.[2]

For these reasons, as to the above issues, I respectfully dissent.

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 coercively question you about your union sympathies and/or support.

WE WILL NOT confiscate union materials from break areas for unlawful discriminatory reasons.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

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

INTERTAPE POLYMER CORP.

The Board's decision can be found at www.nlrb.gov/case/11-CA-077869 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Jasper Brown, Esq., for the Acting General Counsel.
Michael D. Carrouth and *Reyburn W. Lominack, III, Esqs. (Fisher & Phillips, LLP),* for the Respondent.
Benjamin Brandon, Organizer (United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. These cases were heard in Columbia, South Carolina, from October 9 to 12, 2012.[1] The underlying charges were filed by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–

practice, but rather because "[a]n employer has the right to distribute election campaign material of its own . . . . And it has a right to do [it] at the very moment the union is trying to persuade the employees to a contrary view—certainly anywhere on its premises, in the inner reaches of the plant or at the front door, even if the door is made of looking-through glass." 203 NLRB at 406. This same reasoning is applicable in the instant case.

[2] As to this issue (whether to set aside the election), I apply *Dal-Tex* and its progeny in the instant case as existing Board precedent, but I express no view on the soundness of the "virtually impossible" standard.

[1] All dates herein are in 2012, unless otherwise stated.

CIO–CLC (the Union). The resulting complaint alleged that Intertape Polymer Corp. (IPG or the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia: interrogating employees; making threats; engaging in surveillance; confiscating union literature; withholding overtime from Wilton Dantzler; and firing Johnnie Thames. The Union also filed objections to an April representation election, which were based upon the same record and, thus, heard simultaneously.

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, IPG, a corporation, with a Columbia, South Carolina plant (the plant), has manufactured tape. Annually, it purchases and receives goods valued in excess of $50,000 at the plant directly from points outside of South Carolina. Thus, it 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

IPG has owned the plant since 1998, where it employs roughly 320 workers. The plant is led by Operations Manager Don Hoffman, who is aided by Human Resources Manager Sandra Rivers. Hoffman reports to Senior Vice President of Administration Burge Hildreth, who works at IPG's Bradenton, Florida headquarters.

B. Petition and Election

On March 16, the Union filed a petition seeking to represent the plant's production and maintenance employees. (GC Exh. 2.) On April 26 and 27, Region 11 of the National Labor Relations Board (the Board) conducted a secret-ballot election in this bargaining unit (the unit):

> All full-time and regular part-time production and maintenance employees, including converting operators, converting technicians, coating operators, environmental operators, maintenance technicians, stockroom coordinator, mixing operators, quality assurance technicians, shipping/receiving/warehouse operators and lead operators employed by [Intertape at the plant] . . . ; but excluding all office clericals, professional employees, guards and supervisors as defined in the Act.[3]

(GC Exhs. 3, 5.) The Union lost this election,[4] and filed several objections. (GC Exhs. 4–6.)

C. Preelection Activities

1. Captive audience meetings

Prior to the election, IPG held several captive audience meetings, where Hoffman and Hildreth spoke. Counsel for the Acting General Counsel (the GC) averred that many of their strike-related comments were unlawful. (GC Exh. 1.)

a. February 13

The testimony covering this meeting is mostly undisputed. Donnie Mack recalled Hoffman stating that IPG did not need a third party and was disappointed. Rivers testified that Hoffman read a prepared speech to employees. (R. Exh. 6.) Regarding strikes, his speech provided that, "in a union operation, you can have problems with . . . work stoppages . . . . [y]ou need to understand how a strike could affect . . . your job, and . . . family . . . ." (Id.)

b. February 21 and 22

Rebecca Dunlop testified that Hoffman and Rivers spoke at this meeting. She recounted Hoffman stating that, "the Union could cause us to go on strike and that if we go on strike, that we would not get paid . . . [and were not] guaranteed to have our jobs." (Tr. 184.)

Rivers testified that she and Hoffman made Power Point presentations to employees, which were read verbatim. (R. Exh. 7.) Concerning strikes, their presentation provided:

> Since January 2000, the Steelworkers have called 254 strikes . . . .
>
> We hope that we never have a strike at IPG . . . .
>
> Because most contracts last about 3 years, employees could face another strike before even recovering what was lost [by going on a 49 day strike] . . . .
>
> A strike could affect our ability to maintain business relationships . . . .
>
> Steelworkers Strike in Brantford, Ontario
>
> - In August 2008, the Steelworkers called its members out on strike.
> - In March 2011, IPG was forced to close the Brantford plant for business reasons.
> - The plant was not closed to punish employees because of the strike.
> - The plant was not closed because it was union.
> - Having the Steelworkers did not guarantee higher pay and benefits and did not guarantee job security. . . .

(Id.) (emphasis as in original). Hoffman reiterated that he read his prepared speech verbatim.

Given that Dunlop testified that Hoffman stated that the Union would prompt a strike and cause job losses, and Rivers testified otherwise, I must resolve this factual dispute. For several reasons, I credit Rivers, who was honest, cooperative, and consistent, with a strong recall. Her testimony was supported by documentary evidence and Hoffman. Dunlop, on the other hand, had a poor recall, and retreated from portions of her testimony during cross-examination.

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[2] The Union did not file a posthearing brief.

[3] There were roughly 250 employees in the unit.

[4] The Tally of Ballots revealed 97 employees voting for, and 142 against, unionization. (GC Exh. 5.)

c. March 25 and 26

Dantzler testified that, on March 26, he attended a meeting, where Hildreth stated:

> [H]e . . . will be conducting the negotiation with the Union . . . . [and] didn't have to negotiate . . . [and] could cause a lockout. And that if we thought we were going to make $5 more an hour . . . , we could all get on the bus and go to California.

(Tr. 66.) Mack testified that Hildreth said that, "if [we] . . . wanted . . . [to] be paid a higher cost of living . . . get on the bus to California." (Tr. 141.) Shirley Gladden recalled Hildreth saying that, if employees want to make more money, they should "catch a bus and go to California." Faith Epps recounted Hildreth announcing that employees could not expect to the make the same wages as California workers. Richard Dupree related that Hildreth said that "if the employees were to go on strike, that we would get replaced by temporary workers . . . . [and] we can be permanently replaced." (Tr. 173–174.) Joseph Pearson reported that Hildreth stated that, if employees struck, they would be replaced.

Rivers testified that Hildreth and Hoffman spoke. She recalled Hildreth commenting that California's labor market mandated higher wages and, if employees wanted higher wages, they could work there. She denied that he said that employees would be permanently replaced, if they struck. She added that the presentations flowed from power point slides, which did not discuss strikes or threaten discharge. (R. Exh. 8.)

Hildreth testified that the Union deceptively contrasted IPG's South Carolina wages to costlier labor markets, which prompted him to discuss California. He denied stating that, if employees struck, they would be replaced, or mentioning a lockout. He admitted that he mainly followed the power point slides, but, did not read this material "word for word." Regarding California, he recalled stating:

> [W]hen we negotiate . . . with the Union . . . we're looking at . . . the competitive landscape for labor in that market, because you have to attract and retain qualified employees, so you've got to pay a decent wage . . . . And I said, if you're being told that the Union has contracts elsewhere that are paying much higher rates . . . , you need to ask them where they are, and I said I'll give you an example. If you're in California, . . . the hourly rates are . . . higher . . . , but so is the cost of your home and . . . other things . . . . So if you want that, you have to get on a bus and go to California and work, because that's where that rate is . . . .

(Tr. 650–651.)

Hoffman testified that he read his portion of the Power Point slides verbatim. He denied stating that workers would be replaced during a strike. Daryl Hinton, a machine operator, stated that neither Hoffman nor Hildreth stated that employees would be replaced, if the Union struck.

Although it is essentially undisputed that Hildreth told employees that, if they wanted a raise, they could get on a bus and go to California, there is a significant factual dispute concerning his other comments, which must be resolved. Specifically, the GC's witnesses collectively stated that Hildreth said that he didn't have to negotiate with the Union, could cause a lockout and IPG would replace employees, while Hildreth broadly denied such comments. For several reasons, I credit the GC's witnesses. I found Hildreth to be less than credible; his demeanor suggested a disdain for the Board's processes. He appeared cagey, self-serving, and argumentative on cross. He also acknowledged that he did not read the slides in verbatim manner, which makes it plausible that his ad-libs yielded the contested commentary. Although I found Rivers to be mostly credible, even she admitted that Hildreth ran astray of the slides. On the contrary, many of the GC's witnesses were credible. Epps was clear, consistent, and honest, while Dupree was believable and even-keeled. Although it's a closer call, Dantzler was also more credible than Hildreth.

d. April 9 and 11

Joseph Pearson testified that, on April 9, he attended a meeting, where Production Manager Harry Plexico and Hoffman spoke. He recalled them stating that, if employees struck, they would be replaced.

Rivers said that Hoffman and Plexico made power point presentations on April 9 and 11. (R. Exh. 10.) She denied hearing them tell workers that, if they struck, they would be replaced. The slides discussed unfair labor practice charges filed against the Union and strike fund procedures. (Id.) Hoffman and Plexico testified that they made a verbatim reading of the slides.

Given that Pearson stated that employees were told that, if they struck, they would be replaced, and Plexico, Rivers, and Hoffman stated otherwise, I must make a credibility resolution. For several reasons, I credit Rivers over Pearson. As noted, she was a highly credible witness, whose testimony was consistent with Plexico, Hoffman, and documentary evidence. (R. Exh. 10.)

e. Other April meetings[5]

The testimony covering these meetings was essentially undisputed.[6] Rivers testified that, in April, over 2 consecutive days, Hoffman made another scripted power point presentation. (R. Exh. 9.) Concerning strikes, this presentation provided:

> USW Strikes
> - I am not predicting that we would ever have a strike at IPG . . . .
> - However, strikes are a real part of the collective bargaining process . . . .
> - IPS's Recent Experiences with Steelworkers Strike in Brantford, Ontario
> - In August 2008, the Steelworkers called its members out on strike.
> - IPG continued to operate the plant with replacements workers.
> - In March 2011, IPG . . . close[d] the Branford plant for business reasons.

[5] The parties did not specify the dates of these meetings, beyond agreeing that such meetings occurred in April.

[6] The GC did not proffer any witnesses, who discussed this meeting.

- The plant was not closed to punish [striking] employees . . . .

Questions/Answers on Strikes

- Q: How often do the Steelworkers go on strike?
- A: Since January 2000, the Steelworkers have called 254 strikes . . . .

(R. Exh. 9.) She stated that Hoffman did not threaten permanent replacement or discharge. Hoffman reiterated that his comments were limited to a verbatim reading of the power point slides.

2. February conversation involving Williams and Thames[7]

Thames stated that, in February, he and Supervisor Bill Williams had this exchange:

> [H]e was asking me what I think about the Union, and said that . . . it can hurt you, and so I didn't respond to him. I just walked away.

(Tr. 251) (grammar as in original). Williams denied this discussion. (Tr. 690.)

I credit Thames over Williams. Thames offered a detailed account and had a strong recall of this discussion. It is probable that Williams, a lower-level supervisor, was curious about Thames' union sentiments at this nascent campaign stage and unaware that such queries might be unlawful. Williams' testimony on this issue was not persuasive; he solely offered a general denial.

3. February 16—Robinson's overtime comments

Dantzler stated that, on February 16, he attended a meeting, which was interrupted by Supervisor Leon Robinson, who summoned him to his office. He recounted this exchange:

> [H]e said that he thought I was taking a break. And I told him, no . . . I wasn't . . . . [H]e just told me that due to my . . . activities[8] that my overtime was cut. . . .

(Tr. 58). Robinson denied this statement.

In this credibility dispute, I credit Robinson, who was open, cooperative, consistent, and helpful. Dantzler was not credible; he was less than candid, and seemed mainly motivated to advocate his overtime case, rather than aiding the proceeding. For example, although he rattled off the dates that he allegedly missed overtime and who was absent on such dates, he was unable to produce notes supporting his assertions, even though he claimed that he initially prepared notes. He, instead, explained that he discarded his notes, once he committed these matters to memory. His inexplicable decision to destroy probative evidence deeply devalued his testimony.

4. Mid-March—Plexico's comments to Dantzler

Dantzler testified that, in mid-March, Plexico said, "[T]his Union activity is going to get you all in trouble." (Tr. 62.) On cross-examination, he admitted, however, that Plexico added that: he could talk to employees outside of work areas; he needed to stay in his assigned area during worktime; and he was warning him because he did not want him to get into trouble. (Tr. 109.)

Plexico testified that in March, Ira Radin, manager, told him that Dantzler was seen talking to rubber department employees, without a work-related reason to be in the area. Plexico stated that he later told Dantzler that he should not visit departments, which were not required by his job. He denied raising his union activity and stated that he previously advised him that he could solicit outside of work hours, or in nonwork areas. Dennis Webber testified that Dantzler approached him in the rubber department during working hours and encouraged him to support the Union, without a business-related reason to visit his workstation.

I credit Plexico over Dantzler, who, as explained, was less than credible. Plexico was candid and straightforward; his testimony was plausible and corroborated by Webber.

5. March and April—Disposal of union flyers in the break area

a. IPG's solicitation and distribution rule

At all material times, IPG has maintained the following rule:

> Solicitation by employees is prohibited when the person soliciting or the person being solicited is on working time. Working time is the time employees are expected to be working and does not include breaks, meals, before the shift starts, and after the shift ends.
>
> Distribution by employees during working time, as defined above, is prohibited.
>
> Distribution by employees in working areas is prohibited at all times.

(GC Exh. 1.)

b. GC's position

(1) March 22

Epps testified that, on March 22, she left union flyers in the breakroom, which is 35 feet from her workstation. She stated that, upon returning to her workstation, she observed Williams enter the breakroom and linger for 5 minutes. She said that, immediately after he departed, she re-entered the breakroom and noted that her flyers were missing. She stated that, before the campaign began, literature (e.g., newspapers, magazines, etc.) left in the breakroom remained untouched until, minimally, the end of the workday.

(2) March 23

Epps stated that, on March 23, she left union flyers on the breakroom counter. She stated that, while returning to work, she saw Williams enter the breakroom and discard her flyers.

(3) March 29

Epps testified that, on March 29, she observed another coworker leave union flyers in the breakroom. She stated that, when she later observed that these flyers had been thrown away, she retrieved the flyers and replaced them on the counter. She stated that, upon returning to work, she saw Williams collect the flyers, and that, thereafter, they remained missing.

[7] The parties did not specify the exact date of this discussion.

[8] Dantzler initially testified that Robinson said, "Union activities," but then changed his testimony to "activities" only, although he averred that he was implying "Union activities." (Tr. 58.)

(4) April 23

John Jordan said that, on April 23, after distributing union literature in the breakroom, Supervisor Chuck Becknell advised him that he could no longer pass out such materials. He stated that he retrieved his literature and told Becknell that this directive was unlawful.

c. IPG's response

Williams testified that he regularly cleans the break area and, consequently, removes union literature in the process. He added that he also discards newspapers, soda cans, and other refuse. He stated that he normally cleans the breakroom, after break periods. Moran testified that supervisors normally assist the cleaning crew by cleaning up breakrooms.

Becknell testified that, on April 24, Jordan told him to ask Hoffman why IPG was discarding union materials. He stated that Jordan never accused him of removing union flyers. He denied banning,[9] or confiscating, such materials. On cross-examination, however, he admitted to periodically removing union flyers from the break area. (Tr. 476.)

d. Credibility resolution

For several reasons, I credit Epps' testimony that: (1) Williams entered the breakroom after she left on March 22, 23 and 29, and discarded union flyers; and (2) prior to the Union's organizing drive, reading material was left in the break area, until, at least, the end of the workday. First, concerning demeanor, Epps was open, candid, and keenly committed to relaying truthful testimony. She was consistent, with a strong recall. Second, her testimony was corroborated by Jordan's credible testimony that Becknell banned him from leaving out union literature.[10] Third, Williams, who did not deny inadvertently disposing of union materials, implausibly stated that his actions were an accidental byproduct of his commitment to breakroom tidiness. I find it unbelievable that his actions were unintentional and that it was mere coincidence that his clean sweeps of the break area aligned with Epps leaving out union materials. Lastly, I found Becknell to be a less than credible witness.[11]

6. April 24 and 25—Leafleting at the Plant Gate

These facts are mostly undisputed. Dantzler and others distributed Union literature to workers at the plant gate on April 24 and 25, while supervisors John Thompson, Jason Beck, Moran, Plexico, and Michael Johnson simultaneously distributed IPG's campaign literature in close proximity. (R. Exhs. 11–12). On some occasions, IPG's team arrived to leaflet first, while on others, the Union group first appeared. Moran stated that, generally, management does not leaflet workers at the plant gate and personnel matters are addressed at meetings.

[9] Michelle Diamond, who reportedly observed this conversation, said that Becknell never told Jordan that he could not leave out union literature.

[10] Jordan had a believable demeanor, strong recall and was consistent.

[11] I note that he indicated on direct that he did not discard union literature and then admitted to doing so on cross.

D. Thames' Discharge

1. Work rules and progressive disciplinary system

IPG maintains a progressive disciplinary policy, which provides:

> Work rules are grouped into three levels (LEVEL I, LEVEL II, and LEVEL III). Violation[s] . . . will result in a . . . a written counseling, final written counseling, or discharge. The level of discipline . . . depends on the seriousness of the violation, whether there were single or multiple violations, the time period over which the violations occurred, and other relevant factors. Typically, a LEVEL I work rule violation moves 1 step within the discipline system; LEVEL II work rule violation moves 2 steps within the system; and LEVEL III work rule violation results in a Final Written counseling or discharge.
>
> A violation of . . . LEVEL II and III work rules are . . . more serious . . . and violations may result in immediate discharge . . . .

(GC Exh. 7.) This progressive disciplinary system describes these successive steps: written counseling; second written counseling; final written counseling; and discharge. (Id.)

2. Prior discipline issued to Thames

On December 21, 2011, Thames received a second written counseling for:

> Creating a disturbance . . . [by] arguing with supervisor . . . . [and] lack of application on the job . . . .

(R. Exh. 1.)

3. Termination

On March 6 (i.e., less than 3 months from the second written counseling), Thames was fired for "sleeping while on duty," which is a LEVEL II offense that moved him 2 steps up the disciplinary ladder to the termination rung. (GC Exhs. 7, 9.) His discharge form stated:

> Johnny was seen sleeping in a chair upstairs by his Supervisor Bill Williams. There was work that could have been done, boxes on lift, helping . . . etc.

(GC Exh. 9.)

a. GC's position

Thames testified that, during his March 6 shift, he began feeling shaky due to diabetes, and retreated to the upstairs warehouse to rest and inject insulin. (GC Exh. 16.) He indicated that Williams appeared and accused him of sleeping, which he adamantly denied.[12] He averred that, at this time, he was talking with Javier Suarez, a colleague, who left after Williams

[12] He admitted that Williams observed him seated with his hands clasped behind his head.

arrived.[13] He said that Williams returned 5 minutes later with Moran, who again asked why he was asleep.

The GC argued that Thames was fired due to his relationship with Epps, a known union adherent. Thames testified that he and Epps were solely workplace friends and agreed that many workers socialized with her. He stated that Williams chided him about their friendship. He stated that, although he signed a union authorization card, IPG management did not observe this action. He said that, beyond signing a card, he performed no Union activities. He stated that he spent equal social time with Epps both before, and during, the campaign. (Tr. 278.)

Epps testified that she began supporting the Union in February. She stated that she distributed flyers, encouraged coworkers, secured seven authorization cards, wore union paraphernalia, and leafleted.[14] She claimed that Williams knew about these activities. She noted that she periodically socialized with Thames during work, although she conceded that she gets many daily visitors. She added that, besides Thames, none of her other visitors were disciplined. She stated Williams commented that Thames visited her before the union campaign began. (Tr. 300.)

b. IPG's position

Rivers indicated that, although Thames denied sleeping, she ultimately credited Williams, who is a trusted employee that lacked an obvious motivation to lie.[15] (GC Exh. 10; R. Exh. 5.) She explained that, because Thames had a preexisting second written counseling, his current discipline, a LEVEL II offense, resulted in him moving up two steps on the disciplinary ladder and being fired. She added that employees are consistently issued LEVEL II violations for sleeping on the job. She stated that, although it would have been preferable to have multiple witnesses to Thames' misconduct, a single witness did not preclude the issuance of discipline.[16]

Williams testified that, on March 6, after discovering Thames asleep, he summoned Moran to act as a witness. He averred that he chose not to immediately awaken Thames because he was concerned about a potentially aggressive reaction. He noted that, when he returned with Moran, Thames was already awake. He denied Thames raising his diabetes, knowing that Thames or Epps supported the Union, or ever thinking that they were more than workplace acquaintances.

Moran testified that Williams approached her and reported that Thames was asleep. She said that she saw him seated with his hands clasped behind his head, but, not asleep.

c. Past discipline issued for sleeping on the job

This chart summarizes past discipline issued at the plant for sleep-related offenses:

Name	Date	Incident	LEVEL II	Discipline in Last Yr.	Discipline Issued
M. Johnson	Sep. 8, 2006	Sleeping on duty	Yes	n/a	2nd Written
F. Mason	Jan. 15, 2008	Sleeping on duty	Yes	Level 1 – failure to call in	Final Written
D. Wilson	Apr. 1, 2008	Sleeping on duty	Yes	Level 1 – wasting materials	Final Written
D. White	May 13, 2008	Sleeping on duty, and other violations	Yes	n/a	Discharge (all violations)
E. Gadson	Nov. 13, 2008	Sleeping on duty	Yes	n/a	2nd Written
R. Vinson	Mar. 2, 2009	Sleeping on duty	Yes	n/a	2nd Written
E. Bradley	Sep. 1, 2010	Sleeping on duty	Yes	Level 1 – wasting materials	Final Written
S. Wingard	Jan. 31, 2011	Sleeping in duty	Yes	Level 1 – not wearing safety glasses[17]	Final Written
M. Johnson	Nov. 29, 2011	Sleeping on duty	Yes	n/a	2nd Written
D. Wilson	May 18, 2012	Sleeping on duty	Yes	n/a	2nd Written

(R. Exh. 2; GC Exhs. 11, 12, 18).

d. Credibility resolution

Given that Thames denied sleeping and Williams testified

[13] On cross-examination, however, he agreed that he contrarily stated in his sworn affidavit that Suarez remained, after Williams arrived. (Tr. 272.)

[14] She admitted that several employees secured more authorization cards than she did.

[15] She averred that, although Suarez did not observe Thames asleep, he was not present at all relevant times.

[16] Jennifer Lucas, converting supervisor, testified that she disciplined Marvin Johnson for sleeping on the job, without a second witness. Dantzler opined that employees cannot be disciplined for sleeping on the job, without second witnesses; this less than credible opinion, however, was based upon conjecture and inconsistent with IPG's personnel rules, which do not expressly require corroborating witnesses. (GC Exh. 7.)

[17] He received the level 1 safety violation at the same time that he received the level 2 sleeping on duty violation.

otherwise, this key factual dispute must be resolved. For several reasons, I credit Williams. Regarding demeanor, Thames appeared to be a strong advocate on direct, but, less than helpful on cross. His testimony was inconsistent with his sworn affidavit, where he claimed that Suarez was present, when Moran arrived. Moreover, the GC's conspicuous and unexplained failure to call Suarez greatly decreases Thames' credibility.[18] It is also implausible that, if Williams concocted Thames being asleep, he would have summoned Moran to witness a fictitious event.

E. Dantzler's Overtime Issues

1. GC's position

Dantzler, a hazardous waste handler, who services the coating, mixing, solvent recovery, and latex departments, testified that he previously worked 3 to 4 hours of daily overtime. He noted that this overtime covered absences and workload increases. He said that, in January, he initiated the Union's campaign; he reported that he collected 50 union authorization cards, leafleted, campaigned in the break area, and wore union insignia.

Dantzler testified that, on February 17, he and Odell Harris, mixing department lead, discussed overtime. He related that Harris told him that Supervisor Cam Dornauer said that he was to be assigned "absolutely no overtime unless there were two men out."[19] (Tr. 59–60.) He stated that he promptly followed-up on this matter with Dornauer and recounted this exchange:

> I just asked him why I couldn't get more overtime in the mixing department. And he said that two people had to be out in order for me to get overtime . . . . He responded that that was for nobody else, just for me.

(Tr. 60.) He related that he was formerly offered overtime on a "man-for-man" basis, which meant that, if a single worker was absent, overtime was offered. He stated that he was, consequently, not assigned overtime until early September. He stated that, although he asked why he was being singled out, Dornauer refused to explain.

Dantzler contended that he should have been assigned overtime on March 11 and 18, April 18 to 20, and May 12 and 20. He testified that two employees were absent on each of these dates, and identified several absent workers, whose absences were posted.[20] (Tr. 74.) He conceded, on cross-examination, that, in September 2011, IPG went from 12-hour shifts to 8-hour shifts, which reduced overtime. (Tr. 98.)

2. IPG's position

Dornauer testified that he and Robinson supervised Dantzler. He noted that, in February, IPG sought to control overtime due to decreased business. See (R. Exhs. 18–19.) He stated that there is no policy, which bans overtime unless two employees are absent, and denied announcing this rule to Dantzler. He explained that overtime is only a function of workload demands.

Leon Robinson, a former supervisor in coating, latex, and mixing, testified that he supervised Dantzler until his April 29 retirement. He confirmed that, in early 2012, IPG prioritized controlling overtime costs, which decreased everyone's overtime. He denied retaliating against Dantzler because of his union activities.

Plexico,[21] Dantzler's second-level supervisor, testified that Dantzler historically worked overtime in coating and mixing. He stated that, in September 2011, business declined sharply and overtime was cut.[22] See (R. Exh. 14.) On September 22, 2011, he, accordingly, sent this email to his first-level supervisors:

> Everyone is aware that we are working schedules of reduced hours in Saturation, Coating and Mixing . . . . I do not understand how we can have overtime when we are working four or five day work weeks. If we need overtime please let me know as timely as possible. . . . We have to get something accomplished if I allow them to work when we do not have a schedule to make anything . . . .

(R. Exh. 15.) He stated that Dantzler, who previously worked significant overtime, was greatly impacted by these changes. In February,[23] he then sent out this ongoing overtime missive:

> We should only have scheduled OT. If we have a need for more than that, you (SUPERVISORS) need to be the one to solicit for it and I need to know about it.

(R. Exh. 16.)

Robert Powell, Master Scheduler, agreed that product demand sunk in February, and that he struggled to avoid having idle staff. He estimated that this dilemma began in December 2011. Harris, a lead, testified that, in early 2012, overtime shrunk. William Roach, a forklift driver, testified that he had typically worked overtime in mixing, before overtime ended in February.

IPG's records demonstrated that, between December 3 and 18, 2011, Dantzler worked 51.79 hours of overtime. (R. Exh. 21.) Between January 14 and February 12, he worked 56.11 hours of overtime. (Id.) No subsequent records of his overtime were submitted by IPG or the GC.[24]

3. Credibility resolutions

As a threshold matter, it appears to be undisputed that: overtime opportunities decreased in late 2011; overtime continued to decrease into early 2012; and this decrease was prompted by

[18] Suarez, a key witness, could have independently and persuasively confirmed Thames' denial.

[19] Harris was not alleged to be a supervisor; this testimony was, accordingly, not received for its truth.

[20] He stated that he created a list of the absent employees, which was never produced. (Tr. 78.) He inexplicably stated that he discarded this list, after committing it to memory. (Tr. 92, 107.)

[21] He oversees the mixing, latex, adhesive coating, and paper adhesive coating departments.

[22] He stated that, at this time, production employees consequently went from a 7-day to a 5-day schedule.

[23] He indicated that, at this time, he was unaware of any union activity at the plant.

[24] Cf. (R. Exh. 17) (showing that planned overtime was subsequently offered in various departments, but, neglecting to identify the affected employees).

a drop in business. Several IPG witnesses provided unrebutted testimony about these matters, and IPG provided corroborative documentary evidence.

I do not credit Dantzler's testimony that he should have been assigned overtime on March 11 and 18, April 18 to 20, and May 12 and 20 due to absences. As noted, regarding demeanor, he was less than candid; it is also suspect that he destroyed the very same notes that would have corroborated this testimony. It is noteworthy that the GC neglected to produce any personnel records, which corroborated his claim that two employees were absent on each of these dates.[25] Finally, the GC failed to show that someone else actually worked overtime on these dates, or that they were inappropriately assigned overtime over Dantzler (i.e., it was not their turn).[26]

Lastly, I do not credit Dantzler's claim that Dornauer told him that he was solely subject to a specialized overtime rule requiring two employees to be absent in order for him to get overtime. I credit Dornauer's denial; he was a straightforward, consistent and possessed a solid recall.

III. ANALYSIS

A. Section 8(a)(1)

1. Interrogation[27]

IPG, by Williams, unlawfully interrogated Thames about his Union activities. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that these 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.

In February, Williams approached Thames, his direct subordinate, in the plant; he asked him what he thought about the Union and told him that it could hurt him. This query was unlawful; it was coercive, and reasonably designed to restrain Section 7 activity.

2. Captive audience meeting threats[28]

a. Strike-related comments

IPG's strike-related comments were lawful. The GC asserted that IPG unlawfully threatened employees with replacement during a strike, if they unionized. The contested comments were made by Hoffman and Hildreth at captive audience meetings.

An employer can lawfully inform employees that they are subject to permanent replacement, in the event of a strike. *Eagle Comtronics*, 263 NLRB 515, 516 (1982). It need not fully explain the Act's protections for replaced strikers. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 462 (2003). Where its statements about permanent replacements, however, make specific references to job loss, such statements are generally unlawful since they convey that employees will be terminated.[29] *Wild Oats Market*, 344 NLRB 717, 740 (2005).

In the instant case, IPG lawfully told employees about: strikes being a part of collective-bargaining; the Union's strike record and strike fund procedures; and a recent strike involving IPG and the Union. See *Novi American, Inc*., 309 NLRB 544 (1992) (finding statement about possible strike lawful). Similarly, IPG lawfully told employees that they were subject to permanent replacement, if they struck, and did not suggest that their *Laidlaw* rights would terminate. See *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1981).

b. Lockouts and futility of bargaining

IPG unlawfully told employees that unionizing was futile and would trigger a lockout. The Board has held that, barring outright threats to refuse to bargain in good faith with a union, the legality of any particular statement depends upon its context. *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because 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); see, e.g., *Smithfield Foods,* 347 NLRB 1225, 1230 (2006) (statement from highest official that company was in complete control of future negotiations was unlawful); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees unlawfully implied that unionizing would be futile).

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[25] The GC's unexplained failure to produce these records suggests that the records would not have been supportive.

[26] The GC similarly neglected to produce pay records (i.e. Dantzler's pay checks), which would have corroborated that his claim that he received no overtime through September. The GC also failed to produce records showing that his coworkers worked greater overtime, or did so when it was not their fair turn. Dantzler's overtime allegations, as a result, rested almost entirely upon his uncorroborated statements, which should have been supplemented by documentary evidence. These conspicuous omissions undercut his testimony about these issues.

[27] These allegations are listed under pars. 7 and 16 of the complaint.

[28] These allegations are listed under pars. 8 and 16 of the complaint.

[29] Such comments contradict employees' *Laidlaw* rights. *Laidlaw*, 171 NLRB 1366 (1968) (permanently replaced strikers, who have made unconditional return to work offers, receive full reinstatement once replacements depart).

Hildreth commented that unionizing and collective bargaining would be futile. He added that he did not have to negotiate with the Union and would prompt a lockout. He announced that, if employees wanted a raise that IPG unilaterally deemed to exceed local labor market conditions, they should move to California and seek it there. These statements, in totality, conveyed that Hildreth, who identified himself as a key player at the bargaining table, would irrespective of the Union's proposals and contrary positions: not bargain over wages that he independently deemed unreasonable; force the Union's hand via a lockout; and unilaterally set wages in accordance with IPG's assessment of the local labor market. He drove this point home by drawing an analogy to California, and effectively said, if you don't like it, board a Greyhound to California. These statements, when taken as a whole, conveyed that unionizing would be futile.

3. Threats to reduce overtime[30]

IPG, by Robinson, did not threaten employees with lost overtime. I did not credit Dantzler's testimony that Robinson threatened to cut his overtime because of his Union activities.

4. Unspecified reprisals[31]

IPG, by Plexico, did not threaten employees with unspecified reprisals. I did not credit Dantzler's testimony that Plexico told him that "this Union activity is going to get you all in trouble." Plexico solely told him to cease soliciting in departments outside of the scope of his assignment during working hours.

5. Confiscation of union materials[32]

IPG unlawfully confiscated Union literature from the break areas. Employees generally have the 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, accordingly, violates the Act by confiscating union materials from its employees. *Ozburn-Hessey Logistics, LLC*, 357 NLRB 1632 (2011). Given that IPG's rules expressly permit solicitation and distribution during "breaks, before the shift starts, and after the shift ends," Williams' repeated confiscation of Epps' union materials from the break area was unlawful.[33]

6. Surveillance[34]

IPG engaged in unlawful surveillance. An employer unlawfully "surveils employees engaged in Section 7 activity by observing them in a 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 employees while observing them, and whether the employer engaged in other coercive behavior during its observation." Id. On April 24 and 25, management simultaneously leafleted at the plant gate in close proximity to the Union's supporters, *only days before* the election. From its post, management was free to observe who accepted a union leaflet or interacted with its supporters. This scenario was unusual, inasmuch as management typically communicated in meetings and there was no evidence of any pre-campaign leafleting. This arrangement, as a result, constituted unlawful surveillance.

B. Section 8(a)(3)[35]

IPG did not violate Section 8(a)(3). The GC alleged that IPG violated Section 8(a)(3) by terminating Thames and reducing Dantzler's overtime opportunities.

1. Legal framework

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), sets forth 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 adverse employment action. 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, 1065–1066 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretextual (i.e., the reasons given for its actions are either false or not relied upon), it 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. Further analysis, however, 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 its 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).

2. Thames' discharge

a. Prima facie case

The GC made a prima facie *Wright Line* showing that Thames' discharge violated Section 8(a)(3). He had limited

[30] These allegations are listed under pars. 9 and 16 of the complaint.

[31] These allegations are listed under pars. 10 and 16 of the complaint.

[32] These allegations are listed under pars. 12 and 16 of the complaint.

[33] See *Seton Co.,* 332 NLRB 979, 992 (2000) (an employer who disparately enforces or applies rules against employees based on the employees' support or opposition towards a union violates the Act).

[34] These allegations are listed under pars. 13 and 16 of the complaint.

[35] These allegations are listed under pars. 14, 15, and 17 of the complaint.

Union activity; he signed a card and associated with Epps, a Union adherent. Concerning knowledge, Williams observed and commented upon his relationship with Epps.[36] Lastly, there is evidence of Union animus, which can be gleaned from the unlawful threats, surveillance, and interrogation violations found herein.

b. Affirmative defense

IPG demonstrated that it would have taken the same action against Thames for permissible reasons. First, he was guilty of the underlying offense. He was caught sleeping on the job, a LEVEL II offense. Second, IPG's rules expressly provided for his discharge; his LEVEL II offense moved him 2 steps up the disciplinary ladder and placed him at the termination level. Third, other employees, who were caught sleeping, were consistently issued LEVEL II offenses, and comparably moved 2 steps up the disciplinary ladder. Fourth, the GC's attempt to link Thames' discharge to his relationship with Epps is tenuous, at best, inasmuch as it is undisputed that: Epps is a popular worker, who is visited by many others throughout the workday; none of her other visitors were disciplined; Thames visited Epps in a consistent manner before, and during, the campaign; and Epps, who only obtained seven union authorization cards in a 250-person unit, was admittedly a lesser player in the Union's organizing drive than many others.[37] Under these circumstances, IPG demonstrated that it consistently disciplined an employee, who violated its rules, irrespective of his limited union activities and tenuous connection to a union adherent.

3. Dantzler's overtime

a. Prima facie case

The GC made a prima facie *Wright Line* showing that Dantzler's discharge violated Section 8(a)(3). Dantzler had substantial union activity; he initiated the campaign; collected 50 Union authorization cards; leafleted; and wore union insignia. Concerning knowledge, IPG minimally observed him leafleting at the plant gate. Finally, as noted, there is evidence of union animus, which can be gleaned from the 8(a)(1) violations found herein.

b. Affirmative defense

IPG demonstrated that Dantzler's overtime would have been reduced, irrespective of his union activity. First, in early 2012, business demand dropped, which decreased everyone's overtime. Second, the GC conspicuously failed to produce documentary evidence, which demonstrated that Dantzler received a less than proportional share of existing overtime opportunities.[38] The GC, instead, solely relied upon Dantzler's uncorroborated and self-serving testimony that he lost overtime on certain dates,[39] and was subject to a more rigorous overtime rules than his coworkers.[40] This unsupported testimony, as discussed, was simply not credible.

IV. REPRESENTATION CASE

The Union filed 17 objections[41] to IPG's conduct during the critical period preceding the election (i.e., March 16 to April 27).[42] (GC Exh. 4.) Some objections mirrored the complaint's allegations. IPG presented argument concerning these objections in its posthearing brief.

A. Objections

1. Objections 1 and 4

Objections 1 and 4 alleged that, during the critical period, IPG engaged in surveillance. Given that I have found that IPG engaged in unlawful surveillance on April 24 and 25, these objections are valid.

2. Objection 2

Objection 2 alleged that, during the critical period, IPG unlawfully interrogated employees. Although I found that Williams unlawfully interrogated Thames in February, this activity preceded the critical period that began on March 16. Given that the Union adduced no evidence of interrogations occurring during the critical period, this objection is invalid.

3. Objection 3

Objection 3 alleged that, during the critical period, IPG unlawfully issued warnings to employees due to their union activities. This objection focused on Thames' discharge. It is, thus, invalid for two reasons: his discharge was lawful; and his firing occurred before the critical period.

4. Objection 6

Objection 6 alleged that, during the critical period, IPG confiscated union literature from plant break areas. Given that I have found this conduct to be unlawful, this objection is valid.

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[36] Knowledge is based upon the assumption that Williams knew about Epps' union activities, which, at the time of Thames' discharge, was debatable. I will, however, give the GC the benefit of the doubt on this issue, and move forward with the *Wright Line* analysis.

[37] The GC's discharge theory would have been more persuasive, if centered upon someone with substantially more union activity than Epps, who held a more exceptional relationship with Thames.

[38] Specifically, the GC failed to explain why these overtime records, which IPG clearly maintained in the normal course of its business, were never presented. These records would have been the best evidence of Dantzler's overtime losses and alleged discrimination, and might have conclusively shown that his colleagues, who were not union activists, were receiving a disproportionately greater share of overtime opportunities. Ironically, the only overtime records that were produced for Dantzler covered December 2011 through February 13 (see (R. Exhs. 21–22)), which preceded the February 17 onset date of his alleged overtime discrimination. In sum, the failure to produce this critical documentary evidence deeply undercut this allegation.

[39] Although Dantzler identified specific dates that he lost overtime, the GC neglected to produce any records regarding these dates, which would have corroborated his testimony on this point (i.e., records demonstrating that overtime was offered to someone else, or that two employees, as Dantzler suggested, were absent on these dates).

[40] The GC similarly neglected to produce records, which supported Dantzler's contention that his coworkers were granted overtime, when only one person was absent.

[41] At the hearing, it withdrew Objections 5, 7, 11, 15, and 17. See (Tr. 322, 592, 772).

[42] *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961) (critical period is span between petition and election dates).

5. Objections 8–10, and 12–14[43]

Objections 8–10 and 12–14 alleged that, during the critical period, IPG, inter alia, threatened "dire consequences," and "created the impression of futility," if employees unionized. These objections focused on the captive audience meetings, which have already been considered. Given that I that found Hildreth's comments to be unlawful, these objections are sustained.

6. Objection 16

Objection 16 alleged that, during the critical period, IPG "engaged in isolation of the employees." This objection focused on Plexico's mid-March comment to Dantzler about performing union activities outside of his assigned area, when he was supposed to be working. Given that Plexico's statement was lawful, this objection is denied.

B. Conclusion

I find that Objections 1, 4, 6, 8–10, and 12–14 are valid, and that the conduct underlying these objections, which also violated Section 8(a)(1), prevented employees from exercising free choice during the election. I recommend, accordingly, that the election be invalidated, and that employees be permitted to vote in a second untainted election. See *General Shoe Corp.,* 77 NLRB 124 (1948); *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1988).

CONCLUSIONS OF LAW

1. IPG 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 Section 2(5) of the Act.

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

a. Interrogating employees about their Union or other protected concerted activities.

b. Threatening employees that, if they selected the Union as their collective-bargaining representative, it would not negotiate, cause a lockout, and bargaining would be futile.

c. Confiscating union materials and related documents from break areas.

d. Engaging in surveillance of employees' union or other protected concerted activities.

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

5. IPG has not otherwise violated the Act.

6. By the conduct cited by the Union in Objections 1, 4, 6, 8–10, and 12–14, IPG has prevented the holding of a fair election, and such conduct warrants setting aside the election held in Case 11–RC–076776.

REMEDY

Having found that IPG committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

IPG must have a responsible official read the Notice to Employees to the unit during working hours at a meeting or meetings, in the presence of a Board agent. A notice reading will likely counteract the coercive impact of the instant unfair labor practices, which were, in the case of Hildreth's unlawful commentary, committed by a high-ranking official. See *Consec Security*, 325 NLRB 453, 454–455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (participation of high-ranking management in ULPs magnifies the coercive effect); *Mcallister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) ("[T]he public reading of the notice is an 'effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].'"). A notice reading will also foster the environment required for a final election result.

IPG will distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J Picini Flooring*, 356 NLRB 11 (2010).

[Recommended Order omitted from publication.]

[43] At the hearing the Union amended Objection 13 to allege that, "[IPG] [a]dvised employees that they would be permanently and forever replaced." (Tr. 322.)