Caterpillar Logistics, Inc. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) *and* Michael L. Craft. Cases 09–CA–114560, 09–RC–111362, and 09–CA–120356

March 30, 2015

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On August 4, 2014, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed reply briefs. In addition, the General Counsel and the Union each filed limited cross-exceptions and a supporting brief, and the Respondent filed a consolidated answering brief, to which the General Counsel and the Union each filed a reply 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 and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge, for the reasons stated in his decision, that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by: (1) announcing and granting employees a $400 safety bonus during the critical period;[4] (2) announcing the construction of smoking shelters for employees during the critical period; and (3) interrogating employees during the critical period.[5] In addition, and also for the reasons stated in his decision, we affirm the judge's finding that the Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Michael Craft. Contrary to the judge, however, and as explained below, we find that the Respondent also violated the Act and engaged in objectionable conduct by creating the impression that employees' union activities were under surveillance.

The Respondent operates a distribution warehouse in Clayton, Ohio. The Union began a campaign to organize the Respondent's employees in late 2012 or early 2013 and filed a representation petition on August 16, 2013.[6] An election was held on September 27, and the tally of ballots showed 188 votes for and 229 against representation by the Union, with no challenged ballots.

[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.

There are no exceptions to the judge's finding that the Respondent did not violate Sec. 8(a)(1) or engage in objectionable conduct by interrogating warehouse associate Kevin Harvey through its manager John Gruet.

[2] We have amended the judge's conclusions of law consistent with our decision herein.

[3] We shall modify the judge's recommended Order to include the appropriate remedial language for the impression of surveillance violation, and for the judge's recommended Social Security Administration reporting and tax compensation remedies. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In addition, we shall modify the judge's recommended broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). Finally, we shall substitute a new notice to conform to the Order as modified.

[4] We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) and engaged in objectionable conduct by announcing, during the critical period, that employees would receive a bonus. Specifically, we find, in agreement with the judge and contrary to our dissenting colleague, that even if the Respondent's witnesses were fully credited, their testimony would only demonstrate that the Respondent's statements about a possible safety bonus program—at employee meetings in March and July 2013—were full of contingencies. As such, those statements did not amount to an announcement that employees *would* receive a bonus. The applicable testimony shows that the first and only time the Respondent made a definitive statement about its entry in the safety award competition, which was the triggering factor that would obligate it to pay the bonus, was at an employee meeting during the critical period. Accordingly, the announcement and grant of the bonus was unlawful and objectionable.

Contrary to his colleagues, Member Johnson would reverse the judge's finding that the Respondent violated Sec. 8(a)(1) and engaged in objectionable conduct by its announcement and grant of a safety bonus. In his view, the record supports the Respondent's contention that it determined the details of the 2013 bonus program in late 2012, prior to the union campaign, including the safety criteria which, if met, would trigger a nondiscretionary submission for the bonus to be paid. The program was announced to employees in March 2013, long before the election petition was filed. When the safety criteria were undisputedly met, the Respondent prepared the submission in September and announced this fact to employees. Member Johnson would find that there is no evidentiary basis for inferring that the Respondent manipulated the timing of the submission and its announcement to impact employee choice in the election. Accordingly, he would dismiss the complaint allegation on this issue and overrule the parallel objection.

[5] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) and engaged in objectionable conduct by interrogating employees, we do not rely on the judge's statement that the interrogations, standing alone, would not be sufficient to warrant a second election. Member Johnson disagrees and, like the judge, would find that absent evidence of sufficient dissemination the interrogations would not, standing alone, require a rerun election.

[6] Subsequent dates are in 2013, unless otherwise indicated.

In late August, the Union held its first meeting for the employees eligible to vote in the election. The meeting was held at a nearby hotel. The Respondent's supervisors and agents were neither invited to nor attended the Union's meeting. At this meeting, John Sponsler, a warehouse associate who had not yet openly supported the Union, made a presentation in favor of representation.

The following day, Nick Ewry, one of the Respondent's supervisors, approached Sponsler and asked him what his feelings were about the Union. Sponsler responded that he was in favor of union representation, and added that he was afraid of retaliation if the Union lost the election. Ewry replied that Sponsler need not worry, because "management already knew everyone who was involved in the organizing effort."

The complaint and the objections allege that Ewry's statements in this conversation constituted both an interrogation and the creation of the impression of surveillance. The judge found merit in the interrogation allegation but dismissed the impression of surveillance allegation. With respect to the latter allegation, the judge made no reference to Ewry's statements and instead stated that "[a]ssuming management had information as to who supported the union, there were many other means by which they may have gained such information" apart from surveillance. Contrary to the judge, we find that Ewry's statement created the impression of surveillance as alleged.[7]

As described above, Ewry's statement that "management already knew everyone who was involved in the organizing effort" occurred just 1 day after Sponsler made a presentation in favor of representation at the union meeting, and was unaccompanied by any comment about the source of that information. In these circumstances, Sponsler would reasonably have assumed that the Respondent was monitoring the employees' union activities. It is well settled that an employer creates an impression of surveillance by telling employees that it is aware of their union activity without disclosing the source of that information, "because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through *employer* monitoring." *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014), quoting *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009), affd. and incorporated by reference in 357 NLRB 633 (2011), enfd. 498 Fed. Appx. 45 (D.C. Cir. 2012) (emphasis in original).

[7] As set forth above, we adopt the judge's interrogation findings for the reasons set forth in his decision.

The judge's statement that there were "other means by which they may have gained such information" misses the mark. "[T]he Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee[s'] activities by unlawful means." *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Rather, the critical inquiry is whether "the employees would reasonably assume from the employer's statements or conduct that their union activities had been placed under surveillance." *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004). Therefore, even if the Respondent had introduced evidence of "other means" to identify employees involved in the organizing effort,[8] such evidence would not change the fact that Sponsler would reasonably assume from Ewry's statement that the Respondent was monitoring employees' union activities. See, e.g., *Spartech Corp.*, 344 NLRB 576, 576–577 (2005) (statement that employer "knew who had attended a union meeting" created impression of surveillance even though such information was available through other means, where it was apparent that employer was "endeavoring to keep track" of who attended the meeting).[9]

Accordingly, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by creating the impression that employees' union activities were under surveillance.

AMENDED CONCLUSIONS OF LAW

Insert the following as Conclusion of Law 4 and renumber the subsequent paragraphs.

"4. The Respondent, by Nick Ewry, violated Section 8(a)(1) and engaged in objectionable conduct by creating the impression that employees' union activities were under surveillance during the critical period between the filing of the representation petition and the election."

ORDER

The National Labor Relations Board orders that the Respondent, Caterpillar Logistics, Inc., Clayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees because of their support for the International Union, United Automobile, Aerospace and

[8] The record indicates that the Respondent instructed supervisors to gauge employees' support of the Union—on a scale of 1 to 5—during the organizing campaign.

[9] Member Johnson would find Ewry's statement to be unlawful and objectionable absent evidence that a reasonable employee would be aware of other noncoercive means of observation by which the Respondent would be able to identify "everyone" involved in the organizing effort. Thus, he finds this case is distinguishable from *Greater Omaha Packing Co.*, 360 NLRB 493, 495 fn.7 (2014) (Member Johnson dissenting in relevant part).

Agricultural Implement Workers of America (UAW), or any other Union.

(b) Coercively interrogating employees about their union sympathies.

(c) Creating the impression that employees' union and other protected concerted activities are under surveillance.

(d) Announcing, promising, and/or granting benefits to employees in order to dissuade employees from supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) or any other union.

(e) 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 from the date of the Board's Order, offer Michael Craft full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Craft whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision, as amended in this decision.

(c) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(d) Compensate Michael Craft for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to Michael Craft's discharge, and within 3 days thereafter notify Michael Craft in writing that this has been done and that the discharge will not be used against him 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 amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Clayton, Ohio facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 16, 2013.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 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 of Second Election omitted from publication.]

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 discharge, discipline, or otherwise discriminate against any of you for engaging in union or other protected activity, including announcing your sup-

[10] 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."

port for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other union.

WE WILL NOT interrogate you about your support or lack thereof for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other union.

WE WILL NOT create the impression that your union and other protected concerted activities are under surveillance.

WE WILL NOT announce, promise or grant you benefits in order to discourage you from supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), or any other union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Michael Craft full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Craft whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Michael Craft for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Michael Craft.

WE WILL, within 3 days thereafter, notify Michael Craft in writing that this has been done and that the discharge and suspension will not be used against him in any way.

CATERPILLAR LOGISTICS, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-114560 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.

Joseph F. Tansino, Esq., for the General Counsel.
Joseph J. Torres, Derek G. Barella, Heather S. Lehman, Esqs. (Winston and *Strawn),* of Chicago, Illinois, for the Respondent.
Kristin Seifert Watson, Esq. (Cloppert, Latanick, Sauter & Washburn), of Columbus, Ohio, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Dayton, Ohio, on May 14–16, 2014.[1] The Charging Party Union, the UAW, filed charge in Case 09–CA–114560 on October 17, 2013. The UAW also filed objections to conduct affecting the results of a September 27, 2013 representation election on October 3, 2013.[2] In that election 229 votes were cast against the UAW and 188 were cast in favor of UAW representation of Respondent's warehouse associates, warehouse associate team leaders and quality technicians at Caterpillar Logistics' Clayton, Ohio facility.

The Regional Director for NLRB Region 9 directed a hearing on the Union's Objections 3, 5, 8, and 10. These objections are essentially more general versions of the allegations contained in paragraphs 6–10 of the consolidated complaint issued on March 12, 2014. These paragraphs allege that Respondent violated Section 8(a)(1) by interrogating employees, giving them the impression that employees' union activities were under surveillance, soliciting grievances, and making promises to discourage employees from voting for union representation. The March 12, 2014 Order also consolidated charge in Case 09–CA–120356 (complaint par. 11) which was filed by Michael Craft on January 9, 2014. That charge alleges that Respondent violated the Act in discharging Craft.[3]

[1] The record in this matter did not close until June 19, 2014. On May 16, I left the record open in order for the Respondent to produce all subpoenaed documents and for the General Counsel and the Union to satisfy themselves that the hearing need not be resumed.

[2] The "critical period" during which objectionable conduct generally must occur began with the UAW filing a representation petition on August 16, 2013.

[3] At the outset of the hearing, Respondent moved to sever Michael Craft's case from the UAW's. I denied that motion on the well-settled legal principle that since both I and Craft were already in the courtroom and ready for litigation of his discharge, it should proceed to trial.

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Caterpillar Logistics, has operated a huge distribution warehouse in Clayton, Ohio, near Dayton since the spring of 2011.[5] During 2013, more than $50,000 worth of goods were sold and directly shipped from the Clayton facility to points outside of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Most of the issues in this case arise out the Union's attempt to organize Respondent's Clayton, Ohio facility. Organizing activity began in early 2013 or late 2012. At least by early 2013, Respondent's managers were aware that an organizing effort was underway at the plant. The Union filed a representation petition on August 16, 2013. A representation election was conducted on September 27, 2013, which, as stated previously, the Union lost 229 votes to 188.

Complaint Paragraph 6 (Objections 5 and 10 as they Relate to Supervisor or Coach Nick Ewry)

Unit employee John Sponsler testified that in late August 2013, shortly after the Union had a meeting at a Holiday Inn, his supervisor, Nick Ewry (or coach as Respondent calls its supervisors), approached him and asked Sponsler what his feelings were about the Union. Sponsler further testified that he told Ewry that he was in favor of the Union and the reasons for his position. He then told Ewry that he was afraid of retaliation if the Union lost the election. According to Sponsler, Ewry replied that he had nothing to worry about and that upper management already knew everyone who was involved in the organizing effort.

Sponsler testified that prior to this conversation he had solicited other employees to sign union authorization cards and talked to other employees to encourage them to vote for the Union. However, he had not previously discussed his views on the Union with Ewry or worn any prounion clothing or paraphernalia. On the other hand, he had advised a prior supervisor, Tom McNulty, about his prounion views some months previously.

Ewry testified that he approached Sponsler in late June or July and asked him how he felt things were going on the floor. Then, according to Ewry on direct examination, Sponsler complained that Respondent was telling employees that union authorization cards were legally binding. Sponsler also complained about other issues, including the distribution of overtime. Ewry testified that at the end of the conversation Sponsler asked him if there was going to be a witch hunt. Ewry said there would not be. He denies telling Sponsler that management already knew who was involved in union organizing.

On cross-examination, Ewry's testimony appears to suggest that in the course of his conversation about how things were going on the floor, Sponsler gratuitously volunteered the fact that he was a union supporter (Tr. 561–562). I find this extremely unlikely.

In weighing the relative credibility of Sponsler and Ewry, I take into consideration the fact that Respondent's supervisors were having weekly meetings with Caterpillar Labor Relations Representative Ron Hassinger. In these meetings they were asked to rate the employees they supervised on a scale of 1–5 (5 being strong prounion). Thus, there was tremendous incentive, if not pressure, for supervisors to probe as to their employees' views on unionization and the upcoming representation election.

Therefore, on the basis of the inherent probabilities of the encounter between Ewry and Sponsler, I credit Sponsler, *Daikichi Sushi*, 335 NLRB 622, 623 (2001).

Complaint Paragraph 7 (Objection 10 as it Relates to Supervisor/Coach Cory Butcher)

Marquis Applin, a first-shift employee, testified that his Supervisor/Coach Cory Butcher approached him after a late August mandatory company meeting. According to Applin, Butcher asked him if he had made a decision as to how he would vote. Applin also testified that Butcher told him that if the Union won, Butcher could not talk to Applin 1 on 1. Applin testified that this conversation occurred before he began to wear prounion paraphernalia.

Butcher testified that he never asked Applin what he thought of the Union. However, Butcher also testified that he might have asked Applin what he thought of a company meeting about the Union (Tr. 576–577). I find that he did ask Applin this question and it is the functional equivalent of interrogating Applin about his union sympathies. I find that the inquiry was motivated by each supervisor's obligation to report their assessment of each employee's stand on unionization. Any answer by Applin would tend to indicate where he stood.

Complaint Paragraph 8 (Objection 8 as it Relates to John Gruet)

Warehouse associate Kevin Harvey is one of the most active and outspoken advocates of UAW representation at the Clayton facility. Harvey testified that after a company meeting about the union organizing drive, which occurred a week or two prior to the September 27 election, John Gruet, the assistant value stream manager for the second shift, approached him.[6] At the meeting, Harvey challenged and questioned the Company's speaker advocating voting against union representation. According to Harvey, Gruet asked him after this meeting what he could do to make "this union stuff" go away. Harvey testified further that he responded that it was too late to change his mind. Then Gruet asked, "[W]hat can I do for you?" Harvey

[4] Tr. 240, L. 10: "appropriate" is a mistranscription. The correct word may have been "admissible."

[5] Respondent employs about 600 people at Clayton; approximately 550 are in the bargaining unit.

[6] Gruet was thus one of, if not the highest ranking production manager on the second shift.

testified that he responded that he would change his mind, "when hell freezes over."

Gruet testified that he recalls asking Harvey why he was adamantly so prounion. Gruet testified that Harvey mentioned some unhappiness with upper management, including their salaries. He essentially denied that he said the things to which Harvey testified. In this instance I find the testimony of Harvey and Gruet to be equally plausible; therefore I decline to credit Harvey.

Complaint Paragraphs 9 and 10: Promises of a Safety Bonus and a Shelter for the Smokers' Break Area (Objections 3 and 8)

The Safety Bonus

It is uncontroverted that at an all-employee meeting on or about September 18, 2013, little more than a week before the representation election, Plant Manager Brian Purcell and Safety Manager Kevin Rivera announced to employees that they would be receiving a one-time "safety bonus" of $400, to be paid in December. What is primarily at issue is whether this was news to Respondent's employees **and** whether there was any reason for the timing of the announcement other than the pending election.

This safety bonus was a material change in the manner in which Respondent's employees were compensated for good safety practices. In 2012, safety was one of several elements included in Respondent's "gain-sharing program." Lost-time accidents reduced every employee's gain-sharing. Employees who had a written warning or other discipline were not eligible for any gain-sharing payment. In contrast, the 2013 safety bonus of $400 (which apparently is not to be paid in 2014) was paid in December to every unit employee at the Clayton facility.[7]

There is no question that announcement of the $400 bonus made a significant impression on unit employees and could well have influenced the outcome of the election. Supervisor Cory Butcher wrote the following to Human Relations Manager Jason Murphy on September 25, 2 days before the election:

> Apparently, the big thing in my PID's the last two mornings is on the $400 check everyone will be getting for us submitting the safety award. Several people feel it will be taken away after the election (to which I have assured them during the AEM [all employee meeting] and I followed up with Rivera, that we did trigger the money. They have asked if Caterpillar will put that payment in writing to the associates as a guarantee that they will see the money in December.

(UAW Exh. 1.)

The gross weekly pay of an employee such as Tandy Combs, whose was making $13.14 per hour for 40 hours, is $525.60. Thus, for such an employee the safety bonus amounted to about 75 percent of his or her weekly wage (excluding overtime). Employees received this bonus in addition to a quarterly gain-sharing check.

[7] Taxes were withheld from the safety bonus. Employee Tandy Combs took home $249.40 from the safety bonus either in the last week of November or in December 2013, GC Exh. 3.

Respondent's Evidence of Information Regarding the Safety Bonus Communicated to Employees Prior to September 18, 2013

Pahlas, the value stream manager at Clayton, testified that at Respondent's March 2013 all-employee meeting, then-Plant Manager Jeff Slocum[8] told employees that ***if*** the plant was able to submit a proposal for the Caterpillar Chairman's safety award, Respondent would pay employees a $400 safety bonus. According to Pahlas, Slocum typically read word for word from a power point presentation. Employees were not given hard copies of the power point. If this information was communicated to them, it was only done verbally (Tr. 494–495).

The power point (R. Exh. 2 at p. 7) states the following:

> For 2013 We have set aside a OTO [one time only] discretionary $400 per team member IF AND ONLY IF we are positioned to submit a viable safety program for consideration in the annual "Chairman's Safety Award" process.
>
> Things that are in the submission include
>
> Facility achieves its required CI Card target + 6.0 cards/team member by YE[9]
>
> Documented reduction in high risk and zero tolerance behaviors
>
> Documented improvements in "near misses" at the facility
>
> Completion of formal training related to safety
>
> Safety teams in place and active
>
> True peer-to-peer safety observations and recognition in place
>
> You get the picture

Not one of the 12 unit employees called by the General Counsel testified to recalling this presentation. Several testified that the first time they recalled anything about the $400 safety bonus was at the September all-employee meeting. **There is no evidence that Slocum advised employees when a decision would be made about submitting a proposal for the safety award, or when the safety bonus would be paid.**

Unit Employees who Testified for Respondent Concerning their Knowledge of a $400 Safety Bonus Prior to the Filing of the Election Petition

Joel Gambrell

Joel Gambrell is a team leader on the second shift. He is a member of the bargaining unit. His testimony is inaccurate in several respects. Gambrell testified that he received the $400 safety bonus in September. In fact it was not paid until December. He also testified that he recalls Plant Manager Brian Purcell reading from slides at an all-employee meeting in March 2013. This is also incorrect in that Purcell did not arrive at the plant until mid-July. When asked by Respondent's coun-

[8] Brian Purcell replaced Slocum as Respondent's plant manager at Clayton in mid-July 2013.

[9] YE appears to stand for Years End. That being so it is difficult to correlate Slocum's remarks with the safety bonus announced in September 2013, and paid in late November 2013. I am not aware of evidence that Respondent operated on a fiscal year different than a calendar year.

sel what was particularly memorable, Gambrell replied that it was the material on page 6 of Respondent's Exhibit 2, "What about Safety Behaviors? Something completely different here!" Gambrell said nothing about the $400 bonus until led by Respondent's counsel. I decline to credit his testimony on this subject.

Daniel Pinkston

Daniel Pinkston is a second-shift unit employee, who wore a bracelet and T-shirt prior to the election advocating that employees vote against union representation. Pinkston testified that he learned about a potential safety bonus at the March 2013 meeting. Pinkston, unlike Gambrell, recalled correctly that then-Plant Manager Jeff Slocum addressed employees at this meeting. Pinkston testified to specifically recalling Slocum's rendition of slide 6, the same one that Gambrell recalled, as well as slides 7 and 8. Slide 7 is the one that specifically mentioned the possibility of a $400 one-time bonus.

Pinkston attended one of several sessions of the March 2013 all-employee meeting. The only evidence that Slocum read through slides at each session is that of Value Stream Manager Pahlas.

Angel Cuellar

Angel Cuellar is a warehouse associate who worked on the second shift throughout almost all of 2013. Cuellar wore a vote "No" bracelet during the organizing campaign. Cuellar testified that he recalled the PowerPoint presentation about the potential $400 safety bonus. However, he recalled that employees would receive this bonus only if the Clayton facility won the Chairman's Safety Award; not that employees would receive such a bonus upon the plant's submission for the award.

Evidence that Respondent Communicated with Unit Employees about the Bonus in July 2013

Value Stream Manager Pahlas testified that in July employees were told at another all-employee meeting that Respondent was going to submit a proposal for the Chairman's award (Tr. 466). That testimony is not supported by the record.

Kevin Rivera, the facility safety director, testified that at the July meeting he presented a slide entitled "safety update" (Tr. 511–513; R. Exh. 3, p. 7). Rivera's testimony is that:

> I asked if they remembered the safety component of the gain sharing program and how it was contingent on us submitting a project for the Health and Safety Award. And I covered the two projects that I thought we would be submitting for that award.

Even if I credited the testimony of Respondent's witnesses, I would find that employees were not told that a decision had been made to submit for the safety award, nor when a decision would be made, nor when the safety bonus would be paid, until September 18, 2013.

Rivera testified that the submission was not prepared until August. It was not submitted to corporate headquarters until September 13, 2013. I infer that if lost-time injuries had occurred between the July all-employee meeting and September 13, or if the contingencies set forth in slide 7 of the March PowerPoint had not been satisfied, the submission for the award may not have occurred.[10]

Rivera's July slide does not state for certain that the Clayton facility would be submitting a proposal for the Chairman's Award. It states that the facility has two project ideas: Clayton Safety Culture Improvement and IPC Light Pack Table Ergonomic.

Not a single unit employee, including the three who testified for Respondent as to their knowledge of the safety bonus, testified that they recalled the July reminder.[11] I find that Respondent did nothing to indicate for certain that they would be receiving the one-time safety bonus until the September all-employee meeting, within 10 days of the representation election.

The Shelter for the Smokers' Break Areas

It is undisputed that Respondent informed unit employees for the first time at 7–8 sessions of the September all-employee meeting that it would be constructing shelters in the break areas for smokers. Brian Purcell discussed facility improvements as part of his presentation at this meeting. Among these improvements were additional outside break areas and covering them (R. Exh. 4). As of the September all-employee meeting, Respondent had not made plans to provide cover for the break areas reserved for smokers. According to Purcell, at the first session of the September meeting, an employee asked what the Company was going to do for smokers.

Purcell then asked the smokers to stay after the first session and about 15–18 did so. He told the employees that Respondent was erecting shelters so that smokers could stay out of the rain on their breaks (Tr. 249). At all subsequent sessions of the September meeting, Purcell asked the smokers to remain in the conference room when nonsmokers left. There is no evidence that any employee asked Purcell about shelters for the smokers at any meeting other than the first session. It was Purcell who initiated the discussion of shelter for the smokers at these sessions (Tr. 772–773).

Purcell told the smokers at each session that the Company was providing shelter for them. While it unclear how many employees stayed behind at the other six or seven sessions, Purcell's promise to erect shelters for smokers was thus disseminated to more than the 15–18 unit employees at the first meeting. It is possible that as many as 100 to 150 unit employees who smoked were told for the first time on September 18, that Respondent was erecting shelters for them. The construction of the shelters did not start until long after the representation election and was not completed until March 2014. During this period smokers continued to take their breaks outside without

[10] Actually, it is not clear that the criteria mentioned by Slocum for submitting a proposal for the Chairman's Safety Award were fulfilled. There is no evidence on this point. I am also unaware of any documentation in support of Respondent's testimony that Monday, September 30, was the deadline for the Chairman's Awards submissions. Kevin Rivera did not assert that he told employees about a September 30 deadline at the July all-employee meeting.

[11] Joel Gambrell testified that he remembered seeing the slides in Exh. R-3 at the July meeting. But all he could recall about them was that the slides stated that employees had worked over 600,000 hours without an injury. He apparently did not recall being reminded of the possibility of a safety bonus at the July meeting.

shelter in all the same break areas as they did prior to September 18. Whatever safety hazards smokers were exposed to, continued unabated until March 2014.

Kevin Harvey's testimony that he had been complaining to management about the lack of shelter for smokers since 2011 is uncontradicted. Other employees had submitted CI cards, which are essentially suggestions, about the need for a shelter for smokers prior to September 18 (Tr. 767). Denise Scales-Smith complained about the lack of benches in the smoke break areas prior to September 18.

The Discharge of Michael Craft (Complaint Paragraph 11)

Michael Craft worked for Respondent from June 2012, until he was discharged on November 15, 2013. He did not support the Union during the organizing campaign. On the evening of Thursday, November 14, 2013, Brian Purcell conducted an all-employee meeting. During that meeting, Purcell announced that guard shacks would be constructed by the employee entrance to the facility. Previously, the guards had patrolled the facility in vehicles. Michael Craft asked Purcell what the shacks were for. Purcell answered, "guards." The room erupted in laughter.

The next day Craft reported for work at 2 p.m. Sometime between 3 and 4 p.m. Craft approached an area in which employees Gary Cox and Kevin Harvey were working. Supervisor Jason Brown and Team Leader Angel Cuellar were conversing nearby.[12] The most reliable account of what transpired is the written statement that Jason Brown completed on the afternoon on November 15 (R. Exh. 19).

> On Friday 11/15/2013 I was speaking with Angel Cuellar about where to place associates coming in for over-time. Angel and I were standing at the visual flow monitor in PA20. I heard Mike Craft speaking to Gary Cox with a raised voice almost yelling. Kevin Harvey was off loading totes from the conveyor next to where Mike Craft was talking, listening to Mike. Greg Goffee was standing closer to the bins listening as well. Mike made this statement. "You guys (union supporters) just gained another supporter, I'm sick of the way they treat us here. He (Brian Purcell) thinks he can treat us like he treated the thugs he managed in Denver. I'm not putting up with it anymore. I'm sick of it, that motherfucker is going down, the gloves are fucking off now." I pulled Mike Craft off to another area by the stairs around PA01. I told Mike I cannot have him making threats to anyone at work. I asked Mike why he was upset and yelling. Mike stated that he had asked the question "what are the guard shacks for?" in the AEM and Brian Purcell said "for guards." Mike stated that everyone erupted in laughter and he was not given a followup response by Brian and the meeting was over. Mike stated that he felt embarrassed and made out to look foolish. Mike continued to say that he was for the union now due to the way Brian was treating the associates like they were thugs. I let Mike get these things off of his chest but kept him calm while doing so. I stated to Mike that I cannot have associates making threats to anyone inside or outside the building at any time. Mike said that he never meant he wanted to do physical harm to Brian Purcell he just meant that he wanted Brian to be held accountable for his actions towards Mike Craft. I told Mike to take several minutes to gather himself and refrain from yelling and making threats. I asked Mike Craft if he would like to go and talk to Brian Purcell at the moment to make Brian aware of Mike's feelings were hurt. Mike stated that he was "Good" and he would talk to Brian on Monday. I advised Mike to not let things build up and have another blow-out in front of associates again. Mike said that he was relaxed and wanted to go back to work. I immediately went to John Gruet and reported the conversation I just had with Mike Craft. I asked Angel Cuellar to write a witness statement of the details he had heard. Angel hand wrote what he witnessed and Angel turned it over to me.

At 5:27 p.m. Jason Brown sent an email to Value Stream Manager John Gruet with his statement as an attachment (R. Exh. 20). At 5:57 p.m. Gruet forwarded Brown's statement to Brian Purcell and Human Resources Manager Jason Murphy. Gruet stated (R. Exh. 20):

> I don't believe Mike is a violent person but he is upset. I don't believe Mike intended physical harm with his words as listed in Jason's statement but I do feel we need to discuss ramifications for his actions and comments towards Brian Purcell.
>
> I contemplated dismissing Mike for the night with pay but after discussing Jason's conversation with Mike and calming him down, I felt he was fit for work and would not harm any associates.

At 6 p.m. Michael Craft left the facility and went on his lunchbreak. Sometime between 5:57 and 6:30 p.m., Human Resources Director Murphy called Gruet and told Gruet to suspend Craft. Gruet met Craft on his way back into the plant and told him he was being suspended pending an investigation.

Around the same time, Murphy called Brian Purcell at home. Purcell called Ron Hassinger, a corporate labor relations official. Hassinger advised Purcell to report the incident to the Clayton police department. Purcell, Murphy and John Gruet met with a Clayton policeman. They summoned Gary Cox to the office to give a statement to the police (R. Exh. 10). So far as this record shows, the police took no further action. Respondent also took no further steps directed at a criminal prosecution.

Brian Purcell decided to terminate Craft's employment. Respondent sent Craft a termination letter on November 19, 2013. When Purcell made the decision to terminate Craft he had reviewed the written statement of Jason Brown and possibly that of Angel Cuellar and John Gruet (Tr. 756). He was present when Gary Cox gave a statement to the Clayton police. Purcell did not talk to either Brown, Cuellar, or Craft about what had

[12] There are differences in the testimony as to when this incident occurred. I conclude it occurred between 3 and 4 p.m. from the following evidence: Angel Cuellar's statement, R. Exh. 18 and testimony at Tr. 488; Gary Cox's statement, R. Exh. 10 and Kevin Harvey's testimony at Tr. 411–412.

happened. He was aware that Craft had mentioned the Union in his outburst (Tr. 754).

Purcell also testified that his decision was also based on information he received from Jason Murphy that Craft had a history of workplace violence. This assertion is not quite accurate. The reference to a history of workplace violence is apparently predicated on a written warning issued to Craft on May 29, 2013 (R. Exh. 9).

The warning states that it is being issued for unsatisfactory job performance. The warning was issued due to a verbal altercation Craft had with another employee in which he asked the other employee several times, "[W]hat are gonna do about it and You wanna hit me." The document states, "Michael is being issued a Written Warning for performance. It is expected that all associates Live the Values, plus this type of behavior could be considered a breach of our Prohibitive Harassment Policy and Workplace Violence." Respondent's Workplace Violence Policy (R. Exh. 23) states that Caterpillar will not tolerate threats by any means. All persons who violate this policy will be subject to discipline up to, and including, termination of employment, and/or criminal prosecution.

Analysis

Announcement of the Safety Bonus and Shelter for Smokers During the Critical Period

Legal Principles

The Board will infer that an announcement or grant of benefits during the critical period is objectionable. However, the employer may rebut the inference by establishing an explanation other than the pending election for the timing of the announcement or the bestowal of the benefit. The employer may rebut the inference by showing that there was a legitimate business reason for the timing of the announcement or for the grant of the benefit. In some cases, the employer may be able to successfully rebut the inference with respect to the benefit, but may fail to show any reason for the timing of the announcement of the benefit other than the pending election, *Sun Mart Foods*, 341 NLRB 161, 162 (2004).

An employer's granting or announcement of a benefit during the critical period is objectionable also when it responds to a request made by employees well before the organizing campaign, *Durham School Services*, 360 NLRB 708 (2014), and cases cited therein.

The Legal Principles as Applied to the Safety Bonus

Regarding the safety bonus, the announcement of this benefit at the September 18 meeting is what I would term the "low hanging fruit" in this case. There was no reason for Brian Purcell to announce the fact that employees would be receiving the bonus in December other than to influence them in voting in the representation election. I find that the announcement was motivated by Respondent's desire to discourage unit employees from voting for union representation.[13] The announcement in of itself is sufficient reason to order a second election and find that Respondent violated Section 8(a)(1).

Moreover, I find that the grant of this benefit during the critical period was also objectionable and violative. There is no credible evidence that a firm decision had been made to pay employees the $400 bonus prior to the filing of the representation petition on August 16.

The Legal Principles as Applied to the Shelters for Smokers

Announcing the erection of shelter for the employees who smoked is also clearly objectionable and violative. Respondent justifies the announcement on the grounds that Brian Purcell responded to an employee inquiry. However, this was only true with regard to the first session of the all-employee meeting. Subsequent promises were purely gratuitous. Indeed, there was no reason to make such an announcement at these subsequent sessions other than to sway employees prior to the election.

Respondent also argues that telling employees that it would erect shelters for the smoke break areas cannot be considered a benefit within the meaning of Board law. I conclude otherwise. First of all, it is hard to fathom Respondent's contention that promises in this regard would likely be viewed as a "non-event" by employees (R. Br. at 27). I conclude that unit employees would deem it quite beneficial to smoke in a sheltered area in bad weather, and in the case of the IPC area, not to walk down a potentially hazardous slope to reach the smoke break area (R. Br. at 12).

In *Teledyne Dental Products Corp.*, 210 NLRB 435 (1974), the Board found the employer's implementation of a new coffee break policy, in response to employee demands, to violate the Act. I find, as the Board did in that case, that Respondent was indicating its willingness to comply with employees' demands and give them reason to believe that it was equally anxious to satisfy their other demands. Respondent deliberately embarked upon a course of action designed to convince the employees that their demands would be met through direct dealing with Respondent and that union representation could in no way be advantageous to them.

Kevin Harvey's uncontradicted testimony establishes that employees had complained about the lack of shelter for smokers many times prior to the filing of the representation petition. The safety concerns cited by Purcell were concerns that could have been addressed by Respondent long before September 18, 2013, and were not addressed for several months after the election.

Respondent's Violative and Objectionable Conduct with Respect to the Safety Bonus and Smoke Shelters Warrants Setting Aside the Election

Generally, the Board will set aside an election and order a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. The only exception to this policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome could be affected. In assessing whether the misconduct could have affected the result of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the

[13] The fact that Respondent has no plans for such a bonus in 2014 supports my conclusion that the 2013 bonus was motivated in part by its awareness since at least November 2012 that union organizing activity was taking place in its facility, Tr. 547–548, 770.

size of the unit, the proximity of the misconduct to the election, and the closeness of the vote. It also appears to consider the position of the managers who committed the violations, *Bon Appetit Management Co.*, 334 NLRB 1042 (2001). All of these factors, with the possible exception of the closeness of the vote, favor directing a new election. The safety bonus promise was disseminated to the entire bargaining unit; the smoke break shelters were promised to possibly over a quarter of the unit. These promises were made by Brian Purcell, the highest ranking on-site manager, no more than 9 days before the election. Finally, Cory Butcher's memo indicates that the grant of the safety bonus was indeed a factor in the way some unit employees voted. In summary, these violations were far from de minimis and warrant setting aside the election and ordering a rerun.

Creating the Impression that Employees' Union Activities were Under Surveillance

There is no credible evidence to support this objection/complaint allegation. Assuming management had information as to who supported the Union, there were many other means by which they may gained such information; e.g., employees volunteering such information and open union activity.

Interrogations

With regard to the allegation regarding John Gruet's inquiries to Kevin Harvey, I find Gruet's testimony equally credible to that of Harvey. Therefore I dismiss the 8(a)(1) allegation and overrule the objection in complaint paragraph 8. However, I find that Nick Ewry and Cory Butcher violated Section 8(a)(1) as alleged in complaint paragraphs 6 and 7 with regard to interrogating employees about their union sympathies.

Butcher's inquiry to Marquis Applin about what Applin thought about a company meeting held to discourage employees from supporting the Union, is the equivalent of asking Applin whether he supported the Union or not. I credit Applin's testimony that he had not openly supported the Union when this inquiry was made. If he had, there would have been no reason for Butcher to ask his question. Moreover, I infer that Butcher made this inquiry so that he could assess which way Applin was leaning in his weekly report to Ron Hassinger. I draw the same inference with regard to Ewry's conversation with John Sponsler.

The lead Board case regarding the legality of interrogations is *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Pursuant to the *Rossmore* test,

> Under Board law, it is [well established] that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act."

In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter, *Norton Audubon Hospital*, 338 NLRB 320, 320–321 (2002). I find that the inquiry from Butcher, designed to gain information about Applin's union sympathies, violates Section 8(a)(1). Particularly, coming on the heels of a meeting in which Respondent made it clear that it opposed unionization, the question was coercive. Employees have a right to vote for or against union representation without their views being made known to management. Butcher's conduct is also objectionable, but standing alone would not be sufficient to order a second election. I draw the same conclusions about Ewry's discussion about the Union with John Sponsler.

Michael Craft's Discharge

There is no question that Michael Craft engaged in activity protected by Section 7 of the Act in announcing his support for the Union to other employees, namely Gary Cox and Kevin Harvey. Thus, the issue in this matter is whether he lost this protection by threatening Brian Purcell in the course of the same conversation. The standard for evaluating such situations is that set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). Whether otherwise protected activity has lost the Act's protection is determined by balancing four factors: (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice; Also see *Overnite Transportation Co.*, 343 NLRB 1431, 1437 (2004).

Applying the *Atlantic Steel* criteria to this case: (1) the place of the discussion, on the warehouse floor cuts both ways. Craft disrupted work for a very brief period of time. On the other hand, the seriousness of his misconduct is somewhat lessened by the fact that Brian Purcell was not present when he made his remarks. In *Plaza Auto Center*, 360 NLRB 972, 977 (2014), the Board found that a face-to-face confrontation, not present in this case, weighs in favor of an employee losing the protection of the Act. Moreover, Craft's statement was not accompanied by any threatening physical gestures, *Kiewit Power Constructers*, 355 NLRB 708 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011), which also weighs in favor of a finding that he did not lose the Act's protection.

Criteria (2) the subject of the discussion: Craft's newly discovered support for the Union cuts in favor of a finding that he did not lose the protection of the Act. Criteria (3) is the most important. Without the first sentence, Craft's statements are certainly a threat which would lose him the protection of the Act. However, the M—fer going down, the gloves are off has to be placed in context. The statement makes no sense if one interprets it as I am going to kill or assault Brian Purcell and then support the Union. It is also important that when confronted by Jason Brown, Craft explained that he did not want to physically attack Brian Purcell, but wanted to hold him accountable for the previous night's embarrassment. Thus, Craft was threatening consequences, such as future unionization, rather than physical harm, *Plaza Auto Center*, 360 NLRB 972.

Although whether Craft's statement is a threat it must be judged on an objective basis (how a reasonable person would view it), the subjective reactions of Jason Brown and John Gruet, in allowing him to go back to work and in not summoning security or the police should be taken into account in making this determination. Although Brian Purcell did summon the police, neither the police nor Respondent took any further ac-

tion that would be consistent with an understanding that Craft had made a threat to harm Purcell physically.

In sum, I conclude that the nature of Craft's outburst is insufficient to forfeit the protections of the Act. Criteria (4) Purcell certainly did not provoke Craft by committing any unfair labor practice. Moreover, Craft's outburst 18 hours or so later seems totally unwarranted. However, I conclude that this is an insufficient reason to deny Craft the protection of the Act in view of the other factors.

CONCLUSIONS OF LAW

1. Respondent, by Nick Ewry violated Section 8(a)(1) and engaged in objectionable conduct by interrogating John Sponsler about his union sympathies during the critical period between the filing of the representation petition and the election.

2. Respondent, by Cory Butcher violated Section 8(a)(1) and engaged in objectionable conduct by interrogating Marcus Applin about his union sympathies during the critical period between the filing of the representation petition and the election.

3. Respondent, by Brian Purcell violated Section 8(a)(1) and engaged in objectionable conduct by announcing a safety bonus, promising to erect shelters in the smokers' break area and granting a safety bonus during the critical period between the filing of the representation petition and the election.

4. Respondent has engaged in objectionable conduct necessitating the setting aside of the results of the September 27, 2013 election and the conduct of a second election.

5. Respondent violated Section 8(a)(3) and (1) in discharging Michael Craft.

REMEDY

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

Respondent, having discriminatorily discharged Michael Craft, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Michael Craft for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]