

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CEMEX CONSTRUCTION MATERIALS  
PACIFIC, LLC**

**and**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

**Cases    28-CA-230115  
          28-CA-235666  
          31-CA-237882  
          31-CA-237894  
          31-CA-238094  
          31-CA-238239  
          31-CA-238240  
          28-CA-249413**

**CEMEX CONSTRUCTION MATERIALS  
PACIFIC, LLC**

**and**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS**

**Case      28-RC-232059**

**BRIEF IN SUPPORT OF GENERAL COUNSEL'S EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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**I. INTRODUCTION**

The charges in these cases were filed in the wake of a campaign by International Brotherhood of Teamsters (“Union”) to organize employees of Cemex Construction Materials Pacific, LLC (“Respondent”) at 23 facilities in southern California and two facilities in Las Vegas, Nevada. The organizing campaign ultimately secured overwhelming majority support among Respondent’s employees. That support, however, was methodically eroded by Respondent’s coercive and unlawful anti-union campaign leading up to the union election. Respondent’s

pervasive unlawful conduct had its intended and expected effect. The Union lost the election, which was simultaneously conducted at 12 different plants in Southern California and Las Vegas. The tally of ballots shows that the Union lost by a vote of 166 to 179. After the election, the Union filed charges and objections to the election. And despite the election results, Respondent continued its unlawful conduct by suspending and later discharging a main union supporter, Diana Ornelas (“Ornelas”)—sending a clear message that continued support for the Union would have severe consequences. Word of Ornelas’ discharge spread fast and further eroded support for the Union. The number and nature of Respondent’s unfair labor practices made it impossible for there to be a fair re-run election. Counsel for the General Counsel (“CGC”), therefore, sought a *Gissel* bargaining order and other enhanced remedies.

A hearing was conducted between November 2020 and February 2021. Based on the record evidence, Administrative Law Judge John T. Giannopoulos (“ALJ”) issued a decision on December 16, 2021, properly concluding that Respondent violated Section 8(a)(1) of the Act in about 25 instances between August 2018 and March 2019, including by threats of plant closure,<sup>1</sup> discipline,<sup>2</sup> discharge,<sup>3</sup> reduced

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<sup>1</sup> *Cemex Construction Materials Pacific, LLC*, 28-CA-230115, 2021 WL 5987176 (Dec. 16, 2021) at 23, 75-76 (“ALJD”).

<sup>2</sup> *Id.* at 90-91.

<sup>3</sup> *Id.* at 14-15, 19.

hours,<sup>4</sup> and frozen wages;<sup>5</sup> directing employees to remove Union stickers<sup>6</sup> and not speak with the Union;<sup>7</sup> interrogation,<sup>8</sup> surveillance,<sup>9</sup> and promises of benefits;<sup>10</sup> and assigning security guards to patrol all plants two weeks prior to the election.<sup>11</sup> In addition, the ALJ concluded that Respondent violated Section 8(a)(1) and (3) by suspending<sup>12</sup> and discharging<sup>13</sup> key Union supporter Ornelas in July and September of 2019, respectively.

However, the ALJ failed to recommend the issuance of a *Gissel* bargaining order, despite the record evidence showing majority support for the Union and Respondent's serious unfair labor practices.<sup>14</sup> The ALJ also failed to find that Respondent violated Section 8(a)(1) of the Act, as alleged, when it threatened employees with loss of work hours, replacement, or termination in order to discourage their union activities; threatened its employees by equating union activity with animosity against Respondent; threatened its employees with discipline and/or discharge in order to discourage their Union activities; threatened its employees with unspecified reprisals for engaging in Union activities; threatened

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<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Id.* at 38-39.

<sup>6</sup> *Id.* at 14, 19, 24.

<sup>7</sup> *Id.* at 20, 48-49, 90-91.

<sup>8</sup> *Id.* at 23, 26, 90.

<sup>9</sup> *Id.* at 31.

<sup>10</sup> *Id.* at 54-55.

<sup>11</sup> *Id.* at 65-66.

<sup>12</sup> *Id.* at 96.

<sup>13</sup> *Id.* at 106.

<sup>14</sup> *Id.* at 109-115.

its employees with reprisals if they unionized by stating that Respondent could send them to Las Vegas to work in order to keep them busy if there was no work in the area; and threatened employees with a loss of benefits by telling its employees they would only receive new equipment and pay raises if they voted no in the upcoming union election. Although unalleged in the Complaint, the ALJ also did not find that Respondent violated Section 8(a)(1) of the Act through its “25<sup>th</sup> Hour” videos and failed to consider the videos in his analysis of dissemination and the appropriateness of a *Gissel* bargaining order. Finally, the ALJ failed to recommend consequential damages as a remedy for the discharge of main Union supporter Diana Ornelas.

CGC does not seek to disturb the ALJ’s findings and conclusions concerning Respondent’s numerous unfair labor practices. Rather, CGC presents this case to the Board as an appropriate vehicle for the Board to revisit the cases discussed below. First, the Board should overrule *Tri-Cast, Inc.*<sup>15</sup> and hold that an employer violates Section 8(a)(1) of the Act when it explicitly misrepresents an employee’s right under the proviso to Section 9(a) to deal directly with their employer after selecting an exclusive bargaining representative. Second, the Board should overrule *Sysco Grand Rapids, LLC*<sup>16</sup> and hold that changed circumstances of the kind at issue there do not mitigate against the issuance of a *Gissel* bargaining order. Alternatively, the Board should clarify that to the extent it must address evidence

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<sup>15</sup> 274 NLRB 377 (1985).

<sup>16</sup> 367 NLRB No. 111 (2019), *enforced in part*, 825 F. App’x. 348 (6th Cir. 2020).

of changed circumstances in light of court precedent, mere delay does not mitigate against issuance of a bargaining order. Third, the Board should overrule *Crown Bolt, Inc.*<sup>17</sup> and hold that it will presume dissemination of threats of plant closure and other serious coercive conduct absent employer rebuttal. Moreover, the Board should issue a *Gissel* bargaining order in this case, regardless of whether it readopts a presumption of dissemination, because there is sufficient evidence of dissemination under current Board law to warrant a bargaining order. Fourth, the Board should overrule *Linden Lumber Div., Summer & Co.*<sup>18</sup> and reinstate the doctrine under *Joy Silk Mills, Inc.*,<sup>19</sup> prospectively, because the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections. Fifth, the Board should overrule *Babcock & Wilcox Co.*<sup>20</sup> and hold that an employer violates Section 8(a)(1) of the Act when it threatens employees with reprisal if they decline to listen to speech concerning employee exercise of Section 7 rights. Sixth, the Board should find that Respondent violated Section 8(a)(1) of the Act by making various additional threats, as alleged and supported by the record evidence. Seventh, the Board should find that Respondent's "25<sup>th</sup> Hour" videos violated Section 8(a)(1) of the Act and that their dissemination can be considered for the appropriateness of a *Gissel* bargaining

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<sup>17</sup> 343 NLRB 776 (2004).

<sup>18</sup> 190 NLRB 718 (1971), *rev'd sub nom. Truck Drivers Union Local No. 413*, 487 F.2d 1099 (1973), *rev'd*, 419 U.S. 301 (1974).

<sup>19</sup> 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

<sup>20</sup> 77 NLRB 577 (1948).

order. Finally, the Board should order Respondent to pay consequential damages for the discharge of main Union supporter Diana Ornelas.

## **II. STATEMENT OF FACTS**

### **A. Background**

Respondent manufactures cement and has operations in Southern California and Las Vegas, Nevada. The Union began an organizing drive in 2017. Respondent operates 23 ready-mix concrete plants in Southern California spanning from San Diego to Santa Barbara, along with two additional ready-mix plants in Las Vegas, Nevada.<sup>21</sup> Respondent batches (i.e., manufactures) ready-mix concrete at its various plants according to the specifications of the customer's construction project. The drivers' primary job function is to deliver wet concrete from Respondent's plants to customer sites. Each plant has a foreman referred to as a "batchman" who is responsible for ensuring that the accurate portion of aggregate, cement, and additives are mixed into the delivery truck's drum. After the ready-mix trucks are loaded with concrete, Respondent's drivers transport the product to the customer's jobsite where it is immediately poured.<sup>22</sup> After washing out their mixer trucks, the drivers are directed to one of the Respondent's plants to obtain another load of concrete, and they return to a customer's jobsite to repeat the process.<sup>23</sup>

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<sup>21</sup> GCX21.

<sup>22</sup> Tr. 261.

<sup>23</sup> Tr. 262.

## **B. The Union's Organizing Campaign**

The Union filed a petition on December 3, 2018, seeking to represent a unit of ready-mix concrete drivers. The Regional Director issued a Decision and Direction of Election in Case 28-RC-232059 finding an appropriate unit of approximately 373 ready-mix drivers with 40 drivers based at two plants in Las Vegas and the remaining drivers spread across 23 plants in Southern California and directing an election to take place March 7, 2019.<sup>24</sup> The Union lost the election, 166 to 179. The Union subsequently filed objections to the election, which were consolidated with a complaint alleging numerous unfair labor practices. During the times material to the Complaint allegations, there were approximately 366 employees in the bargaining unit across Respondent's 25 plants at issue. At the hearing the Union and Respondent stipulated to the unit description, which makes minor corrections to the wording of the unit found appropriate by the Regional Director in Case 28-RC-232059 but does not add or subtract from the unit any job classifications, plant locations, or employees eligible to vote. CGC adopted the parties' stipulation as to the wording of the appropriate unit, which is used in the ALJD.<sup>25</sup> The parties stipulated that 97 authorization cards contained the authentic signatures of the named employees. For 72 of the cards, CGC presented testimony from employees who either signed a card, or who solicited a coworker's signature on a card and

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<sup>24</sup> The 23 Southern California plants are divided into several districts in which the employees may have more interaction with one another as they may deliver concrete from the various plants within a district.

<sup>25</sup> ALJD at 116, n. 44.

watched them sign it. Finally, the ALJ compared employee signatures on 58 authorization cards with signature exemplars on W-4 forms from Respondent's business records and determined the exemplars were sufficient to establish that 38 of these cards were signed by the employee in question. In total, the record evidence shows that, by the end of November 2018, the Union possessed authorization cards from at least 207 of Respondent's 366 Unit employees. This is equivalent to 57% of the Unit and well over the 184 cards needed to establish a majority.<sup>26</sup>

### **C. Respondent's Serious Unfair Labor Practices**

Respondent created a "steering committee" to oversee its response to the organizing drive. Members of the committee included its Vice President, who oversaw Respondent's ready-mix business in Southern California and Southern Nevada; its national labor relations manager; its in-house counsel; and its human resources manager, who oversaw the Southern California plants.<sup>27</sup>

Among Respondent's numerous unfair labor practices found by the ALJ were coercive statements made by the Vice President during a January 29, 2019, meeting attended by six employees at the Oxnard plant in Southern California.<sup>28</sup> The Vice President told the employees that unionization would change the relationship they had with management and that once they were under a collective-bargaining agreement, they had to go through the Union instead of coming directly to management. The Vice President said employees would lose their ability to deal

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<sup>26</sup> *Id.* at 109.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.* at 38-40.

directly with their supervisors and that if drivers needed anything, they would have to work through the union contract/union representatives and could not come directly to him, as he would not be able to do anything for them. He added that they were putting at risk the relationship they had with their supervisors and batchmen.

In terms of hallmark<sup>29</sup> or other serious violations, the ALJ found that Respondent violated Section 8(a)(1) when a supervisor threatened two employees in Las Vegas with discharge and that Respondent would close its business if they unionized.<sup>30</sup> On another occasion, the same supervisor threatened a different employee in Las Vegas with plant closure if the employees unionized. The ALJ found that Respondent's lead labor consultant threatened employees with plant closure at a meeting at a Southern California plant at which at least 38 drivers from three different plants were likely present.<sup>31</sup> Regarding the unlawful discharge of a key Union supporter, Diana Ornelas, the ALJ concluded that her discharge was known by at least the 39 drivers who worked at the five plants in her district and that evidence supported a finding that additional drivers beyond her district had learned of it based on a Union organizer's testimony that he informed 20 to 25 drivers.<sup>32</sup> Further, the ALJ found that the Vice President's unlawful statements to

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<sup>29</sup> The Board has long recognized that certain unfair labor practices—including threats of loss of employment, the discharge of union adherents, and the threat of plant closure—are “hallmark” violations, which are among the most flagrant forms of Section 7 interference, and support the issuance of a *Gissel* bargaining order because they are likely to have a lasting inhibitive effect on a substantial percentage of the workforce. *Highland Plastics, Inc.*, 256 NLRB 146, 147 (1981); *Milum Textile Services Co.*, 357 NLRB 2047, 2055 (2011).

<sup>30</sup> ALJD at 109.

<sup>31</sup> *Id.* at 113.

<sup>32</sup> *Id.* at 113-14.

14 employees at one Ventura County plant that Respondent could not give a wage increase due to the Union and threat of futility that Respondent could shift work from one plant to another if the employees unionized, were serious violations.<sup>33</sup> Lastly, although the ALJ did not categorize these unfair labor practices among Respondent's more "serious" violations, he concluded that the entire unit was directly impacted when Respondent dispatched security guards to patrol all facilities during the election timeframe in order to intimidate employees, and that an unknown number of the 39 drivers who work at the Inglewood location in Southern California were directly impacted by unlawful surveillance that took place on January 28, 2019.<sup>34</sup>

#### **D. The ALJ's Recommended Remedies**

The ALJ concluded that the Union had obtained a majority of union authorization cards and that, at the time of the hearing, two thirds of the eligible voters remained employed, as did the majority of Respondent's management representatives who were involved in the unfair labor practices.<sup>35</sup> Nonetheless, he declined to recommend a *Gissel* bargaining order solely based on his determination that the unfair labor practices did not affect a substantial percentage of the unit

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<sup>33</sup> *Id.* at 113. Respondent committed many of its violations during formal meetings it convened with employees around late January and February 2019 in order to discuss the topic of unionization. Each meeting took place at one of Respondent's offices. Respondent expressly characterized the meetings as mandatory and convened the meetings on paid time. Tr. 264-265. There is no evidence that Respondent offered any assurances to employees that their attendance was voluntary.

<sup>34</sup> *Id.* at 112-14. Inglewood is not one of the five Ventura County plants that the ALJ concluded would have been aware of the discharge of the key Union supporter. The surveillance entailed two management officials standing at the front gate for about 20 to 30 minutes watching and waving at employees who were speaking with Union representatives before entering and exiting the plant.

<sup>35</sup> *Id.* at 109, 111-12.

pursuant to *Cardinal Home Products*, 338 NLRB 1004 (2003), and *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001), *enforcement denied in relevant part*, 437 F.3d 1266 (D.C. Cir. 2006).<sup>36</sup> Instead, the ALJ recommended the Board set aside the election and order special remedies, including a notice reading and requiring Respondent provide the Union a list of current employees, access to its bulletin boards and plants, and the right to deliver a speech in response to future presentations made by Respondent to its employees on the question of union representation. Finally, the ALJ failed to recommend consequential damages for the unlawful discharge of main Union adherent, Diana Ornelas.<sup>37</sup>

**E. Respondent’s Additional Violations of Section 8(a)(1) of the Act Not Found Unlawful by the ALJ**

**1. Estevan Dickson’s Unlawful Threats at the Sloan Plant Office – Complaint Para. 5(a)**

Around the end of July 2018, drivers Ibrahim Rida (“Rida”) and Rodney Coleman (“Coleman”) were in the Sloan plant office when Plant Foreman Estevan Dickson (“Dickson”)<sup>38</sup> walked in with a piece of paper in his hand. Dickson slammed the paper on his desk and said he found the piece of paper in a company truck.

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<sup>36</sup> *Id.* at 114-15.

<sup>37</sup> *Id.* at 118.

<sup>38</sup> The ALJ found that Dickson committed eight other independent violations of Section 8(a)(1) of the Act, including by telling employees they could be written up or fired for having union stickers on their hardhats (ALJD at 14); by making various threats of termination and reduced hours or benefits if employees unionized (ALJD at 14); by instructing employees not to speak to Union organizers (ALJD at 19); by telling employees to remove the union stickers from their hardhats (ALJD at 19); by inviting employees to quit by asking employees why they did not go work at another, unionized company if they wanted the Union (ALJD at 23); by repeatedly telling an employee to remove their Union sticker from their hardhat until the employee peeled the sticker off and threw it in the trash (ALJD at 24); by stating that Respondent was going to close their doors and take their trucks to another state if employees unionized because they did not want the Union (ALJD at 23); and by interrogating an employee about what the Union had to offer employees (ALJD at 23).

Dickson said if the Company goes union, you will be fired. Dickson then said if they don't fire you, they're just going to cut your hours and bring in guys from Florida. Rida responded and said how could you (Dickson) be mad at me and the drivers for wanting to better ourselves. Dickson said, I'm just telling you what can happen. Coleman spoke up and said, Estevan (Dickson) you're violating his rights, you can't be doing that. Dickson unapologetically said, I can say that. Having been subjected to Dickson's coercive statements, Rida got up and walked out of the office.<sup>39</sup>

## **2. Estevan Dickson's Unlawful Threat at the I-215 and Revere Jobsite – Complaint Para. 5(b)(2)**

When driver Rida arrived at work early in the morning for a shift in August 2018, dispatch wanted him to go to North Las Vegas to help out the North plant. Rida got loaded and went to a jobsite on I-215 and Revere. He parked his truck and walked around to the back of it. While there, Rida started talking to another driver Chris Lauvao ("Lauvao"). At one point, Dickson walked up to Rida and Lauvao and said if they get caught with union stickers on their hard hats or on the truck, that they could be fired or written up for having the stickers on their hard hats or company trucks. Dickson said if Respondent did go union, that a lot of them would get fired, hours would get cut, they would lose their vacation, and they're just going to bring in guys from Florida. Dickson said, from here on out, if you guys do get

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<sup>39</sup> Tr. 806-807.

caught with the union stickers, you will be terminated.<sup>40</sup> The ALJ found that these statements violated Section 8(a)(1) of the Act.<sup>41</sup>

However, after this incident between Rida, Lauvao and Dickson, Rida started going to the washout area of the jobsite to clean out his truck. Rida heard Dickson yelling at Union organizer Mike Hood (“Hood”). Hood knew most of the drivers in Las Vegas because he previously worked for Respondent and did a lot of the training there. As a Union organizer, Hood would go to jobsites, meet with drivers, and distribute “Demand Your Worth” stickers to drivers as the stickers would show open support for the Union.<sup>42</sup> Rida heard Dickson telling Hood, you’re not allowed to be on the jobsite, you need to leave.<sup>43</sup> Dickson then asked Hood, why are you doing this? But before Hood could respond, Dickson answered his own question and said to Hood you’re only doing this because you have animosity towards Respondent. Rida was close enough to hear and see everything between Hood and Dickson.<sup>44</sup> The ALJ failed to find that Dickson threatened its employees by equating union activity with animosity against Respondent.<sup>45</sup>

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<sup>40</sup> Tr. 808-809.

<sup>41</sup> ALJD at 14.

<sup>42</sup> Tr. 552-553.

<sup>43</sup> Tr. 810.

<sup>44</sup> Tr. 810.

<sup>45</sup> ALJD at 15.

### **3. Estevan Dickson's Unlawful Threat at the KB Homes Tanglewood Jobsite – Complaint Para. 5(c)(3)**

On August 22, 2018, Union organizer Hood was talking to drivers at the KB Homes Tanglewood jobsite near the washout area. Two drivers, Oscar Orozco (“Orozco”) and Lauvao, were rinsing and washing out their trucks at the time.<sup>46</sup> When Dickson approached Hood and asked him a number of questions about the Union campaign, including how the campaign was going, how many people they had supporting the Union, and how close were they to the vote.<sup>47</sup> Hood did not answer Dickson’s questions. Dickson then got very frustrated and turned around to talk to Orozco and Lauvao. Dickson said, you guys don’t talk to these union guys. The ALJ found that Dickson’s instruction not to speak to “these union guys” violated Section 8(a)(1) of the Act.<sup>48</sup> Dickson then pointed his finger at Orozco and Lauvao and said, take these damn stickers off your hat or you will be fired – written up or fired.<sup>49</sup> Orozco and Lauvao did not reply and they just stood there with their mouths open, looking at Hood to see if he could do something. Hood spoke up and said, you can’t say that Estevan (Dickson). Dickson just turned around and stormed off. Hood looked at Orozco and Lauvao and said Dickson is not allowed to say those things.<sup>50</sup>

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<sup>46</sup> Tr. 553.

<sup>47</sup> Tr. 556.

<sup>48</sup> ALJD at 19.

<sup>49</sup> Tr. 556-558.

<sup>50</sup> Tr. 558.

The ALJ found that Dickson’s instruction to remove the Union stickers violated Section 8(a)(1) of the Act but did not find that Dickson threatened them with discipline and/or discharge.<sup>51</sup>

**4. Estevan Dickson’s Unlawful Threat at the Losee Plant  
– Complaint Para. 5(d)(2)**

Driver Gary Collins (“Collins”) was working in the Losee yard in early January 2019. Collins was at the fuel pump fueling up his truck when Dickson drove up in the loader and repeatedly yelled at Collins to take his Union stickers off his hardhat and then drove off. Collins had two Union stickers on his hardhat that said, “Demand My Worth.” A couple of minutes later, Dickson came back and said the same thing, telling Collins to take the Union stickers off. Collins just kept fueling up his truck and Dickson took off for a second time. Collins finished fueling up and was sitting in his truck waiting for a load when Dickson again drove up, got out of the loader, and started yelling at Collins again. Dickson said, Gary (Collins), I’m serious, take them Union stickers off your hardhat. Collins took his hardhat off and peeled the Union stickers off and then threw the stickers in the trash.<sup>52</sup>

The ALJ found that Dickson’s repeated instructions to remove the Union stickers violated Section 8(a)(1) of the Act but did not find that these repeated instructions were accompanied by any threat of unspecified reprisals.<sup>53</sup>

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<sup>51</sup> ALJD at 19.

<sup>52</sup> Tr. 682-684.

<sup>53</sup> ALJD at 24.

## **5. Juan Torres' Threat of Reprisals at the Oxnard Plant – Complaint Para. 5(k)**

On February 21, 2019, driver—and main Union adherent—Diana Ornelas (“Ornelas”) had a conversation with supervisor Juan Torres (“Torres”). The conversation took place in the batch office at the Oxnard plant. Three other drivers were present in office at the time. Torres called the four drivers into the office and handed them some pamphlets. He said the pamphlets were something Respondent wanted them to have. He also stated that if a union comes in, Respondent could start sending people to Las Vegas to keep them [the drivers] busy if there is no work there [Oxnard].<sup>54</sup> Normally, if there was no work to do or if a job got canceled last minute, the drivers would get paid “show up time” and get to go home.<sup>55</sup> One of the drivers asked Torres if Respondent could permanently relocate them, and Torres responded that it was up to Respondent.<sup>56</sup> Ornelas then asked if the meeting was just for the pamphlets, and Torres responded yes and that they would get paid four hours for show up time and that they could go home. The four drivers then walked out of the office.

The ALJ failed to find that Torres threatened employees with reprisals if they unionized by stating that Respondent could send them to Las Vegas to work to keep them busy if there was no work in the area.<sup>57</sup>

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<sup>54</sup> Tr. 983-984.

<sup>55</sup> Tr. 225.

<sup>56</sup> Tr. 984.

<sup>57</sup> ALJD at 42.

## **6. Ryan Turner’s Threat of Loss of Benefits at the Perris Plant – Complaint Para. 5(r)**

In early March 2019, driver Donald Shipp Jr. (“Shipp Jr.”) had a conversation with Area Manager for the Inland Empire and San Diego, Ryan Turner, Sr. (“Turner”),<sup>58</sup> in the yard at the Perris plant. Shipp Jr. parked his work truck as he waited in line to get loaded. Shipp Jr. was standing outside of his truck as he waited. There were about 20 drivers in line around that time and Turner was talking to the ones that had their window down or who were standing outside of their trucks. While Shipp Jr. was waiting outside of his truck, Turner walked up to him and asked how things were going. Shipp Jr. responded that things were going well, and that everything was pretty good. Shipp Jr. then asked Turner if it would be possible for him to get a new truck and a raise. Turner responded by saying, “for the good of the company, just Vote No, and we’ll see what we can do as far as like you getting a new truck and a raise.” No one else was close enough to Turner and Shipp Jr. to hear the conversation. The conversation lasted about ten minutes and after it ended, Shipp Jr. observed Turner talking to two other drivers that were in line.<sup>59</sup>

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<sup>58</sup> The ALJ found that Turner had committed other independent violations of Section 8(a)(1) of the Act by interrogating employees (ALJD at 26), and by informing employees that he had done them favors in the past and to vote against the Union, and that he would not be able to help employees anymore if they “went Union” (ALJD at 54).

<sup>59</sup> Tr. 760-762; 2259-2260.

The ALJ failed to find that Turner threatened Shipp Jr. with a loss of benefits by telling him he would only receive new equipment and pay raises if they voted no in the upcoming union election.<sup>60</sup>

### **7. Respondent's Unlawful Statements in its "25<sup>th</sup> Hour" Videos**

In his decision, the ALJ also discussed Respondent's "25<sup>th</sup> Hour" videos, which Respondent showed to all of its employees the day before the Union election in March 2019.<sup>61</sup> The videos featured Respondent's Vice President and General Manager, in separate videos, urging employees to vote against the Union. The day before the Union election, the "25<sup>th</sup> Hour" video by the Vice President was shown to Southern California employees and another version of the video by the General Manager was shown to Las Vegas employees on paid time.<sup>62</sup> Employees were notified of the "25<sup>th</sup> Hour" video meetings by being scheduled to attend the meetings where they were shown after their clock-in time.<sup>63</sup> There is no evidence that Respondent expressly offered any assurances to employees that their attendance was voluntary.<sup>64</sup> The "25<sup>th</sup> Hour" videos were entered into the record and there was extensive witness testimony concerning the videos.<sup>65</sup>

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<sup>60</sup> ALJD at 56-57.

<sup>61</sup> ALJD at 4-5 & n.5.

<sup>62</sup> Tr. 2050; 2059; 2113; 2115.

<sup>63</sup> Tr. 2141.

<sup>64</sup> Tr. 2143.

<sup>65</sup> Tr. 102-103, 140, 2034-35, 2040-2050, 2063, 2157-2158; Respondent's Exhibits 24-25.

As described by the ALJ, the “25<sup>th</sup> Hour” videos include the following statements:

In [Vice President] Forgey’s video, he tells employees, in part, that although the law does not allow him to make promises or discuss what may happen if the company wins the election, “I have heard you loud and clear throughout this process and you have my full attention,” he also says that he “accept[s] responsibility for any challenges we may have experienced over the past few years” and highlights to employees the “strong track record of addressing the concerns you have brought to our attention” including a wage increase implemented in February 2018 that was “significantly higher than the market average.” Forgey then asks employees to give him “a single year, just 12 months to earn your trust and show you what life at Cemex can be like without a union” and to further show employees how good the company can make the Southern California operation without a union. In the video, Forgey said that, if the company did not succeed, and employees decided life with the Teamsters would be better, they always have the right to bring the Union back in 12 months, but that he was confident that after a year the employees would be thankful they voted no and put their faith in the company instead of gambling with the Union.

[General Manager] Hill’s video is substantially similar to Forgey’s. Hill is shown standing in the same shop, with the same background, and he makes the same statements to employees as outlined above, except tailored to the Las Vegas drivers. However, in addition to highlighting the February 2018 wage increase that was significantly higher than the market average, Hill tells the Las Vegas drivers the company listened to employee concerns about the quality of their equipment, that it ordered new trucks, and made sure that additional new trucks were included in the budget for the upcoming years so that all of the drivers would eventually be driving new equipment. Hill further said that the company “listened to your feedback regarding the composition of our management team and we made the necessary changes to ensure we have effective and compassionate leadership in place at each plant.”<sup>66</sup>

Although the statements referenced above from the “25<sup>th</sup> Hour” videos were not alleged as unfair labor practices in the Complaint or included in the Union’s

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<sup>66</sup> ALJD at 7-8. Transcript citations omitted.

objections, the ALJ insinuated that certain statements in the video may have constituted unlawful promises of benefits but failed to recommend such violations of the Act to the Board.<sup>67</sup> The ALJ also failed to consider the dissemination of such statements in his analysis of whether a *Gissel* bargaining order should issue.

### III. ARGUMENT

#### A. The Board Should Overrule *Tri-Cast, Inc.*

The Board should limit its application of *Tri-Cast, Inc.*<sup>68</sup> and hold that preelection statements that explicitly misrepresent employee rights under the proviso to Section 9(a) are unlawful threats of the loss of existing benefits. Although an employer is free to communicate its general views about unionism and make predictions as to the effects of unionization, its prediction “must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control.”<sup>69</sup> The proviso to Section 9(a) of the Act provides that although a union selected by a majority of unit employees is the exclusive bargaining representative, employees may continue to bring grievances to their employer and the employer may adjust such grievances, as long as the adjustment is consistent with any applicable collective-bargaining agreement and the union is given an opportunity to be present for the adjustment.<sup>70</sup>

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<sup>67</sup> ALJD at n.5.

<sup>68</sup> 274 NLRB 377 (1985).

<sup>69</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

<sup>70</sup> See *Emporium Capwell Co.*, 420 U.S. 50, 61 n.12 (1975) (recognizing employees’ right under Section 9(a) to present grievances to their employer).

Before *Tri-Cast*, the Board held that employer statements that misrepresented employees' Section 9(a) right to deal directly with the employer after designation of an exclusive union representative violated Section 8(a)(1) or were objectionable preelection conduct.<sup>71</sup> To determine whether such employer statements were misleading and coercive, the Board often considered the circumstances in which the statements were made, including employer warnings that its relationship with employees would deteriorate if the employees chose representation.<sup>72</sup> In *Tri-Cast* the Board changed course and concluded that the following employer statements were a lawful explanation of the employer's view of

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<sup>71</sup> See, e.g., *Joe & Dodie's Tavern*, 254 NLRB 401, 406, 411 (1981) (affirming ALJ's conclusion that employer's statements that employees "absolutely cannot" deal directly with employer because employer was "legally obligated to deal solely" with union conveyed an "erroneous statement of the law" and threatened loss of benefits in violation of Section 8(a)(1)), *enforced*, 666 F.2d 383 (9th Cir. 1982); *LOF Glass, Inc.*, 249 NLRB 428, 428-29 (1980) (employer's statement that "the right and the freedom of each of you to come in and settle matters personally would be gone" was a "serious misrepresentation" of employees' right under 9(a) and objectionable conduct sufficient to warrant setting aside election); *Colony Printing & Labeling*, 249 NLRB 223, 224 (1980) (employer's statements that when employees sign a union card, "you give up the right to talk to us about your hours, your work, your working conditions, your pay, and everything else concerning your future and continued employment," and "you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job" were "misstatements of the law which constitute threats . . . to curtail employee rights and discontinue employee benefits" violative of Section 8(a)(1)), *enforced*, 651 F.2d 502 (7th Cir. 1981); *Robbins & Myers, Inc.*, 241 NLRB 102, 103-04 & n.7 (1979) (employer's statement that when union comes in, "employees lose all rights for direct communication with the [employer]" was a "misrepresentation" of Section 9(a)), *enforced*, 653 F.2d 237 (6th Cir. 1980). Cf. *Westmont Engineering Co.*, 170 NLRB 13, 13 (1968) (employer's statement that employer must handle any grievances through union if union won election, although not "entirely accurate," was not coercive and did not violate Section 8(a)(1)).

<sup>72</sup> See, e.g., *Greensboro News Co.*, 257 NLRB 701, 701 (1981) (employer's statement that although supervisors and managers presently could deal with employees as individuals, if the union came in the employer "must deal with [the union], not you," was, in the context of other statements that employees would be "worse off," an unlawful threat to terminate existing beneficial situation); *Tipton Elec. Co.*, 242 NLRB 202, 203, 205-06 (1979) (affirming ALJ's finding that employer's statement conveyed message that employer's harmonious relationship with employees would cease if union was voted in), *enforced*, 621 F.2d 890, 892 (8th Cir. 1980). See also *Sacramento Clinical Laboratory*, 242 NLRB 944, 944 (1979) (employer's statement conveyed that all direct dealing with employees would be banned, especially where made one-on-one in employer's office to newly appointed employee negotiator), *enforced in part*, 623 F.2d 110 (9th Cir. 1980).

how its relationship with employees would change if they unionized: “[w]e have been able to work on an informal and person-to-person basis. If the union comes in this will change,” and “[w]e will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.”<sup>73</sup>

Moreover, the Board specifically overruled three prior decisions, signaling that the Board no longer viewed employer misrepresentations of employees’ Section 9(a) rights as unlawfully coercive.<sup>74</sup> In reaching its decision, the Board improperly relied on its statement in *Midland National Life Insurance Co.* that it would “no longer probe into the truth or falsity of the parties’ campaign statements.”<sup>75</sup> The Board has subsequently applied its rationale in *Tri-Cast* so broadly that it will find lawful nearly any statement concerning employees’ Section 9(a) proviso rights, and has failed to distinguish between mere predictions of a change in the employer/employee relationship with express statements that employees will not have the rights provided by Section 9(a)’s proviso if they vote for representation.<sup>76</sup>

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<sup>73</sup> *Tri-Cast*, 274 NLRB at 377.

<sup>74</sup> See *id.* at 377 n.5 (overruling *Greensboro News Co.*, 257 NLRB 701, *Armstrong Cork Co.*, 250 NLRB 1282 (1980), and *LOF Glass, Inc.*, 249 NLRB 428).

<sup>75</sup> *Tri-Cast*, 274 NLRB at 378 (quoting *Midland*, 263 NLRB 127, 133 (1982)). The *Tri-Cast* Board’s reliance on *Midland* is misplaced because it fails to take into account that statements concerning employees’ right to deal directly with their employer post-unionization are not unlawful solely as misrepresentations of the law, but because they may, given the specific facts and circumstances, represent a threat by the employer of its intent to enact a retaliatory change to the employer/employee relationship due to the employees’ selection of the union. Similarly, an employer that threatens to begin strictly enforcing employee work rules if its employees selected a union, would also violate the Act. In such a context, it is clear that the employer’s defense that it was merely describing the impact of Section 9(a) is pretextual. Importantly, the *Midland* Board also affirmed that it would “continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.” 263 NLRB at 133.

<sup>76</sup> See, e.g., *Tesla, Inc.*, 370 NLRB No. 101, slip op. at 8-10 (2021) (no violation where employer said “[t]he [u]nion is a . . . two-class system where [the union] is the only one that has a voice and not the workers”); *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 1 n.2, 4-7 (2018) (no violation where

In the instant case, although the ALJ found a violation citing Board decisions that issued prior to *Tri-Cast*, the Board should revisit *Tri-Cast* and hold that statements that misrepresent employee rights under Section 9(a)'s proviso are unlawful threats of the loss of existing benefits. The Vice President clearly misrepresented employee rights under Section 9(a) by saying that after unionization employees would *have* to go through the Union instead of coming directly to management, would lose their ability to deal directly with their supervisors, and if drivers needed *anything*, they would have to work through the union contract/union representatives as he would not be able to do *anything* for them. Thus, the totality of the Vice President's statements did not simply convey an anticipated change in the nature of the employer/employee relationship, but rather, a threat by Respondent to impose an absolute prohibition on employees seeking redress directly with management and a refusal to do anything for them, as to any matter whatsoever, if they chose to unionize. The unambiguous threat of a loss of existing benefits conveyed by these misstatements concerning Section 9(a) is bolstered by the Vice President's additional comments that employees were putting at risk the relationship they had with their supervisors and batchmen, whom the drivers rely upon for their job assignments, and by Respondent's overall antiunion campaign, which included numerous Section 8(a)(1) and (3) violations. Thus, CGC

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employer said, "you'll be giving up your right to speak for and represent yourself"), *enforcement denied*, 932 F.3d 465 (6th Cir. 2019).

respectfully requests that the Board grant its exception and return to its pre-*Tri-Cast* precedent.

**B. The Board Should Overrule *Sysco Grand Rapids***

The Board should overrule *Sysco Grand Rapids, LLC*<sup>77</sup> and hold that changed circumstances like the ones present there do not mitigate against the issuance of a *Gissel* bargaining order. In the alternative, the Board should clarify that, to the extent it must address evidence of changed circumstances in light of court precedent, mere delay does not mitigate against issuance of a bargaining order because, without overwhelming employee and management turnover, the passage of time cannot possibly erase the effects of severe unfair labor practices.

In *Gissel*, the Supreme Court affirmed the Board's authority to issue a bargaining order based on a union's card majority where the employer has committed unfair labor practices so serious that they make a fair election unlikely.<sup>78</sup> In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of dissemination among employees, the

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<sup>77</sup> 367 NLRB No. 111 (2019), *enforced in part*, 825 F. App'x. 348 (6th Cir. 2020).

<sup>78</sup> 395 U.S. at 614-15. The Supreme Court identified two types of employer misconduct that may warrant a bargaining order. Category I cases involve unfair labor practices so outrageous and pervasive that they cannot be erased by traditional remedies. Category II cases are marked by less pervasive unfair labor practices which nonetheless tend to undermine majority strength and impede the election process. *Research Federal Credit Union*, 327 NLRB 1051, 1051 n.3 (1999). This brief will focus its discussion on *Gissel* Category II bargaining orders.

identity and position of the individuals committing the unfair labor practices,<sup>79</sup> and whether the employer is likely to engage in future violations.<sup>80</sup> The Board traditionally evaluates the circumstances at the time the unfair labor practices occurred and does not consider changed circumstances following the commission of the violations.<sup>81</sup> As such, the passage of time and subsequent management or employee turnover do not mitigate against issuance of a bargaining order because it would allow the employer to benefit from the effects of its wrongdoing including delays inherent in the litigation process.<sup>82</sup> Moreover, the passage of time is unlikely to sufficiently dissipate an employer's unlawful conduct because "practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed."<sup>83</sup> However, given the courts' nearly unanimous requirement that changed circumstances be considered before

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<sup>79</sup> *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999) (citing *Holly Farms Corp.*, 311 NLRB 273 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1995), *aff'd*, 517 U.S. 392 (1996)), *enforced*, 245 F.3d 819 (D.C. Cir. 2001).

<sup>80</sup> *Gissel*, 395 U.S. at 614 (in fashioning a bargaining order remedy, "the Board can properly take into consideration the extensiveness of employer's unfair labor practices . . . and the likelihood of their recurrence in the future"). See *M.J. Metal Products*, 328 NLRB 1184, 1185 (1999) (*Gissel* order supported in part by employer's continued misconduct after election because "[a]n employer's continuing hostility toward employee rights in its postelection conduct evidences a strong likelihood of a recurrence of unlawful conduct in the event of another organizing effort") (citations and internal quotation marks omitted), *aff'd*, 267 F.3d 1059 (10th Cir. 2001); *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993) (employer's unlawful activities continued even after it agreed to enter into purported informal settlement agreement it raised as defense to imposition of bargaining order, indicating strong likelihood of recurring unlawful conduct), *enforced*, 47 F.3d 1161 (3rd Cir. 1995).

<sup>81</sup> *Milum Textile*, 357 NLRB at 2056.

<sup>82</sup> See *Garvey Marine*, 328 NLRB at 993-95 (rejecting employer's argument that bargaining order should not issue due to changed circumstances including turnover of majority of bargaining unit since election and departure of a supervisor who committed multiple 8(a)(1) violations); *Electro-Voice, Inc.*, 321 NLRB 444, 444 (1996) (passage of time, including absence of subsequent unfair labor practices, is irrelevant).

<sup>83</sup> *Garvey Marine*, 328 NLRB at 996 (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978)).

granting enforcement, the Board typically addresses any such evidence proffered by employers.<sup>84</sup>

In *Sysco Grand Rapids*, the majority adopted the ALJ's finding of numerous violations by the employer during an organizing campaign, including threats of loss of wages, benefits, and jobs; a threat of plant closure; the discharge of a key union supporter; and the solicitation of grievances with a responsive grant of benefits.<sup>85</sup> The Board acknowledged that the severity of the employer's unfair labor practices would normally warrant a *Gissel* bargaining order but declined to issue one because four years had elapsed between the unfair labor practices leading up to the election and the issuance of the Board's decision, reasoning that the courts would be unlikely to enforce such an order.<sup>86</sup> Dissenting, Member McFerran observed that a bargaining order was clearly appropriate pursuant to the Supreme Court's guidance in *Gissel*.<sup>87</sup> Regarding the passage of time, McFerran noted that the employer currently retained the majority of its managers who had committed the unfair labor practices and a significant majority of the unit employees who were employed at the time of the election.<sup>88</sup> As such, despite the passage of time, the possibility of a fair

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<sup>84</sup> See GC Memorandum 99-08, "Guideline Memorandum Concerning *Gissel*," dated Nov. 10, 1999, at 13-14 (explaining procedural posture in which Board often addresses employer arguments concerning changed circumstances).

<sup>85</sup> 367 NLRB No. 111, slip op. at 1.

<sup>86</sup> *Id.*, slip op. at 2. The Board also noted that about 30 percent of the employees in the unit had left since the time of the unfair labor practices.

<sup>87</sup> *Id.*, slip op. at 7 (McFerran, dissenting).

<sup>88</sup> *Id.*, slip op. at 9. Importantly, the Board majority characterized the delay as four years since the unfair labor practices "leading up to the election," failing to account for more recent unfair labor practices occurring six months after the election. As explained by Member McFerran, more recent unfair labor practices must also be accounted for because they continued to make a free and fair

election remained unlikely. In addition, McFerran observed that courts have enforced bargaining orders with similar periods of delay<sup>89</sup> and that the risk of nonenforcement from some courts did not justify the Board abdicating its role in setting national labor policy and effectuating the purposes and policies of the Act.<sup>90</sup>

Here, although the ALJ found that the passage of time did not mitigate against issuing a bargaining order, CGC takes exception to the ALJD and asks the Board to reaffirm its traditional position that it does not consider changed circumstances in determining whether to issue a bargaining order because doing so would reward employers for the direct consequences of their statutory violations. Initially, Respondent's unfair labor practices, including those taking place long after the election, directly caused the delay incident to the current litigation. The Board should not penalize employees for this delay, which is entirely beyond their control.<sup>91</sup> Moreover, even if the Board were to address changed circumstances here, it should affirm the ALJ's finding that the passage of time did not mitigate against issuing a bargaining order because, similar to *Sysco Grand Rapids*, two thirds of the eligible voters remain employed, as does the majority of Respondent's management representatives who were involved in the anti-union campaign and violations of the

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election impossible, and doing otherwise would reward the employer for its continued unlawful conduct.

<sup>89</sup> *Id.* (collecting cases).

<sup>90</sup> *Id.*, slip op. at 8.

<sup>91</sup> This is true regardless of whether the delay is attributable to an employer, the speed at which the Agency processed the case, or some other factor. For example, here the ALJ noted that the COVID-19 pandemic substantially delayed the trial while the Board transitioned to remote hearings. ALJD at 110.

Act. Thus, the mere passage of time cannot be said to have made a fair election any more likely in the instant case.

At a minimum, the Board should clarify that to the extent it addresses the passage of time and employee/management turnover, it will consider the last serious unfair labor practice rather than restricting its focus to unfair labor practices occurring before the election. Here, any consideration of the passage of time could begin no sooner than six months after the election in September 2019 when Respondent committed the hallmark violation of discharging Ornelas—a key Union supporter. The courts have approved bargaining orders for comparable or longer periods of delay.<sup>92</sup>

**C. Dissemination of Respondent’s Unlawful Conduct Warrants a *Gissel* Bargaining Order**

As explained above, the Board considers the extent of dissemination of unfair labor practices throughout the bargaining unit in determining whether a *Gissel* bargaining order is appropriate.<sup>93</sup> Where a substantial percentage of unit employees is *directly* affected by an employer’s serious unfair labor practices, the possibility of holding a fair election decreases.<sup>94</sup> Similarly, the Board considers the extent of the dissemination of serious unfair labor practices to employees not personally affected by them.<sup>95</sup>

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<sup>92</sup> See n.89, *supra*.

<sup>93</sup> *Cardinal Home Products, Inc.*, 338 NLRB at 1010.

<sup>94</sup> *Id.* (citing *Cogburn Healthcare Center*, 335 NLRB at 1399).

<sup>95</sup> *Id.* at 1010.

Historically, the Board presumed dissemination of threats of plant closure and other serious coercive conduct and, absent employer rebuttal, would find this factor weighed in favor of issuing a bargaining order based on that presumption.<sup>96</sup> In *Springs Industries*, the Board explained that “[i]t is a reality of industrial life, long recognized by the Board, that a threat of plant closure, which necessarily carries with it serious consequences for all employees in the event of a union election victory, will, all but inevitably, be discussed among employees.”<sup>97</sup> Thus, the Board found sufficient dissemination to set aside an election where the employer threatened plant closure to one employee who testified that she reported the threat to “everybody on break.”<sup>98</sup> Absent record evidence to the contrary, the Board presumed the employees who learned about the threat on break told others.<sup>99</sup>

In *Crown Bolt*,<sup>100</sup> however, the Board wrongly overruled this longstanding precedent and held that it would no longer presume dissemination of threats of plant closure and other serious coercive conduct, and placed the burden on the

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<sup>96</sup> See, e.g., *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972) (issuing *Gissel* bargaining order based, in part, on presumed dissemination of plant closure threat made to 1 of 32 unit employees), *enforcement denied*, 472 F.2d 170 (2nd Cir. 1972); *Marion Rohr Corp.*, 261 NLRB 971, 986 (1982) (issuing *Gissel* bargaining order based, in part, on presumed dissemination of unlawful 8(a)(3) discharge), *enforcement denied*, 714 F.2d 228 (2nd Cir. 1983); *Vinyl-Fab Industries, Inc.*, 265 NLRB 1097, 1098 n.7 (1982) (applying presumption of dissemination to threats of discharge and more onerous working conditions made to one employee and issuing *Gissel* bargaining order).

<sup>97</sup> 332 NLRB 40, 40 (2000) (citing *General Stencils*, 195 NLRB at 1110).

<sup>98</sup> 332 NLRB at 40.

<sup>99</sup> *Id.* at 40-41. While there was record evidence of dissemination in *Springs Industries*, the Board specifically noted that such evidence is not required under the presumption. Nonetheless, some evidence of actual dissemination together with the presumption will decrease the employer’s chance at rebuttal.

<sup>100</sup> 343 NLRB 776 (2004).

General Counsel to prove dissemination.<sup>101</sup> The majority held that the presumption ran counter to the Board's typical burden-allocation norm of placing the burden on the objecting party and created a slippery slope whereby the Board might presume the dissemination of all kinds of coercive statements.<sup>102</sup> It further contended that the presumption was unnecessary because, while the General Counsel could easily establish the chain of dissemination by witnesses who participated in the transmission, by contrast, it would be difficult for an employer to rebut a presumption because it "could not compel its employees to name those told of the threat, and it is unlikely that employees will volunteer such information."<sup>103</sup>

**1. There is Sufficient Evidence of Dissemination to Warrant a *Gissel* Bargaining Order in the Instant Case**

In weighing the factor of dissemination when considering whether to issue a bargaining order under current precedent, the Board considers whether a substantial percentage of the bargaining unit was either directly impacted by or became aware of the unlawful conduct. For example, in *Cogburn Healthcare*, the Board found that a substantial percentage of the unit was directly impacted and issued a bargaining order, where out of a unit of 135, about 30 to 60 employees were directly impacted by unfair labor practices, with the exception of an unfair labor practice concerning surveillance via a newly installed video camera system, which

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<sup>101</sup> *Id.* at 779.

<sup>102</sup> *Id.* at 777-78.

<sup>103</sup> *Id.* at 778.

affected the entire unit.<sup>104</sup> By contrast, in *Cardinal Home Products*, the Board declined to issue a bargaining order where the employer's unfair labor practices only directly affected nine employees out of a unit of sixty, with virtually no evidence of dissemination of the unfair labor practices beyond those directly affected.<sup>105</sup> The Board also noted that threats of plant closure or other threats of job loss were not present.<sup>106</sup> Significantly, dissemination is one factor among several, and as with any multi-factor test, a strong showing in some factors may offset less of a showing in others.<sup>107</sup>

Here, the ALJ correctly concluded that the other *Gissel* factors weigh in favor of a bargaining order given the severity and pervasiveness of the violations, including Respondent's multiple hallmark violations and other serious violations

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<sup>104</sup> 335 NLRB at 1398-1400. Although the ALJ found that the employer threatened discharge at one meeting attended by 18 to 20 employees and loss of benefits at another meeting attended by 30 employees, *id.* at 1409, the extent of overlapping attendance at the two meetings is unclear, and consequently, how much of the bargaining unit directly heard the threats is unclear. In addition, the instances of interrogation and discharge also overlapped, as the employer interrogated some employees multiple times and several of the employees were interrogated, discharged, and attended the meetings described herein. Accordingly, the number of employees directly impacted by the employer's serious unfair labor practices is somewhere around 30 to 60.

<sup>105</sup> 338 NLRB at 1010-11. The dissemination evidence consisted of the testimony of one employee that, on one single occasion, employees who were unlawfully promoted talked about it in the lunchroom. The witness did not provide further details about who or how many others were present at that time.

<sup>106</sup> *Id.* at 1011. Similarly, courts have refused to implement a bargaining order where only a small portion of the bargaining unit has been impacted. *See, e.g., Be-Lo Stores v. NLRB*, 126 F.3d 268, 281 (4th Cir. 1997) (refusing to enforce bargaining order where less than 6 percent of work force directly impacted by unfair labor practices); *Somerset Welding & Steel, Inc. v. NLRB*, 987 F.2d 777, 780 (D.C. Cir. 1993) (refusing to enforce bargaining order where only 10 percent of employees were directly affected by employer's unfair labor practices); *Avecor, Inc. v. NLRB*, 931 F.2d 924 (D.C. Cir. 1991) (refusing to enforce bargaining order where 6 percent of labor force was directly affected by unfair labor practices), *cert. denied*, 502 U.S. 1048 (1992).

<sup>107</sup> *See Stern Produce Co.*, 368 NLRB No. 31, slip op. at 10 (2019) (McFerran, dissenting) (explaining that hallmark violations not required for issuance of *Gissel* bargaining order where numerous other unfair labor practices, together, have lasting impact on employee free choice).

committed by upper management, and the decision to discharge key Union supporter Ornelas by Respondent's steering committee, which included high ranking national and regional executives. In addition, the pervasive nature of the violations, *i.e.*, the number and variety of unfair labor practices reaching all locations and Respondent's continued unlawful conduct long after the election, all demonstrate that a second election would not be viable.<sup>108</sup>

Concerning dissemination, by the ALJ's own conclusions, approximately 80 drivers—over 20 percent of the unit—were directly impacted or became aware of Respondent's serious unfair labor practices, including threats of plant closure, threats of discharge, the discharge of key Union supporter Ornelas,<sup>109</sup> and statements that Respondent could not provide wage increases because of the Union and could open and close plants at will even if employees unionized. The instant case is analogous to *Cogburn* in terms of the percentage of employees reached by the serious unfair labor practices. In addition, in both *Cogburn* and the instant case, the entire unit was directly impacted by similar violations designed to intimidate—video surveillance in *Cogburn* and the unprecedented use of security guards here—even though such violations were not hallmark violations. Lastly, Respondent's

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<sup>108</sup> See *M. J. Metal Products*, 328 NLRB at 1185 (*Gissel* order supported in part by employer's continued misconduct after election because this evidenced strong likelihood of recurrence in event of another organizing effort); *Garney Morris, Inc.*, 313 NLRB at 103 (continuation of employer's unlawful conduct after it agreed to purported settlement agreement indicated strong likelihood of recurrence).

<sup>109</sup> The impact of Respondent's discharge of Ornelas is heightened by evidence of her extensive open Union activities, including speaking out at captive audience meetings, appearing in videos on behalf of the Union made public on Facebook, and displaying a "vote yes" Union sticker on her car. Thus, her coworkers would reasonably suspect her discharge was connected to Union support.

unlawful surveillance directly impacted an additional undetermined number of the 39 employees assigned to the Inglewood facility. As noted above, cases in which courts have found that dissemination was not substantial tend to involve smaller percentages of the unit than the ALJ found affected here, or have virtually no evidence of dissemination, in contrast to the ample evidence of dissemination here.<sup>110</sup>

Finally, the ALJ's decision incorrectly converted substantial dissemination of hallmark violations into a standalone requisite element rather than a factor to consider among many in determining whether a fair election is possible. As a result, the ALJ failed to balance the strength of the other factors in this case. Namely, the severity, high likelihood of recurrence, commission by top management officials, and the dissemination of non-hallmark violations, overwhelmingly demonstrate that a fair election is not possible even if the hallmark violations may not have been disseminated to the entire unit.

## **2. The Board Should Overrule *Crown Bolt***

Although the facts of the instant case warrant a bargaining order under extant law, the Board should follow the superior approach set forth by the majority in *Springs Industries* and the dissent in *Crown Bolt* and return to its traditional presumption of dissemination. Initially, burdens of proof are often allocated based on “the judicial estimate of the probabilities of the situation,” with the burden

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<sup>110</sup> See n.106, *supra*.

placed on “the party who contends that the more unusual event has occurred.”<sup>111</sup> Thus, notwithstanding the Board’s general rule of placing the burden on the objecting party, it has historically and correctly placed the burden on employers to “prove what would be a highly idiosyncratic fact—namely, . . . that employees did not talk with each other about their employer’s plant-closure threat.”<sup>112</sup> Leaving aside the administrative efficiency of presuming the obvious—that a message as powerful as one that implies the end of every employee’s job will make the rounds—this approach also takes into account that employees are understandably reluctant to testify against their own employer.<sup>113</sup> Conversely, armed with the fact that employees are in a position of economic dependence on the employer, putting the burden on it to prove the absence of dissemination is far more appropriate. Finally, the *Crown Bolt* majority’s slippery-slope concern is unavailing because the Board does not indiscriminately apply the presumption without regard to the nature of the particular statement. Rather, the presumption is limited to threats or conduct sufficiently coercive to make it a likely topic of workplace conversation.<sup>114</sup> As such, the Board has presumed dissemination of other types of statements and conduct

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<sup>111</sup> 343 NLRB at 781 (Liebman and Walsh, dissenting) (quoting John William Strong, ed., McCormick on Evidence § 337 (4th ed. 1992)).

<sup>112</sup> *Id.* at 781.

<sup>113</sup> *Id.* The majority, in fact, acknowledged employees’ reluctance to become involved in legal proceedings connected to their workplace in stating its concern that employees would not be eager to cooperate with an investigation of the employer into dissemination. Such reluctance would only be exacerbated in the case of an employee called as a witness by the government to testify in its case against their employer. *See, e.g., Flexsteel Industries*, 316 NLRB 745, 745 (1995) (recognizing employees’ testimony against their own employer is against their pecuniary interest, and therefore enhances their credibility), *aff’d mem.*, 83 F.3d 419 (5th Cir. 1996).

<sup>114</sup> 343 NLRB at 781-82 (Liebman and Walsh, dissenting).

beyond plant-closure threats, such as threats of discharge, layoff, interrogations, and promises of benefits,<sup>115</sup> but declined to apply the presumption in other situations, such as a threat to one employee to reduce her wages,<sup>116</sup> or the interrogation of one employee who was not part of the bargaining unit.<sup>117</sup>

Here, under the Board's traditional standard, Respondent has not met its burden to rebut the presumption. Given the gravity and scope of the serious threats and coercive conduct at issue, it is highly likely they would be disseminated. Specifically, Respondent made multiple threats of plant closure, which, if imposed, would severely and equally affect all employees in the plant. It is also reasonable to presume dissemination of Respondent's unlawful statements that it could not give a wage increase due to the Union. A withheld wage increase would affect the entire unit, and it is severe given that pay is a primary—if not the most important—condition of employment. And the effect would continue to be felt over time as the lost pay would compound on an ongoing basis. Likewise, it is reasonable to presume Respondent's threat of futility—that it could shift work from one plant to another if the employees unionized—would be disseminated. This threat also impacts the entire unit because Respondent did not limit its threat to any specific facility, and it involves among the most severe employment consequences short of discharge—layoff or loss of hours and the coincident loss of income over an indefinite time

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<sup>115</sup> *Id.* at 782 n.9 (collecting cases).

<sup>116</sup> *Id.* at 782 (citing *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 n.12 (2001) (distinguishing *Springs Industries*)).

<sup>117</sup> *Cenco Medical/Health Supply Corp.*, 207 NLRB 123, 137 n.23 (1973).

period. It is also reasonable to presume key Union supporter Ornelas' discharge was widely disseminated given that the Board considers the discharge of union adherents as among "the most flagrant forms of interference with Section 7 rights."<sup>118</sup>

**D. The Board Should Overrule *Linden Lumber* and Reinststate the *Joy Silk* Doctrine**

The Board should revisit its decision in *Linden Lumber Div., Summer & Co.*<sup>119</sup> and reinststate the doctrine under *Joy Silk Mills, Inc.*,<sup>120</sup> prospectively,<sup>121</sup> because the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections. Specifically, as discussed below, the Board should reinststate *Joy Silk* in its original form, with the employer bearing the burden to demonstrate its good faith doubt as to majority status without requiring an increased threshold of "substantial unfair labor practices" to demonstrate the lack of good faith. Thus, the Board should consider all relevant circumstances, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.

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<sup>118</sup> *Milum Textile*, 357 NLRB at 2055 (presuming dissemination of union supporters' discharges based solely on union organizer testimony that union-meeting attendance decreased and employees reported fear of wearing union insignia, rather than direct evidence of dissemination).

<sup>119</sup> 190 NLRB 718 (1971), *rev'd sub nom. Truck Drivers Union Local No. 413*, 487 F.2d 1099 (1973), *rev'd*, 419 U.S. 301 (1974).

<sup>120</sup> 85 NLRB 1263 (1949), *enforced*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

<sup>121</sup> Given that the instant case warrants a bargaining order under *Gissel* and that CGC requests prospective application of the *Joy Silk* doctrine, CGC does not address in this brief whether a *Joy Silk* order would issue under the facts of the instant case.

Indeed, the Board retains the authority to reinstate the *Joy Silk* doctrine given the substantial deference it enjoys in enacting national labor policy; the doctrine is rational and consistent with the Act, and it strikes an appropriate balance between employees' Section 7 rights to choose whether or not to select union representation. Moreover, the relevant Supreme Court decisions support rather than preclude reinstatement of the doctrine.

In *Joy Silk*, the Board announced its “good faith doubt” test under which it would order an employer to recognize and bargain with a union, where the union presented evidence of a card majority and the employer refused recognition but was unable to establish a good faith doubt as to the union’s majority status.<sup>122</sup> In determining whether the employer had refused recognition in good faith, the Board considered all relevant circumstances, including any unlawful employer conduct, the sequence of events, and the time lapse between the refusal and the unlawful conduct.<sup>123</sup> While in most cases the Board relied on the employer’s unfair labor practices as part of its determination to issue a bargaining order, in some instances, the Board found that other circumstances demonstrated a lack of good faith notwithstanding the absence of unfair labor practices.<sup>124</sup> Over time, the Board

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<sup>122</sup> 85 NLRB at 1264.

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., *Snow & Sons*, 134 NLRB 709, 712 (1961) (bargaining order issued based on employer’s refusal to abide by its agreement to submit to results of third-party card check), *enforced*, 308 F.2d 687 (9th Cir. 1962); *Greyhound Terminal*, 137 NLRB 87, 91-92 (1962) (bargaining order issued where employer insisted on election two days after it had met with union, accepted authorization cards, and acknowledged union was employees’ representative), *enforced*, 314 F.2d 43 (5th Cir. 1963); *Arthur Derse & Wilder Mfg. Co.*, 185 NLRB 175, 177 (1970) (bargaining order issued where union presented card majority, majority of employees engaged in picketing, and employer stated at internal meeting that 10 of 18 employees were “union”).

modified its approach, shifting the burden to the General Counsel to prove that the employer lacked a good faith doubt<sup>125</sup> and eventually requiring “substantial unfair labor practices calculated to dissipate union support” to establish a lack of good faith doubt.<sup>126</sup> The Board abruptly abandoned this good faith doubt standard during oral arguments before the Supreme Court in *Gissel*.<sup>127</sup> As a result, the Supreme Court established a new doctrine which focused not on the employer’s motivation at the time of its refusal to bargain, but rather, the remedial question of whether the employer’s extensive unfair labor practices made a fair election highly unlikely or impossible even after application of the Board’s traditional remedies.<sup>128</sup>

*Joy Silk* is logically superior to current Board law’s ability to deter election interference. It directly disincentivizes an employer from engaging in unfair labor practices during organizing campaigns to avoid a bargaining obligation, as doing so will typically result in the imposition of a bargaining order. Unlike *Gissel*, in which the employer can safely assume that, except in the rarest of instances, it can accomplish its goal of remaining union free through unlawful interference with the organizing campaign, under *Joy Silk* the employer’s unfair labor practices will, in most cases, suffice to demonstrate its lack of good faith doubt of the union’s majority

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<sup>125</sup> *John P. Serpa, Inc.*, 155 NLRB 99, 100-01 (1965), *rev’d*, 376 F.2d 186 (1967).

<sup>126</sup> *Aaron Bros.*, 158 NLRB 1077, 1079 (1966).

<sup>127</sup> *Gissel*, 395 U.S. at 594 (“Although the Board’s brief before this Court generally followed the approach set out in *Aaron Brothers*, . . . the Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether.”). *See*, Brian J. Petruska, *Adding Joy Silk to Labor’s Reform Agenda*, 57 Santa Clara L. Rev. 97, 108-111 (2017) (explaining how the Associate General Counsel misrepresented controlling Board law regarding the *Joy Silk* doctrine at oral argument before Court).

<sup>128</sup> 395 U.S. at 614-15.

and result in a bargaining order. This argument for the *Joy Silk* doctrine's superior deterrence is corroborated by the empirical evidence referenced below.

The *Gissel* doctrine on the other hand has failed to deter employers from interfering with the Board's election process.<sup>129</sup> After the Board replaced *Joy Silk*, the commission of unfair labor practices during election campaigns, including unlawful discharges, increased dramatically. In turn, the number of elections fell precipitously and, as a result, the rate of unionization now rests near all-time lows.<sup>130</sup> The ineffectiveness of *Gissel* resides largely in its formulation, which requires the Board and courts to speculate about future events, and also frames the order as something that will rarely be warranted—namely, inquiring whether the employer's unfair labor practices are so serious and pervasive as to make a fair election very unlikely or impossible, even after traditional remedies are applied.<sup>131</sup> Given this framing, many courts have characterized the *Gissel* bargaining order as an “extraordinary remedy,” one of last resort.<sup>132</sup> The problem is further exacerbated by the inherent delay incident to litigation and the fact that most courts consider changed circumstances when evaluating an potential order, and therefore analyze

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<sup>129</sup> The argument for pursuit of a bargaining order, Sections B and C *supra*, is in no way affected by CGC's position here. Indeed, pursuit of *Gissel* bargaining order relief in this case is wholly appropriate, given it is the only form of relief currently available to combat tactics that have made a fair second election impossible.

<sup>130</sup> See Petruska, 57 Santa Clara L. Rev. 97 at 99, 116-32 (detailing the empirical evidence corroborating trends in unfair labor practices, election rates, and unionization after the abandonment of *Joy Silk*).

<sup>131</sup> 395 U.S. at 614-15.

<sup>132</sup> See Petruska, 57 Santa Clara L. Rev. 97 at 115 n. 89 (collecting cases where various courts have designated *Gissel* bargaining orders as an “extraordinary remedy”).

whether a fair election is possible several years after the initial organizing campaign.<sup>133</sup> It is, therefore, unsurprising that the *Gissel* doctrine provides little deterrent effect given the low likelihood that a bargaining order will issue and ultimately be enforced against the offending employer.

The Board has the authority to adopt policies, and so long as its construction of a policy is permissible under the Act and meaningfully engages in the balancing of legitimate conflicting interests, that balancing is subjected to limited judicial review.<sup>134</sup> The Supreme Court has recognized the ability of the Board to reverse its prior positions, as it is the “province of the Board, not the courts, to determine whether or not the ‘need’ exists in light of changing industrial practices.”<sup>135</sup> The Court further noted that “to hold that the Board’s earlier decisions froze the development of . . . the national labor law would misconceive the nature of administrative decisionmaking,” as “cumulative experience begets understanding and insight by which judgments . . . are validated or qualified or invalidated.”<sup>136</sup>

Here, the re-adoption of the *Joy Silk* doctrine is rational given the superior deterrence of *Joy Silk* based on its analytical underpinning and the evidence of the Board’s last 50 years of cumulative experience showing that *Gissel* has failed to adequately deter unfair labor practices and protect the integrity of elections.<sup>137</sup>

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<sup>133</sup> See Section B & n.84, *supra*.

<sup>134</sup> *NLRB v. Weingarten*, 420 U.S. 251, 266-67 (1975); *Beth Israel Hospital*, 437 U.S. 483, 500-01 (1978); *NLRB v. Truck Drivers, Local Union No. 449*, 353 U.S. 87, 96-97 (1957).

<sup>135</sup> *Weingarten*, 420 U.S. at 266.

<sup>136</sup> *Id.* at 265-66 (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

<sup>137</sup> In this way, the *Joy Silk* doctrine furthers the policies set forth in Section 1 of the Act to “eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by

Moreover, it strikes a balance of legitimate conflicting interests between deterring election interference so that employees may exercise free choice and accommodating the employer's interest in ensuring that the union has, in fact, achieved majority support because it permits the employer to make efforts to ascertain majority status provided that it does so in good faith.<sup>138</sup> In addition, *Joy Silk* balances employees' interest in access to the Board's secret ballot election process with their right to select a representative through alternative means such as through authorization cards because, at most, it limits access to the election process to scenarios in which the employer acts in bad faith when presented with proof of majority status.

Moreover, as explained by the Court in *Frank Bros.*, "a [bargaining] order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement," because it does not fix a permanent bargaining relationship.<sup>139</sup> Employees who later wish to disavow their union can simply file a decertification petition, as there is nothing permanent in a bargaining order.<sup>140</sup>

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encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." The *Joy Silk* doctrine's deterrent effect will contribute to the Board's policy of preserving "laboratory conditions" to ensure elections represent the uninhibited desires of employees. *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952). *Joy Silk* will reasonably serve to further those goals and thus is rational and consistent with the Act and is based on the Board's cumulative experience with the shortcomings of *Gissel*.

<sup>138</sup> For example, an employer may ask a union to respond to good faith concerns it has about the authenticity of card signatures or the appropriate scope of the unit. However, it may not simply refuse to respond or object to authorization cards as a method of demonstrating majority status.

<sup>139</sup> *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).

<sup>140</sup> *Gissel*, 395 U.S. at 612-13.

In addition, *Joy Silk* is clearly a permissible construction consistent with the Act given its many years of prior implementation by the Board and its firm rooting in Section 8(a)(5)'s prohibition on failing to bargain in good faith with a designated Section 9(a) representative.<sup>141</sup> The Supreme Court's decisions in *Gissel* and *Linden Lumber* support rather than preclude reinstatement of the *Joy Silk* doctrine. In *Gissel*, the Court affirmed a critical piece of the *Joy Silk* doctrine—that a union may be designated, with a resulting bargaining obligation under Section 8(a)(5), through authorization cards without an election. In discussing the *Joy Silk* doctrine and its progeny, the Court simply noted that the Board had announced its position that the employer's good faith doubt of majority status was "largely irrelevant" as the basis of bargaining orders and instead had moved to an assessment of whether "the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election."<sup>142</sup> While permitting the Board to shift toward a remedy-based analysis in cases where the employer committed unfair labor practices, the Court expressly declined to prohibit the Board from continuing to issue orders based on a good faith doubt, stating that "we need not decide whether a bargaining order is ever appropriate in cases where there is no

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<sup>141</sup> Indeed, the text of Section 9(a) defines a bargaining representative as "designated or selected" rather than "certified," demonstrating that certification through the Board's election process is not required for a bargaining obligation to arise.

<sup>142</sup> 395 U.S. at 594.

interference with the election processes.”<sup>143</sup> Consequently, the Board continued to issue bargaining orders under a good-faith-doubt theory after *Gissel*.<sup>144</sup>

Two years after *Gissel* issued, in *Linden Lumber*, the Board announced its total abandonment of the good-faith-doubt test, holding that an employer would not violate Section 8(a)(5) solely by insisting on a Board election, regardless of its motivations.<sup>145</sup> The Board stated it would no longer “reenter the ‘good faith thicket’ of *Joy Silk*” and generally alluded to the difficulties in determining an employer’s intent and knowledge.<sup>146</sup> In upholding the Board’s *Linden Lumber* decision, the

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<sup>143</sup> *Id.* at 594-95.

<sup>144</sup> See, e.g., *Arthur Derse & Wilder Mfg. Co.*, 185 NLRB at 177; *Pacific Abrasive Supply Co.*, 182 NLRB 329, 330-31 (1970) (bargaining order issued where entire unit of four employees signed cards, talked with employer about their support, and picketed, despite no unfair labor practices taking place).

<sup>145</sup> *Linden Lumber*, 190 NLRB at 720-21. Despite the Board’s abandonment of the good-faith-doubt test, it has continued to apply corollary principles with respect to card checks as developed in the *Snow & Sons* line of cases. As such, the Board will find a violation of Section 8(a)(5) where an employer refuses to abide by the results of a previously agreed upon card check absent a good faith doubt as to the union’s majority status. See, e.g., *Gregory Chevrolet*, 258 NLRB 233, 239-40 (1981) (employer polling and questioning employees why they had signed authorization cards demonstrated no good faith doubt as to majority status as shown by agreed upon card check); *Research Management Corp.*, 302 NLRB 627, 627 n.2 & 638-39 (1991) (employer’s defense that it did not understand implications of agreeing to card check irrelevant where employer lacks good faith doubt as to union’s majority status); *J. Picini Flooring*, 355 NLRB 606, 609-611 (2010) (employer violated 8(a)(5) where its dispute over card check language in voluntary recognition clause of collective-bargaining agreement was motivated by bad-faith), *enforced sub nom. International Union of Painters, Local 159*, 656 F.3d 860 (9th Cir. 2011).

<sup>146</sup> 190 NLRB at 720-21. This justification for abandoning the good-faith-doubt test is exceedingly weak given that the Board must routinely ascertain parties’ motivations in a variety of contexts, including nearly all Section 8(a)(3) cases and 8(a)(1) discrimination cases concerning protected concerted activities pursuant to *Wright Line*, 251 NLRB 1083, 1090 (1980), *enforced*, 662 F.2d 1899 (1st Cir. 1981), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983); Section 8(a)(5) surface bargaining cases in determining whether a party’s purpose was to frustrate rather than arrive at agreement, *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enforced*, 938 F.2d 815 (7th Cir. 1991); and Section 8(b)(1)(A) duty-of-fair-representation cases to determine whether the union was motivated by arbitrary, discriminatory, or bad faith reasons, *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Thus, the *Linden Lumber* Board’s vague assertion of the difficulty in ascertaining employer motivation does not justify a desertion of the doctrine. In addition, the unexplained nature of the Board’s abandonment of *Joy Silk* during oral argument in *Gissel* further undermines the wisdom of continuing that departure. See n.127, *supra*.

Supreme Court, again, did not mandate an abandonment of the *Joy Silk* doctrine but merely held that *Linden Lumber* was a permissible interpretation of the Act, holding that, “[i]n light of the statutory scheme and the practical administrative procedural questions involved, we cannot say that the Board’s decision that the union should go forward and ask for an election on the employer’s refusal to recognize the authorization cards was arbitrary and capricious or an abuse of discretion.”<sup>147</sup> Accordingly, the relevant Supreme Court precedent in no way precludes the Board from readopting *Joy Silk*.

Here, the Board should reinstate the *Joy Silk* doctrine for the reasons set forth above. Moreover, as mentioned above, the Board should reinstate *Joy Silk* in its original form, under which the employer will retain the burden to demonstrate its good faith doubt as to majority status without requiring an increased threshold of “substantial unfair labor practices” to demonstrate the lack of good faith because the heightened evidentiary requirements and burden shifting in the *Joy Silk* doctrine’s later modified iterations, e.g., *Aaron Bros.*, would be less effective in achieving the deterrence needed to ensure fair and free elections as required by the Act.<sup>148</sup> Rather, as set forth in *Joy Silk*, the Board should consider all relevant

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<sup>147</sup> *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 309-10 (1974).

<sup>148</sup> As with *Gissel*, later iterations of *Joy Silk* would be less effective deterrents because they would make bargaining orders a rarity. The increased threshold of “substantial unfair labor practices” implicates that most violations of the Act will not demonstrate a lack of good faith doubt, and the analysis would be unnecessarily complicated by raising the questions of which and how many unfair labor practices are “substantial” enough to warrant the inference of bad faith. And placing the burden on the General Counsel would make obtaining bargaining orders more difficult and obscure the inquiry into the employer’s motivations because the employer could simply refuse to present evidence to explain its actions. Moreover, from an evidentiary standpoint, it makes sense to place the

circumstances, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct.

Accordingly, the Board may determine that a bargaining order should issue if the circumstances demonstrate a lack of good faith doubt even absent unfair labor practices, such as due to testimony or internal documentary evidence revealing the employer's purpose at the time of its refusal to bargain, the legitimacy of the employer's proffered reasons for refusing to bargain, or its failure to offer any explanation. This would include situations in which the employer's reason for refusing to bargain is to gain time in order to persuade employees to change their minds, even using what would otherwise be lawful persuasion. In addition, where the employer has committed unfair labor practices, the Board may consider all circumstances, including the identity of the agent who committed the violations, the nature of the violations, and the timing of the violations, but in any event, such violations will decrease the likelihood that the employer will meet its burden to show good faith doubt.

**E. The Board Should Overrule *Babcock & Wilcox* and Hold that an Employer Violates Section 8(a)(1) by Threatening Employees with Reprisal if They Decline To Listen to Speech Concerning Employee Exercise of Section 7 Rights**

As the Board long ago recognized, the Act protects employees' right to listen as well as their right to refrain from listening to speech concerning the exercise of

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burden on the employer because it is the best positioned to present evidence about its own motivations.

their Section 7 rights.<sup>149</sup> Mandatory meetings held by employers (including but not limited to those commonly referred to as captive-audience meetings) in which employees are forced to listen to their employer’s speech concerning their exercise of Section 7 rights inherently involve a threat of reprisal to employees for exercising the protected right to refrain from listening to such speech. That threat therefore violates Section 8(a)(1) of the Act. Because such meetings involve a threat of reprisal to employees for exercising the protected right to refrain, they fall outside the scope of Section 8(c), which shields from unfair-labor-practice liability only expression that “contains no threat of reprisal or force.”<sup>150</sup>

In *Babcock & Wilcox Co.*,<sup>151</sup> the Board overruled *Clark Brothers* and incorrectly concluded that an employer does not violate the Act by compelling its employees to attend speeches in which it urges them to reject union representation. As a result, employers commonly use express or implicit threats to force employees into captive-audience meetings concerning the exercise of Section 7 rights.<sup>152</sup> And the Board allows employers to make good on those threats by discharging or disciplining employees who insist on, or exercise, their right to refrain from listening.<sup>153</sup>

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<sup>149</sup> *Clark Bros. Co.*, 70 NLRB 802, 805 (1946), *enforced*, 163 F.2d 373 (2d Cir. 1947).

<sup>150</sup> 29 U.S.C. § 158(c).

<sup>151</sup> 77 NLRB 577, 578 (1948).

<sup>152</sup> *See 2 Sisters Food Group*, 357 NLRB 1816, 1825 n.1 (2011) (Member Becker, dissenting in part) (citing study finding “that in 89 percent of [representation- election] campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meeting[s] during the course of the campaign”).

<sup>153</sup> *See, e.g., Litton Systems, Inc.*, 173 NLRB 1024, 1030-31 (1968).

*Babcock's* holding is based on a fundamental misunderstanding of Section 8(c). The license it gives employers to coerce employees in the exercise of their Section 7 rights is an anomaly in Board law inconsistent with the Act's purpose of providing employee free choice. The Board should overrule it and hold that, as a matter of law, reasonable employees will perceive an implicit, if not explicit, threat of reprisal for exercising their right to refrain from listening to their employer's speech concerning their exercise of Section 7 rights in two circumstances: when they are (1) convened on paid time or (2) cornered while performing their job duties. In both cases, employees constitute a captive audience, compelled to listen by a threat of discipline, discharge, or other reprisal. In addition, the Board should adapt the frameworks of *Johnnie's Poultry Co.*,<sup>154</sup> *Struksnes Construction Co.*,<sup>155</sup> and *Allegheny Ludlum Corp.*,<sup>156</sup> involving sensible prophylactic safeguards, to the captive-audience context as more fully discussed below. Such an approach would appropriately protect employers' free-speech right to express views, argument, or opinion concerning Section 7 activity without unduly infringing on the Section 7 right of employees to refrain from listening to such expressions.

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<sup>154</sup> 146 NLRB 770, 774 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

<sup>155</sup> 165 NLRB 1062, 1062 (1967).

<sup>156</sup> 333 NLRB 734, 734 (2001), *enforced*, 301 F.3d 167 (3d Cir. 2002).

## 1. The Act Prohibits Employer Threats that Interfere with Employees’ Protected Right to Refrain from Listening

### a. Section 7 protects employees’ right to listen—and to refrain from listening

Section 7 of the Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as “the right to refrain from any or all of such activities.”<sup>157</sup> “Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization[al] rights.”<sup>158</sup> The effectiveness of organizational rights, as the Supreme Court has observed, depends on employees’ ability “to learn the advantages and disadvantages of organization from others.”<sup>159</sup> Free and uncoerced communication is likewise essential to the exercise of the other rights that Section 7 protects.<sup>160</sup> Whether or not a union is involved, the right of

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<sup>157</sup> 29 U.S.C. § 157.

<sup>158</sup> *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (citing *Peyton Packing Co.*, 49 NLRB 828 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)).

<sup>159</sup> *Id.* Employees’ interests in that regard are so weighty that “employers’ property rights may be ‘required to yield to the extent needed to permit communication of information on the right to organize.’” *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992) (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

<sup>160</sup> *See, e.g., Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n.10 (2014) (“[W]ages are a ‘vital term and condition of employment,’ and the ‘grist on which concerted activity feeds’; discussions of wages are often preliminary to organizing or other action for mutual aid or protection.” (quoting *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enforcement denied in part on other grounds*, 81 F.3d 209 (D.C. Cir. 1996))); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (“It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.”), *enforced*, 519 F.3d 373 (7th Cir. 2008).

employees to act together “to improve terms and conditions of employment or otherwise improve their lot as employees” includes the right “to communicate with each other and with the public for that purpose.”<sup>161</sup>

Because the right to communicate is integral to the right to act, the Board has long recognized that Section 7 protects employees when they listen no less than when they speak.<sup>162</sup> The employee who accepts and considers literature protected by Section 7 enjoys the same protection as the employee who distributes it.<sup>163</sup> And the employee who attends a meeting to learn about the advantages or disadvantages of union representation or other protected concerted activity has the same protection as the host.<sup>164</sup> In short, the Act’s protection for an employee’s choice to receive a message concerning Section 7 activity parallels the protection for the employee who imparts the message.

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<sup>161</sup> *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 12 (2018) (citations omitted).

<sup>162</sup> See *Climatrol, Inc.*, 329 NLRB 946, 956 (1999) (the Act protects “the right to listen to a union organizer’s arguments in favor of the union”); *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (“Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.” (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951))), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

<sup>163</sup> See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 (1978) (distribution of newsletter urging employees to engage in concerted activity for mutual aid and protection was protected); *Sunbelt Mfg., Inc.*, 308 NLRB 780, 780 n.3 (1992) (videotaping that “specifically revealed whether certain employees accepted or rejected campaign literature” violated Section 8(a)(1)); *Roxanna of Texas, Inc.*, 98 NLRB 1151, 1165 (1952) (employee engaged in union activity by “taking union handbills when they were passed out”).

<sup>164</sup> See, e.g., *Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73, slip op. at 2-3 (2022) (employee engaged in Section 7 activity by attending union meeting); *Guess?, Inc.*, 339 NLRB 432, 434 (2003) (“It is well settled that Section 7 of the Act gives employees the right to keep confidential their union activities, including their attendance at union meetings.”); *Foothill Sierra Pest Control, Inc.*, 350 NLRB 26, 29 (2007) (employee “engaged in union activity by contacting the [u]nion, talking to other employees about the [u]nion, and hosting a union/employee meeting at her house”).

Moreover, as the Board correctly recognized over 75 years ago in *Clark Brothers*, the “freedom to receive aid, advice, and information from others” concerning Section 7 activity necessarily encompasses the freedom “to determine whether or not to receive such aid, advice, and information.”<sup>165</sup> The right to accept an offer is “meaningless,” after all, if there is no right to decline it without fear of reprisal.<sup>166</sup>

One year after *Clark Brothers*, Congress affirmed the principle that a right to act is not complete without the corresponding right to not act. Congress amended Section 7 to protect “the right to refrain from any or all” of the activities already protected by that provision.<sup>167</sup> The right to refrain extends equally to employees who support and to those who oppose union representation.<sup>168</sup> Thus, in amending the Act, Congress removed any possible doubt concerning the scope of employee rights in response to speech in the Section 7 realm. If employees have the right to seek out and listen to a message, they also have the right to turn away and refrain from listening to it.<sup>169</sup>

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<sup>165</sup> 70 NLRB 802, 805 (1946).

<sup>166</sup> *Id.*

<sup>167</sup> 61 Stat. 136, 140 (1947) (codified at 29 U.S.C. § 157).

<sup>168</sup> See *NLRB v. Magnavox Co.*, 415 U.S. 322, 326 (1974) (“[E]mployees supporting the union have as secure [Section] 7 rights as those in opposition.”).

<sup>169</sup> See *Lee v. NLRB*, 393 F.3d 491, 495 (4th Cir. 2005) (“[I]f there is a presumptive right to wear union insignia as part of engaging in union activity under Section 7, there is a reciprocal Section 7 right contained in that section’s ‘right to refrain’ language to choose not to wear union insignia.”). Cf. *Associated Rubber Co. v. NLRB*, 296 F.3d 1055, 1058 (11th Cir. 2002) (noting that employee “showed his opposition to the union by refusing to accept some literature that a union supporter offered him”).

That common-sense principle of labor law accords with the Supreme Court’s recognition, in the First Amendment context, that “[p]rivate citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider.”<sup>170</sup> “Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit . . . .”<sup>171</sup> Within the employment relationship, as in society more broadly, once “an offer by one to communicate and discuss information with a view to influencing the other’s action . . . is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.”<sup>172</sup> “From all of this the person sought to be influenced has a right to be free . . . .”<sup>173</sup>

**b. Section 8(a)(1) prohibits employer threats that interfere with, restrain, or coerce employees in the exercise of their Section 7 rights**

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”<sup>174</sup> The test under Section 8(a)(1) is objective: whether the employer’s

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<sup>170</sup> *Hill v. Colorado*, 530 U.S. 703, 734 (2000).

<sup>171</sup> *Rowan v. U.S. Post Off. Dep’t*, 397 U.S. 728, 737 (1970).

<sup>172</sup> *Hill*, 530 U.S. at 717 (quoting *Am. Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921)).

<sup>173</sup> *Id.* (quoting *Am. Steel Foundries*, 257 U.S. at 204). For scholarly discussion of the right to not listen as a corollary to the First Amendment rights to speak and refrain from speaking, see generally Roger C. Hartley, *Freedom Not To Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 Berkeley J. Emp. & Lab. L. 65 (2010).

<sup>174</sup> 29 U.S.C. § 158(a)(1).

conduct or speech “tends to interfere with the free exercise of employee rights.”<sup>175</sup> The Board evaluates employer actions and statements from the perspective of employees who are in a position of “economic dependence” and necessarily pick up threatening implications “that might be more readily dismissed by a more disinterested ear.”<sup>176</sup>

As shown above, employees exercise a right protected by Section 7 when they choose whether or not to listen to messages regarding union organization or other protected concerted activity. It follows that an employer coerces employees and interferes with that choice in violation of Section 8(a)(1) by threatening employees with reprisals for choosing to refrain or not from listening.

The Board already applies that straightforward principle in a variety of settings. Employers violate the Act if they threaten employees with reprisal to compel them to attend or refrain from attending union meetings.<sup>177</sup> And, in an analogous situation, “[i]t is beyond doubt that if a labor organization threatened employees in any manner in order to coerce their attendance at a union meeting

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<sup>175</sup> *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001).

<sup>176</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); See also Michael M. Oswald, *The Content of Coercion*, 52 U.C. Davis L. Rev. 1585, 1603-06 (2019) (discussing the Supreme Court’s recognition of workers’ reliance on management for their livelihood and how this affects workers as listeners and their free will as workplace actors).

<sup>177</sup> See, e.g., *Maui Surf Hotel Co.*, 235 NLRB 957, 958 (1978) (“[T]hose employees, who chose to remain at work and to exercise their statutory right to refrain from union activity, were subjected to duress when they were threatened by the [e]mployer with an adverse citation of insubordination . . . .”), *enforced in part mem.*, 601 F.2d 603 (9th Cir. 1979); *Electric Hose & Rubber Co.*, 265 NLRB 696, 699 (1982) (employer violated Section 8(a)(1) by warning employee to “be careful” if he attended a union meeting); *Price’s Pic-Pac Supermarkets, Inc.*, 256 NLRB 742, 748 (1981) (“By threatening [employees] with discharge for attending a union meeting, [the employer] violated Section 8(a)(1) of the Act.”). Cf. *Chariot Marine Fabricators*, 335 NLRB 339, 349 (2001) (employer violated Section 8(a)(1) by telling employees that plant was being closed because of their attendance at union meeting).

where they would be urged to vote in favor of representation or to prevent their attendance [at] an employer meeting where they would be urged to vote against representation, the labor organization’s conduct would be an unfair labor practice under Section 8(b)(1)(A).”<sup>178</sup> In each of the foregoing circumstances, the Act is violated if reasonable employees would perceive a threat that would tend to prevent them from freely choosing to listen or refrain from listening to speech concerning the exercise of Section 7 rights. In certain circumstances, as we now show, the Board should find that employees are “captive” to their employer’s message and would necessarily perceive an unlawful threat.

**2. The Board Should Conclude that Captive-Audience Meetings Regarding the Exercise of Section 7 Rights Are Per Se Unlawful**

**a. Captive-audience meetings inherently contain a threat**

A threat of reprisal is unmistakably present whenever an employer requires employees to listen to its message concerning Section 7 activity.<sup>179</sup> In particular, the Board should hold that, as a matter of law, reasonable employees will perceive an implicit, if not explicit, threat of reprisal for exercising their right to refrain from listening to their employer’s communications concerning their exercise of Section 7

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<sup>178</sup> *2 Sisters*, 357 NLRB at 1825 (Member Becker, dissenting in part). *Cf. Peninsula Shipbuilders’ Ass’n*, 237 NLRB 1501, 1506 (1978) (union violated the Act “by threatening an employee not to process his grievance if he continued to attend meetings conducted by a rival union”). *See also Carpenters Union Loc. 180*, 328 NLRB 947, 949-50 (1999) (unions are entitled to engage in “peaceful persuasion,” but they violate the Act by threatening employees with reprisal for engaging in protected activity).

<sup>179</sup> As discussed at greater length below, *Babcock* found “compulsory audience” meetings lawful, but it did not explain its conclusion that “the conduct herein does not contain any threat of reprisal.” 77 NLRB at 578.

rights in two circumstances: when they are (1) convened on paid time or (2) cornered while performing their job duties. In both cases, employees constitute a captive audience, compelled to listen by a threat of discipline, discharge, or other reprisal.<sup>180</sup> Such a threat, and the fear it necessarily inspires in economically dependent employees, is the epitome of coercion, stripping employees of any meaningful right to refrain.<sup>181</sup>

First, the Board should conclude that an employer has convened a captive-audience meeting when it asks employees to attend a meeting on paid time without providing assurances that the meeting is voluntary as described below. In such cases, employees will reasonably perceive a threat of reprisal for failure to attend, whether or not such a threat is openly stated. Even if the employer does not expressly make the meeting mandatory, reasonable employees understand that acceding to their employer's implied wishes while they are on the clock is a part of the job.<sup>182</sup> Second, the Board should conclude that an employer has cornered employees into a captive-audience meeting when it approaches them while they are

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<sup>180</sup> See *NLRB v. United Steelworkers of Am. (Nutmeg)*, 357 U.S. 357, 368 (1958) (Warren, J., dissenting in part and concurring in part) (“Employees during working hours are the classic captive audience.”); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991) (“Few audiences are more captive than the average worker.” (citation omitted)).

<sup>181</sup> See *Oswalt, supra*, at 1642-47 (explaining that coercion occurs when a worker has a credible fear that they will suffer adverse consequences for exercising their Section 7 rights and no reasonable way to cope with the situation by avoiding it or actively lessening its impact).

<sup>182</sup> See, e.g., *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019) (employee “understood (as any reasonable employee would, given the context) that [employer]’s directive to ‘pay attention’ to the presentation included an implicit instruction to put down his phone,” and employer reasonably considered failure to do so to be “insubordinate”); *Demuth Electric, Inc.*, 316 NLRB 935, 935 (1995) (although employer who called union cap “inappropriate” did not “specifically prohibit” employee from wearing it, the “message was clear that [the employee] risked employer retaliation if he did so”).

performing job duties. In such cases, employees will reasonably perceive that they cannot abandon their work without risking reprisal.<sup>183</sup> They remain in place under threat.

Properly defined by the presence of a threat ensuring employees' presence, the concept of captive-audience meetings is not limited to its common manifestation in the form of mandatory speeches delivered to groups of employees ahead of a representation election. Employees may be captive whether they are addressed individually or in a group, and a captive-audience meeting concerning Section 7 activity conveys an unlawful threat regardless of whether a union election or other protected activity is at issue. As a matter of law, employers who speak to convened or cornered employees concerning their exercise of Section 7 rights unlawfully threaten reprisal should the employees exercise the right to refrain from listening.<sup>184</sup>

To be sure, the threat implicit in captive-audience meetings, or any employer dictate, is ordinarily a lawful incident of the employment relationship. When, for

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<sup>183</sup> See, e.g., *Neptco, Inc.*, 346 NLRB 18, 20 (2005) (employer lawfully discharged employee for insubordination where employer's "own understanding of 'insubordination' encompassed the more general failure to adhere to the [employer]'s expectation that [the employee] 'stay at his machine'"); *Parker Hannifin Corp.*, 259 NLRB 263, 267 (1981) (employee lawfully discharged for "refusal to stay at her work area and do her job").

<sup>184</sup> In circumstances where employees are neither convened nor cornered, as those terms are used in this brief, the question of whether employees would reasonably perceive a threat of reprisal for refraining from listening to employer speech on Section 7 activity should be evaluated based on the totality of the circumstances. Cf. *Rossmore House*, 269 NLRB 1176, 1177-78 & n.20 (1984) (discussing factors to be considered in evaluating whether, under the totality of the circumstances, questioning about union sentiments violates Section 8(a)(1)), *enforced sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Thus, for instance, whether an employee invited to an after-work meeting or approached on break time in a nonwork area would reasonably feel free to refrain would depend on the specific circumstances of the case.

example, an employer requires employees to attend a meeting for job training or safety instructions—implicitly threatening discipline if they skip it—there is generally no interference with Section 7 rights. But it is a different matter if the employer uses the meeting to dissuade employees from unionizing or engaging in concerted activity to improve job training or safety. If reasonable employees would understand the meeting to be about the exercise of Section 7 rights, including the employer’s expression of “any views, argument, or opinion” on that subject,<sup>185</sup> the Act protects their right to freely choose to refrain or not from listening.

**b. To dispel the unlawful threat, employers must assure employees that attendance is voluntary**

Section 8(c) of the Act provides that an employer may lawfully express “views, argument, or opinion” so long as “such expression contains no threat of reprisal or force or promise of benefit.” That provision “merely implements the First Amendment” by preserving “an employer’s free speech right to communicate [its] views to [its] employees.”<sup>186</sup> But as the Supreme Court has recognized, “an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1) and the proviso to [Section] 8(c).”<sup>187</sup> To fully protect the free speech rights of employers as well as the Section 7 rights of employees, the Board should provide a clear framework under which employers who choose to address employees on paid

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<sup>185</sup> 29 U.S.C. § 158(c).

<sup>186</sup> *Gissel*, 395 U.S. at 617.

<sup>187</sup> *Id.*

time concerning employees' Section 7 activity can dispel implicit threats of reprisal and ensure that employees who choose to listen do so on a truly voluntary basis.

Several lines of precedent demonstrate that the Board can establish safeguards that properly protect the interests of employers and Section 7 rights of employees in various circumstances and provide guidance on how the Board might do the same here. When an employer questions employees about activity protected by Section 7 in order to prepare a defense against unfair-labor-practice charges, the Board has recognized “the inherent danger of coercion.”<sup>188</sup> In order to shield legitimate employer interests, however, the Board has “established specific safeguards designed to minimize the coercive impact of such employer interrogation.”<sup>189</sup> Specifically:

the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.<sup>190</sup>

The Board has formulated similar safeguards to accommodate the rights of employers and employees in cases where an employer conducts a poll to ascertain whether a union enjoys majority support. “[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to

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<sup>188</sup> *Johnnie's Poultry Co.*, 146 NLRB 770, 774 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965).

<sup>189</sup> *Id.* at 775.

<sup>190</sup> *Id.*

cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights.”<sup>191</sup> Nonetheless, the Board has concluded, polling of employees may be lawful if the employer takes prescribed steps to minimize coercion.<sup>192</sup>

Finally, the Board drew on *Johnnie’s Poultry* and *Struksnes* when it established a framework “concerning the circumstances in which an employer may lawfully include visual images of employees in campaign presentations.”<sup>193</sup> In that setting, the Board recognized, “a direct request that employees appear in an antiunion videotape would put the employees in a position in which they reasonably would feel pressured to make ‘an observable choice that demonstrates their support for or rejection of the union.’”<sup>194</sup> The Board, however, held “that an employer may lawfully solicit employees to appear in a campaign video” if the employer satisfies a series of requirements.<sup>195</sup>

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<sup>191</sup> *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967).

<sup>192</sup> *Id.* at 1063. The requirements are that: “(1) the purpose of the poll is to determine the truth of a union’s claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.” *Struksnes*, 165 NLRB at 1063.

<sup>193</sup> *Allegheny Ludlum Corp.*, 333 NLRB 734, 734 (2001), *enforced*, 301 F.3d 167 (3d Cir. 2002).

<sup>194</sup> *Id.* at 740 (quoting *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995)).

<sup>195</sup> *Id.* at 743. The requirements are that:

1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee’s picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
2. Employees are not pressured into making the decision in the presence of a supervisor.

When employers address their employees on paid time concerning employees' exercise of Section 7 rights, similar prophylactic safeguards are necessary to neutralize the implicit threat of reprisal. Safeguards are also needed because, if listening to such a speech is voluntary, employees will inevitably make an observable choice—by attending or refraining from attending—that would tend to demonstrate their own Section 7 views. Accordingly, we propose that the Board adapt the frameworks it has used in *Johnnie's Poultry*, *Struksnes*, and *Allegheny Ludlum* to the captive-audience context as follows:

**Convened Employees.** If an employer convenes employees for a Section 7 meeting on paid time, it must satisfy the following requirements to make the meeting voluntary. First, the employer must explain the purpose of the meeting. Second, the employer must assure employees:

- a. that attendance is voluntary,
- b. that if they attend, they will be free to leave at any time,
- c. that nonattendance will not result in reprisals (including loss of pay if the meeting occurs during their regularly scheduled working hours), and
- d. that attendance will not result in rewards or benefits.

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3. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.

4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.

5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

*Allegheny Ludlum*, 333 NLRB at 743 (footnote omitted).

If an employer announces a meeting in advance, it must reiterate the explanation and assurances set forth above at the start of the meeting. Finally, the meeting must occur in a context free from employer hostility to the exercise of Section 7 rights.

**Cornered Employees.** If an employer corners employees to address them concerning their exercise of Section 7 rights, it must satisfy the following requirements to ensure that the meeting is voluntary. First, the employer must explain the purpose of the encounter. Second, the employer must assure employees:

- a. that participation is voluntary,
- b. that nonparticipation will not result in reprisals (including loss of pay), and
- c. that participation will not result in rewards or benefits.

Furthermore, because employees cannot ordinarily choose to leave their work area, the employer must obtain affirmative consent to talk to the employees there and assure them that they may end the encounter at any time without loss of pay (either by leaving or by asking the employer to stop). Finally, the encounter must occur in a context free from employer hostility to the exercise of Section 7 rights.<sup>196</sup>

By adopting this approach, the Board would appropriately protect employers' free speech right to express views, argument, or opinion concerning Section 7 activity without unduly infringing on the Section 7 right of employees to refrain

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<sup>196</sup> It is important to note, however, that even if the safeguards described here dispel any unlawful threat under Section 8(a)(1), Board law would continue to prohibit employers or unions from speaking to massed assemblies on paid time concerning union representation within the 24-hour period before an election. *See Peerless Plywood Co.*, 107 NLRB 427, 429 (1953).

from listening.<sup>197</sup> It would eliminate only restraint, coercion, or interference with an employee’s right to refrain from listening, while leaving employers free to address their employees on a voluntary basis on any subject, at any time, and in any place—before, during, or after work, inside or outside the workplace.<sup>198</sup>

Limiting an employer’s ability to accompany its persuasion efforts with unlawful coercion does not interfere with protected employer speech, just as other well-settled principles of Board law do not interfere with an employer’s lawful ability to conduct its business. To take just a few examples, an employer may discharge an employee for good reason, bad reason, or no reason at all without violating the Act—provided that the reason is not activity protected by Section 7.<sup>199</sup> And an employer may coerce its employees to answer any question, consistent with the Act—so long as it does not interfere with their exercise of Section 7 rights.<sup>200</sup> In the same way, employers may, without violating the Act, compel employees to listen to employer speech on nearly any subject, from job-related instructions to the

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<sup>197</sup> See Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 Ind. L.J. 123, 145 (2012) (proposing a similar adaptation of *Struksnes* assurances for captive-audience settings). *But see* Oswald, *supra*, at 1651-52 (questioning whether such assurances are sufficient to dispel coercion).

<sup>198</sup> The General Counsel will however consider the circumstances under which an employer who holds a voluntary meeting concerning unionization might engage in unlawful conduct if it provided inducements for employees to attend, such as payments above and beyond compensation for regular work hours. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) (“[Section 8(a)(1)] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.”); *Delchamps, Inc.*, 244 NLRB 366, 367 (1979) (discussing circumstances under which employer policies concerning pay for attending campaign meetings may violate Section 8(a)(1)), *enforced*, 653 F.2d 225 (5th Cir. 1981).

<sup>199</sup> *Wright Line*, 251 NLRB 1083, 1096 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

<sup>200</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260-64 (1975).

weather. But they may not use threats of reprisal, implicit or otherwise, to compel employees to listen when the employees have a Section 7 right to refrain.

### 3. The Board Should Overrule Contrary Precedent

In adopting the framework set forth above, the Board should overrule *Babcock & Wilcox Co.*<sup>201</sup> In that case, the Board recognized that under its then-governing precedent, an employer violated the Act when it “removed the element of choice from [its] employees and, in effect, compelled them to attend” speeches concerning whether or not to select union representation.<sup>202</sup> But the Board overturned that precedent based on a single sentence of analysis:

However, the language of Section 8(c) of the Amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses.<sup>203</sup>

The Board did not explain why Section 8(c), enacted the year before, permitted the compulsion that the Board had previously found unlawful. Nor did the Board specify the legislative history on which it relied.<sup>204</sup>

The Board erred. As explained above, Section 8(c) by its terms protects only speech—not threats. A “threat of retaliation” is outside the scope of Section 8(c), and likewise “without the protection of the First Amendment.”<sup>205</sup> As the Supreme Court has recognized, “employers’ attempts to *persuade* to action with respect to joining or

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<sup>201</sup> 77 NLRB 577 (1948).

<sup>202</sup> *Clark Bros.*, 77 NLRB at 578.

<sup>203</sup> *Babcock*, 77 NLRB at 578.

<sup>204</sup> *See 2 Sisters*, 357 NLRB at 1827 (Member Becker, dissenting in part).

<sup>205</sup> *Gissel*, 395 U.S. at 618.

not joining unions are within the First Amendment’s guaranty.”<sup>206</sup> But “[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.”<sup>207</sup> In other words, as the Board properly recognized in *Clark Brothers*, the right to speak does not carry with it a right to coerce employees to listen by threatening reprisal should they exercise their right to refrain. That threat is “not an inseparable part of the speech, any more than might be the act of a speaker in holding physically the person whom he addresses in order to assure his attention.”<sup>208</sup> “The law may and does prevent such a use of force without denying the right to speak.”<sup>209</sup>

The legislative history of the Taft-Hartley Act cannot change the meaning of Section 8(c), for “legislative history can never defeat unambiguous statutory text.”<sup>210</sup> In any event, the legislative history does not suggest that Congress intended to authorize the compulsion that *Clark Brothers* found unlawful. To the extent some legislators expressed disapproval of *Clark Brothers* (in the Senate committee report), they disagreed with what they took to be a rule that employer

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<sup>206</sup> *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (emphasis added).

<sup>207</sup> *Id.* at 537-38. See also *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (Section 8(c) manifests “congressional intent to encourage *free* debate on issues dividing labor and management” (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966))); *Hill v. Colorado*, 530 U.S. 703, 735-36 (2000) (Souter, J., concurring) (right to free speech “does not necessarily immunize a speaker from liability for resorting to otherwise impermissible behavior meant to . . . guarantee [the audience’s] attention”).

<sup>208</sup> *Clark Bros.*, 70 NLRB at 805.

<sup>209</sup> *Id.*

<sup>210</sup> *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1750 (2020).

speech was necessarily coercive if delivered “in the plant on working time.”<sup>211</sup> In doing so, the legislators invoked *Thomas v. Collins, supra*, and asserted that the Board should not predicate unfair-labor-practice findings on speech where “under all the circumstances, there is neither an express nor an implied threat of reprisal.”<sup>212</sup> Under the rule proposed here, only speech delivered to a captive audience (absent the sensible prophylactic safeguards described above), and thus subject to an express or implied threat of reprisal, is unlawful. In accordance with the safeguards laid out above, employers may continue to address their employees on working time, on a voluntary basis.

In the decades since *Babcock*, the Board has never clarified or expanded that decision’s rationale.<sup>213</sup> Moreover, the Board has compounded the damage *Babcock* does to employees’ Section 7 rights by building on its erroneous holding. Starting with the erroneous proposition that captive-audience meetings are lawful employer free speech, without a recognition of the threat of reprisal involved in requiring employees to listen to that speech, the Board has been constrained to conclude that there must be no Section 7 right to refrain from attending such meetings:

An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management’s noncoercive antiunion speech designed to influence the outcome of a union election. For if he had such a statutory right, then management’s compulsory requirement to attend

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<sup>211</sup> *2 Sisters*, 357 NLRB at 1827 (Member Becker, dissenting in part) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947)).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1827-28 (Member Becker, dissenting) (surveying decisions).

such a meeting would interfere with and restrain him in the exercise of that right in violation of Section 8(a)(1) of the Act.<sup>214</sup>

Indeed, the erroneous decision in *Babcock* has caused the Board to reach the irreconcilable conclusions that Section 7 protects employees “participating in a union meeting” on the benefits and drawbacks of union representation, but “employees were not really engaged in concerted activity when they were compelled to attend a meeting and listen to the employer’s speech as to why they would be better off without union representation,” because “the function was to have them be an audience to the employer’s position on union representation.”<sup>215</sup> On the contrary, as we have shown above, it is clear that employees have the same protected right to attend or refrain from attending meetings held by employers concerning the exercise of Section 7 rights as they indisputably have to attend or refrain from attending similar meetings held by unions. Certainly, there is no basis in law or policy for extending lesser protection to that right when the message comes from an employer, “who has control over th[e] [employment] relationship.”<sup>216</sup>

In sum, a proper analysis begins with the rights Section 7 protects—not with *Babcock*’s unjustified solicitude for employer coercion. As shown above, that analysis dictates that employees must be fully free to decline to listen to speech concerning their exercise of Section 7 rights from employers or unions. Section 7 grants employees the same right to listen or refrain from listening to persuasion

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<sup>214</sup> *Litton*, 173 NLRB at 1030-31.

<sup>215</sup> *Goya Foods, Inc.*, 356 NLRB 476, 477 (2011).

<sup>216</sup> *Gissel*, 395 U.S. at 620.

from a union or an employer. Mandatory meetings in which employers address employees concerning their exercise of Section 7 rights, without the assurances discussed herein, interfere with that right to refrain by forcing employees to listen under implicit or explicit threat of reprisal. The Board should therefore overrule *Babcock* and hold that such meetings are unprotected by Section 8(c) and violate Section 8(a)(1).

In the instant case, Respondent held many captive audience meetings: those referenced in Complaint paragraphs 5(h), 5(i), and 5(k) and Objection 6 and the “25<sup>th</sup> hour video.”<sup>217</sup> because the Complaint did not specifically allege that captive-audience meetings are inherently unlawful absent certain safeguards, CGC only seeks a prospective ruling that, going forward, the Board will find that captive-audience meetings are unlawfully coercive absent the prophylactic measures set forth above.

**F. The Board Should Find That Respondent Made Various Additional Threats in Violation of Section 8(a)(1) of the Act**

**1. Estevan Dickson’s Unlawful Threats at the Sloan Plant Office – Complaint Para. 5(a)**

As noted above, the test under Section 8(a)(1) is objective: whether the employer’s conduct or speech “tends to interfere with the free exercise of employee rights.”<sup>218</sup> The Board evaluates employer actions and statements from the perspective of employees who are in a position of “economic dependence” and

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<sup>217</sup> ALJD at 7-8 n.5, 33-34, 38-40, 41-42, 72-73.

<sup>218</sup> *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001).

necessarily pick up threatening implications “that might be more readily dismissed by a more disinterested ear.”<sup>219</sup> Accordingly, a threat of lost hours in retaliation for union activities violates Section 8(a)(1) of the Act.<sup>220</sup> And, obviously, a threat to terminate an employee for their union activities also violates Section 8(a)(1) of the Act.<sup>221</sup>

In the instant case, the record evidence shows that Plant Foreman Dickson, in the office at Respondent’s Sloan plant, threatened employee Rida with loss of work hours, replacement, or termination to discourage union activities by telling him, in front of driver Coleman, if the Company goes union, you will be fired and if they don’t fire you, they’re just going to cut your hours and bring in guys from Florida.

The ALJ found the following regarding this allegation:

I generally did not find Dickson to be a credible witness. That being said, based upon observing their respective testimonies, I have no reason to discredit Coleman or to somehow credit Rida over Coleman. Rida admitted that he and Coleman were friends, and there is no evidence to support a conclusion that Coleman was somehow hostile to Rida or the drivers’ unionization efforts. In fact, Coleman signed a union authorization card. Because Coleman denied that the conversation occurred, I find the General Counsel has not shown that the statements attributed to Dickson were made, and I recommend this allegation be dismissed.<sup>222</sup>

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<sup>219</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *See also* Michael M. Oswalt, *The Content of Coercion*, 52 U.C. Davis L. Rev. 1585, 1603-06 (2019) (discussing the Supreme Court’s recognition of workers’ reliance on management for their livelihood and how this affects workers as listeners and their free will as workplace actors).

<sup>220</sup> *See Hi-Lo Foods*, 247 NLRB 1079 (1980) (affirming the ALJ’s finding that a threat to cut hours violates the Act).

<sup>221</sup> *See, e.g., Caron Intern., Inc.*, 246 NLRB 1120, 1125 (1979).

<sup>222</sup> ALJD at 12.

The ALJ specifically did not credit Dickson as a witness and found that he committed eight other independent violations of Section 8(a)(1) of the Act. Nevertheless, the ALJ credited Coleman’s testimony denying he was present for a conversation with Rida and Dickson about the Union during the time period in question. But there was also no reason not to credit the testimony of Rida, which clearly established a violation. Rida gave detailed descriptions of all conversations he had with Respondent’s managers and agents. He provided a detailed accounts as to the approximate date, time, and location of the alleged unlawful conversations, including other allegations that the ALJ did find unlawful.<sup>223</sup> Rida recalled the persons present at the time of each conversation, gave a detailed and consistent account of Dickson’s unlawful statements, and provided context surrounding those remarks.

It is not rational for the ALJ to credit Coleman over Rida on the grounds that they were friends and at one point signed a union authorization card, where Respondent waged a forceful anti-union campaign that may well have impacted Coleman’s willingness to tell the full truth or to support his friend (as evidenced by his being called as a witness by Respondent). This was the sole basis for the ALJ’s determination that he had “no reason to discredit Coleman or to somehow credit Rida over Coleman.” Based on the record evidence, the Board should find that Dickson—in line with his other unlawful conduct—threatened Rida with a loss of

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<sup>223</sup> *Id.* at 14-15.

work hours, replacement, or termination if Respondent were unionized in violation of Section 8(a)(1) of the Act.

## **2. Estevan Dickson's Unlawful Threat at the I-215 and Revere Jobsite – Complaint Para. 5(b)(2)**

The record evidence shows that shortly after Dickson violated Section 8(a)(1) of the Act when he threatened drivers Rida and Lauvao with termination and reduced hours or benefits if employees unionized,<sup>224</sup> Rida started going to the washout area of the jobsite to clean out his truck. Rida then heard Dickson yelling at Union organizer Hood and saying, you're not allowed to be on the jobsite, you need to leave. Dickson then asked Hood, why are you doing this? But before Hood could respond, Dickson answered his own question and said to Hood you're only doing this because you have animosity towards Respondent. Rida was close enough to hear and see everything between Hood and Dickson.

The ALJ made the following finding regarding this allegation:

The General Counsel further alleges that Rida's testimony about what Dickson said to Hood about "doing this" because he had animosity towards the company constitutes a violation. However, despite the fact Hood was called as a witness by the General Counsel, he was never asked about this incident. Hood was working for the Union as a lost-time organizer at the time, and the evidence shows that he was, in essence, the Union's lead organizer in Las Vegas. In this capacity it is a reasonable to assume that Hood's testimony would have been favorable to the General Counsel and the Union. Thus, the fact that Hood testified about other statements made by Dickson, but did not testify about this particular incident, warrants an inference that his testimony would not have corroborated Rida's regarding what Dickson said to Hood on the day in question. *Vista Del Sol Health Services, Inc.*, 363 NLRB No. 135, slip. op. at 14 (2016) (adverse inference is warranted by the unexpected failure of a favorable witness to testify regarding a factual question on

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<sup>224</sup> ALJD at 14.

which the witness is likely have knowledge) (citing *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977)). Under these circumstances, while I do not necessarily believe Dickson about what he told Hood that day, I cannot rely upon Rida's testimony about this matter and find that the General Counsel has not met his burden of proof to show a violation occurred. Therefore, I recommend that the allegation in Complaint paragraph 5(b)(2) be dismissed.<sup>225</sup>

As previously noted, the ALJ found that Dickson committed numerous other unfair labor practices and was not credible. Dickson's similar unlawful conduct and uncredited testimony should be enough to overcome an adverse inference made from the lack of corroborating testimony from CGC's witness. The ALJ credits Rida, but nevertheless fails to find a violation. Again, this is a credibility determination implicating the clear preponderance standard. The ALJ's determination was grounded in an error in application of the law. The ALJ says, "Under these circumstances, while I do not necessarily believe Dickson about what he told Hood that day, I *cannot* rely upon Rida's testimony about this matter and find that the General Counsel has not met his burden of proof to show a violation occurred."<sup>226</sup> However, Board law permits, but does not compel, the ALJ to draw an inference against a party based on the failure to question a witness about an event that was the subject of the testimony of another witness.<sup>227</sup>

Given the numerous Section 8(a)(1) violations in this case, including threats of lost benefits, lost hours, and loss of employment, and under a totality of the circumstances assessment, Dickson's statement to Union organizer Hood, in the

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<sup>225</sup> ALJD at 15.

<sup>226</sup> *Id.* Emphasis added.

<sup>227</sup> *See Constr. & Gen. Laborers' Loc. Union No. 190*, 306 NLRB 93, 93 n. 2 (1992).

presence of at least one employee that Respondent viewed their union activity as equal to a display of animosity against Respondent, interferes with employee Section 7 rights and violates Section 8(a)(1) of the Act.

### **3. Estevan Dickson’s Unlawful Threat at the KB Homes Tanglewood Jobsite – Complaint Para. 5(c)(3)**

The record evidence shows that Dickson became very frustrated after a discussion with Union organizer Hood and turned around to talk to drivers Orozco and Lauvao. Dickson said, you guys don’t talk to these union guys. The ALJ found that Dickson’s instruction not to speak to “these union guys” violated Section 8(a)(1) of the Act.<sup>228</sup> Dickson then pointed his finger at Orozco and Lauvao and said, take those damn stickers off your hat *or you will be written up or fired.*<sup>229</sup>

The ALJ made the following finding regarding this allegation:

Therefore, the credited evidence shows that, while Dickson was speaking with Hood at the Tanglewood jobsite, he became frustrated that Hood would not answer his questions about the organizing drive. Dickson then turned to Orozco and Lauvao, who were both wearing Union stickers on their hardhats. Dickson pointed his finger at the two drivers and started speaking loudly to them saying that they were not to speak to “these union guys” and to “take those damn stickers” off their hats or they would be written up or fired. Hood then told Dickson that he “can’t say that.”<sup>230</sup>

The ALJ found that Dickson’s instruction to remove the Union stickers violated Section 8(a)(1) of the Act but did not find that Dickson threatened them with discipline and/or discharge.<sup>231</sup> But Dickson’s blatant statement to employees

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<sup>228</sup> ALJD at 19.

<sup>229</sup> *Id.* Emphasis added.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

that they would be written up or fired if employees did not remove their Union stickers from their hardhats clearly violated Section 8(a)(1) of the Act.

**4. Estevan Dickson's Unlawful Threat at the Losee Plant  
– Complaint Para. 5(d)(2)**

The record evidence shows that while driver Collins was at the fuel pump fueling up his truck, Dickson drove up in the loader and repeatedly yelled at Collins to take his Union stickers off his hardhat and then drove off. A couple of minutes later, Dickson came back and said the same thing, telling Collings to take the Union stickers off. Collins just kept fueling up his truck and Dickson took off for a second time. Collins finished fueling up and was sitting in his truck waiting for a load when Dickson again drove up, got out of the loader, and started yelling at Collins again. Dickson said, Gary (Collins), I'm serious, take them Union stickers off your hardhat. Collins took his hardhat off and peeled the Union stickers off and then threw the stickers in the trash.

The ALJ made the following finding regarding this allegation:

Regarding what occurred at the Losee yard, I credit Collins' testimony that Dickson told him to remove the union stickers on his hardhat three times, and that after the third time Collins peeled the stickers off his hat and threw them in the trash. Dickson's demand that Collins remove the stickers from his hardhat constitutes violation of Section 8(a)(1).<sup>232</sup>

The ALJ found that Dickson's repeated instructions to remove the Union stickers violated Section 8(a)(1) of the Act but did not find that these repeated instructions were accompanied by any threat of unspecified reprisals, as alleged.<sup>233</sup>

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<sup>232</sup> *Id.* at 24. Citation omitted.

<sup>233</sup> ALJD at 24.

The ALJ failed to mention or make a finding on the related allegation of a threat of unspecified reprisals if Collins refused to take his stickers off. Dickson’s repeated, unlawful instructions to Collins created an implied threat of unspecified reprisals. Dickson returned to Collins twice at the jobsite to underscore that Collins must remove his Union stickers from his hardhat and enhanced the statements’ coercive effect by telling Collins, “I’m serious.” The implication is clear: take your Union stickers off your hardhat or something bad is going to happen to you. Indeed, employees would reasonably perceive a threat of reprisal for failure to follow their supervisor’s repeated instructions, whether or not such a threat is openly stated.<sup>234</sup> Of course, this is precisely what occurred here, and Collins peeled his Union stickers off his hardhat and threw them in the trash, as directed. Dickson’s conduct—now par for the course—constitutes a threat of unspecified reprisals for engaging in union activities in violation of Section 8(a)(1) of the Act.

#### **5. Juan Torres’ Threat of Reprisals at the Oxnard Plant – Complaint Para. 5(k).**

The record evidence shows driver—and main Union adherent—Ornelas had a conversation with supervisor Torres with three other drivers present in office. Torres called the four drivers into the office and handed them some pamphlets. He said the pamphlets were something Respondent wanted them to have. He also

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<sup>234</sup> See *Electrical Contractors, Inc.*, 331 NLRB 839, 839 (2000) (Board adopts ALJ holding that a project manager made an unlawful implied threat of reprisals by repeatedly asking an employee to sign a letter addressed to the Commissioner of Labor); *Sea Ray Boats, Inc.*, 336 NLRB 779, 782 (2001) (Board adopts ALJ holding that a supervisor made an unlawful threat of unspecified reprisals when he told an employee to “shut up” about the union).

stated that if a union comes in, Respondent could start sending people to Las Vegas to keep them [the drivers] busy if there is no work there [Oxnard]. Normally, if there was no work to do or if a job got canceled last minute, the drivers would get paid “show up time” and get to go home. One of the drivers asked Torres if Respondent could permanently relocate them, and Torres responded that it was up to Respondent.

The ALJ failed to find that Torres threatened employees with reprisals if they unionized by stating that Respondent could send them to Las Vegas to work to keep them busy if there was no work in the area.<sup>235</sup>

The ALJ made the following finding regarding this allegation:

Ornelas said the conversation with Torres was “probably less than 10 minutes” which implies the interaction between Torres and the drivers that was longer than the few words Ornelas attributed to Torres. The lack of context in this instance is important. In some cases a statement can constitute an illegal threat, based upon the context, while in other instances the statement, in a different context, is lawful. *Bandag, Inc.*, 225 NLRB 72, 83 (1976). Here, the statement attributed to Torres could have different interpretations, depending upon the specific context in which it was spoken. Torres could be reassuring drivers that the company would do anything in its power to make sure everyone was employed, and would even send them to Las Vegas if necessary, in the event there was no work in Southern California. On the other hand, Torres could be trying to frighten the drivers by saying a union would cause work to dry up and they would have to send people to Las Vegas if they wanted to work. Because of the lack of context and the ambiguous nature of the words attributed to Torres given the circumstances, I find the General Counsel has not met his burden of proof to show a violation occurred, and recommend the allegation in Complaint paragraph 5(k) be dismissed.<sup>236</sup>

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<sup>235</sup> ALJD at 42.

<sup>236</sup> *Id.*

Importantly, the ALJ did not find supervisor Torres to be a credible witness.<sup>237</sup> The threat couched in Torres' statement came in two forms: (1) the threat is that employees will be subject to a reassignment that will require them to experience the inconvenience of having to leave their current location; and (2) the threat that employees will lose the benefit of having the day off when there is no work. With Torres' statement, the drivers were presented with the threat of these situations occurring if they unionized.<sup>238</sup> Just because Ornelas did not testify to everything discussed during the meeting, it does not take away the coercive impact of Torres' statements she did credibly testify about. Torres' statement is a threat of reprisals for engaging in union activities and violates Section 8(a)(1) of the Act.

#### **6. Ryan Turner's Threat of Loss of Benefits at the Perris Plant – Complaint Para. 5(r)**

The record evidence shows Turner threatened driver Shipp Jr. with a loss of benefits, when Shipp Jr. asked about getting a new truck and a raise, by telling him “for the good of the company, just Vote No, and we’ll see what we can do as far as like you getting a new truck and a raise.”

The ALJ made the following finding regarding this allegation:

Shipp testified that Turner walked up to him and asked how things were going. Shipp said everything was going “pretty good” and asked Turner if it would be possible to get a new truck and a raise. Turner told Shipp to vote no “for the good of the Company” and said “we’ll see what we can do as far as like getting a new truck and a raise.”  
[...]

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<sup>237</sup> *Id.*

<sup>238</sup> See *Douglas Emmett Management*, 370 NLRB No. 92, slip op. 6 (2021) (Board adopted ALJ's conclusions that an employer violated Section 8(a)(1) by making unspecified threats of reprisal during the union's organizing campaign).

Regarding the March 2019 conversation at the Perris plant, I credit Shipp that Turner told him to vote no for the good of the company. And, at one point during their conversation, Turner said that “we’ll see what we can do” regarding a new truck and a raise. However, I also believe there was more to this conversation than what was elicited from Shipp during his examination from the General Counsel, as Ship testified that his conversation with Turner lasted about 10 minutes. While his pre-trial affidavit said that it only lasted one or two minutes, either way it was clearly a discussion that lasted longer than a few words.

[...]

Therefore, I find that the credited evidence, along with the reasonable inferences derived therefrom, show that Turner was at the Perris plant that day talking to the drivers while they were in line waiting to load, and that he asked Shipp to vote against the union for the good of the company. At some point during his conversation, after Shipp asked if it would be possible to get a new truck and a raise, Turner said “we’ll see what we can do” but explained to Shipp that new trucks were distributed based on seniority, after old trucks are removed from the system, and told Shipp that he would get a raise on his anniversary date pursuant to the company’s matrix. Accordingly, I find that the evidence does not support a finding that Turner connected his request that Shipp vote against the union for the good of the company with the potential of getting a new truck and/or a raise and recommend that this allegation be dismissed.<sup>239</sup>

Turner’s statements, as credibly testified to by Shipp Jr., are clearly coercive and unlawful.<sup>240</sup> As discussed above, even if the conversation was 10 minutes long, and Shipp Jr. only testified about part of the conversation, a statement from a supervisor—a week before the union election—to vote no “for the good of the Company and we’ll see what we can do as far as like getting a new truck and a raise” is unlawfully coercive. There is no amount of context that would be able to

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<sup>239</sup> ALJD at 56-57.

<sup>240</sup> See *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992); *Pembrook Management*, 296 NLRB 1226, 1239 (1989), *Daikichi Corp.*, 335 NLRB 622, 624 (2001).

cure the coerciveness of such a statement. Turner’s statement constituted a threat of loss of benefits in violation of Section 8(a)(1) of the Act.

### **7. Respondent’s “25<sup>th</sup> Hour” Videos Violated Section 8(a)(1) of the Act**

An employer’s legal duty in deciding whether to grant a benefit during the critical period before an election is to act as it would have if the union were not present.<sup>241</sup> Thus, while the Board has inferred from the timing of such a grant of benefit that it was unlawful, the Respondent may rebut this inference by showing that the timing of its action is explained by reasons other than the pending election.<sup>242</sup>

In his decision, the ALJ discussed Respondent’s “25<sup>th</sup> Hour” videos, which Respondent showed to all its employees the day before the Union election in early March 2019. The videos featured Respondent’s Vice President and General Manager, urging employees to vote against the Union. Although the videos were not pled in the Complaint or included in the Union’s objections, the ALJ insinuated that some statements in the video may have constituted unlawful promises of benefits.<sup>243</sup>

The ALJ made the following finding regarding the “25<sup>th</sup> Hour” videos:

In its Complaint, the government has not alleged that anything said in the videos constitute an unfair labor practice, nor has the Union alleged that the videos amounted to objectionable conduct. Compare *Desert Aggregates*, 340 NLRB 289, 290, 297–298 (2003), remedy and order modified 340 NLRB 1389 (2003) (Statement from employer’s agent, who had spoken with employees to determine their concerns, that the union campaign had “rung bells all the way at the top” of the company and

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<sup>241</sup> *Desert Aggregates*, 340 NLRB 289, 290, 297–298 (2003).

<sup>242</sup> *Id.*

<sup>243</sup> ALJD at 7-8, n.5.

that workers should “give the company a year” and see what changes would be made constitutes a violation); *Lutheran Home of NW Indiana, Inc.*, 315 NLRB 103, 104 (1994) (“Objectionable conduct where employer said that he cannot make promises because that would be illegal but the company was “definitely looking into getting employees a pension.”); and *Wake Electric Membership Corp.*, 338 NLRB 298, 306–307 (2002) (manager’s statement that he was not making any promises “was mere verbiage, in light of his request that the employees give the Company ‘another chance,’ and his averment that the Company would ‘work with’ the employees.”) with *Noah’s New York Bagels, Inc.*, 324 NLRB 266, 267 (1997) (no violation where employer confessed it had neglected matters and asked for a second chance to make things better).<sup>244</sup>

In the instant case, certain statements made in the “25<sup>th</sup> Hour” videos are similar to the those made in the cases cited by the ALJ in his decision. The Vice President said “I have heard you loud and clear throughout this process and you have my full attention,” he also says that he “accept[s] responsibility for any challenges we may have experienced over the past few years” and highlights to employees the “strong track record of addressing the concerns you have brought to our attention” including a wage increase implemented in February 2018 that was “significantly higher than the market average.” He then asks employees to give him “a single year, just 12 months to earn your trust and show you what life at Cemex can be like without a union” and to further show employees how good the company can make the Southern California operation without a union. Such statements amount to a promise of benefits in violation of Section 8(a)(1) of the Act, but the ALJ failed to recommend such violations because it was unpled in the Complaint and not included in the Union’s Objections to the election.

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<sup>244</sup> *Id.* at n.5.

An unpled matter may support an unfair labor practice finding if it is closely connected to the subject matter of the complaint and has been fully litigated.<sup>245</sup> The Board applies this test “with particular force where the finding of a violation is established by the testimonial admissions of the Respondent's own witnesses.”<sup>246</sup> The Board has held that, “The determination of whether a matter has been fully litigated rests in part on whether . . . the Respondent would have altered the conduct of its case at the hearing, had a specific allegation been made.”<sup>247</sup>

In the instant case, the “25<sup>th</sup> Hour” videos are closely connected to the subject matter of the Complaint because there were contemporaneous unfair labor practices alleged in the Complaint and related Objections filed by the Union, including numerous other Section 8(a)(1) allegations. In addition, an allegation of promise of benefits contained in the videos was fully litigated because Respondent offered the “25<sup>th</sup> Hour” videos into the record and solicited extensive testimony about the videos from its own witnesses, including from the Vice President and General Manager featured in the videos. The witnesses were cross-examined by both the Union and CGC regarding the videos. In addition, the statements made in the video are plain and unambiguous—making additional evidence unnecessary to determine whether a violation occurred. Therefore, the ALJ could have found that Respondent promised benefits in violation under Section 8(a)(1) of the Act but failed to do so.

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<sup>245</sup> *Pergament United Sales*, 296 NLRB 333, 334 (1989).

<sup>246</sup> *Id.*

<sup>247</sup> *Postal Service*, 352 NLRB 923 (2008).

Not only did the ALJ fail to find a violation based on the “25<sup>th</sup> Hour” videos, but he also failed to consider that violation in his analysis of dissemination and the appropriateness of a *Gissel* bargaining order. Respondent showed its “25<sup>th</sup> Hour” videos to all employees in Southern California and Las Vegas, on paid time, on the eve of the Union election. Given the wide dissemination of these unlawful remarks, the Board should find that they provide further support for ordering a *Gissel* bargaining order.

### **8. Respondent Should Pay Consequential Damages as a Remedy for Diana Ornelas’ Discharge**

The ALJ failed to order consequential damages regarding Ornelas’ discharge. As the General Counsel has previously argued,<sup>248</sup> to fulfill its statutory mandate under Section 10(c) to use its broad discretionary authority to fashion make-whole remedies that will best effectuate the policies of the Act, the Board should require respondents to compensate employees for all consequential harms they sustain because of unfair labor practices.<sup>249</sup> As argued to the Board in *Preferred Building Services*, an employee should be made whole for all losses suffered because of the unfair labor practice, including expenses, penalties, legal fees, late fees, or other costs flowing from the inability to make a payment due to job loss or other adverse action. Employees should also be entitled, as they are under other statutory schemes, to damages for harm such as emotional distress or injury to character,

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<sup>248</sup> See General Counsel’s Brief and Reply Brief to the Board in *Thryv, Inc.*, Cases 20-CA-250250 *et al.*, in response to the Board’s Notice and Invitation to File Briefs regarding consequential damages.

<sup>249</sup> See, e.g., General Counsel’s Statement of Position to the Board on Remand from the Ninth Circuit Court of Appeals in *Preferred Building Services, Inc., d/b/a Ortiz Janitorial Services*, Case 20-CA-149353, filed December 7, 2021.

professional standing, or reputation; as well as remedies that are tailored to addressing the public harm and chilling effect, or potential thereof, of the unfair labor practice at issue.

Even though consequential damages should be awarded as a matter of course without regard to the severity of the violation, such a remedy is particularly needed in the instant case. As the ALJ noted in his decision, the discharge of main Union adherent, Ornelas, was a hallmark violation of the Act, and her discharge was known throughout the Ventura County plants and possibly other plants based on the Union organizers' discussions with other drivers about her discharge.

#### **IV. CONCLUSION**

In sum, CGC respectfully submits this case as an appropriate vehicle for the Board to revisit the cases discussed above. First, the Board should overrule *Tri-Cast* and hold that an employer violates Section 8(a)(1) of the Act when it explicitly misrepresents an employee's right under the proviso to Section 9(a) to deal directly with their employer after selecting an exclusive bargaining representative. Second, the Board should overrule *Sysco Grand Rapids* and hold that changed circumstances of the kind at issue there do not mitigate against the issuance of a *Gissel* bargaining order. Alternatively, the Board should clarify that to the extent it must address evidence of changed circumstances in light of court precedent, mere delay does not mitigate against issuance of a bargaining order. Third, the Board should overrule *Crown Bolt* and hold that it will presume dissemination of threats of plant closure and other serious coercive conduct absent employer rebuttal.

Moreover, the Board should issue a *Gissel* bargaining order in this case, regardless of whether it readopts a presumption of dissemination, because there is sufficient evidence of dissemination under current Board law to warrant a bargaining order. Fourth, the Board should overrule *Linden Lumber* and reinstate the *Joy Silk* doctrine, prospectively, because the Board's current remedial scheme has failed to deter unfair labor practices during union organizing drives and provide for free and fair elections. Fifth, the Board should overrule *Babcock & Wilcox* and hold that an employer violates Section 8(a)(1) when it threatens employees with reprisal if they decline to listen to speech concerning employee exercise of Section 7 rights. Finally, the Board should grant CGC's exceptions to the ALJ's failure to find various threats as alleged and supported by the record evidence.

Dated at Phoenix, Arizona, this 11<sup>th</sup> day of April 2022.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's decision in Cases 28-CA-230115. *et al.*, was e-filed and served on this 11<sup>th</sup> day of April 2022, as follows:

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