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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

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| and | |
| GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS | |
| and | |
| INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO | |
| and | |
| UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL UNION NO. 862, AFL-CIO | Cases 9-CB-075505<br>9-CB-082805 |
| and | |
| GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS | |

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

## I. OVERVIEW:

This matter is before Administrative Law Judge Bruce D. Rosenstein upon Acting General Counsel's Amended Second Consolidated Complaint (Complaint), issued on August 3, 2012, and as amended at hearing, in Cases 9-CA-075496, 9-CA-078747, 9-CA-082437, 9-CB-075505, and 9-CB-082805, on charges filed by the International Brotherhood of Teamsters, Local 89, herein called the Union or Teamsters 89, alleging that Respondent Voith

Industrial Services, Inc., herein called Voith, and Respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, herein called Respondent UAW International and Respondent United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 862, AFL-CIO, herein called UAW Local 862, and collectively called UAW, engaged in certain conduct in violation of the National Labor Relations Act (Act). At hearing, the Complaint was further amended to allege certain individuals as supervisors and agents of Voith, and to name Patsy Bowman Miles as a discriminatee in attachment A to the Complaint. The administrative hearing on the allegations of the Complaint was held on August 21 to 24, September 19 to 21, and October 1 through 3, in Louisville, Kentucky.

The Complaint, as amended at hearing, alleges that Voith violated Sections 8(a)(1), (2), (3), and (5) of the Act. Voith is alleged to have violated Section 8(a)(1) of the Act by telling an employee that the employee would have to become a member of the UAW, that new hires were represented by the UAW, and that employees would receive health insurance from the UAW. Voith is alleged to have further violated Section 8(a)(1) by threatening to discharge employees for failing to wear Voith/UAW safety vests; by instructing employees to report other employees' Union activities; by denying Teamsters 89 representatives access to employees while extending such access to the UAW; by informing an employee that he would only be hired if he promised to refrain from striking or picketing; and by informing an employee that other members of Teamsters 89 would be hired if Voith's agent did not fear that they would engage in striking or picketing activity.

Voith is alleged to have violated Sections 8(a)(1) and (2) of the Act by rendering unlawful assistance and support to the UAW during employees' orientation; by granting recognition to the UAW at times when it did not represent an uncoerced majority of the

bargaining unit and at a time when Voith had not commenced normal operations and therefore did not employ in the Unit a representative segment of its ultimate employee complement. Voith is further alleged to have violated Sections 8(a)(1) and (2) of the Act by advising an employee that if the employee were hired, the employee would have to become a member of the UAW; by telling an employee that new hires were represented by the UAW and would receive UAW health insurance; and by rendering assistance to the UAW in allowing UAW representatives to meet with employees during work time to obtain membership and check off authorizations.

Voith is alleged to have violated Sections 8(a)(1) and (3) of the Act by implementing a plan to hire and establishing a hiring procedure to avoid or limit the hiring of employees of the predecessor employer and other members of Teamsters 89. In connection with this scheme, Voith has failed and refused to hire or to consider for hire the former employees of Auto Handling and other similarly situated employees because of their membership in and support for Teamsters 89. Voith is alleged to have violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Teamsters 89 as the exclusive representative of the bargaining unit, by unilaterally establishing initial terms and conditions of employment, and by unilaterally contracting out bargaining unit work.

The UAW is alleged to have violated the Act by accepting assistance and support from Voith in meeting with employees to urge them to sign UAW membership applications and check off authorizations, and by obtaining recognition from Voith at times when the UAW did not represent an uncoerced majority in the bargaining unit.

## II. ISSUES:

1. Whether Voith violated Section 8(a)(1) and (3) of the Act by implementing a plan to avoid hiring employees who were former employees of Auto Handling, Inc., a wholly owned subsidiary of Jack Cooper Transport Company, or members of Teamsters 89 through the establishment of a discriminatory hiring procedure and other conduct designed to exclude/or limit the hiring of applicants affiliated with Teamsters 89; and by failing and refusing to hire or

consider for hire the former employees of Auto Handling and other similarly situated employees because of their membership in and support for Teamsters 89.

2. Whether Voith violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Teamsters 89 as the exclusive collective-bargaining representative of the bargaining unit (Unit) and by unilaterally establishing initial terms and conditions of employment for employees of the Unit.

3. Whether Voith violated Section 8(a)(1) and (5) of the Act by unilaterally contracting with Aerotek, inc. to perform bargaining unit work without prior notice to Teamsters Local 89 and without offering the Union an opportunity to bargain with respect to this conduct and its effects.

4. Whether, about February 20, April 11, and April 16, 2012, Voith rendered unlawful assistance and support to the UAW in violation of Sections 8(a)(1) and (2) of the Act by allowing the UAW to meet with employees during their orientation and work time for the purpose of encouraging the employees to sign membership applications and check off authorizations.

5. Whether, about February 22, and May 1, 2012,respectively, Voith unlawfully granted recognition in violation of Section 8(a)(1) and (2) of the Act to the UAW at times when the UAW did not represent an uncoerced majority of its bargaining unit (Unit) and with regard to recognition extended on February 22, at a time when Voith had not commenced normal operations and therefore did not employ in the Unit a representative segment of its ultimate employee complement.

6. Whether Voith violated Section 8(a)(1) and (2) of the Act by: Advising an employee that if the employee was hired the employee would have to become a member of the UAW, such conduct independently violating Section 8(a)(1); and by telling an employee that new hires were represented by the UAW and would receive UAW health insurance, such conduct independently violating Section 8(a)(1).

7. Whether the UAW received assistance and support from Voith on about February 20, April 11, and April 16, 2012, which allowed the UAW to meet with Voith's employees for the purpose of urging employees to sign membership applications and check off authorizations in violation of Section 8(b)(1)(A) of the Act.

8. Whether the UAW obtained recognition from Voith on February 22, and May 1, 2012, respectively, as the exclusive collective-bargaining representative of the Unit at times when it did not represent an uncoerced majority in the Unit and, with respect to the February 22, recognition, at a time when Voith had not commenced normal operations and therefore did not employ in the Unit a representative segment of its ultimate employee complement, in violation of Section 8(b)(1)(A) of the Act.

9. Whether Voith, by Regional Manager Brett Griffin, violated Section 8(a)(1) of the Act by threatening to discharge employees if they did not wear a Voith/UAW safety vest; instructing employees to report other employees Union activities; and by denying Teamsters 89 representatives access to employees while extending such access to the UAW.

10. Whether Voith, by Sarah Curry Martinez, violated Section 8(a)(1) of the Act by informing an employee that he would only be hired if he promised to refrain from engaging in lawful Section 7 activity; i.e. engaging in striking or picketing; and by informing an employee that other members of Teamsters 89 would be hired if she did not fear that they would engage in lawful Section 7 activity; i.e. engaging in striking or picketing.

## III. FACTS: [1]/

Ford Motor Company (herein referred to as Ford) operates a production facility in Louisville, Kentucky known as the Louisville Assembly Plant (LAP). Ford also operates a sister plant in Louisville known as the Kentucky Truck Plant (KTP). Ford's LAP plant production employees are represented by the UAW. Since the early 1950s, Teamsters 89 has represented the "yard" employees at the LAP, who are responsible for transporting the finished vehicles from the assembly plant to the staging or baying areas where the vehicles are eventually loaded for distribution by railcars or car haulers. (Tr. 35 – 36, G.C. Ex. 9) The yard employees, also referred to in the record as vehicle processing employees, are those employees who receive new vehicles at an outside pad after they come off the assembly line. They then scan and bay or stage the vehicles onsite or at nearby offsite lots for transportation by rail, car carrier, or single car drive away. The yard employees are also responsible for loading the new vehicles onto rail cars. They do not load the vehicles onto car carriers. [2]/ As will be discussed in more detail below, the duties performed by yard employees remained the same after Voith took over the operation. During the LAP's lengthy history, a number of contractors have performed the yard work, always agreeing to hire the predecessor's employees, though the instant series of unfair labor

[1]/ References to the transcript will be designated as (Tr.__); references to Acting General Counsel's Exhibits will be designated as (G.C. Ex. __); references to the Charging Party Teamsters' Exhibits will be designated as (CP __); references to Respondent Voith's Exhibits will be designated as (Resp. Ex. __) and references to Respondent UAW's Exhibits will be designated as (RU___).

[2]/ A more detailed description of the yard work is provided later in this brief.

practices was foretold by the conduct of contractor Auto Port in 2008. [3]/ (Tr. 826, 839 – 840, CP 7, G.C. Ex. 9) In December 2010, Ford temporarily ceased its production operation at the LAP for the purpose of retooling the facility in preparation for its production of the Escape model. (Tr. 36)

From late 2008 until Ford's December 2010 temporary cessation of production, Auto Handling, Inc., a wholly owned subsidiary of Jack Cooper Transport (herein called Auto Handling) performed this yard work. (Tr. 1298, G.C. Ex. 9) Auto Handling was signatory to the Teamsters' National Master Automobile Transporters Agreement, Central and Southern Area Supplemental Agreements, and its Local Rider Agreement, effective, by its terms, from June 1, 2008 to May 31, 2011. (G.C. Ex. 2) When Ford ceased production, Auto Handling laid off its remaining employees, leaving 166 yard employees on its seniority list. (Tr. 1352, G.C. Ex. 6)

Voith provides cleaning, transportation and logistics services to various customers in the automobile manufacturing industry. (Resp. Ex. 1) Since 2008, Voith has had a contract with Ford to provide janitorial cleaning services at the LAP. These cleaning employees have been represented by the UAW. Voith maintained a crew of cleaning employees throughout the retooling of the LAP. On November 1, 2011, Voith submitted a bid for the cleaning work projecting to increase the number of its cleaning employees starting in January 2012. (G.C. Ex. 22) This projection reflected a ramp up from about 34 janitorial employees in January 2012, to 36.5 in February, 39 in March, and leveling off at 50 employees in April through June 2012. [4]/

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[3]/ Indeed, some of the players in the 2008 failed Auto Port bid to take over the LAP yard operation and the current situation involving Voith are the same. Current Regional Manager for Voith, Bret Griffin was a regional manager for Auto Port in 2008 and he was also at that time the manager in charge of staffing for the awarded yard work at the LAP. (Tr. 2215)

[4]/ All dates herein are in the fall of 2011 or in calendar year 2012 unless otherwise indicated.

(G.C. Ex. 22) The projected population of janitorial employees would later rise to 60 beginning in August. (G.C. Ex. 22)

In the fall of 2011, Ford began soliciting bids for the yard work at the LAP once production of the Escape was set to commence. In this regard, Ford solicited bids for the yard work to be performed by issuing to selected prospective bidders documents titled "Origin Service Provider 'OSP' Request for Quote." (G.C. Exs. 60, 61) On October 6, a bid meeting was conducted in a conference room at the LAP. (Tr. 1301 - 1304, G.C. Ex. 62) The services to be bid upon were the, "Shuttle Operations, Yard/Inventory Management, Rail Loading & Unloading." (G.C. Ex. 61) Representatives of prospective bidders attended. Herb Hibbs also attended on behalf of the UAW. (G.C. Ex. 62)

On October 21, Voith Director of Business Development Jeff Fahr submitted a quotation or bid for the yard management work. (G.C. Ex. 27, Resp. Ex. 11) The proposal includes a proposal letter dated October 21. (G.C. Ex. 27, Resp. Ex. 11) The letter states unequivocally that with respect to the yard work, "Voith has a national labor contract with the UAW for all Ford related sites. Our hourly employees will be UAW employees." (G.C. Ex. 27, Resp. Ex. 11) Thus, Voith's intent was clear from the inception of the bidding process.

**A. FORD'S ROLE IN THE SCHEME:**

Bill Mikkelson is Ford's manager for finished vehicle logistics, North America. (Tr. 1606) In this capacity, Mikkelson is responsible for all movement of Ford's finished product, post production through to the dealer for 12 North American manufacturing sites. (Tr. 1606 – 1607) Moreover, in this capacity Mikkelson was in the loop and intimately involved with Ford's decision to utilize Voith to perform the yard work at the LAP. (Tr. 1675, G.C. Ex. 63) He is one of three decision makers for Ford who determine which entity will receive the bid award for a particular yard work contract. (Tr. 1675) Indeed, the documentary evidence establishes that

Mikkelson was well aware of Voith's plan to usurp the existing work force and to supplant those Teamsters 89 represented employees with employees represented by the UAW at wages that are less than half the wages paid to the employees they replaced (when benefits are included as labor costs). (Tr. 1637, G.C. Exs. 70, 74) The record further establishes that Voith arrived at this end by systematically excluding the vast majority of Teamster applicants from employment and from consideration for employment.

Voith and Ford contend that Voith lacked knowledge that it would be the successful recipient of the bid for yard work until the award was formally announced on February 13. (Tr. 1741) In this regard, though Teamsters 89 was advised of the award to Voith prior to that date, Mikkelson claimed that no notice of the award, formally or informally, was provided by Ford to Voith prior to the February 13 email on the subject. (Tr. 1640, 1642, 1741) However, Voith's conduct, the conduct of representatives of the UAW, and multiple documentary sources belie this assertion. (G.C. Exs. 44, 63, 94, 101, 106) Thus, Mikkelson, on behalf of Ford, expressed concern that a letter errantly dated January 23, 2010, from Teamsters International President James Hoffa to Respondent UAW International President Bob King might cause Bob King to "take pause." [5/] (Tr. 1629-1631, G.C. Exs. 47, 63) In the letter, Teamsters International President Hoffa asked UAW International President King to respect the jobs of Teamsters performing yard work at the LAP. (G.C. Exs. 47, 63) The email to which the letter is attached is dated January 30, 2012, a full two weeks before the bid was to be awarded, and at a time when Voith had not yet hired its workforce of yard employees. (G.C. Ex. 63) Indeed, Mikkelson testified that the plan as of January 30 was for Voith to take over the yard management at the

[5/] The body of the letter references dates in 2012, including an implementation date of April 9, thus making it clear that the letter was written on January 23, 2012, not 2010. (G.C. Ex. 47)

LAP. [6]/ (Tr. 1637) Mikkelson claimed that a "final" decision as to who would be awarded this work had not been made as of January 13, yet, once again, actions of certain representatives of the UAW belie this claim. (Tr. 1637) Mikkelson feigned ignorance as to why certain representatives of the UAW had appraised potential new hires during the January 12 to 14, timeframe that the UAW would be representing the Voith yard workers. (Tr. 1638)

Mikkelson testified unequivocally that Voith had quoted a specific labor cost component for the performance of the yard work and that this quote was based on its employees being represented by the UAW at Tier II wage rates; a lower scale of wages than the traditional UAW plant scale. (Tr. 1639, G.C. Ex. 74) The UAW was enmeshed in Ford's "labor containment" policy for the LAP as early as November 2012 when Ford executives emailed each other regarding whether UAW representatives, including Bargaining Chairman Steve Stone, had been spoken to about the labor containment strategy. (Tr. 1686, G.C. Ex. 94) Unfortunately, Ford did not provide, pursuant to subpoena, the document titled "LAP Labor Strategy – Next Step" that should have been attached to the email. (G.C. Ex. 94) This document surely would have cast further light on the scheme to supplant Teamsters 89 as the bargaining representative of the yard employees. However, Mikkelson had been involved in the same capacity for Ford in 2008 and was fully aware of the labor strife that was caused at that time at the LAP when contractor Auto Port was awarded the bid, had no contract with a union, and was unable to reach an accommodation with Teamsters 89. (Tr. 838 – 840, 1717)

An obvious part of the labor containment strategy in 2012 on Ford's part was an attempt to placate Teamsters 89 for the loss of their hijacked unit to the benefit of the UAW and Voith by offering Teamsters 89 additional jobs in connection with the performance of other types of

[6]/ Mikkelson and other Ford executives, including Vice President for Labor Relations Marty Malloy, continued to express concern that UAW President King "gets cold feet." (Tr., 1672-1674, G.C. Ex. 93) The clear implication of these statements is that King recognized that the UAW did not have a legitimate claim to represent the yard workers at the LAP and, therefore, that the UAW might disclaim interest; throwing a monkey wrench into Voith's plan to utilize a vastly cheaper labor force to perform the LAP yard work than had theretofore been the case.

logistics work associated with the LAP. (G.C. Exs. 70, 74, 95) In fact, Ford's initial intent was that the displaced Teamsters 89 members who had been performing the LAP yard work would be the ones who would fill the supposed 55 additional single driver or drive away jobs in which employees would drive new Escapes from the Renaissance Yard to Shelbyville. [7]/ (Tr. 1694 – 1695) However, Ford was aware by its February 10 meeting with Teamsters 89 President Fred Zuckerman and Vice-President Thompson that this work belonged to employees on another Teamsters seniority list and that the displaced LAP yard employees would not have the opportunity to perform it. (Tr. 1695 – 1696, G.C. Ex. 97) Mikkelson is the obvious architect in this attempt to buy the Teamsters' silence. In anticipation of a backlash from the award of the work to Voith and its UAW puppet, he created multiple charts and lists to reflect the number of Teamsters 89 jobs prior to the shutdown and contrasted those jobs with the number of Teamsters 89 jobs following the resumption of automotive production with the new Escape in 2012. (G.C. Exs. 70, 74, 95) One such chart mysteriously found its way into the hands of UAW representatives, who clearly intended to use it to explain to an unknown audience the benefits to Teamsters 89 of Ford's overall logistics operation for the new Escape at the LAP. (Tr. 1709, G.C. Ex. 70)

Mikkelson testified that he met with Ford Executive Bill Rooney in the early January timeframe *or earlier* and at that time discussed with him the LAP outbound yard management sourcing. (Tr. 1723, 1725, 1750) Indeed, Mikkelson testified that he could not recall the precise date of his meeting with Rooney and that it could have occurred in November or December 2011. (Tr. 1751) In this discussion he used G.C. Ex. 74 to discuss the planned LAP sourcing. [8]/

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[7]/ Only a fraction of these 55 jobs have ever materialized.

[8]/ G.C. Ex. 74 was provided by the UAW pursuant to subpoena without any indication of when it was created or how a document created by Mikkelson came to be in its possession. The same document was NOT provided by Ford. UAW President Dunn asserted that he lacked knowledge as to its origin, though he was the one who provided it. (Tr. 2398 – 2400, 2414)

(Tr. 1723, G.C. Ex. 74) The document clearly reflects Ford's emphasis on justifying the selection of Voith as the yard management contractor with a projected UAW workforce at tier two wages by emphasizing the other benefits to Teamsters 89 as a whole, including the increase in overall Teamster 89 jobs in 2012 from the period prior to the 2010 shutdown, the use of Teamsters represented carriers to perform the car haul work (including Ford standing by financially distressed Teamsters carrier Allied Trucking), and the creation of drive away work to off-site rail (Shelbyville) for the purpose of offsetting the yard work job losses to Teamsters represented employees of Auto Handling. (G.C. Ex. 74) It is most notable though that Mikkelson carefully calculated the impact of the award of the yard work to Voith with a UAW workforce in G.C. Ex. 74 as much as six weeks before the purported award of the batch and hold work and as much as twelve weeks before the purported award of the yard management work on March 1, at a time when Voith had supposedly not even been informally notified of Ford's intent, and at a time when it had not hired a single employee to perform yard work. (G.C. Exs. 70, 74)

Auto Handling Yard Superintendent Gene Beeber was in charge of the day to day operations of the yard for Auto Handling at the time that the operation closed for retooling in December 2010. (Tr. 1298) On October 6, Beeber attended the bid meeting for the LAP yard management work on behalf of Auto Handling. (Tr. 1301) Several other prospective bidders also attended this meeting, including UAW representative Hibbs as noted above. (Tr. 1302-1303, G.C. Ex. 62) Neither Beeber, nor the more experienced senior vice-president for Auto Handling had ever before seen any union representative in attendance at a bid meeting. (Tr. 1304) The UAW representative and the Voith representatives in attendance sat next to each other on one side of a rectangular table while all the other bidders sat on the other side of the

table. (Tr. 1303) The UAW representative did not have his own bid package, but was reading off one of the Voith representative's bid packets during the meeting. (Tr. 1337)

Former Ford employee Pete Holcombe was intimately involved in the bid process for the yard work to be performed at the LAP. (Tr. 2637, G.C. Exs. 27, Resp. Ex. 11) He was one of two addressees on the proposal letter for Respondent Voith's bid. (G.C. Ex. 27, Resp. Ex. 11) Beeber, on behalf of Auto Handling, asked Holcomb for permission to submit a revised bid for the work. (Tr. 1369) This request was refused by Holcomb. (Tr. 1369) Not long after the yard work was awarded to Voith, Holcomb became a corporate official of Voith. (Tr. 2508 - 2509) Holcomb told bidders for the yard management work that the launch, or batch and hold work, was going to be handled by Ford. This had never been done before, but Holcomb asserted it would be the new standard. (Tr. 1369, 1378) The bidders for the yard management work at the October 6, meeting were told that no vehicles would come into the LAP yard until the launch and batch and hold was completed and the Escapes were ready to ship. (Tr. 1378) This initial batch and hold work would have been performed by Ford employees represented by the UAW. (Tr. 1378)

Beeber was never contacted by anyone with Voith or with Aerotek regarding the possibility of interviewing and hiring his experienced work force of yard work personnel. (Tr. 1301, 2138) Indeed, Voith does not assert that it made any effort to contact Auto Handling, Teamsters 89, or the Auto Handling vehicle processing employees themselves, about their interest in continuing to perform the yard work that they had performed for many years. (Tr. 2138) Additionally, although Respondent Voith cited an imminent need to ramp up its work force to supply Ford with vehicle processing employees, it never even advertised for the positions. (Tr. 2140)

As noted above, on October 21, 2011, in conformity with the timeline established by Ford, Voith submitted its bid for the yard work offering to perform the work with as few as 84 employees, although this number does not reflect managers, supervisor, administrative personnel, security personnel, and a 5% additional body count to account for vacations and absenteeism. (G.C. Ex. 27) Respondent UAW also submitted a bid for the work that stated that, "the UAW and Ford Motor Company feel the Shuttle/Yard Management Operations should be done by UAW/Ford employees and kept within the plant. We have currently taken over several staging operations already and want to expand and take full control of our own shipping Yard." (G.C. Ex. 21)

On December 21, 2011, Teamsters 89 and UAW representatives met at UAW's office to discuss the yard work. (Tr. 84) While at the UAW's office, Teamster 89's representatives Avral Thompson and Fred Zuckerman saw employment applications for Voith and questioned UAW Local 862 President Todd Dunn and Bargaining Chairman Steve Stone about the applications. (Tr. 88 - 89) Zuckerman and Thompson were advised that the employment applications being distributed by the UAW were for the janitorial cleaning work. (Tr. 89) Teamsters 89's representatives were also informed by Stone that the decision about the entity that would be awarded yard work would be made above the local level. (Tr. 89) However, Stone knew details about the bids, including manning proposals, and the supposed cost differential between Voith's bid and that of Auto Handling. (Tr. 89-90) Moreover, while Ford managers were concerned about UAW National President Bob King's support for Voith's and the UAW's takeover of the yard work, it harbored no such concerns at the local level. (G.C. Ex. 106) As Voith Director of Business Development Fahr noted by email to Regional Manager Elam "Dwayne" Barnett on January 17, "Pete (Holcombe) also asked if we have been in contact

with the UAW at a national level. Ford is not concerned about the support at the local level, more of how the UAW handles it when it gets up to Bob King." (G.C. Ex. 106)

### B. VOITH AND THE UAW BEGIN TO SECRECTLY STAFF THE YARD POSITIONS:

In January, the UAW announced on its website that applications to perform work for Voith were available and had to be submitted by January 20. (GC Ex. 52) During this time, UAW committeemen were actively soliciting applicants for the yard work.

Former Voith employee Tiffany Byers credibly testified that she received a telephone call from "a friend of mine," UAW Committeeman Dennis Skaggs, on January 12, about performing yard work at the LAP for Voith. (Tr. 715) Skaggs told her that the work she had previously done at the LAP (yard work) was going to be awarded to a new company. He told her further that, "If I wanted a job with that company, he can get me an application and he can make sure I get hired." (Tr. 715) Skaggs identified the new company as Voith and told Byers that Voith was then performing janitorial work inside the Ford plant. (Tr. 716) Byers asked Skaggs what Voith knew about shipping cars and he responded that he did not know. (Tr. 716) When Byers asked the hourly wage, Skaggs told her it would be $11 an hour. (Tr. 716-717) Byers told Skaggs that Voith, "would be hard pressed to find folks to load railcars for $11 an hour." (Tr. 717) However, Byers asked Skaggs to get her an application as soon as he could. (Tr. 717)

On the morning of January 14, Skaggs brought his daughter to Byers' home for a play date with her daughter. (Tr. 717) He brought Byers the Voith application and told her to complete it as soon as she could because he would be seeing Union President Todd Dunn the following evening at a party for a football game and he would give Dunn the completed application at that time. (Tr. 717, 718) Byers and Skaggs spoke the following day by phone. (Tr. 719) They agreed that Byers would text Skaggs when she was home so he could come by and pick up her application for yard work with Voith. (Tr. 719, G.C. Exs. 43, 44) After

receiving Byers' text, Skaggs stopped by late on the evening of January 15, and picked up the completed application. (Tr. 720)

Over three weeks passed before Skaggs and Byers spoke again about her application for employment performing yard work for Voith. (Tr. 731) The conversation took place at a school function for their daughters. (Tr. 733) Byers told Skaggs that she had not yet heard anything about her application. (Tr. 733) Skaggs told her that he knew she probably had not, but that she would. (Tr. 733)

Indeed, Skaggs was correct as Byers was called by Megan Carter, a recruiter for Aerotek, on March 3, and was asked if she would be interested in performing yard work at the LAP. (Tr. 739-740, 742-744) Carter described the nature of the yard work to Byers. (Tr. 743) Byers knew the job that was described by Carter as she had previously performed the work for Auto Handling, the predecessor employer. (Tr. 743) It appeared that Skaggs' guarantee that Byers was a lock for the job was accurate as she was hired. Byers had not applied to Aerotek and did not know how Aerotek had obtained her name, thus implying that Skaggs must have forwarded her application to the employment service. (Tr. 765)

Auto Handling employee Jewell Clark had a similar experience to Byers. Clark testified that she is currently employed by Auto Handling performing yard work in Ft. Wayne, Indiana at a General Motors auto manufacturing plant. (Tr. 959) This requires Clark to live away from her home in Louisville where she leaves a teenage son. (Tr. 959, 967) Clark first obtained an application for work at the LAP for Voith on January 14. (Tr. 961, G.C. Ex. 50) She was at a Shepherdsville, Kentucky automobile service shop having an oil change performed on her vehicle when she overheard a conversation between the shop's owner, Bill Mason, and UAW

representative Bob Fogarty. [9]/ (Tr. 962 – 967) Fogarty told Mason and his assistant Terry that Voith was getting ready to expand and he had a stack of Voith job applications with him. (Tr. 963-964) Fogarty was bringing the application to Mason to give to someone that Mason knew of who would be interested in the job. (Tr. 964)

Clark asked Fogarty if she could have an application. (Tr. 963, G.C. Ex. 51) She initially had no idea that the jobs being discussed included her former job performing yard work at the LAP. Fogarty gave her an application and told her that "whoever applied for the job would definitely need to have a valid driver's license." (Tr. 964) Clark did not know at the time of this conversation who Fogarty was, but she later learned his identity from Terry, co-workers, and from Teamsters 89 Vice-President Thompson. (Tr. 966-967)

About mid to late January, according to People Services Manager Tim Bauer, Voith started phone screening and interviewing potential employees based on the applications it already had on file for its cleaning positions. (Tr. 1928) Interviews for these positions were held on February 6. (Tr. 1933) However, none of these applications indicated that the individuals were applying for yard work. (G.C. Ex. 38) In addition, as noted above, Voith did not advertise for workers or make any attempt to contact Auto Handling or any of the former yard employees.

At the same time that Voith was engaged in interviewing and hiring, ostensibly only for janitorial positions, Voith was planning to act on its successful bid for the vehicle processing work at the LAP. (G.C. Ex. 101) Thus, Bauer asked Voith Director of Business Development Fahr on *January 18*, about the status of the bid. (G.C. Ex. 101) Fahr responded that Respondent Voith had a "big meeting tomorrow [*January 19*] with the customer," and that they were supposed to make a decision by February 1. (G.C. Ex. 101) Bauer referenced a "functional capacity exam," or physical fitness test that Voith was incorporating into its screening process

[9]/ UAW President Dunn testified that Fogarty was an appointed alternate committeeman and served in this capacity at various time in 2012. (Tr. 2409 – 2411)

for these jobs; jobs that it had supposedly not yet been awarded. (G.C. Ex. 101) Fahr responded that there would be very little ramping up for a vehicle processing launch in February; more in March. (G.C. Ex. 101) Bauer tried to cover his faux pas with Fahr in generically and incorrectly referring to the LAP yard work as the "Kentucky VP" work by claiming he had been hearing talk of potential business at the KTP, where the Teamsters continue to perform yard work. (G.C. Ex. 101) Fahr replied ominously that the KTP, "is not in the picture for the foreseeable future for vehicle processing due to the teamsters issues." (G.C. Ex. 101) Bauer claimed to be ignorant as to what Fahr was referring to by "teamsters' issues," but he was suddenly not very curious and did not ask. (Tr. 1984) Bauer testified that he was seeking information from Fahr about the LAP vehicle processing work because he is "low man on the pole," and the last to know about such awards of work. (Tr. 1999)

On *January 17,* the day before the email exchange referenced above between Fahr and Bauer, Elam "Dwayne" Barnett, who had responsibilities in connection with the LAP vehicle processing launch, sought a meeting with Voith Director of Labor Relations, Erwin Gebhardt for the purpose of discussing "LAP Labor Strategy." (Tr. 2119-2120, G.C. Ex. 106) Fahr was copied on this email. (G.C. Ex. 106) He responded the same day that the matter should be discussed on January 18, as well. (G.C. Ex. 106) Fahr related additionally that Pete (Holcomb) had given him a "heads up" that they (Ford) was looking for Voith to have a "plan on how (Voith) will handle if Teamsters strike, a detailed step by step process of the plan and who (Voith) would involve." (Tr. 2120 – 2121, G.C. Ex. 106) The email exchange involving Fahr, Gebhardt, and Barnett, and the one involving Fahr and Bauer, clearly establish that Voith, despite ridiculous assertions to the contrary, was the *de facto* recipient of the yard work at the LAP long before the formally announced date and that both Voith and Ford were actively planning how to handle Teamsters 89's reaction to the surreptitious method employed in ousting

it and the bargaining unit employees of the predecessor before anyone learned that Voith had been awarded the yard work.

**C. TEAMSTERS 89'S EFFORTS:**

On February 10, at Ford's request, Teamsters 89 representatives Zuckerman and Thompson met with Ford officials in Detroit, Michigan. (Tr. 93 – 99, 794) During this meeting, Ford Vice-President of Labor Relations Malloy advised the Teamster representatives that Voith would be awarded the yard work, but that Ford felt an obligation to the laid off yard employees represented by Teamsters 89. (Tr. 796) Zuckerman and Thompson were told that Ford was going to create new work for 55 of those employees who it considered the core group of Teamsters at normal operation before the 2010 shutdown and that it would award the work to a Teamsters 89 represented company. (Tr. 796) This work was single drive away work from the LAP to the Shelbyville railhead, work that had formerly been performed by eight Teamsters 89 car haulers. (Tr. 98)

Union President Zuckerman advised Malloy, Mikkelson, and the other Ford representative present that as the work was new work, the laid off Auto Handling employees would have no right to follow the work and it would be awarded to other employees represented by Teamsters 89. (Tr. 796, 797) Malloy also stated that Voith's employees would be in the yard on Monday, February 13, and, "that the Voith employees were going to be UAW members." (Tr. 99)

On February 12, Teamsters 89 Vice-President Thompson advised the former Auto Handling employees and others to complete Voith's applications for yard work employment if they wanted to perform yard work at the LAP and to give one copy to Thompson so he could fax them to Voith's Cincinnati, Ohio office. (Tr. 103, 105, 1132, 1175-1176) Thompson also suggested that former Auto Handling employees take Voith applications to the UAW's hall on

Fern Valley Road on the following day. (Tr. 105, 1175) On February 13, the UAW advised Teamsters 89 that Voith had been awarded the yard work and that those jobs would be posted for bid inside the plant. On that same date, as Thompson had suggested, a large number of Auto Handling employees who had previously been employed performing yard work at the LAP went to the UAW's Fern Valley Road hall in Louisville and handed in Voith applications. (Tr. 1132) UAW Bargaining Chairman Steve Stone met with a group of the applicants. (Tr. 1133) He assured them that the UAW did not want the Teamsters jobs, that they wanted nothing more than to take the cars out of the back of the building and turn them over to the Teamsters in the yard. (Tr. 1133)

Voith was ostensibly first notified by Ford, via email, on February 13 that it had been awarded the first portion of the yard work – the batch and hold work related to the launch of the new Escape vehicle. (Tr. 1828) Voith's witnesses testified, contrary to the clear terms of the janitorial contract between it and the UAW, that the contract required Voith to post and offer the yard worker positions to existing janitorial employees at the LAP. (Tr. 1829, G.C. Ex. 84) Immediately, Voith posted these yard job positions for bid among its cleaning employees, claiming that posting was required as new work pursuant to its collective-bargaining agreement with the UAW. (G.C. Ex. 29, 30) However, the UAW's collective-bargaining agreement is limited to general janitorial cleaning and paint booth cleaning work and does not cover yard work. (G.C. Ex. 84) Nevertheless, the yard jobs were posted for 7 days and awarded to 11 janitors. (G.C. Ex. 29, 30)

Thompson faxed a letter from Zuckerman to Voith on February 14, demanding recognition, and attaching a seniority list of 166 employees with their detailed contact information and urging that the former employees be hired. (Tr. 108 - 110, G.C. Ex. 6) Voith never responded to Teamsters 89's letter. (Tr. 831, G.C. Ex. 108) Indeed, the record discloses

that rather than being excited at the prospect of obtaining an experienced workforce comprised of the predecessor's employees, Voith President Morsch pondered on the following day, "what response, if any, we should make." (G.C. Ex. 108) Thompson, on behalf of Teamsters 89 also began faxing to Voith the former Auto Handling employees' applications for the yard work. Between February 14 and 17, Teamsters 89 submitted 32 applications of predecessor Auto Handling yard employees to Voith. On February 23, Thompson sent Voith by overnight mail 62 applications that he had previously faxed to it. (G.C. Ex. 10) On February 28, he sent by overnight mail to Voith an additional 15 applications that he had previously faxed. (G.C. Ex. 13) By March 7, an additional 52 applications from the former employees of Auto Handling were submitted. (Tr. 117 - 118, G.C. Ex. 10) Thompson faxed a total of 186 applications to Voith, with many of the initial applications faxed to Voith on February 14. (G.C. Ex. 10)

The entire seniority list of experienced employees of the predecessor as well as the many applications of experienced predecessor employees and other Teamsters affiliated applications, which were already in possession of Voith at the time it hired its initial complement of yard employees, were simply ignored. Then Facilities Manager Doug Couch had ostensibly obtained a list of janitorial candidates from People Services Manager Tim Bauer that had been culled from a batch of applications that Couch had provided to Bauer. (Tr. 1825) Couch then interviewed and purportedly contingently hired candidates for janitorial positions on about February 6. (Tr. 1826) On February 17, he conducted the initial orientation session for about 40 – 45 janitorial employees at the Fern Valley Inn near the LAP. (Tr. 1833) Couch oriented, and at that time, purportedly hired these employees to perform paint booth cleaning or housekeeping inside the Ford plant. (Tr. 1834) Voith asserts that on February 17, it hired 50 yard employees: The 11 janitors who had successfully bid on the work and the 39 other hires who were selected from the janitorial applications that Respondent Voith already had on file.

Couch testified that he did not learn until the morning of February 20, that employees he had hired to perform janitorial services would be transferred into performing yard work, supposedly at their option. (Tr. 1835) Couch testified that he could not recall having any conversations about the UAW on February 20, at the orientation. (Tr. 1879) Yet, he also could not testify that such conversations did not take place. (Tr. 1879)

The applications of employees who comprised the group on which the recognition of the UAW as representative for the yard employees was based shows that those individuals were applying for cleaning positions. (G.C. Ex. 38) Moreover, despite Couch's claims to the contrary, it was not until sometime after the recognition of the UAW discussed below that these employees were advised that they would be working in the yard and subject to physical fitness requirements. (Tr. 649, 657) Further, unlike the yard work applicants who followed, none of these "janitorial" employees who became yard workers were subjected to Voith's "behavioral test" that in some cases weeded out otherwise extremely well qualified and experienced employees from the applicant pool without explanation as to their alleged personality deficiencies.

**D. VOITH ASSISTS THE UAW IN ORGANIZING EMPLOYEES:**

On February 20 and 21, during orientation meetings, UAW representatives were provided access to Voith's employees and obtained signed membership cards and dues check off authorizations from all employees who were allegedly hired for yard work. It is undisputed that multiple UAW representatives, including Bargaining Chairman Stone approached the new hires at a break during orientation and sought to have them sign authorization cards on behalf of the UAW.

The credible testimony of several employees who were ostensibly hired originally as janitors sheds light on the orientation process. Thus, former Voith employee Teresa Ceesay

testified that she applied to be a housekeeper (janitor) with Voith in February. (Tr. 395) Representatives of the UAW asked her to sign an authorization card on February 20 during a break in orientation. (Tr. 398) Orientation focused on janitorial functions. (Tr. 396-397) At least three days following orientation, Ceesay was told that she was going to be required to drive as part of her job responsibilities. (Tr. 400) Ceesay refused, stating that she had not been hired to drive. (Tr. 400,424) An unidentified supervisor of Voith told her that if she did not do the driving work, she would not have a job. (Tr. 404, 424) Ceesay stated that she quit her employment with Voith because she had not been given a choice of driving or remaining in a janitorial position. (Tr. 427)

Current Voith janitorial employee Keith Robinson testified that he was hired by Voith for a janitorial position on February 17, after initially interviewing with Voith the previous week. (Tr. 580, 589, 599) As Ceesay testified, orientation focused on training for janitorial functions, including safety issues, and chemicals used in cleaning. (Tr. 586) Robinson signed an authorization card during orientation when approached to do so by UAW representatives (Tr. 592) After Robinson signed an authorization card for the UAW, Voith Facilities Manager Doug Couch asked Robinson and others if they were interested in driving and instructed them to sign a list indicating this interest. (Tr. 587) However, all of the employees being oriented at the same time as Robinson were initially hired as janitors and believed this would be their job assignment during orientation. (Tr. 607) Robinson signed the list, but failed the physical and remained employed in a janitorial capacity. (Tr. 590)

Former Voith employee Cody Jaggers testified that the orientation he attended on about February 20, primarily involved learning about various cleaning chemicals used by janitors in the Ford plant. (Tr. 619) A male supervisor for Voith instructed the new employees to take their break in a plant cafeteria. (Tr. 621) An unidentified Voith supervisor told the new hires that

they were not allowed to accompany them inside the cafeteria. (Tr. 635) When the new hires arrived at the cafeteria, they were met by four or five representatives of the UAW, who asked the new hires to sign cards. (Tr. 621 626) One of the new hires asked if they had to fill out the authorization cards. (Tr. 621) Although the UAW representatives told several of the new hires that they did not have to sign the cards, the employees were also coercively told that they might not have jobs or might not be working if they did not sign the cards. (Tr. 626, 649)

Former Voith employee Reginald Farrell testified similarly. Couch told the new hires on February 20, that representatives of the UAW would be waiting for them in the cafeteria. (Tr. 654, 672) Farrell testified that UAW representatives told new hires in the cafeteria that if they failed to sign the authorization cards they, "...probably won't be working if something was to happen." (Tr. 649, 653) A UAW representative stood behind Farrell as he was obtaining his lunch from a machine. (Tr. 696-697) When the representative told Farrell, "you've got to sign this card," Farrell protested that he did not want to do so. (Tr. 697) The UAW representative threatened, "Well, they might take your job." (Tr. 697) Farrell relented and signed the authorization card under duress. (Tr. 653, 697) During orientation on February 20, Farrell formed the opinion based on Voith's representations that he and the other employees being oriented had been hired as janitors and not in any other capacity. (Tr. 669)

Farrell credibly testified that he and other janitorial employees were told four to six weeks after they began working for Voith by Couch and Supervisor Jason Kestler that they would shortly be driving the new Ford Escapes in the performance of their duties for Voith. (Tr. 649, 657) Farrell and other janitorial employees were told that they had to take a physical to perform the yard work driving vehicles. (Tr. 651) They were told that if they did not take the physical they could, "plan on not coming back," or that they could, "plan on not working here." (Tr. 651, 673,674, 701, 708-709) Couch plainly told the janitors of the need for yard employees

thusly, "We don't have nobody out there." (Tr. 673) Farrell told Couch and Kestler that he did not want to drive cars. (Tr. 651) They replied that if he refused, he could, "plan on being fired and not working." (Tr. 651) Farrell took the physical and drove the new Escapes for about five to seven days before personal circumstances involving a family member caused him to begin performing cleaning work in the paint department. (Tr. 661, 678) He subsequently developed an allergic reaction to chemicals in the paint department and Voith moved him back to performing janitorial work. (Tr. 678- 680) Farrell was then laid off, purportedly for a poor performance evaluation. (Tr. 681)

During the timeframe of this orientation, Teamsters 89 Vice-President Thompson contacted Doug Couch whose name had been provided to him by UAW President Dunn as the contact person for Voith. (Tr. 150) Thompson stated that he initially called a Cincinnati number that Dunn had provided to him and asked to speak to Couch. (Tr. 150) He was told by a Voith receptionist that Couch was the facilities manager in Louisville and she provided Thompson with a local Louisville phone number for Couch. (Tr. 151) Thompson called Couch the following week, February 22, or 23. (Tr. 152) Thompson identified himself and told Couch that he represented Teamsters 89 members who had been performing the yard work at the LAP. (Tr. 152) He told Couch he had been directed to him as the facilities manager and asked Couch what he could do to get his members hired. (Tr. 152) Incredibly, Couch told Thompson that he had *heard* that Voith had been awarded the work, but he only did hiring for the janitorial side of the business. (Tr. 152) He confirmed that Thompson had been faxing applications to the correct location, but told Thompson he could not do anything for him. (Tr. 152) Of course, Couch's involvement in the orientation and his clandestine role in fostering the UAWs efforts to obtain signatures on authorization cards seem to strongly suggest that he was misleading Thompson both as to his knowledge and his involvement in Voith's hiring of yard employees. (G.C. Ex.

100) Thompson followed up this call with one to Bargaining Chairman Stone in which Stone assured him that he had received the Teamsters 89 members' applications and while he had not yet provided them to Voith, he was going to do so. (Tr. 152 – 153) Not so ironically, Stone told Thompson that he would be turning the applications over to Couch. (Tr. 153)

**E. <u>VOITH'S INITIAL RECOGNITION OF THE UAW</u>:**

On February 22, Voith's Director of Labor Relations Erwin Gebhardt sent a letter to UAW International Representative George Palmer, in which he advised Palmer that fifty vehicle processing employees at the LAP had unanimously selected Respondent UAW to represent them. (G.C. Ex. 32) The letter stated in part that Palmer was being notified as the existing representative for the UAW for Voith's employees in the "Janitorial and Paint" departments. (G.C. Ex. 32) Voith had agreed to a "neutral" card check of UAW membership cards which was conducted the same day by, Paula Burke, a sister of UAW Bargaining Chairman Stone. (Tr. 2966 – 2967, 2976, G.C. Ex. 32) Gebhardt also notified UAW National Vice-President Jimmie Settles that Voith had recognized the UAW as the representative of the yard employees at the LAP. (G.C. Ex. 31) Moreover, Gebhardt states in relevant part in his letter to Settles that, "Voith is petitioning the UAW Ford National Department to begin bargaining a new classification and pay rate, under our existing National Agreement, for Vehicle Processing work at LAP and other sites where we may be given Vehicle Processing work in the future." (G.C. Ex. 31) Rhetorically one might ask, why does Voith need to petition the UAW for something that it already supposedly believes its contract covers? Clearly, Voith had already floated this suggestion to the UAW and it had been rejected. (G.C. Ex. 72)

Facilities Manager Couch was asked on cross examination how Voith was involved in seeing that all 50 of the new yard employees signed authorization cards for Respondent UAW. (Tr. 1884) He denied that Voith played a role. He was then asked whether it was true that Ford

had released additional funds to Voith after Voith succeeded in obtaining all of the employees signed authorization cards for the UAW. (Tr. 1885) He denied any knowledge of such activity by Voith and then denied being aware that there was a potential for Ford to release additional funds to Voith if it obtained authorization cards from the employees. (Tr. 1886 -1887) Couch, when confronted with an email to him from Elam "Dwayne" Barnett detailing this very information, incredibly denied any recollection that he had seen the email, though he did not deny it was directed to him. (G.C. Ex. 100) The email powerfully conveys Voith's underhanded involvement in the scheme to replace the former Teamsters 89 workforce consisting of the predecessor's employees with UAW represented employees. (G.C. Ex. 100) Barnett writes, "Doug, Can you make sure the 11 Voith emps resign cards today and they are officially verified by the process used yesterday with the new hires? Apparently Ford NAVL will release some additional funds to us once this is completed. Let me know when complete. Thanks!" (G.C. Ex. 100) Of course, Couch also incredibly professed to have no recollection as to whether he communicated back to Barnett regarding this request. (Tr. 1890 - 1892) The email was sent to Couch on the morning of February 21, the day after a multitude of authorization cards were collected by representatives of the UAW (with clear knowledge of Voith as this email reflects) and the day before Voith extended recognition to the UAW as described above. (G.C. Ex. 100) Couch also did not deny that he asked UAW representative Steve Stone to ensure that the eleven Voith employees who had transferred from the janitorial operation to the yard work operation re-sign authorization cards for the UAW. (Tr. 1893 – 1895) Couch merely stated once again that he could not recall having such a conversation with Stone, though he managed to recall providing Stone with handwritten signatures of employees to serve as exemplars for the purpose of having the cards verified by a so-called neutral third party. (Tr. 1894-1895)

Voith had a large well trained work force available to it for the purpose of staffing the yard work -- the workforce of its predecessor, many of whom were eagerly awaiting the opportunity to resume performing the jobs that they had performed for many years. Instead, Voith opted to hire applicants off the street, the vast majority of whom had no experience and had applied for work as janitors. This plan, flying in the face of logic, resulted in a massive failure of the initially hired pool to perform the needed work so that only 22 of the 50 yard employees originally hired by Voith remained in its employ as yard workers after a very short time period, and more may have quit or been terminated following this initial hire period. (Tr. 1939, G.C. Ex. 58)

**F. VOITH INVOLVES AEROTEK IN ITS UNLAWFUL HIRING SCHEME:**

On March 1, Voith was officially awarded the inventory management contract for the LAP. (Tr. 2574, G.C. Exs. 33, 59) That same day, People Services Manager Bauer met with Aerotek Account Manager Sara Curry Martinez and her boss Greg Boehnlein to discuss hiring permanent and temporary workers for Voith's yard work at the LAP. (Tr. 1492-98, 1525) Curry Martinez testified that Bauer "must have" contacted Aerotek about staffing sometime prior to this date. (Tr. 1493) As a result of the March 1 meeting and prior phone conversations, Voith engaged Aerotek to perform hiring services for permanent and temporary yard employees at the LAP. (Tr. 1491, 1496-1497)

Curry Martinez was in charge of the Voith account at the LAP. (Tr. 1490-1491) Aerotek Recruiters Angie Hubrick and Steve Shelburne report to Martinez and worked for her recruiting employees to perform yard work at the LAP for Voith. (Tr. 1489-1490) Aerotek already had a contract in place with Voith to provide hiring services and temporary labor. (G.C. Ex. 81) Bauer told Curry Martinez to screen employees with a goal of hiring 50 full time employees to start work around April 10. (Tr. 1507, 2750, 2775) Bauer purportedly informed Curry Martinez

that applicants for yard work would need a grade of "A" or "B" on a personality test to be hired. (Tr. 2754) As noted previously, no personality test is administered to the janitors who are hired by Aerotek to work at the LAP. (Tr. 2789-90) Bauer provided Curry Martinez with a box purporting to contain several hundred applications for the LAP yard work. (Tr. 2758) Neither Voith, nor Aerotek, ever approached Teamsters 89 to discuss hiring any of the experienced yard employees at the LAP. (Tr. 811) Likewise, Curry Martinez admitted that Aerotek made no effort to reach out to Auto Handling to find experienced personnel for the yard openings at the LAP. (Tr. 2760-61, 2783-84) Curry Martinez acknowledged that she knew many of the Teamster affiliated applicants for the LAP yard work were experienced yard workers, but that she assigned them no priority in the hiring process. (Tr. 2785-86) Although Curry Martinez claimed that the only piece of information that Aerotek cared about on the job applications it screened was whether the applicant had a felony conviction, the evidence revealed that Aerotek played a much more extensive role in excluding employees from the hiring process. (Tr. 2760, 2781-82, G.C. Ex. 102) Indeed, despite Aerotek's knowledge that well over 100 experienced former Auto Handling yard employees had applied, Curry Martinez blithely dismissed an unspecified number of them from the consideration process since they hadn't worked more recently. [10]/ (G.C. Ex. 102) There was no indication in the record that any other applicants were disqualified for this reason. All the while, Aerotek was desperate to find applicants for the yard work, even attending a job fair to attempt to locate more candidates for Voith's vehicle processing jobs. (Tr. 1991-93, G.C. Ex. 104) In addition to hiring yard workers, Aerotek's role included identifying qualified applicants to supervise the temporary workforce. (Tr. 1504)

[10]/ Curry Martinez testified that she had not screened out any employees of the predecessor based on their not performing yard work since early 2010. (Tr. 2782) However, an email from her to Bauer directly contradicts her testimony. (G.C. Ex. 102) When confronted with the email, Curry Martinez admitted that she and Aerotek had excluded these employees of the predecessor from consideration. (Tr. 2803) Yet, she attempted mightily to cling to her lie. (Tr. 2802)

Voith screened the approximately ten supervisory applicants recommended by Aerotek and all were hired. (Tr. 1504)

In early March, Voith began internally re-classifying approximately 24 of the 50 janitorial employees who originally bid into, expressed an interest in or were forced into work as yard employees. (Tr. 1467, 1840-41, 2180, G.C. Exs. 23, 69) The rest of the 50 janitors had washed out of the process as a consequence of failing the physical fitness test, a drug screen or a background check for driving. (Tr. 1467, 1939, 1945, 2090 G.C. Exs. 69, 75) Under its contract with Ford, Voith was required to have 75 full time employees ready to perform yard work when production was scheduled to commence. (Tr. 2090)

As previously noted, on March 3, former Voith employee Beyers got a call from a recruiter named Megan with Aerotek, inquiring if she was interested in a position at the LAP. (Tr. 739-40, G.C. Ex. 45) Megan informed Beyers that the wage for the yard work would be $11 per hour. (Tr. 742-43) Beyers had earned over $19 per hour performing the same work for Auto Handling. (Tr. 745) Megan also told Beyers that she would have to pass a physical examination, a personality test, and a drug test. (Tr. 742) That same day, Beyers informed Teamsters Vice President Thompson that Aerotek was hiring on behalf of Voith. (Tr. 161) Thompson advised the Teamster members to apply with Aerotek. (Tr. 161)

On March 5, several Teamsters, including Kellie Stein, Tim McCrory and Helen Doss went to Aerotek's office to hand in their job applications. (Tr. 1176, 3031, G.C. Ex. 48) Aerotek Recruiter Angie Hubrick told the Teamster applicants that Aerotek was hiring on behalf of Voith for driving jobs at the LAP, but that she had not previously received any job applications from the Teamster affiliated applicants. (Tr. 457-58) Despite his experience working in the yard at the LAP, Aerotek never contacted McCrory to tell him whether he would be hired. When McCrory finally called Aerotek, he learned that he had received a "C" on the

personality test. (Tr. 1177-78) The plain language on the personality test, itself, states that a grade of "C" equates to an "acceptable likelihood of success". (Resp. Ex. 51) In early April, Voith employee Brenda Helm informed McCrory that, in addition to hiring for permanent positions, Aerotek would be supplying temporary yard workers for the LAP. (Tr. 1179-80) McCrory called Aerotek and spoke to Curry Martinez, who informed him that he could work as a temporary employee despite receiving a grade of "C" on the personality test and acknowledged that he would do fine at the job since he had 17 years of experience working in the yard at the LAP. (Tr. 1180, 1182)

In early March, Bauer and other officials of Voith began interviewing yard work applicants who had been pre-screened by Aerotek. (Tr. 1941-42) On or about March 6, Beyers attended an orientation for the yard work at the LAP at Aerotek's facility. One of Voith's officials, Steve Shelburne, described the work and informed Beyers and the other 6 attendees that the employees performing this work were represented by the UAW and that this might impact the starting wage of $11 per hour. (Tr. 746-47) Following this, Beyers had an interview with Bauer on March 8 at Aerotek where he, too, informed her that the work would be UAW and asked Beyers if she had a problem with that. (Tr. 748-49) During the interview Bauer had Beyers' job application that she had given to the UAW. (Tr. 771) Also sometime in March, Teamster Greg Johnson interviewed with Bauer at Aerotek. (Tr. 1001) When Johnson asked Bauer if the yard work at LAP would be union, Bauer responded that it would be UAW and asked if this would be a problem. (Tr. 1001, 1990-91) At the hearing, Bauer admitted that on March 5 he told an applicant that the yard employees would be represented by the UAW. (Tr. 1943-44)

Although neither Voith, nor Aerotek gave any priority to the experienced yard employees in the hiring process, the officials performing the interviews acknowledged the obvious – that

experience performing yard work was invaluable. Around the first week of March, Brenda Helm had an interview with an Aerotek official named Courtney. (Tr. 1391) When Helm explained to Courtney that she had done yard work in the past, Courtney acknowledged that Helm would know what she was doing at the LAP. (Tr. 1391) In early April 2012, Helm interviewed with Voith Supervisor Jason Miller. (Tr. 1137) Miller had previously been a supervisor for Auto Handling at the LAP and Helm had worked for Miller in that capacity. (Tr. 461, 1136) Miller acknowledged that Helm should be hired to work in the yard for Voith since she had previously performed the work. (Tr. 1137-38) Former Auto Handling employee Deborah Cheathem also interviewed with Miller, who acknowledged that she would know how to do the work since she had done it for several years. (Tr. 1214-15) Former Auto Handling employee Kellie Stein also interviewed with Miller. (Tr. 460) Miller acknowledged that it was silly to make Stein answer questions about a yard job that he already knew she could perform. (Tr. 462)

Aerotek's screening eventually resulted in Voith interviewing approximately 85 people for the 50 full time openings. (Tr. 2777) Despite the obvious value of experience performing yard work, Voith ultimately hired only 11 of the experienced employees who were associated with Teamsters 89. (Tr. 70) In addition to excluding employees who obtained a "C" on the personality test (apparently an unnecessary standard according to the test creators who define a "C" as an "acceptable likelihood of success"), there appeared to be irregularities in other aspects of the hiring process when it came to applicants affiliated with Teamsters 89. On March 26, former Auto Handling employee Helen Doss took a physical at Aerotek. (Tr. 3033) Although Curry Martinez claimed that Doss had failed the lifting portion of the physical, Doss testified in great detail that she had passed the test, even recalling that the testing official commented that he had no doubt that she was capable of lifting a heavier weight than that required to perform the LAP yard work. (Tr. 3035) Although Doss was eventually hired to do driving work, she was

assigned to clean inside the plant where she was excluded from further consideration after refusing an assignment to work in an area that was identified as dangerous and off limits. (Tr. 3037-41, 3066) The Kentucky Division of Unemployment Insurance agreed with Doss that she only quit her employment after being required to work in unreasonable conditions. (G.C. Ex. 112)

On April 6, Curry Martinez expressed at least one of Voith's motivations for not hiring the experienced applicants affiliated with Teamsters 89. Teamster affiliated Applicant Wayne Grether had interviewed with Aerotek for one of Voith's permanent yard jobs in late March, but never heard back about how he did in the interview process or whether he would be offered a job. (Tr. 1089-90) On April 6, Voith employee Brenda Helm notified Grether that Aerotek was hiring temporary workers to do yard work at the LAP. (Tr. 1092) Grether called Aerotek on April 9 and spoke to Curry Martinez about temporary yard jobs at the LAP. (Tr. 1092) Grether testified that after he informed Curry Martinez that he had previously worked at the LAP, she told him that she had temporary work available at a rate of $11 per hour, but that she would need a strong commitment from him that he wouldn't go on strike when she needed him to be working and that he needed to promise that he wouldn't strike. (Tr. 1097-99, 1126, GC 80) Curry Martinez went on to say that she would hire "all of you" if she wasn't afraid of the predecessor employees striking. (Tr. 1098) At the hearing, Curry Martinez denied making this statement. (Tr. 2774) Tim Bauer denied instructing Curry Martinez to screen out applicants who indicated willingness to strike. (Tr. 1941)

While Voith and Aerotek were hiring for the LAP yard work, Ford and the UAW began scrambling in an attempt to defend the award of yard work to Voith. Significantly, at this time, it should have still been unknown whether Voith was ultimately going to hire a majority of the predecessor's employees and incur a bargaining obligation with Teamsters 89. The tone of the

e-mails revealed, however, that the representational status of the UAW was already assured and efforts had turned to justifying this fait accompli. Further, the communications revealed that Ford was not some dispassionate third party, but viewed itself as a stakeholder in the dispute. (G.C. Exs. 96, 97) On March 12, Mikkelson authored an e-mail which attempted to demonstrate that Teamsters 89, as a whole, still had a number of employees working for Ford's contractors in the Louisville area – despite the loss of yard jobs. (Tr. 1687, G.C. Ex. 95) On March 13, Steve Stone sent an e-mail to various UAW officials with talking points defending Ford's actions in awarding the yard work to Voith and suggesting that Teamsters 89, overall, had fared relatively well. (G.C. Ex. 70) Attached to the e-mail was a document marked "Ford Confidential" and bearing the Ford logo. On March 27, Mikkelsen sent an e-mail expressing Ford Vice President of Labor Relations Marty Malloy's concern that UAW President Bob King would get "cold feet" as Teamsters 100 held firm in its position that it was entitled to represent the yard workers. (G.C. Ex. 93) On March 29, Stone sent an e-mail to UAW Secretary Suellen Warner, advising her that she should not be involved in Voith's hiring process and to stay out of it —at least "until it clears the LNRB [sic] charges." (G.C. Ex. 73)

Despite Voith's claim that it was hiring janitors at the beginning of 2012, not yard employees, it wasn't until March 15, 2012 that Ford was awarded the bid to provide janitorial services at the LAP. (G.C. Ex. 26)

### G. VOITH WITHDRAWS RECOGNITION OF THE UAW, BUT PROMPTLY PROVIDES ADDITIONAL ASSISTANCE:

On April 9, Voith withdrew recognition of the UAW. (G.C. Ex. 17) The sole reason given for the withdrawal was that Voith was concerned that the previous recognition may have been invalid since it had not actually started vehicle processing work at the time of the recognition. Voith emphasized in its letter withdrawing recognition that it had a longstanding and successful relationship with the UAW. (G.C. Ex. 17) However, as described below, the

UAW immediately launched an aggressive campaign with Voith's assistance to obtain new authorization cards.

On April 10, Fred Zuckerman, on behalf of Teamsters 89, issued a letter demanding recognition from Voith as the collective bargaining representative of employees performing yard work at the LAP. (G.C. Ex. 18) Zuckerman explained his rationale for this demand in detail and expressed concerns that members of Teamsters 89 had been discriminated against in the hiring process.

50 new yard employees attended orientation on April 10 and 11 bringing Voith's total yard employee complement up to the contractually required level. (Tr. 2180) Teamsters affiliated applicants Beyers and Patti Jo Murphy attended new employee orientation on April 10. When Murphy asked Couch what kind of insurance employees would have, he responded that they would have UAW insurance. (Tr. 1026) When Murphy asked Couch if this meant that she would be represented by the UAW, he replied that it did. (Tr. 1026) At the hearing of this matter, Couch denied telling employees that they would have UAW insurance or that he knew what UAW insurance was. (Tr. 1846-47)

According to Brenda Helm, in the orientation, Couch passed out literature which described the UAW as having an "impressive" record with bargaining. (Tr. 1393, G.C. Ex. 56) When it came time for break, Couch told the employees to follow UAW Steward Sharita Blackmon, who escorted them to the break room where Steve Stone informed them that they would be signing UAW cards. (Tr. 1027-28) UAW Officials Stone and Hibbs, however, testified that they met with the employees around April 10 or 11 and answered employee questions, but told them that they had no obligation to join the UAW. (Tr. 2914-16, 2963-65) Although Stone initially testified unequivocally that he had no role in having employees sign UAW cards in this time frame, he was forced to recant after being contradicted by documentary

evidence which proved that he signed as a witness on a number of the new employees' UAW authorization cards. (Tr. 2985-93, G.C. Ex. 111)

On April 11, 2012, Stein, Rhodes, Helm and other newly hired employees affiliated with Teamsters 89 attended new employee orientation at Voith's facility at the LAP. (Tr. 463) UAW Steward Sharita Blackmon escorted the new employees to the conference room for orientation that morning. (Tr. 1215-16) Voith's clerical employees, who had been introduced by Couch, distributed the same flattering literature about the UAW that Helm had received the previous day from Couch. (Tr. 1256-57, 1274, G.C. Ex. 56) At the hearing, however, Couch claimed to be unfamiliar with the document and denied distributing it. (Tr. 1856-57) Hibbs and Stone testified that the literature in question was passed out by the UAW in the cafeteria on February 20. (Tr. 2919-20, 2961-62) Later that day, Couch asked Blackmon to show the new employees around the building. (Tr. 2860-61)

After lunch on April 11, Couch escorted about 15-30 new employees to the yard and introduced them to Voith Supervisors Dennis Frank, Tom Baker, Jason Wilson, Jason Miller, Caleb Williams, and Scott Board. (Tr. 463-64, 466, 891, 1139, 1269, 2343, 2951) The supervisors were in the middle of showing the new employees how to bay cars when Frank told the employees that someone wanted to speak to them or that there was a situation and the supervisors then walked away (estimates generally varied from about 10 to 50 feet away. (Tr. 466, 533-34, 891, 1020-21, 1225, 1243, 1259-60, 1283-84, 2866, 2950) Frank estimated that he walked 50 to 70 feet away, but UAW Bargaining Chairman Teddy Hunt testified that the supervisors were only 10 feet away. (Tr. 2268, 2950) Chris Flanagan, one of the new employees, recalled that Hunt and Frank briefly conversed before Hunt addressed the group. (Tr. 1291) Hunt supported Flanagan's version of events, confirming that he asked the supervisors whether the employees were on break before addressing them. (Tr. 2950) Voith's

supervisors, Frank, Baker and Board claimed at the hearing that Frank called a break prior to walking away. (Tr. 2246-47, 2306, 2360) The Teamster affiliated witnesses were unanimous, however, that they were not on break at the time Hunt addressed them. (Tr. 566, 934, 1151, 1295)

UAW Officials Teddy Hunt and Sharita Blackmon drove up on small motorized vehicles called tugs and Hunt began loudly and angrily yelling at the employees that Teamsters had been in their house and that the employees needed to sign to sign UAW authorization cards. (Tr. 467, 553, 893, 898, 1141, 1152, 1220-23, 1248, 1262) Voith Supervisor Baker testified that Blackmon, an employee of Voith, would have needed Frank's approval to perform union duties on her work time. (Tr. 2347) Supervisors Frank and Board claimed that Hunt, a Ford employee, was wearing a Voith vest – although identifiable Voith vests were not issued until well over a month later on May 31. (Tr. 2186, 2271) Board claimed that Blackmon was also wearing a Voith vest. (Tr. 2368) Supervisors Frank and Baker denied that Hunt was shouting at the employees. (Tr. 2273, 2311) Hunt, however, acknowledged that at the time he addressed the employees, he had just discovered 10 minutes earlier that Teamsters 89 were soliciting authorization cards at the LAP and that he was still feeling the perceived insult. (Tr. 2946, 2955) Hunt told the employees that they would not be allowed to continue working if they did not sign cards. (Tr. 540) Although Teamsters 89 affiliated employees did not sign UAW cards, a number of other new employees did. (Tr. 468, 554, 894, G.C. Ex. 111) Hunt and Blackmon addressed the group of new employees for 10 to 30 minutes. (Tr. 469, 894, 1143, 1225, 1263-64, 2866) The supervisors remained off to the side in the parking lot which Stein and Flanagan described as quiet. (Tr. 470, 1262) Even Supervisor Baker characterized the yard as "pretty dead" other than an occasional construction crew moving by, and noted that production had not yet begun. (Tr. 2322-23)

Employee Flanagan saw Frank talking to the other supervisors and pointing at the new employees and mouthing the words "Teamster" as he identified the Teamster affiliated employees. (Tr. 1263, 1270, 1288) Supervisors Frank, Baker and Board acknowledged that they saw Hunt and Blackmon, who were unknown to them at that time, approach the employees, but that they did nothing. (Tr. 2271, 2309, 2362) Following Hunt's angry outburst to the new employees, the supervisors returned as if nothing had happened. (Tr. 471, 1226, 1264) Frank's testimony at hearing was markedly different than the sworn testimony that he gave in his affidavit to the Region with respect to certain key pieces of information such as the time of the exchange in question, what he was looking at during the time in question and, incredibly, whether he knew that the incident that he testified about in such detail at the hearing had even occurred (Tr. 2282-84, 2290-94)

Other Teamsters affiliated Voith employees also had an encounter with Hunt on April 11. Beyers and others, including Brenda Helm, who had attended orientation the previous day, were assigned to pick up trash. (Tr. 755-57) After Beyers and Helm, who were wearing Teamster apparel, complained to a fellow employee about being assigned to pick up trash, UAW representative Teddy Hunt came up to them and had an angry exchange. (Tr. 757-61) The UAW again demonstrated its intensified efforts to get authorization cards signed on April 11 when UAW representatives Barry Ford and Steve Stone approached Aaron Schott and about 9 other new employees while they were at work cleaning the building and asked them to sign UAW cards. (Tr. 1442-45, 1469)

### H. THE YARD WORK COMMENCES AND IS PERFORMED IN THE SAME WAY THAT IT WAS PEFORMED UNDER THE PREDECESSOR:

Production began at the LAP around April 16. (Tr. 1447) Avral Thompson frequently drove to the LAP yard and observed that Voith's yard employees continued to perform baying of vehicles, rail loading and offsite shuttling, just as they did for Auto Handling Inc. and many

employers before. (Tr. 61-67, 77) Auto Handling Yard Superintendent Gene Beeber agreed that the yard work performed by Voith is the same as the performed by Auto Handling. (Tr. 1309, 1311, 1314) As with Auto Handling, vans transport the yard employees to release gates where the employees "single" (individually) drive new cars (units) to bays (located onsite or offsite) or to the rail loading area, where other yard employees load them onto railcars. (Tr. 66-67, 77, 220-23) (G.C. Ex. 14 and 15) "Baying units" requires yard employees to drive the units safely to their designated parking spots, park them carefully to avoid damaging them, place plastic on the seats, place the keys in the correct location and turn off all accessories. (Tr. 316-17, 441) This work is performed in all weather conditions, including rain and snow. (Tr. 445, G.C. Ex. 37) Yard employees are also called upon to load units onto rail cars. This is a difficult job and it can take up to a year to become proficient at it. (Tr. 379-80) This work requires maneuvering a 60 to 70 foot long buck ramp around the yard and setting it at the proper angle to load units onto rail cars. (Tr. 380) In order to load the units, yard employees must drive the cars up a narrow ramp and then onto the rail cars with only an inch or two of clearance on each side. (Tr. 381) Units must be driven safely through up to five split rail cars before being parked and chocked down. (Tr. 381) The yard employees then lower 60 pound plates between the rail cars before swinging out of the rail car and climbing down a ladder to the ground. (Tr. 381, 443-44) Gebhardt acknowledged that this work is physically demanding and hazardous. (Tr. 2118-19) Challenging physical standards must be met by applicants seeking to perform rail loading work. (G.C. Ex. 35, 36) Voith employees Sandra Rhodes and Patti Jo Murphy both testified that Voith officials who interviewed them (Elam Barnett and Doug Couch) were astonished to learn that women could perform this heavy labor. (Tr. 910-12 and 1023-24)

With only minor exceptions, such as replacing a scanning shed with hand scanners, the work performed by Voith's yard employees is exactly the same work, performed in exactly the

same way, as that performed by Auto Handling. (Tr. 446-47, 514-517, 999, 1020, 1254, 1390) Many of the supervisors remained the same. Steve Tingle, Jason Miller, Dennis Frank and Caleb Williams are Voith supervisors who worked for predecessor Auto Handling. (Tr. 887-88, 1004, 1135-36, 1187, 1305, G.C. Exs. 66, 78) Although Voith tried to make much of the fact that its yard employees individually drive units to newly created offsite locations such as Renaissance and UPS North, similar work was also performed in the past by Auto Handling and other employers. Whether or not offsite shuttling is required depends on how many units the LAP is producing and how many are required by Ford to be held. (Tr. 248-49, 547-48, 884) Another minor logistical change was that pickup trucks manufactured at the Kentucky Truck Plant (KTP) were transferred to the LAP for purposes of mixing loads and transporting both types of units on rail cars more efficiently – although this did not commence until well after the LAP operation in 2012 had resumed plant production with the new Escape SUV. (Tr. 251, 254, 366, 799, 1374, 1726-27, 1358) This swapping of vehicles in 2012 was logistically more practical and profitable than it would have been prior to the 2010 idling of the LAP because the vehicles manufactured at the KTP (large trucks) and the LAP (Explorers) were closer in size than large trucks and Escapes and therefore the benefit gained in terms of putting more vehicles onto rail cars as a result of swapping in 2010 was much less than that which could be gained in 2012. (Tr. 1374) Thus, this change in the amount of swapping taking place from 2010 to 2012 was not a significant change in the nature and type of work being performed, but was driven primarily by the additional profit to be gained by swapping vehicles with a greater size disparity between them as opposed to swapping vehicles of nearly identical size. Although the work performed by Voith is essentially the same as that performed by Auto Handling, wages have been cut dramatically since Voith took over the yard work – from over $21 per hour to less than $14 per hour. (Tr. 1005)

At hearing, Voith made much of various other employers who are involved in one aspect or another of transporting vehicles manufactured at the LAP or KTP, but who do not perform yard work at the LAP. RCS employees, for instance, who are represented by Teamsters 89 for purposes of collective bargaining, work primarily at the Renaissance yard, only coming to the LAP on rare occasions when Voith runs behind on its shuttling duties. (Tr. 69) Teamsters 89 also represent the truck driving employees of Allied Motors and Jack Cooper Transport, but these employees work only out of the Renaissance yard, never coming directly to the LAP. (Tr. 72-73) Likewise, Allied, Cassens, RCS, and Jack Cooper Transport all employ truck drivers, who have never performed yard work at the LAP. (Tr. 78-79)

According to Voith employee Stein, when production began at the LAP, Voith brought in about 50 to 100 "temporary" Aerotek employees, including supervisors, to perform yard work at the LAP. (Tr. 506) It was undisputed that Voith never contacted Teamsters 89 to bargain over contracting out the yard work, which was traditionally performed by employees represented by Teamsters 89. (Tr. 811) Voith's supervisors and Aerotek's supervisors appear to be interchangeable, with each entity's supervisors routinely giving orders to the other's employees. (Tr. 1192-93, 1203) The Aerotek "temporary" employees work side by side with Voith's employees and perform all of the same job functions in the same way, with the exception of rail loading, which is not performed by Aerotek employees. (Tr. 508-09, 1184) The total number of Aerotek employees eventually grew to approximately 200 in Stein's estimation and 300 in McCrory's. (Tr. 507, 545-46, 1188) Various reports placed the number at 150 to 200 at different dates, with up to 500 additional employees available if needed. (G.C. Exs. 58, 67, 68, 69, 87, 88) Curry Martinez testified that, at the time of the hearing of this matter, Aerotek had referred approximately 300 "temporary" employees to the LAP for yard work. (Tr. 1502, 1505) This number is supported by documentation and testimony supplied by Ford. (Tr. 1611, G.C.

Ex. 58) Aerotek continued to fill "temporary" positions in order to maintain the "temporary" force at this level. (Tr. 1506) From May through August, Voith continued to need employees and Aerotek continued to supply them in large quantities. (G.C. Exs. 83, 85) About 8 to 10 of the Aerotek "temporary" employees have been converted into permanent employees of Voith, but "temporary" employees such as McCrory, with a Teamster affiliation, have not been converted to permanent status. (Tr. 1184-86, 1507-08, G.C. Ex. 77)

**I. <u>VOITH CONTINUES TO ASSIST THE UAW</u>:**

On April 17, Voith Supervisor Tom Baker and UAW Steward Sharita Blackmon passed out letters dated April 10 advising the employees that the UAW would no longer represent them for purposes of collective bargaining. (Tr. 473, 475, 542, 946, 1034, 1226, 1394, 2870, G.C. Ex. 40) Blackmon testified that employees asked her questions about the letter and that she called Steve Stone so that he could address them later that day. (Tr. 2870-71) Later that day, Supervisor Tom Baker drove a van full of employees, including most of the Teamster members, from the offsite lot where they were working to Voith's break room and told them that "they want to see you inside" or that he had taken them there to attend a meeting. (Tr. 477-78, 556, 901, 947, 1028-29, 1227, 1396, 1424) Supervisors Frank and Baker claimed that the employees were on break at the time and that they had no knowledge that 3 to 4 UAW officials were addressing 30-40 of Voith's employees. (Tr. 2278-79, 2316-17) Blackmon also testified that employees were on break at the time. (Tr. 2873) The Teamster affiliated employees, however, testified unanimously that they were not on a break. (Tr. 556, 948-49, 1072-73, 1399, 1428, 1433-34) Inside the break room, UAW Officials Steve Stone, Herb Hibbs and Barry Ford were addressing nearly all of Voith's employees. (Tr. 478-79, 903, 1228-29, 1396-97) According to employee Patti Murphy, Stone told them that the UAW would be their representative and that they would soon be signing authorization cards. (Tr. 1029) Stone also told the employees that

the collective bargaining agreement which applied inside the plant to the janitors would not apply to the yard work. (Tr. 1229) At the hearing, however, Stone denied discussing UAW membership at this meeting. (Tr. 2972-73) After allowing the UAW to address the employees for another 15-20 minutes, Dennis Frank finally came in and told the employees to return to work. (Tr. 906, 1029-30, 1229, 1398)

On April 18, Zuckerman sent a letter to Gebhardt responding to Voith's withdrawal of recognition of the UAW and reiterating the willingness of members of Teamsters 89 to perform the yard work at the LAP and Teamsters 89's demand to meet and bargain with Voith. (G.C. Ex. 49)

On April 30, the UAW again requested recognition as the collective bargaining representative of the yard employees at the LAP. (G.C. Ex. 71) The showing of interest used for this second recognition included 27 of the same union authorization cards relied upon for the first showing of interest. (G.C. Ex. 111) On May 1, 2012, Voith again recognized the UAW as its yard employees' collective bargaining representative. (Tr. 2018, G.C. Ex. 34)

As noted above, on May 9, 2012, former Ford manager Pete Holcombe went to work for Voith as Director of Vehicle Processing. (Tr. 1628, 2509) On May 10, 2012 Voith Counsel Stephen Richey sent a letter to Zuckerman accusing employees affiliated with Teamsters 89 of plotting to abandon new vehicles off property. (G.C. Ex. 19) Richey threatened Teamsters 89 with criminal prosecution and civil actions as well. (G.C. Ex. 19) About May 11 or 12, Supervisor Tom Baker and UAW Steward Sharita Blackmon distributed copies of this letter to employees, which stated that Voith was concerned that Teamsters 89 affiliated employees would engage in illegal activity, abandoning or damaging vehicles to protest the situation at the LAP. (Tr. 481, 489, GC 19) Naturally, this letter caused the other employees to disparage the Teamster employees. (Tr. 490, 1454-57) Indeed on May 21, one of Voith's employees who had

been discharged sent an e-mail to management attempting to plead her case. She speculated that she must have been terminated because someone mistakenly believed that she was a Teamster, but explained that she was not. (G.C. Ex. 86)

On May 10, Brett Griffin sent an e-mail to Steve Stone advising that he agreed to honor the janitorial collective bargaining agreement only on behalf of the yard employees who had previously been janitors at the LAP. (G.C. Ex. 109) On May 11, Zuckerman wrote a letter to Gebhardt expressing outrage at the accusations contained in Richey's May 10 letter and again demanding the opportunity to bargain. (G.C. Ex. 20) Voith never responded to this or any of Teamsters 89 demands to engage in collective bargaining over terms and conditions of employment. (Tr. 831-32) On May 12, Ford began releasing vehicles from the LAP for shipment to dealers. (Tr. 1656)

Voith Director of Labor Relations Gebhardt provided an affidavit to the Region on May 21. (G.C. Ex. 110) Nowhere in the affidavit did Gebhardt express a belief that Voith was required to recognize the UAW as representative of the yard work bargaining unit at the LAP due to collective bargaining agreements with the UAW elsewhere in the country. Although Gebhardt claimed at hearing that he first learned of that UAW's belief that the janitorial contract would not apply to yard employees in litigation, Gebhardt admitted that Voith is not fully applying the terms of the janitorial contract at the LAP to the yard employees at the LAP. (Tr. 2131-32, 2165-66, G.C. Ex. 72) Moreover, Voith admittedly has separate contracts with the UAW for the performance of yard work and janitorial work at the Michigan Assembly Plant (MAP)

### J. VOITH USES UNLAWFUL INTIMIDATION TO FORCE EMPLOYEES TO SUPPORT THE UAW:

About May 31, around lunch time, Voith issued employees new safety vests with the UAW logo on them. (Tr. 492, 503, 512, 915, 2189) Supervisors informed the employees that it

was mandatory to wear the UAW vests. (Tr. 492, 1145) Teamster affiliated Voith employees Stein and Helm took the vests and began to walk to their lockers. (Tr. 500) Helm told Stein that she did not want to wear the UAW vest. (Tr. 500) Brett Griffin, who was standing close by talking on the phone, heard the comment and told Helm that it was mandatory to wear the vest and that she could go home if she refused. (Tr. 500-501, 504, 543, 1146, 1155, 1402, 2190) Employee Patti Jo Murphy recalled that Griffin said "you will wear that vest or you'll be violating a direct order and you will not be allowed to work here." (Tr. 1038) Similarly, a temporary supervisor told employee Chris Flanagan that he could wear the UAW vest or go home. (Tr. 1265) Although employees were allowed to continue to wear Teamster shirts, the UAW vest was worn over the top of these shirts. (Tr. 950) Helm had never previously refused to wear a safety vest prior to the issuance of the version with the UAW logo. (Tr. 2209)

The next day on June 1, at about 10 a.m., Voith managers Brett Griffin and Jason Wilson conducted a meeting of the employees in Voith's break room and informed them that they no longer had to wear the UAW vests. (Tr. 502, 504, 2193) Approximately 60 to 70 employees were present. (Tr. 1448) Griffin stated that although the Labor Board had told them to recognize Teamsters 89 as the employees bargaining representative, they were not going to do it. (Tr. 1002, 1231) Griffin also advised the employees that they would eventually be represented by the UAW. (Tr. 504, 1450) Employee Cheathem testified that Griffin said that the employees were represented by the UAW at that time and that they should be in the process of bargaining for a collective bargaining agreement. (Tr. 1231) Griffin warned the employees that Teamsters 89 would be attempting to solicit union cards and to tell management if they felt threatened with respect to union activity. (Tr. 503, 940, 1040, 1233) According to employee Johnson, Griffin told the employees to tell him or Wilson if they were approached about joining a union and felt uncomfortable. (Tr. 1003, 1015) Griffin admitted that he told the employees

that they could come to management *or the UAW* if they felt unsafe or threatened (emphasis added) (Tr. 2199, 2209) Griffin and Wilson claimed that Griffin made these comments in response to questions from an employee; however they did not identify the employee and Voith failed to call this employee – or any employees – as witnesses at the hearing of this matter. (Tr. 2208, 2233-34)

**K. VOITH SEEKS TO AVOID THE TEAMSTERS:**

That same day, after the meeting, a Teamsters member notified Thompson about the meeting. (Tr. 169-70, 329) Teamster officials Avral Thompson, Fred Zuckerman and Ken Lauersdorf went to the LAP. (Tr. 168, 807) In stark contrast to the red carpet treatment given to the UAW, Voith's personnel did not even let the Teamster officers through the gate. (Tr. 168-69) Supervisors Brett Griffin and Jason Wilson came to the turnstile. (Tr. 169, 2205-06) Zuckerman told Griffin and Wilson that Teamsters 89 was demanding access to the facility, that Teamsters 89 was the rightful bargaining agent for the yard employees and that they knew that Voith had held a captive audience meeting that day. (Tr. 169, 2206) Griffin responded by telling the Teamsters 89 officers to leave. (Tr. 170, 810-11, 2238)

On June 15, Voith officials Donald Morsch and Erwin Gebhardt discussed the dispute involving Teamsters 89 by e-mail. (G.C. Ex. 107) Morsch stated that Ford and the UAW agreed with Voith and Morsch stated that he may ask for financial assistance from Ford in the defense of this case. (G.C. Ex. 107)

With Voith's largely inexperienced work force in the yard, new vehicles are damaged at a much greater rate than they ever were when the seasoned Teamster represented employees performed the yard work at the LAP. (Tr. 1004, 1233-34, 1266) Even Dennis Franks complained to the employees that they were averaging 3 wrecked vehicles per week. (Tr. 1266-67) Indeed, one of the reasons that Ford asked Voith to issue employees safety vests identifying

their employer was so that Ford could crack down on Voith's employees who were driving recklessly. (Tr. 2186)

## IV. LEGAL ANALYSIS:

### A. Voith Violated Section 8(A)(1) And (3) Of The Act By Implementing A Plan To Hire Employees And Establishing A Hiring Procedure And Engaging In Other Conduct Designed To Exclude/Or Limit The Hiring Of Employees Of The Predecessor Employer And Has Thereby Failed And Refused To Hire Or Consider For Hire The Employees Of The Predecessor Because Of Their Support For Teamsters 89. (Issue 1)

A new employer is not required to hire the employees of its predecessor but cannot refuse to consider for hire or retain a predecessor's employees solely because they are union members or to avoid recognizing a union. *Love's Barbeque Restaurant*, 245 NLRB 78, 144 (1979), see also, *U.S. Marine Corp.*, 293 NLRB 669, 670 (1989), enfd., 944 F.2d 1305 (7th Cir. 1991). The Board considers the alleged successor's motive; expressions of union animus; absence of a convincing rationale for the failure to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct demonstrating a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its hiring in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force. *Galloway School Lines*, 321 NRLB 1422 (1996); *Planned Bldg. Services*, 347 NLRB 670 (2006).

The above factors, in conjunction with the *Wright Line* test are employed in determining whether a successor has discriminated with regard to the hiring and/or consideration for hire of the employees of a predecessor employer. *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 889 (1st Cir. 1981); *Planned Bldg. Services*, supra at 670. Under a *Wright Line* analysis, the Acting General Counsel shows anti-union animus by establishing three elements: union or protected concerted activity by employees, employer knowledge of that activity, and union

animus on the part of the employer. *Kentucky River Medical* Center, 356 NLRB no. 8 (2010); *Wright Line*, supra.

When a successor employer is found to have discriminated in hiring, the Board assumes that, but for the unlawful discrimination, the successor would have hired the predecessor employees in their unit positions. In this regard, "Although it cannot be said with certainty whether the successor would have retained all the predecessor employees if it had not engaged in discrimination, the Board resolves the uncertainty against the wrongdoer..." *Planned Bldg. Services*, supra at 674, citing *Love's Barbeque*, supra at 82. Accordingly, the Board assumes that the union representing the predecessor employees would have retained its majority status. E.g. *GFS Building Maintenance*, 330 NLRB 747, 752 (2000); citing *State Distributing Co.*, 282 NLRB 1048 (1987).

In the subject case, it is clear that Voith engaged in a hiring process designed to avoid a bargaining obligation with Teamsters 89 by failing and refusing to hire the employees of its predecessor Auto Handling in violation of Section 8(a)(1) and (3) of the Act. In this connection, Voith announced in its bid for the yard work (months before a workforce of yard employees was hired) that it intended for those employees to be represented by the UAW. Additionally, both the UAW and Ford advised Teamsters 89 that yard employees were going to be represented by the UAW. Prior to the formal award of the work, Voith initiated a hiring scheme calculated to avoid hiring Teamsters 89 affiliated employees of the predecessor employer. This scheme included hiring employees for janitorial positions and forcing them into yard worker positions regardless of their abilities or desires; hiring employees who were referred for employment by representatives of the UAW; falsely advising a Teamsters 89 representative that Voith was unaware that it would be formally awarded the bid; concealing the role of Voith's hiring contacts for yard work, and applying different hiring requirements for predecessor employees.

Further, the record discloses that Voith had contact information for the entire workforce of the predecessor and had in its possession numerous applications for predecessor employees at the time it hired an initial complement of yard employees by converting some existing janitors to yard workers and requiring janitorial new hires to accept yard worker positions. Not a single experienced yard employee of the predecessor was hired at that time -- not one. Despite Voith's pretextual reliance on a supposed timeline needed to process applicants, no exigent circumstances existed that would have compelled Voith to ignore a standing experienced and qualified work force for unproven and inexperienced employees applying for and working in dramatically different positions. One might analogize this situation to a nation state ignoring a standing army of battle tested veterans and opting instead to field raw recruits with pitchforks and plungers.

When Voith experienced massive job failure in the ranks of its initial complement, yard employees who were comprised of inexperienced "janitors," it was forced to hire more employees into full time positions than it had originally contemplated. This provided a slim opportunity for a few persistent employees of the predecessor or others affiliated with Teamsters 89 to be hired. However, the process was changed to weed out applicants who did not obtain a certain score on an amorphous personality test even though the test creators deemed a lower score acceptable and even when the relevance of such a test being applied to employees who had successfully performed the yard work jobs for many years defies logic. Moreover, the record discloses that at least some employees of the predecessor employer found the test difficult to access, thereby discouraging applicants. Aerotek Account Manager Curry Martinez simply disqualified an unknown number of predecessor employees from the hiring process solely on the basis that they had not worked recently enough. Despite assertions to the contrary,

Curry Martinez and Aerotek had obviously been instructed to avoid hiring employees of the predecessor when possible.

Although it is not the Acting General Counsel's burden to show that each of the predecessor employees should have been hired when Voith's scheme of avoiding hiring the predecessor employees to avoid recognizing and bargaining with Teamsters 89 is so patently established, the obvious exclusion of certain of those employees merely because of their status as employees of the predecessor permeates the record. For example, predecessor employee Helen Doss is a strong, physically fit yard employee with years of service performing such work. Yet Voith concocted a reason to disqualify her. It is a reason that Doss credibly testified was false and Voith failed to call a witness to rebut her. (Tr. 3035)

Auto Handling employee Ricky Ragland had continuously performed yard work at the LAP for a number of contractors since 1991. (Tr. 3076) While not a young man, he still appeared to be strong and physically fit when he appeared as a witness at the hearing of this matter. Ragland was told the LAP would be idled for retooling, but he was told he would have an opportunity when operations resume, i.e. that "we would be back out there working." (Tr. 3078) He continued to perform the same type of yard work at the KTP in 2011. (Tr. 3078) Ragland applied for work with Voith as soon as he learned it had obtained the contract to perform yard work at the LAP. (Tr. 3078 – 3079) He was never contacted for work by Voith or Aerotek. (Tr. 3079) Ragland was an obviously well qualified, experienced and high seniority employee of the predecessor who did not merit even a phone call in the opinion of Voith and Aerotek.

Voith was motivated in refusing to hire and consider for hire predecessor employees to avoid the possibility of Teamsters representation because it feared the economic package that the Teamsters would seek, including wages and benefits commensurate with those contained in the

most recent agreement covering the performance of yard work at the LAP. Additionally, Voith's anti-Union motive as applied to Teamsters represented employees included the fear that such employees would not hesitate to collectively employ lawful economic weapons, including the right to strike, to advance their positions on wages and benefits. In furtherance of its unlawful motive, Voith sought to minimize and isolate the few Teamsters 89 predecessor employees who were hired in its second wave by demonizing these employees to co-workers, accusing them of contemplating a plot of sabotage. (G.C. Ex. 19) Voith failed to establish any basis for this unfounded accusation.

As part of the noted scheme, Voith made no attempt to contact Auto Handling management or any of the former employees about their interest in continuing to perform yard work at the LAP. This scheme resulted in the hiring of an alleged "representative complement" just 4 days after Ford formally awarded the work. Moreover, in just another 3 days after this hiring, Voith was able to schedule orientation of these employees, give assistance to the UAW in urging these employees to sign membership applications and recognize the UAW shortly thereafter on February 22. This entire scheme was accomplished and completed almost 7 weeks before the start of the yard work, which commenced only nominally on about April 9, and in earnest on about April 16. Indeed, these "yard workers" performed janitorial work for weeks before commencing yard work.

On March 1, Voith initiated a new hiring process with the use of a temporary service to fill the remaining yard positions. During this second hiring process with Aerotek, employees were told by Voith representatives that they would be represented by the UAW, that the work would be UAW and, as noted above, that the predecessor employees would be hired if Voith's hiring agent Aerotek were not afraid of the employee applicants striking. Voith offered no legitimate business justification or rationale for failing to contact or include the predecessor

employees in this hiring process or for the necessity of hiring the yard employees so quickly. Indeed, while Voith claims that it needed to ramp up its vehicle processing workforce quickly to accommodate Ford's projected schedule, it fails to articulate a coherent rationale for ignoring the well-qualified and experienced workforce already in place. The only rationale even alluded to for ignoring the existing workforce consists of self-serving "that's not the way we do things" assertions that fly in the face of logic when considered in the context of Voith's eventual need for a substantial number of qualified employees to perform vehicle processing work and the abysmal failure rate connected with its initial manning of the vehicle processing work with inexperienced janitorial employees. The Board has considered disparities in qualifications, particularly experience, in finding discriminatory motive in connection with the refusal to hire a predecessor's employees. See, e.g., *FiveCAP, Inc.*, 331 NLRB 1165, 1217 (2000), enfd. in relevant part, 294 F.3d 768 (6th Cir. 2002); cf. *Custom Leather Designers, Inc.*, 314 NLRB 413, 418j (1994)("The failure of [the successor] to hire experienced, unionized employees, whose work had proved satisfactory in the past, indicates at the very least that its selection process was deliberate and was aimed specifically at them because of their status as former [predecessor] employees.").

A similar hiring scheme was found violative in *New Concepts Solutions*, 349 NLRB 1136 (2007). That case involved yard work at a General Motors facility and employees who had been represented by the Teamsters for over 35 years. The employer's owners, unable to obtain concessions from the Teamsters, created a new company that was awarded the yard work. The employer utilized a city employment development agency to obtain employees and instructed the agency to exclude the former employees. After hiring an initial complement, the employer recognized and entered into contracts with two different labor organizations. Under these circumstances, the Board, in adopting the ALJ Decision that the employer's conduct was

unlawful, noted that the employer, instead of hiring any of the former employees, "initiated a frenzied hiring effort to recruit, screen, hire, train and 'unionize' a new work force in roughly 30 days." Further, the Board concluded that the employer thwarted the hiring of the predecessor's employees by failing to tell the former employees how and where to apply, by failing to tell the employment agency that the work had to be union and by telling the agency not to hire the former employees.

Here, similar to the situation in *New Concepts,* Voith engaged in a frenzied hiring effort. While it needed to hire janitors for work inside the LAP facility assuming it was awarded the next janitorial contract, it clearly used this potential need as "cover" for its initial hiring of a yard worker or vehicle processing workforce. In this manner, Voith was able to substantially staff up its yard work force with putative janitorial employees before it was inundated with applications from the existing work force of vehicle processing employees (yard workers). By the time it moved forward with its plan, Voith already had a multitude of applications from employees of the predecessor as well as contact information for many more. These applications and entreaties from the Teamsters to hire the existing workforce fell on deaf ears. Additionally, as was the case in *New Concepts*, Voith failed to tell the predecessor's employees how and where to apply for work and used an employment agency (in this case, Aerotek) to screen out as many former employees of the predecessor and other Teamsters as possible.

**B. Voith Violated Section 8(A)(1) And (5) Of The Act By Failing And Refusing To Recognize And Bargain With Teamsters 89 As The Exclusive Collective-Bargaining Representative Of The Bargaining Unit And By Unilaterally Establishing Initial Terms And Conditions Of Employment For Employees Of The Unit. (Issue 2 and 3)**

Voith's refusal to recognize and bargain with the Teamsters violates Section 8(a)(1) and (5) of the Act. Under the "successorship" doctrine, an employer that takes over the operations and employees of a predecessor employer is required to recognize and bargain with the union representing the predecessor's employees where: (1) there is a continuity between the old and

new entities, demonstrated by a showing that a majority of the predecessor employees comprise the new work force; (2) there is a continuity in the employing industry; and (3) whether the bargaining unit remains intact and is appropriate. *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987); *Burns Security Services*, 406 U.S. 272 (1972). With respect to the latter two factors, there is substantial continuity between Voith and Auto Handling. The businesses of both entities are the same; the work is the same and is being performed under similar working conditions; and the methods of operations are for the same customer and at the same location. The establishment of an offsite yard known as Renaissance to facilitate car carrier transportation and other movement of new vehicles is not significant. [11]/ As the Board noted in upholding the decision of the administrative law judge in *Tree-Free Fiber Co.*, 328 NLRB 389 (1999), the Supreme Court in *Fall River* "made it quite clear that the 'substantial continuity' analysis in successor cases is to be taken primarily from the perspective of the employees, i.e., 'whether those employees who have been retained will understandably view their job situations as essentially unaltered.'" *Tree-Free Fiber*, supra, citing *Fall River Dyeing*, supra, 482 U.S. at 43, quoting, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

There was about a 14-month hiatus before Voith began hiring employees, but operational pauses for longer durations have not precluded the finding of a successorship. *Pennsylvania Transformer Technology*, 331 NLRB 1147, 1150 (2000), enfd. 254 F.3d. 217 (2001) (two year hiatus); *Tree Fiber*, supra (16-month hiatus). Moreover, the significance of a hiatus is whether it impacts the employees' expectations of rehire. *Aircraft Magnesium*, 265 NLRB 1334 (1982). Here, for numerous years before Voith was awarded the yard work, the successor companies hired the predecessor's employees and recognized the Teamsters. Additionally, it was widely

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[11]/ Other such surface lots had been utilized as part of the LAP yard management operation in the past – characterized as a batch and hold operation, including during the predecessor's tenure at the LAP.

known that Ford's cessation of production was temporary just as it had occurred at multiple times in the past at the LAP since the 1950s. Thus, this approximately 14 month hiatus did not impact the continuity of the yard work operations.

With respect to the first factor, continuity of the workforce, when an employer attempts to evade a bargaining obligation by discriminatorily refusing to hire employees of the predecessor, the Board will presume that the employer would have employed the predecessor employees in its unit positions. *Planned Bldg. Services*, supra at 670; *American Press, Inc. v. NLRB*, 833 F.2d 621, 627 (6th Cir. 1987). *State Distributing Co.*, supra. As a result of such an unlawful hiring scheme, an employer forfeits its right to unilaterally change initial terms and conditions of employment. *Massey Energy Co.*, 354 NLRB 687 (2009); *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997). Accordingly, there is also substantial evidence that Voith violated Section 8(a)(1) and (5) of the Act by unilaterally setting initial terms and conditions of employment. This includes not only the setting of wages and benefits, but working conditions, hours of work, and specifically the subcontracting to Aerotek of historic unit work.

### C. The Refusal To Hire Or Consider For Hire Those Teamster Affiliated Applicants Who Were Not Employees Of The Predecessor Auto Handling Violates Section 8(A)(1) And (3) Of The Act Under The Analytical Framework Of *FES (Div. Of Thermo Power)*, 331 NLRB 9 (2000), Enforced, 301 F.3d 83 (3d Cir. 2002). (Issue 1)

*FES* expanded the General Counsel's burden in the failure to hire context by requiring proof that the employer was hiring and that the unhired applicants had relevant experience or training for the job. *FES*, supra, at 11 – 12. In *Planned Building Services*, supra, the Board departed from precedent regarding the standard used to evaluate failure to hire claims. The Board determined that it was pointless in successorship situations involving a refusal to hire to show that an employee was qualified to hold the same job he performed for the predecessor.

*Planned Building Services*, supra at 11-12. However, this case also involves discriminatees who were not employees of the predecessor Auto Handling, *FES* is the proper burden of proof for those Teamsters affiliated employees that Voith refused to hire or consider for hire.

As noted above, *Wright Line* is the analytical framework to be used in determining whether Voith refused to hire or consider for hire the employees of the predecessor, Auto Handling. However, this case involves an additional subset of discriminates: those Teamsters affiliated employees who submitted applications to Voith, but who were not hired or considered for hire. There are about 101 such applicants. A total of about 186 applications were submitted to Voith by Teamsters 89. The other 85 are those predecessor employees found on Attachment A to the Complaint. Many of these applicants also applied through Aerotek or the UAW. The pool of discriminatees also contains those predecessor employees on the Auto Handling seniority list for the LAP yard work. There are a total of about 166 predecessor employees on this list. Of that number, the same 85 noted above are predecessor employees who sent in applications to Voith. Thus, the total pool of discriminatees is about 267. (166 predecessor employees plus 101 Teamsters affiliated employees) The record shows that there are more than enough yard positions for these discriminatees when the entire yard work force comprised of yard management and batch and hold employees is considered.

The additional criteria of *FES* are easily satisfied in this case. As noted above, Voith and Aerotek's combined work force of yard employees had reached 272 employees by May 23, if not sooner and this number increased thereafter. (G.C. Exs. 58, 68, 69) Thus, there were positions for all the predecessor employees and Teamsters affiliated applicants. Additionally, the record is clear that Voith hired employees for yard positions without any prior experience in performing the work. Accordingly, even though many of the 101 Teamsters affiliated applicants had some related experience, it was not necessary for any of them to have specialized experience or

qualifications because Voith did not require it. Accordingly, it is respectfully submitted that the Acting General Counsel has met his burden with regard to the discriminatory refusal to hire the employees of the predecessor as well as the Teamsters affiliated employees.

**D. Aerotek Is An Agent Of Voith (Issues 3 and 10)**

The Complaint alleges that Aerotek is an agent of Voith within the meaning of Section 2(13) of the Act. The record fully supports this allegation. Section 2(13) of the Act provides: In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. It is well settled black letter law that agency status may be actual or apparent. In *Local 9431, Communications Workers of America, AFL-CIO and J. Rodman Stoker, an Individual,* 304 NLRB 446 (1991), the Board defined how both actual and apparent agency may be created:

> "According to the Restatement 2d, Agency, § 7, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, Agency, § 27. As with actual authority, apparent authority can be created either expressly or, as in this case, by implication." *Local 9431, Communications Workers of America,* supra at 446, fn 4.

The burden of proving agency status is on the party asserting that agency status exists. See, *Food Mart Eureka, Inc.*, 323 NLRB 1288, 1295 (1997); *United Federation of Teachers Welfare Fund*, 322 NLRB 385, 391 (1996); *Millard Processing Service*, 304 NLRB 770 (1991). It is well-settled that an individual or entity that is involved in the hiring process for an employer is imbued with actual authority in connection with such hiring and is an agent of that employer. *See Grimmway Farms*, 314 NLRB 73, 73-74, n. 6, 88, n. 25 (1994), *enf'd in relevant part*, 85 F.3d 637 (9th Cir. 1996) (providing information to applicants during hiring process sufficient to

establish agency status); *Enterprise Aggregates Corp.*, 271 NLRB 978, 979-980, n. 2 (1984) (employee responsible for hiring "at least" an agent under Section2(13)).

Here, the record evidence is indisputable that Aerotek and its managers, supervisors, and employees are agents acting on behalf of Voith in connection with the hiring of Voith's permanent and "temporary" workforce of yard employees. Thus, Account Manager Curry Martinez and the recruiters working at her direction were engaged by Voith to winnow through applications for the purpose of obtaining employees to perform yard management work as well as batch and hold work driving vehicles between the LAP and surface lots. Curry Martinez and her recruiters ensured that applicants passed required physicals, drug screens, and personality tests (for those employees hired to perform yard work as opposed to janitorial work). Applicants who passed these tests then interviewed with Voith representatives for the yard management positions – sometimes referred to in the record as permanent positions. Successful applicants for the batch and hold positions as determined by Aerotek – sometimes referred to in the record as temporary positions – were sent to the LAP as putative employees of Aertotek though they often worked alongside "permanent" Voith employees, shared common supervision, and performed the same work. It is in this capacity that Curry Martinez coerced and threatened an employee regarding employees' right to strike and acted at Voith's behest to exclude Teamsters 89 employees from the hiring process as detailed elsewhere in this brief. Accordingly, it is respectfully requested that the Administrative Law Judge find that Aerotek and managers and supervisors acting on its behalf, including Curry Martinez, are agents of Voith with regard to hiring.

### E. Sara Curry Martinez's Statements To Wayne Grether About Striking And Picketing Violate Section 8(A)(1) (Issue 10)

It is unlawful for an employer to demand that employees sacrifice their Section 7 rights to strike as a condition of their employment. E.g. *Standard Sheet Metal, Inc.*, 326 NLRB 411, 420-

21 (1998); *Romo Paper Products,* 208 NLRB 644 (1974). It is equally well settled law that an employer may not threaten employees about the consequences of exercising their Section 7 rights by stating that other employees were not hired due to a concern that they would strike or picket. *Standard Sheet Metal, Inc., supra.* Accordingly, when Curry Martinez, an agent of Voith, told job applicant Wayne Grether that she would only hire him with a "strong commitment" that he wouldn't strike, Voith violated the law. Likewise, Voith violated the law when Curry Martinez told Grether that she would hire "all of you" (i.e. the Teamsters affiliated employees) if she didn't fear that they would strike. Although Curry Martinez denies making this statement, Grether should be credited. Grether's recollection of Curry Martinez's statement, including the "Human Resource speak" detail of asking for a "strong commitment" rings true. Any assessment of Curry Martinez's credibility must take into account the fact that she was essentially caught "red handed" fabricating her sworn testimony at the hearing of this matter when she denied eliminating applicants from consideration based on anything in their applications apart from a felony conviction when an e-mail clearly demonstrated that she eliminated a number of Teamsters affiliated applicants from consideration because of perceived gaps in their work history. Even if the Court is disinclined to believe that Curry Martinez intentionally fabricated her testimony with regard to the April 9 statements, certainly Curry Martinez would be less likely to recall one of hundreds of such conversations that she must have had with applicants for the LAP yard work than Grether, who had one conversation and was concerned about securing work. Further, it is of no consequence that Voith denied instructing Aerotek to exclude applicants who were employees of the predecessor or otherwise affiliated with the Teamsters or who refused to give up their right to engage in protected Section 7 activity since Aerotek was Voith's agent and acted with apparent authority on its behalf.

### F. Bret Griffin's Threat To Discharge Brenda Helm For Not Wearing A UAW Safety Vest Violates Section 8(A)(1) And Was Not Cured (Issue 9)

It is unlawful for an employer to threaten employees for engaging in protected Section 7 activity such as refraining from showing allegiance to a given labor union. E.g. *Bellsouth Telecomunications, Inc.*, 346 NLRB 637 (2006). Voith violated the Act on May 31 when it issued new safety vests bearing the UAW logo and Brett Griffin told Brenda Helm that she could go home if she refused to wear the vest. It should have been clearly understood that Helm's only objection to wearing the vest was the UAW logo, since she had never before refused to wear a safety vest. The statement that Helm could "go home" if she refused to wear the vest was a threat of discharge since it suggested that her refusal to wear the vest was inconsistent with her continued employment with Voith. *American Medical Response of Connecticut*, 356 NLRB No. 155, 36 (2011). The clear implication was that she could not return to work until she agreed to wear the vest and show loyalty to the UAW. The circumstances presented in the instant case are far more compelling than those in *Bellsouth Telecommunications* since the wearing of the UAW logo was compelled at a time when the UAW did not legitimately represent the unit employees. Although employees were allowed to wear shirts which showed their Teamster affiliation, in contrast to the UAW vests, they were not *required* to wear the shirts under threat of discipline.

The fact that Voith subsequently reversed itself and told employees that they did not have to wear the UAW vest is insufficient to cure the initial unfair labor practice under the Board's well-established standards. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). In *Passavant*, the Board set forth its criteria for curing past unfair labor practices. The Board found that repudiation must be (1) timely, (2) unambiguous, (3) specific to the coercive conduct, and (4) free from other prescribed illegal conduct. In the instant case, Voith did not cure its violation of Section 8(a)(1) by simply issuing a new policy making the UAW vests optional. In order to cure its violation, Voith was obligated, at a minimum, to clarify for its employees that they have

a Section 7 right to refrain from engaging in union activity and that this included refraining from wearing such vests. Moreover, the revocation of the unlawful rule in this case was not free from other illegal conduct. Among other violations discussed in this brief, Voith continued to illegally withhold recognition from the Teamsters 89 and continued to unlawfully recognize the UAW as its employees' collective bargaining representative.

### G. Bret Griffin's Instructions To Employees To Report Union Activities Of Fellow Employees Violates Section 8(A)(1) (Issue 9)

An employer unlawfully discourages protected Section 7 union activity when it tells employees to report that activity to management. The Board has held this kind of directive to be unlawful since it encourages employees to identify union supporters to management – even if it is couched in terms of reporting "threats". *Tawas Industries*, 336 NLRB 318, 322 (2001). Voith violated the Act on June 1 when Griffin instructed employees to tell management if they felt "threatened", "uncomfortable" or "unsafe" about a union. As an initial matter, there is no indication, whatsoever, that any employees were threatened by a union representative, particularly a Teamsters representative, so it is unclear why Voith would suddenly be concerned that employees might feel "unsafe." Second, Griffin's statements must be placed in their proper context to truly understand their implication. Certainly, no one from management advised employees to report if they felt uncomfortable about unions when Voith's supervisors were facilitating their interactions with the UAW – only after Region 9 of the NLRB suggested that the Teamsters also had rights in this scenario did Voith's purported concerns surface about employee rights vis-à-vis union organizing. Most significantly of all, however, Griffin admitted that he told employees that if they had concerns about unions, in addition to coming to management, they could go to the UAW. This statement clearly demonstrated Voith's belief that the activities of the Teamsters union were the only union activities that employees should have

cause to be concerned about – as employee concerns about threats by the UAW would obviously not be best handled by the UAW.

### H. Brett Griffin's Denial Of Access To The Teamsters, While Permitting Access To The UAW, Violates Section 8(A)(1) (Issue 9)

Inasmuch as Teamsters 89 was the rightful representative of the successor bargaining unit in this case (see discussion, *supra*), Voith violated the Act on June 1 when Griffin barred Teamster representatives from the premises – not even allowing them through the gate. See, e.g. *C.C.E., Inc.,* 318 NLRB 977 (1995). The icy treatment given the Teamster representatives should be contrasted with the multiple accommodations shown to the UAW discussed *infra*. Voith's repeated and demonstrated willingness to allow the UAW into its areas to address employees show that Voith had no valid reason for excluding the Teamsters officers and denying them similar access.

### I. The Statements By Timothy Bauer And Doug Couch To Applicants And Employees About Their Obligations To The UAW Violate Sections 8(A)(1) And (2) (Issue 6)

Voith violated the Act in March when Bauer told both Beyers and Johnson that they would be represented by the UAW if hired for yard work at the LAP. *Cf. Kessel Food Mkts., Inc.*, 287 NLRB 426, 429 (1987)(holding that when an employer tells applicants that the company will be nonunion, it is telling them that it intends to discriminate in order to ensure nonunion status), *enforced*, 868 F.2d 881 (6th Cir. 1989), *cert. denied*, 493 U.S. 820 (1989). Similarly, Voith violated the Act on April 10 when Doug Couch told employees that they would be represented by the UAW and receive UAW insurance. These statements are particularly damning to Voith when one considers that Voith supposedly had withdrawn recognition of the UAW the day before. Although Couch denied making such a statement or knowing what "UAW" insurance is, his self-serving statements should not be credited. The UAW may not be an insurance provider, but clearly it bargains for and requires employers to provide insurance to

its unit employees. This is certainly what Couch meant when he referred to "UAW insurance" and how employees would have understood his statement. The credibility of the employee witnesses who testified to Couch's statement is bolstered by the testimony of multiple witnesses that Couch and his surrogates were also distributing literature which praised the UAW during the orientation.

### J. Voith's Assistance To The UAW On February 20, April 11 And April 16 And The UAW's Acceptance Thereof, Violate Sections 8(A)(1) And (2) And 8(B)(1)(A), Respectively (Issues 4, 6 and 7)

An employer violates Section 8(a)(2) of the Act when it assists a union in its efforts to organize employees and a union violates Section 8(b)(1)(A)of the act when it accepts this assistance. *Alton Belle Casino*, 314 NLRB 611(1994); *Windsor Castle Health Care Facilities*, 310 NLRB 579 (1993); *Safeway Stores*, 276 NLRB 944, 954 (1985); *Franklin Convalescent Center*, 223 NLRB 1298, 1306-11 (1976). Voith and the UAW's conspiracy to coercively unionize Voith's employees manifested itself on February 20, April 11 and April 16. It is particularly striking to note the level of assistance provided to the UAW by Voith despite Voith's "no solicitation/distribution" policy contained in its own handbook. See *In re Duane Reade, Inc.*, 338 NLRB 943 (2003).

On February 20, Voith assisted the UAW in soliciting union authorization cards while new janitorial employees, including Keith Robinson, Cody Jaggers, Reginald Farell and Teresa Ceesay were attending orientation. When it came time for a lunch break the supervisors led the new employees to the cafeteria. Although the new employees may, technically, have been permitted to take their breaks elsewhere, they certainly would not have known this on their first day and naturally would have followed their supervisors in this unfamiliar environment. Cody Jaggers' testimony that one of the supervisors told the new hires that he (the supervisor) was "not allowed" to accompany them into the cafeteria clearly demonstrates that Voith was

aware that the UAW was going to use the lunch break as an opportunity to solicit union cards. The staged nature of the UAW's card signing efforts was further demonstrated by the well organized, assembly line atmosphere that the new employees found in the cafeteria as they were greeted by a number of UAW officials who methodically followed them around and pressured them to sign cards.

The UAW's sales pitch to sign authorization cards included unlawful threats. *Communications Workers Local 1101 (New York Telephone)*, 281 NLRB 413 (1986); *Rockville Nursing Center*, 193 NLRB 959, 976-77 (1971). According to Jaggers, the UAW representatives told the new hires that they might lose their jobs if they didn't sign the cards. Farrell testified similarly – that the UAW officials informed them that signing the cards was mandatory and that they might not be working if they failed to do so. While the pressure exerted on the new employees was subtle in some instances and more direct in others, the intense pressure exerted by the UAW representatives, combined with the implied endorsement of Voith's management, led to the implausible result of every single member of this diverse group of new employees signing UAW authorization cards.

Again on April 11, Voith played a significant role in facilitating the UAW's efforts to coerce employees into signing authorization cards. A number of Voith's supervisors suddenly walked away when Teddy Hunt came up to address the new employees about signing UAW cards. Flanagan's version of events, i.e. that Hunt first spoke to the supervisors prior to addressing the employees, was confirmed by Hunt. New employees who witnessed Hunt talking to the supervisors prior to talking to them would have logically assumed that Hunt, and whatever he had to say, carried management's endorsement. *Ryder Systems*, 280 NLRB 1024, 1026 (1986); *Vernitron Electrical Components, Inc.*, 221 NLRB 464, 465 (1975). Although the estimates varied as to how far away the supervisors walked when Hunt addressed the new

employees, the vast majority of witnesses testified that the yard was largely quiet at the time of the incident. Significantly, Hunt, who would have no incentive to fabricate this point, estimated that the supervisors were only 10 feet away. It is undisputed that production had not started. Thus, it is reasonable to conclude that the supervisors could have clearly heard much of what Hunt was saying to the new employees – especially since he was loud and agitated by most accounts.

When the supervisors failed to intervene to stop Hunt's belligerent behavior, the new employees would have reasonably concluded that management supported what Hunt was saying to them. Flanagan testified credibly that the supervisors demonstrated their awareness of what Hunt was saying by pointing out the Teamsters in the crowd to one another as Hunt ranted about employees needing to sign UAW cards to continue working for Voith. The accounts of the supervisors, i.e. that they allowed perfect strangers to address brand new employees without demonstrating even the mildest curiosity about what they were saying simply defies belief and common sense. Frank, in particular, lacked credibility since he testified to such a markedly different version of events at the hearing of this matter than he did in his sworn affidavit.

Voith again facilitated the UAW's card signing drive a few days later on April 16 or 17, when supervisors such as Tom Baker drove them to Voith's building and told them to attend a meeting being conducted by several UAW officials. Although witnesses for Voith and the UAW testified that management was unaware of the meeting, again, it defies belief to conclude that management would have been totally unaware of such a large scale meeting of all of its employees -- lasting over 20 minutes – taking place at its facility. Again, the employee witnesses testified unanimously that they were not on a regularly scheduled break at the time of the meeting. *Windsor Place Corp.*, 276 NLRB 445, 448-49 (1985). Credible and detailed witness testimony by Patti Murphy supports the conclusion that the UAW used this meeting to

encourage employees to sign additional authorization cards. The timing of the meeting, right after Voith withdrew recognition of the UAW, logically leads to the conclusion that the meeting's purpose was to regain recognition with a new showing of interest.

### K. Voith's Grant Of Recognition To The UAW On February 22 And May 1 And The UAW's Acceptance Thereof Violates Sections 8(A)(1) And (2) And 8(B)(1)(A), Respectively (Issue 5 and 8)

As discussed, *supra., s*ince Voith unlawfully refused to hire the predecessor's employees, there is a presumption that the Teamster's status as the majority representative continued, thus rendering unlawful Voith's recognition of the UAW at a time when the Teamsters Union had not abandoned its claim as the employees' bargaining representative. *New Concepts Solutions, supra.* Further, it is well settled that a union without majority status violates Section 8(b)(1)(A) by accepting recognition and, indeed, that there "could be no clearer abridgement of Section 7 of the Act.". *ILGWU v. NLRB*, 366 U.S. 731, 737-38 (1968). There are several additional factors that render Voith's recognition of the UAW on February 22 unlawful. First, Voith had clearly not commenced the normal business of performing yard work at that time and did not employ a "substantial and representative" complement of its projected workforce. *Cf. Klein's Golden Manor*, 214 NLRB 807, 815 (1974); *Paramus Ford, Inc.*, 351 NLRB 1019, 1026 (2007); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). In the absence of either of these requirements, a grant of recognition is unlawful. *A.M.A. Leasing*, 283 NLRB 1017, 1023 (1986). Although 50 employees had been hired at the time of the recognition, all were hired as janitors and none were performing – or even training to perform – yard work at the time of the recognition. Indeed the 39 employees who had been hired as janitors were not even informed that they would be performing yard work until after the grant of recognition to the UAW. Yard operations did not actually commence until April 9, when nominal operations commenced and April 16, when normal operations commenced.

Secondly, the recognition was based on cards that were tainted by coercion – there was not an uncoerced majority. *Fountainview Care Center*, 317 NLRB 1286, 1289 (1995); *Famous Castings, Corp.*, 301 NLRB 404, 408 (1991); *Amalgamated Local 355 v. NLRB*, 481 F.2d 996 fn. 8 (2d Cir. 1973). For the reasons discussed above in the analysis of the February 20 incident, it is clear that the UAW used threats, coercion, and Voith's assistance to obtain the cards relied upon in obtaining recognition from Voith – cards which were verified by UAW Bargaining Chairman Stone's sister. Recognition is not valid under those circumstances. Voith's withdrawal of recognition on April 9 did not remedy the unlawful recognition since the withdrawal was not timely, unambiguous, or specific in nature and Voith did not publicly disavow the prior unfair labor practice of granting recognition. *Passavant, supra.* Furthermore, as demonstrated throughout this brief, Voith's action in temporarily withdrawing recognition from the UAW was far from being untainted by other unfair labor practices.

The previous improper recognition of the UAW had not been properly cured at the time of the second recognition on May 1, rendering the second recognition invalid as well. As with the February 22 recognition, the May 1 recognition was rendered invalid by the absence of an uncoerced majority. Many of the cards that were improperly secured in support of the February 22 recognition were again relied upon for the May 1 recognition. Additionally, the cards secured on April 11 were similarly tainted by threats and coercion on the part of the UAW agents and by the UAW's reliance on Voith's assistance. Accordingly, both the February 22 and May 1 grants of recognition to the UAW and the UAW's acceptance thereof, constitute unfair labor practices.

**L. Voith's Affirmative Defenses**

In its Answer to the Complaint, Voith advances four affirmative defenses for its conduct. It first asserts that it is not a successor employer because the requisite continuation of the employing industry does not exist. (G.C. Ex. 1(jj)) Voith makes three principal claims in

support of this assertion. One appears to be a hiatus argument which also attaches some significance to the termination of Auto Handling's service contract with Ford at the time that the plant was idled in December 2010. Voith claims additionally it is not a successor because it and Auto Handling parent company Jack Cooper Transportation became competitive bidders for "certain limited aspects of the car hauling work performed by Auto Handling under its prior terminated contract." (G.C. Ex. 1(jj)) Finally, Voith asserts that the fact that all vehicle logistics involving the LAP, including car hauling work that does not involve this Unit or these employees, has been bid differently in 2012 than it previously was bid, and that this "parsing" of certain parts of the LAP vehicle logistics spanning far beyond yard work somehow compels a conclusion that there is a lack of "substantial continuation of the employing entity."

Voith's second affirmative defense is a claim that Voith's contract with Ford constitutes an accretion to the existing janitorial bargaining unit under the terms of a national agreement between Voith and the UAW. Voith claims alternatively, in its third affirmative defense, that its contracts with the UAW at other Ford locations were intended to extend to and did in fact extend to car hauling work performed by Voith at the LAP. As for its fourth affirmative defense, Voith asserts that if the "car hauling" (this should be read as yard or vehicle processing work) work at the LAP is an appropriate stand-alone unit then the UAW has, from its inception, maintained and/or obtained majority status which obligated Voith to recognize and bargain with the UAW or extend the terms of its national contract with the UAW.

The fourth affirmative defense is amply addressed elsewhere in this brief. Suffice it to say that it is quite clear that the UAW has never obtained an untainted and uncoerced majority in the Unit of yard employees. Voith's first affirmative defense is also addressed at length elsewhere in this brief. The fact that the contract between Ford and Auto Handling may have terminated on the idling of the LAP in December 2010 is irrelevant. The fact that Voith and

Auto Handling's parent company became competitive bidders for the work is similarly irrelevant. The alleged "parsing" of the Unit work involved herein never happened. The yard work that Auto Handling performed in 2010 was substantially identical to the work that Voith performs in 2012. Teamsters 89 has represented this separate and distinct Unit since at least the mid 1950s at this location. Yes, the production of a new vehicle that is a high volume seller caused some minor changes in how the work is performed. Nevertheless, the work remains substantially the same, is performed substantially at the same location, and for the same customer as before. Even several of the supervisors employed by Auto Handling and then by Voith are the same. See, *Tree-Free Fiber*, supra. The Board has approved a finding of successorship when there have been much more significant changes in the business enterprise than found here. See, e.g., *Tree-Free Fiber*, supra, at 399 (continuity found even though scale of the successor business was substantially smaller than that of the predecessor)

Voith's final two affirmative defenses appear to be somewhat interrelated theories that the bargaining unit of yard employees at the LAP constitute an accretion to Voith's existing units – amazingly even to wildly different types of units. Accretion of a group of employees to an existing unit without the opportunity to vote is permitted for the purpose of preserving industrial stability by allowing adjustments in bargaining units to conform to new conditions without requiring an election each time new jobs are created. *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1271 (2005). Accretion is disfavored, however, because it permits employees to be added to a unit without affording them the opportunity to vote on representation. *Frontier Telephone*, supra, at 1271. Accordingly, the Board follows a restrictive policy in finding accretions to existing units. *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001). The Board finds a valid accretion only when the additional employees have little or no separate group identity and cannot constitute a separate appropriate unit. Additionally, the new employees must

share an overwhelming community of interest with the existing unit to which they are being accreted. *Safeway Stores*, 256 NLRB 918 (1981); *Frontier Telephone*, supra, at 1271.

This case, the yard employees can obviously constitute a separate appropriate unit. The yard employees at the LAP have been recognized as such a unit for nearly 60 years. Moreover, they perform a set of distinct and identifiable tasks which begin when new vehicles leave the manufacturing facility and end when the vehicles are transported into the logistical stream toward automobile dealers by car carriers, single drivers, and by rail. It is impossible to conceive any set of circumstances in which it would be appropriate for the yard employees to be accreted into the existing unit of janitorial employees at the LAP. The two groups possess entirely different types of skills and perform functions under different daily supervision. There is no integration of the type of work the two groups perform; their working conditions are distinctly different as one group works indoors while the other works outdoors in all kinds of weather. There is no evidence of regular physical contact between the two groups. Finally, there is no bargaining history that would compel such a result and the only significant employee interchange was occasioned by Voith carrying out its scheme. See, *Frontier Telephone*, supra at 1271. Therefore, it is respectfully requested that Voith's second affirmative defense be disregarded as it is wholly lacking in merit.

The third affirmative defense appears to bring into the accretion equation a reliance on after acquired clauses. *Kroger Co.*, 219 NLRB 388 ( 1975) The Board determined in *Kroger* that such clauses are contractual commitments by an employer to forego its right to resort to the Board's election process in determining a union's representation status in any after acquired locations. However, even when an after acquired clause is applicable to a particular "new" location and here it is not, recognition is still unlawful in the absence of proof of a union's majority status. *Kroger Co.*, supra, at 389; *Alpha Beta Co.*, 294 NLRB 228, 229 (1989) (fn.

omitted); see also, *Safety Carrier, Inc.*, 306 NLRB 960 (1992) (employer grant of recognition to union at newly acquired location without proof of majority status and with unlawful employer assistance in obtaining authorization cards). Therefore, it is again respectfully requested that Voith's third affirmative defense be disregarded as wholly lacking in merit.

## V. CONCLUSION:

This case is simple despite over 3,000 pages of testimony, numerous witnesses and a multitude of documents. Voith desired the LAP yard or vehicle processing work. To obtain this bid award Voith had to submit a bid with a lower labor cost component than that of its competitors. To achieve this lower cost component, Voith desired to orchestrate a situation wherein its yard employees would be represented by a shamefully compliant UAW at Tier 2 UAW wages, a historically substandard wage and benefit package for employees who have performed this work for over half a century. Voith could have hired its yard workforce on a non-discriminatory basis, including considering for hire the experienced workforce already in place. However, Voith was unwilling to do so because it recognized that hiring the predecessor's workforce would require it to recognize and bargain with Teamsters 89, and to deal with Teamsters 89 in the context of its historically much higher wages and benefits for the Unit than the labor cost economics that constituted the foundation of Voith's bid to Ford for the work. As Voith President Donald Morsch wrote on June 15, "We cannot and will not accept representation by the Teamsters, as it becomes economically infeasible to perform to the contract and puts us in a long term liability (Teamster's pension plan)." (Tr. 2123, G.C. Ex. 107)

Voith could have followed the law. Voith could have bargained in good faith with Teamsters 89 in an attempt to reach an accommodation on wages and benefits. However, Voith was unwilling to bargain in good faith, unwilling to risk that Teamsters 89 and the employees that it represented for many years might be willing to use the economic weapons, including the

right to strike, that the laws of this country provide to employees who seek collectively to enhance their wages, hours, or working conditions -- in this case by seeking to maintain wages and benefits to keep them above the poverty level. After all, Voith's representatives were fully aware that contractor Auto Port's 2008 pyrrhic and short-lived stint as the service provider for LAP vehicle processing was doomed because of its failure to reach agreement on terms with Teamsters 89. For this reason, Voith, with the complicity of Ford and the UAW, conspired to keep news that they were the recipient of the yard work secret until such time as it could amass applicants who had no connection to Teamsters 89, and it could be assured that a majority of its employees would not be former employees of the predecessor employer, Auto Handling. The conspiracy was furthered by Voith's aid and assistance to the UAW in granting unlimited access to solicit coerced authorization cards and by extending recognition to the UAW at a time when Voith was not even performing yard work at the LAP.

Moreover, Voith and the UAW sought to demonize the few Auto Handling Teamsters who had been hired by asserting that Teamsters 89 recognition would result in the discharge of non-Teamsters and by blaming Teamsters 89 affiliated employees by publishing to their co-workers an unsubstantiated and false claim that they intended to engage in malfeasance in connection with the performance of their duties. Voith asserts that it was not only permitted to engage in the hiring pattern that it followed, but that this pattern of hiring and subsequent recognition of the UAW was required by law. Voith reaches this conclusion by several different routes involving supposed accretion and contract extension theories; theories concocted by an attorney who was not even on the scene when Voith took its unlawful action, nor when it responded to the charges. To reach the explanation that Voith proffers one has to go through so many improbable steps, so many leaps of logic, and so much baloney, that the end result is an upside down world that would make Author Lewis Carroll proud. In sum, deciphering a way

through Voith's morass of a defense for its blatantly unlawful conduct is truly an "Alice's Adventures in Wonderland," and a "Through the Looking Glass," journey into the fantastic. The simple explanation, the explanation that makes sense, is that Voith was unwilling to risk the economics of its bid by lawfully considering for hire and hiring the employees of its predecessor. Therefore, it sought by any means possible to eliminate their consideration: hiring a small number (a number incapable of bringing economic pressure to bear) only to put a gloss of pretext on its unlawful conduct and then hounding that small number, in part by characterizing them as potential saboteurs, to keep them compliant.

For the reasons discussed above, Counsel for the Acting General Counsel requests that the Administrative Law Judge find that Voith and the UAW violated Section 8(a)(1)(2)(3), and (5) of Act and Section 8(b)(1)(A) of the Act, respectively, as alleged and fashion an appropriate remedy in this case. The recommended conclusions of law are set forth below:

1. Respondent Voith violated Section 8(a)(1) of the Act by threatening to discharge employees for refusing to wear a safety vest identifying their union representative as the UAW when the UAW did not represent an uncoerced majority of employees in the bargaining unit.
2. Respondent Voith violated Section 8(a)(1) of the Act by coercively instructing employees to report other employees' union activities.
3. Respondent Voith violated Section 8(a)(1) of the Act by denying representatives of the lawful bargaining representative of the Unit, Teamsters 89, access to Unit employees in its work areas, while permitting such access to representatives of the UAW, which does not represent an uncoerced majority of the Unit.
4. Respondent Voith, acting through its agent Aerotek, violated Section 8(a)(1) by threatening an employee that the employee would only be hired if the employee

promised to refrain from engaging in any strike or picketing activity, and further violated Section 8(a)(1) of the Act by coercively advising the employee that other members of Teamsters 89 would be hired if Voith did not fear that they would engage in lawful Section 7 activity; striking or picketing.

5. Respondent Voith violated Section 8(a)(1) and (3) of the Act by implementing a plan to hire employees and establishing a hiring procedure and engaging in other conduct designed to exclude/or limit the hiring of employees of the predecessor employer and other applicants affiliated with Teamsters 89 and has thereby failed and refused to hire or consider for hire the employees of the predecessor and other Teamsters affiliated applicants because of their support for Teamsters 89.
6. Respondent Voith violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with Teamsters 89 as the exclusive collective-bargaining representative of the bargaining unit and by unilaterally establishing initial terms and conditions of employment for employees of the Unit.
7. Respondent Voith violated Section 8(a)(1) and (5) of the Act by unilaterally contracting with Aerotek, Inc. to perform bargaining unit work without prior notice to Teamsters Local 89 and without offering the Union an opportunity to bargain with respect to this conduct and its effects.
8. Respondent Voith violated Section 8(a)(1) and (2) of the Act by about February 20, April 11, and April 16, 2012, rendering unlawful assistance and support to the UAW by allowing the UAW to meet with employees during their orientation and during work time for the purpose of encouraging employees to sign membership applications and check off authorizations.

9. Respondent Voith on February 22, and May 1, 2012, respectively, unlawfully granted recognition to the UAW as the exclusive bargaining representative of the Unit in violation of Section 8(a)(1) and (2) of the Act at times when the UAW did not represent an uncoerced majority of the Unit and with regard to recognition extended on February 22, at a time when Voith had not commenced normal operations and therefore did not employ in the Unit a representative segment of its ultimate employee complement.
10. Respondent Voith violated Section 8(a)(1) and (2) of the Act by: Advising an employee that if the employee was hired the employee would have to become a member of the UAW, such conduct independently violating Section 8(a)(1); by telling an employee that new hires were represented by the UAW and would receive UAW health insurance, such conduct independently violating Section 8(a)(1);
11. Respondent Voith violated Section 8(a)(1) and (2) of the Act by advising an employee that if the employee was hired the employee would have to become a member of the UAW and by telling an employee that new hires were represented by the UAW and would receive UAW health insurance.
12. Respondent UAW received and accepted assistance and support from Respondent Voith on about February 20, April 11, and April 16, 2012, which allowed Respondent UAW to meet with Respondent Voith's employees for the purpose of encouraging employees to sign membership applications and check off authorizations in violation of Section 8(b)(1)(A) of the Act.
13. Respondent UAW obtained recognition from Respondent Voith on February 22, and May 1, 2012, respectively, as the exclusive collective-bargaining representative of the Unit at times when it did not represent an uncoerced majority in the Unit and, with

respect to the February 22, recognition, at a time when Voith had not commenced normal operations and therefore did not employ in the Unit a representative segment of its ultimate employee complement, in violation of Section 8(b)(1)(A) of the Act.

**VI. REMEDY:**

Counsel for the Acting General Counsel respectfully submits that Respondent Voith should be required to instate all of the named discriminatees in attachment A as well as those who are similarly situated to bargaining unit positions and to restore the terms and conditions of employment of its employees to those in effect at the time of the closure of the LAP and hiatus in operations. These terms and conditions should be applied to all discriminatees herein, including those similarly situated to the individuals named in attachment A, and to the employees employed by Respondent Voith in the Unit as required by the Board in *Love's Barbeque*, 245 NLRB 78 (1979). Additionally, it is respectfully requested that all discriminatees be made whole for any losses they have suffered.[12]/ In this regard, Counsel for the Acting General Counsel seeks an order requiring Respondent to reimburse any back pay recipient for amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. Further, Counsel for the Acting General Counsel seeks, as part of its remedy for all allegations calling for backpay, that Respondent be required to submit the appropriate documentation to the Social Security Administration so that when back pay is paid, it will be allocated to the appropriate periods.

In addition to the above, it is respectfully submitted that Respondent Voith be required to recognize and bargain in good faith with Teamsters 89 as the exclusive collective bargaining representative of the Unit, and to immediately rescind all unilateral changes to wages, hours,

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[12]/ This make whole remedy extends to compensating for the difference in wages and benefits provided by Respondent Voith and those it was lawfully required to provide, those employees whom Respondent Voith actually did hire and who would have been hired for positions after all of the named discriminatees of the predecessor, those on the predecessor's seniority list, and the other similarly situated Teamsters 89 affiliated employees.

working conditions, and all other terms and conditions of employment, including rescinding the contracting out of Unit work to Aerotek. It is requested that Respondent Voith be required to cease recognizing the UAW as the exclusive collective bargaining representative of the Unit. Finally, it is requested that the UAW cease accepting unlawful assistance and support from Respondent Voith, that Voith cease offering such assistance and support, and that the UAW be required to disclaim interest in the Unit.

Moreover, as part of the remedy for the unfair labor practices alleged above, the Acting General Counsel seeks an Order requiring Respondent to hold a meeting or meetings, during work time, scheduled to ensure the widest possible employee attendance, at which a Notice to Employees prepared by the undersigned will be read to employees in English and in any other language deemed appropriate, by a responsible management representative of Voith or, at Voith's option, by a Board agent in the presence of Voith's responsible management representative. A representative of Teamsters 89 should be allowed to be present during any meeting or meetings where the Notice is read.

Lastly, the Acting General Counsel seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Attached hereto as Attachments A and B are proposed Notices to Employees for your consideration.

Dated at Cincinnati, Ohio this 7th day of December 2012.

Eric A. Taylor
Counsel for the Acting General Counsel

Jonathan D. Duffey
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**PROPOSED NOTICE:**

Counsel for the Acting General Counsel urges the Administrative Law Judge to order Respondent Voith and Respondent UAW to post and mail the proposed Notices to Employees, attached hereto as Attachments A and B, respectively, as part of the remedy in this case.

**Attachment A:**

THE NATIONAL LABOR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other aid or protection;
To refrain from any or all of these things.

In recognition of these rights, **WE HEREBY NOTIFY** our employees that:

**WE WILL NOT** tell you that your employment is dependent on becoming a member of United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO or its Local Union No. 862 (UAW).

**WE WILL NOT** assist the UAW by allowing them to use our facilities to solicit our employees to become members of the UAW while our employees are on work time.

**WE WILL NOT** tell you that you have UAW representation and that you will receive UAW health insurance when the UAW does not represent a majority of our employees.

**WE WILL NOT** threaten to fire you if you do not wear a safety vest with the UAW logo.

**WE WILL NOT** tell you, or instruct our hiring contractor, Aerotek, Inc., or any other hiring contractor, to tell you that you cannot work for us unless you waive your right to engage in lawful picketing.

**WE WILL NOT** instruct you to report union activity to us.

**W E WILL NOT** refuse to hire or otherwise discriminate against applicants, including former employees of the predecessor employer, Auto Handling, Inc., a wholly owned subsidiary of Jack Cooper Transport Company (Cooper Transport), to avoid bargaining with General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters (Teamsters).

**WE WILL NOT** assist or recognize and bargain with UAW as the collective-bargaining representative of our employees who are employed by us at the Ford Motor Company Louisville Kentucky Assembly plant, performing vehicle processing including staging, shuttle and yard/inventory work, unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of these employees.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

**WE WILL** withdraw and withhold all recognition from the UAW as the collective-bargaining representative for our employees at the Ford Motor Company Louisville Kentucky Assembly plant performing vehicle processing (including staging, shuttle and yard/inventory work), unless and until the UAW has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative for these employees.

**WE WILL** notify the Teamsters, in writing, that we recognize it as the exclusive collective-bargaining representative of our employees.

**WE WILL**, upon request, recognize and bargain with the Teamsters as the exclusive representative of our employees employed by us at the, performing vehicle processing including vehicle staging, shuttle and yard/inventory work, concerning their terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

**WE WILL**, at the request of the Teamsters, rescind any departures from the terms and conditions of employment that existed immediately prior to our award of the predecessor Cooper Transport's vehicle processing operations, retroactively restore pre-existing terms and conditions of employment, including, but not limited to, wage rates and benefits plans, until we negotiate in good faith with the Teamsters to agreement or to impasse.

**WE WILL** offer, in writing, immediate and full employment to the employees of the predecessor Cooper Transport named on the Attachment, in the order of our receipt of their employment applications, without prejudice to their seniority and other rights and privileges, discharging if necessary employees previously hired to make room for them, and make them whole for any loss of earnings they may have suffered by reason of our unlawful failure to hire them.

**WE WILL** offer, in writing, immediate and full employment to the other applicants whose applications were submitted to us by Teamsters 89 for vehicle processing work at our Ford Motor Company Louisville Kentucky Assembly plant, in the order of our receipt of their employment applications, without prejudice to their seniority and other rights and privileges, discharging if necessary employees previously hired to make room for them, and make them whole for any loss of earnings they may have suffered by reason of our unlawful failure to hire them.

**WE WILL** rescind our contract with Aerotek, Inc.

VOITH INDUSTRIAL SERVICES, INC.
(Employer)

Date: _____ By: _____
(Responsible Official) (Title)

**Attachment B:**

THE NATIONAL LABOR RELATIONS ACT GIVES ALL EMPLOYEES THESE RIGHTS:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other aid or protection;
To refrain from any or all of these things.

In recognition of these rights, **WE HEREBY NOTIFY** employees that:

**WE WILL NOT** accept assistance or support from Voith Industrial Services, Inc. in order to solicit employees to sign membership applications and dues check off authorizations forms.

**WE WILL NOT** act as the exclusive collective-bargaining representative of Voith Industrial Services, Inc.'s employees who are employed at the Ford Motor Company Louisville Kentucky Assembly plant, performing vehicle processing including staging, shuttle and yard/inventory work unless and until we are certified by the National Labor Relations Board as the exclusive collective bargaining representative of these employees.

**WE WILL NOT** in any like or related manner, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, AFL-CIO AND ITS LOCAL UNION NO. 862
(Union)

Date: _____ By: _____
(Responsible Official) (Title)

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## CERTIFICATE OF SERVICE

December 7, 2012

I hereby certify that I served the attached Counsel for the Acting General Counsel's Brief to the Administrative Law Judge on all parties by electronic mail to the following addresses listed below:

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