Aladdin Gaming, LLC *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 28–CA–18851 and 28–CA–19017

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 28, 2004, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed answering briefs; the Respondent filed a reply brief to the General Counsel's answering brief; the Charging Party filed cross-exceptions and a supporting brief; the Respondent filed an answering brief to the Charging Party's cross-exceptions; and the Charging Party filed a reply brief in support of its cross-exceptions.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified.

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

[2] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by (1) interrogating employees about their union membership and other activities; (2) promulgating and enforcing an overly broad and discriminatory rules prohibiting its employees from wearing union buttons and from talking about the Union and limiting the amount of off-duty time employees could spend in the employee dining room; (3) threatening employees with reprisals for supporting the Union and for wearing union buttons; (4) informing employees that support for the Union was futile; (5) threatening employees with discharge or other disciplinary action because of their union activities and support; (6) threatening employees with closure of the facility because of their union activity and support; (7) soliciting grievances from an employee and promising employees increased benefits and improved terms and conditions of employment if they would refrain from supporting the Union; and (8) granting employees a benefit by implementing a shift change in order to encourage them to cease supporting the Union. Further, no exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) of the Act by (1) issuing employee Joe Trevino a disciplinary warning; (2) imposing more onerous working conditions on employee Jose Beltran by requiring him to work alone; (3) discriminatorily enforcing a work rule concerning hair length against employee Elisabeth Peuser; (4) discharging employee Pablo Blanco; (5) requiring employee Luis Herrera to work during his lunchbreak; (6)changing the working conditions of employees Jose Beltran and Luis Herrera by requiring them to wear hairnets; (7) issuing employee Norma Quinones an unwarranted verbal warning; and (8) discharging employee Socrates Oberes.

1. The Respondent has excepted to the judge's conclusion that the Respondent violated Section 8(a)(1) by surveilling employees engaged in Section 7 activity when, on or about June 4, 2003, Tracy Sapien, the Respondent's vice president of human resources, approached a table in the employee dining room at which employees were soliciting other employees to sign union authorization cards. The Respondent has also excepted to the judge's conclusion that Stacey Briand, the Respondent's director of human resources, unlawfully surveilled employees Azucena Felix and Adelia Bueno in the employee dining room on or about June 6, 2003, when Felix was soliciting Bueno to sign an authorization card.

The Respondent, Aladdin Gaming, LLC, operated a large hotel and casino in Las Vegas, Nevada. The Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 initiated a campaign to organize the Respondent's employees in 2003.[3]

On June 4, off-duty employees Sheri Lynn and Julie Wallack solicited employees to sign union authorization cards in the employee dining room, an area in which both managers and unit employees regularly dined. Manager Sapien walked by the table at which Lynn and Wallack were soliciting employees. She stood by the employees' table for approximately 2 minutes before interrupting them. She gave management's perspective on unionization at the Respondent's facility. She spoke for 8 minutes and then left the employee dining room.

On June 6, off-duty employee Azucena Felix solicited off-duty employee Adelia Bueno to sign a union authorization card at a table in the employee dining room. Manager Briand approached the employees and offered management's view of unionization at the Respondent's facility. Bueno did not speak English, and Briand did not speak Spanish, but Felix spoke both languages. After Briand spoke, Felix translated Briand's comments for Bueno, and Briand then left the area.

As stated, Sapien observed the employees for approximately 2 minutes before she interrupted the employees' conversation. Briand observed Felix and Bueno for no longer than a moment before approaching their table. Neither Sapien nor Briand engaged in any other behavior or made any statements alleged to be coercive during these events.

Whether Sapien or Briand unlawfully surveilled employees in the employee dining room depends on the nature and duration of their observation. A supervisor's routine observation of employees engaged in open Sec-

[3] All dates refer to 2003, unless otherwise indicated.

tion 7 activity on company property does not constitute unlawful surveillance. *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991). However, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is "out of the ordinary" and thereby coercive. *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB,* 993 F.2d 913 (D.C. Cir. 1993). Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. Id.

Sapien's and Briand's observations were qualitatively different from those in other cases where the Board has found unlawful surveillance. For example, in *Sands Hotel & Casino*, 306 NLRB at 172, an employer unlawfully surveilled employees by posting security guards near employee entrances and in a nearby hotel room, where the guards viewed employees' Section 7 activity through binoculars. In *Eddyleon Chocolate Co.*, supra, the company president watched employees engaged in protected activity from his car parked 15 feet away, all the while speaking on his cell phone. On another occasion, the president called the police and verbally threatened the employees as they passed out union handbills. The Board found that the employer unlawfully created an impression of surveillance.

Sapien's and Briand's observation of employee open prounion activity was for an even shorter period of time than in other cases where the Board has not found unlawful surveillance. In *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003), for example, the Board found that a manager's 30-minute observation while sitting on a bench outside the store of union handbilling taking place in the employer's public parking lot, unaccompanied by other coercive behavior, did not constitute unlawful surveillance. Similarly, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found that an employer did not unlawfully surveil its employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday. The employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice.

In context, Sapien's and Briand's conduct was routine and not "out of the ordinary." Like the employer in *Metal Industries*, supra, Sapien's and Briand's presence in the dining room where managers and employees dined was routine and their consequent observation of employees engaged in solicitations was unaccompanied by coercive conduct. The dining room was an open area, and the union activity was in the open. The presence of Briand and Sapien in the dining room was not unusual. Of course, both persons had an 8(c) right to assert their views regarding unionization. That they did so during an employee conversation about the Union or that Sapien waited 2 minutes before speaking does not establish that the supervisors' conduct was out of the ordinary, requiring a different result. In sum, we find that neither Sapien nor Briand unlawfully surveilled employees in the Respondent's employee dining room on June 4 and 6.

As noted above, Section 8(c) gives an employer representative the right to express an antiunion opinion to employees. Apparently, our colleague would not allow such expression if the employees are engaged in a Section 7 discussion at the time. However, there is nothing in Section 8(c) that even remotely suggests such a limitation. To the contrary, in order to have a free exchange of views in "a market place of ideas," that time would be a logical time for the employer representative to express his opinion. Further, the fact that the employer representative may speak when an employee is talking does not take the employer remarks out of Section 8(c). At worst, this is rude, but it is not unlawful. Of course, employees may listen to the employer representative while he speaks, and, to this extent, stop their Section 7 conversation. But, this is the essence of the exchange of ideas. After the employer representative has spoken, the employees can respond, or ignore him and continued their conversation. Finally, this is not a case when an employer representative lurks in the background to surreptitiously hear the employee conversation. Rather, this is a case where the representative openly stood by the employee table for 2 minutes until he began to speak.

In sum, far from an "absurd, unjust result," we believe that our approach encourages a robust debate and is thus quite consistent with Section 8(c).

Dayton Hudson Corp., 316 NLRB 477 (1995), cited by our dissenting colleague, is distinguishable. There, unlike in the instant case, the respondent videotaped employee movements and actions, watched and followed employees, and monitored employees' telephone calls. This activity involved multiple employees on multiple occasions. In *Hawthorn Co*., 166 NLRB 251 (1967), enfd. in pertinent part 404 F.2d 1205 (8th Cir. 1969), also relied on by our colleague, a foreman, during the period of union organization, adopted the new practice of sitting at employee tables in the cafeteria, instead of at the foremen's table, during coffeebreaks, so that the foremen's table would afford an even clearer view of the men during their coffeebreaks. Here, by contrast, Sapien and Briand did not change their normal practice. Similarly, *Elano Corp*., 216 NLRB 691 (1975), unlike the

instant case, involved a newly instituted requirement that supervisors be present when the employees ate their lunch. The respondent's foremen were directed to eat in the lunchroom, whereas previously they had been allowed to eat their meal in a control room overlooking the plant floor. In *Oakwood Hospital*, 305 NLRB 680 (1991), enf. denied 983 F.2d 698 (6th Cir.1993), the respondent embarked on an elaborate plan, involving many members of its personnel staff on many occasions, to remain in close proximity to a union representative while he was in the cafeteria, take down names of employees who met with him, and take notes during employees' conversations with him. In *Oakwood*, supra, unlike here, the respondent acted in a manner which was plainly out of the ordinary. *Liberty House Nursing Homes*, 245 NLRB 1194 (1979), is also distinguishable. There, unlike here, supervisors departed from the practice of taking breaks in a private dining room. Instead, they deliberately mingled with employees in the dining area used by the latter during their breaks and lunch periods. Indeed, a supervisor followed two employees who left the dining area, and on another occasion she followed two employees who had changed tables because of the presence of supervisors. In *Tyson Foods,* 311 NLRB 552 (1993), employee Smith asked employee Cunningham in the breakroom to tell her about the union. Cunningham suggested that Smith speak to steward Foster, who was nearby. The two employees were discussing the union with Foster when respondent's agent, Andrews, approached them and sat down near Cunningham. Cupping her hand, Andrews whispered to Cunningham, "I have to sit down to keep John [Foster] from talking to her." Foster and Smith then stopped talking and left the area. Not only is there no analogue to this statement in the instant case, but also the Board in *Tyson* relied as well on the finding that earlier in the year two high company officials had told a meeting of supervisors that one way to assist in the decertification of the union was to isolate union supporters and to "scare off" union stewards. Viewing the Andrews' incident in that context, the Board found it not isolated but rather consistent with the respondent's unlawful plan to oust the union. The finding of unlawful surveillance in *Teksid Aluminum Foundry*, 311 NLRB 711 (1993), was based on several incidents and involved conduct much more intrusive than the instant conduct. On one occasion, a manager followed two employees wearing union insignia into a locker room and then stood at the end of a row of lockers where he had visual contact with the two employees. He stayed there for about 5 to 10 minutes while they changed clothes, and when they left to go home he followed them out of the locker room. About 10 or 12 other employees were in the room during the incident. About 2 weeks later, a supervisor took breaks coextensive with those of one of the two employees involved in the earlier incident. During morning break, the supervisor entered the breakroom immediately after the employee, sat down, but did not obtain anything to eat or drink. After 10 minutes, when the employee left, the supervisor came out right behind him. The pattern was repeated at lunch and during the evening break. Also, on the same day, when the employee was talking to some coworkers in the parking lot before going home, the supervisor appeared on the scene, still wearing his work shoes and safety glasses. The supervisor stood silently among the employees for about 4 or 5 minutes, until they left.

Our dissenting colleague, apparently recognizing the weakness of her position as to surveillance, goes on to say that, even if the conduct is not surveillance, it is nonetheless unlawful. Of course, surveillance is the allegation of the complaint, and we question the fairness of finding a violation on the basis of an allegation that was not made. In any event, our colleague's contention has no merit. It appears to be based on the assertion that the Respondent's managers intruded into a conversation among others. We are aware of no case which teaches that an employer manager violates Section 8(a)(1) by injecting himself into a conversation in order to express an 8(c) opinion. Our colleague says that this is an "absurdly unjust result." While we do not consider freedom of speech and robust debate in the workplace to be "absurdly unjust," we decline to engage in polemics. We will simply apply the law to the facts.

2. The Charging Party has excepted to the judge's revocation of the Charging Party's subpoena for the names and contact information of hotel customers who submitted written complaints about employee Luis Velasquez. The Charging Party argues that the Respondent solicited those complaints as a pretext for discharging Velasquez, and that the real reason for the discharge was Velasquez' union activity. We find no merit in the exception. First, the Board affirms an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. *PPG Industries,* 339 NLRB 821, 821 (2003). Second, the record contains no evidence supporting the Charging Party's contention that the Respondent solicited complaints about Velasquez.

PPG Industries, supra, is clearly distinguishable. In that case, the Board found that an administrative law judge abused his discretion where his evidentiary ruling precluded the introduction of evidence that was necessary to fully litigate an unfair labor practice complaint. The judge had determined that the documents would duplicate others already in evidence, even though he had

never examined the subpoenaed documents, and his conclusion about their relevance was found to be speculative. Id. at 822.

In the present case, the only evidence in the record that supports the Charging Party's contention that the Respondent solicited the customers' complaints consists of Velasquez' testimony that he overheard Supervisor Pamela Garrett ask complaining customers whether they wanted to file written complaints to support oral complaints they had made about Velasquez' service. Even if true, this evidence would merely show that the Respondent solicited customers to memorialize oral complaints that they had already made. Other evidence suggests that the Respondent did not solicit the customers' complaints to create a pretext for disciplining Velasquez. In fact, one of the customer complaints on which the Respondent based its decision to terminate Velasquez predated the initiation of the Union's organizing campaign.

The judge weighed the scant evidence supporting the Union's argument against the privacy interests of customers who filed written complaints. The interests that the judge considered included a customer's stated fear that Velasquez would retaliate against the customer's wife, and the distance that many of the customers would probably have had to travel to testify.

Our dissenting colleague asserts that the customer contact information sought by the Charging Party was evidence crucial to the Charging Party's claim on behalf of Velasquez, and that the judge should not have revoked the subpoena. In support of this assertion, our colleague states that there is "some evidence" purportedly establishing the Respondent's disparate treatment of Velasquez as well as the Respondent's active solicitation of customer complaints against him. Regarding the alleged disparate treatment, we note that Velasquez was the subject of six disciplinary actions, three times as many as any other employee, in the 6 months prior to his ultimate termination.[4] This distinction places Velasquez in a different class than other disciplined employees. Regarding the Respondent's alleged solicitation of customer complaints, we reiterate our finding that there is no evidence in the record supporting this contention.

Further, evaluating this issue, we note that the General Counsel, who controls the litigation of the prosecution side of the case, did not subpoena the information at issue here. In addition, our colleague minimizes the significance of the customer information and the Respondent's interest in keeping it confidential. Contrary to the suggestion of our colleague, the information was much more than a "typical customer service survey." The customer had made oral complaints about Valasquez. Valasquez had been fired because of, inter alia, such complaints, and the matter had become an issue in litigation. Clearly, a customer would have a concern about making his name and address available to the discharged employee. And, the Respondent would have an interest in protecting the customer's privacy. We have weighed these matters and we have concluded that the marginal relevance of these matters does not outweigh the substantial privacy and business interests involved.

Under the circumstances presented, we find that the Charging Party has not met the high burden of showing that the judge abused his discretion.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Aladdin Gaming, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(j) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

MEMBER LIEBMAN, dissenting in part.

As the Board observed many years ago, "[i]nherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or even knowledge."[1] It seems shockingly obvious that the Respondent committed an unfair labor practice when two of its high-level managers separately interrupted private employee conversations on union matters and injected themselves into the discussion. The majority's apparent endorsement of such conduct—which stifles employees' free speech—is wrong. Section 8(c) of the Act does not give employers a license to effectively terminate a conversation between employees.

The majority also errs in failing to reverse the judge's revocation of a union subpoena, which sought information related to customer complaints about an employee who was discharged because of them. The Respondent put the validity of the complaints at issue, and the Union's need for the information clearly outweighed the minimal burden that enforcing the subpoena would have placed on the customers.

[4] We also point out that the Respondent initially terminated Velasquez after the fourth disciplinary action, but soon reinstated him with full backpay and benefits, further weakening any claim of overly harsh treatment on the part of the Respondent.

[1] *Standard-Coosa-Thatcher Co.,* 85 NLRB 1358, 1360 (1949).

I address each issue in turn.[2]

1. *The Surveillance Violation.* Contrary to the majority, I would adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act when Managers Tracy Sapien and Stacey Briand aggressively inserted themselves into statutorily protected conversations between employees in the employee dining room in order to present management's views on unionization.[3] There should be no doubt that, as the judge found, this conduct was unlawful.

On June 4, 2003,[4] off-duty employees Sheri Lynn and Julie Wallack were having lunch together in the employee dining room. While doing so they engaged a number of other employees in a conversation about whether they would like to sign union authorization cards. Sapien, the Respondent's vice president of human resources, approached the employees and hovered silently nearby for approximately 2 minutes listening in on the employees' conversation. Sapien then interrupted the employees and barged into their conversation by stating, "I would like to make sure you have all the facts before you sign that card." Sapien's manner was described as "strong" and "very intimidating." For approximately the next 8 minutes Sapien discussed with the employees the downsides to signing a union authorization card, effectively taking over the employees' conversation. Sapien then walked away.

Although Sapien ordinarily eats in the employee dining room, it is unusual for her to sit with uniformed employees. It certainly was unusual for her to hover near Lynn, Wallack, and the other employees involved, listen to their conversation, and then barge into that conversation. Clearly, this would have inhibited their conversation about the signing of union authorization cards.

Two days later, Briand—Respondent's director of human resources—similarly approached a pair of employees in the employee dining room, at the very moment that employee Adelia Bueno was signing an authorization card that union committee leader Azucena Felix had asked her to sign. Briand interjected herself abruptly into their conversation, and advised Bueno that she "shouldn't be signing things that she wasn't sure about, because what she was signing was something like a contract, and that [Felix] was probably promising something that [Felix] was not going to be able to give her." During their exchange, Briand even demanded to know what Felix said to Bueno in Spanish. Briand had never before spoken to Felix in the employee dining room.

This unusual and intrusive conduct by two high-level managers went well beyond merely observing an open display of union activity, and would certainly have a tendency to make employees feel that their union activities were under surveillance and discourage them from having discussions about union matters while in the facility.

The majority insists that Sapien's and Briand's conduct does not fit within the pigeonhole of surveillance and, therefore, does not violate the Act. However, precedent demonstrates that the conduct here can fairly be called surveillance.[5] The concept of surveillance has long been applied by the Board to bar employers' efforts to intrude on employees' private conversations—both passively and actively—in a manner that inhibits Section 7 activities. See, e.g., *Hawthorn Co.*, 166 NLRB 251 (1967), enfd. in pertinent part 404 F. 2d 1205, 1208–1209 (8th Cir. 1969) (foreman changed seating in cafeteria in order to sit among employees during breaktimes); *Elano Corp.*, 216 NLRB 691, 695 (1975) (unlawful surveillance found, despite absence of complaint allegation, where supervisors began to eat lunch with employees in order to inhibit discussion among employees); *Oakwood Hospital*, 305 NLRB 680 fn. 2, 688 (1991) (surveillance found where employer agents sat in close proximity to union organizer who attempted to talk to employees in the employee cafeteria; "dining table conversation" was not "public" union activity), enf. denied 983 F.2d 698 (6th Cir. 1993).

Sapien's interruptions of the employees' protected discussion about signing authorization cards was preceded by her lurking for a few minutes immediately adjacent to where the employees were conversing, without any neutral explanation. Briand's interruption of employee Felix was particularly inhibiting because Felix had been unlawfully told just the week before that she could talk about the Union during work hours only while "on break." Thus, Briand's interruption of Felix's breaktime conversation makes the following statement from precedent fully applicable here:

> This preemption of nonworking time possessed all elements of unlawful surveillance and beyond that constituted a pronounced impediment to the employees' right to utilize the only opportunity during working

[2] I join the majority in adopting the judge's findings of numerous 8(a)(1) and (3) violations that the Respondent did not except to, which are specified in the majority's fn. 2. I also join the majority in denying the Respondent's request for oral argument, for the reasons stated in the majority's fn. 1.

[3] The Respondent does not except to the judge's factual findings regarding Sapien's and Briand's conduct, only to the conclusion that such conduct was unlawful.

[4] All dates refer to 2003, unless otherwise indicated.

[5] See, e.g., *Dayton Hudson Corp.*, 316 NLRB 477, 477 fn. 1 (1995) (affirming judge's finding that employer "engaged in unlawful surveillance by . . . watching and following employees, and interrupting their conversations").

> hours in which they could engage in Section 7 activity . . . .

Liberty House Nursing Homes, 245 NLRB 1194, 1200 (1979).

Similar intrusions by supervisors intended to impede discussions about protected activity have been found unlawful on this ground, without specific reference to any alleged surveillance. In *Tyson Foods,* 311 NLRB 552 (1993), for example, the Board found unlawful the employer's interruption of employees' conversation about the union, stating that the "test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act." But however the conduct is classified, its likely chilling effect on union activity is clear, and that is all that matters. Section 8(a)(1) makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The Act does not dictate rigid unfair labor practice subcategories, and neither do the Board's decisions.

The majority's approach here produces an absurdly unjust result. It seemingly would permit management to inject itself into any employee conversations about union matters whenever management observes such conversations—although precedent makes clear that even silently observing such a conversation, much less butting in, would be unlawful.[6] The majority appears oblivious to the chilling effect that management's invasion of these conversations would have on the ability of employees to freely share their views with coworkers.[7] Citing Section 8(c) of the Act will not do. The issue here is management's conduct, not the content of its speech. Notions of "freedom of speech and robust debate in the workplace" cannot privilege employers to insert themselves between employees who are talking to each other, not to the boss. Put somewhat differently, an employer that already is free to compel employees to listen to its antiunion message in captive audience meetings, one-on-one encounters, and other settings,[8] now also has the right to preempt private conversations between employees, while unions and employees meanwhile lack reciprocal workplace communication rights.[9]

2. *The Subpoena Revocation.* Unlike the majority, I believe that the judge abused his discretion in revoking the Union's subpoena for the names and contact information of customers who submitted written complaints about employee Luis Velasquez.

The judge undervalued the Union's need for the subpoenaed information to investigate the validity of the customer complaints and overestimated the burden that the subpoena would impose on the customers' convenience and privacy interests.

a. The information sought by the subpoena was critically important to the Union's ability to challenge Velasquez' discharge.

As the majority acknowledges, the General Counsel met his initial burden under *Wright Line*[10] of demonstrating that Velasquez' union activity was a motivating factor in the Respondent's decision to discipline and discharge him. Thus, the burden shifted to the Respondent to demonstrate that it would have fired Velasquez even in the absence of his union activities. The Respondent's *sole* asserted reason for discharging Velasquez is his allegedly poor work performance, as proven by the customer complaints.[11] The Union contends both that the Respondent exaggerated the complaints' seriousness, and that the Respondent harassed customers into submitting written complaints in order to exacerbate Velasquez' disciplinary record.

The record contains some evidence in support of each of these contentions. As to the first contention, there is testimonial and documentary evidence that other servers' customer-service deficiencies—many of which were more serious than Velasquez'—were treated less harshly than his. Before Velasquez' discharge, the Respondent had never fired an employee because of a customer complaint.[12] As to the second contention, it is supported by

[6] See, e.g., *Teksid Aluminum Foundry*, 311 NLRB 711, 715 (1993) (supervisor's obtrusive "silent interludes in the locker room, breakroom, and the parking lot" while employees were engaged in conversation, constituted unlawful overt surveillance).

[7] The majority describes the conduct here as "[a]t worst . . . rude, but . . . not unlawful," and would distinguish the cases I have cited, on their facts. But those decisions all reflect the basic legal principle implicated in this case: under Sec. 7 of the Act, employers may not intrude on employees engaged in union activity.

[8] *Livingston Shirt Corp.,* 107 NLRB 400 (1953) (captive audience meetings); *Associated Milk Producers,* 237 NLRB 879 (1978) (one-on-one meetings); *Frito Lay, Inc.,* 341 NLRB 515 (2004) (supervisor ride alongs with drivers).

[9] See, e.g., *Hale Nani Rehabilitation & Nursing,* 326 NLRB 335 (1998).

[10] *Wright Line,* 252 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] In this regard, the judge obviously erred when he stated that the customer complaints were not offered into evidence by the Respondent for the truth of the matter asserted. To the contrary, the Respondent is clearly asserting that Velasquez engaged in the conduct reflected in the customer complaints, and is not merely arguing that it acted on a good faith but mistaken belief that Velasquez had engaged in such conduct. Furthermore, the judge himself relies on the customer complaints as proof of Velasquez' allegedly poor work performance.

[12] For instance, an employee who served a guest a glass of water containing juice and salt received only a warning, even though she had previously been warned for another customer-service infraction. Another employee who served a customer a drink containing a chunk of glass, and who had several past infractions, received only a final warning, while an employee who spilled coffee on a customer received a

Velasquez' testimony that he heard his supervisor repeatedly ask complaining customers if they wanted to submit written complaints. If the Union were successful in proving these contentions this would effectively defeat the Respondent's defense, and leave the Board with no choice but to find Velasquez' discharge unlawful.

It is clear, then, that having an opportunity to communicate with the customers about the quality of service that Velasquez actually provided and whether the Respondent harassed them into providing written complaints is vitally important to the Union's case.

b. That interest, in turn, outweighs the minimal burden on the customers entailed in enforcing the subpoena, which the judge exaggerated.

To begin, the judge wrongly construed what the subpoena would compel. It would compel only disclosure from the Respondent of the customers' contact information. It would not compel them to testify at the hearing. The Union would need to seek an additional subpoena in order to compel customers to testify.[13] Once provided with contact information pursuant to the subpoena, the Union apparently intended to contact the customers and question them about the facts of their complaints and how they came to submit written complaints. The burden of such a discussion would be modest—little more than what the customers would incur if they participated in a typical customer service survey. In fact, the subpoena would not even compel the customer to talk to the Union.

Moreover, the judge weighted the customers' privacy interest far too heavily. This interest is, at best, minimal, especially given that the subject matter on which they would be asked to provide information is merely the quality of service that they received in a public eating establishment.[14]

Because the balance of interests regarding the Union's subpoena, when properly assessed, tips clearly in favor of the Union, I would find that the judge abused his discretion in granting the Respondent's motion to revoke the subpoena.

written warning. Finally, although server Helena Hart admitted partial responsibility for Velasquez' alleged failure to bring a customer orange juice, she was reportedly given only a verbal warning.

[13] The Union obviously would have no reason to compel the testimony of customers through a subpoena until after it had communicated with the customers and confirmed that they in fact would provide testimony that serves to defeat the Respondent's defense. If the Union confirmed that they would provide such testimony, then the importance of their testimony would necessarily outweigh any inconvenience that the customers would incur by having to attend the hearing. Furthermore, the judge could condition the issuance of the subpoena on a showing of such relevance.

[14] To the extent that the judge relied on a customer's asserted fear of Velasquez learning her identity, the judge failed to consider the availability of potential protective measures. For instance, the customer's contact information could be provided to the Union's attorney or business agent on condition that it not be given to Velasquez.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for, or activities on behalf of, the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union), or any other union.

WE WILL NOT announce and enforce a rule prohibiting you from wearing union buttons.

WE WILL NOT announce and enforce a rule prohibiting you from talking about the Union, or any other union.

WE WILL NOT announce and enforce a rule limiting the amount of time that you can spend in the employee dining room (EDR) before your shift begins and after your shift ends.

WE WILL NOT threaten you with unspecified reprisals for continuing to support the Union, or any other union.

WE WILL NOT threaten you with unspecified reprisals for wearing union buttons.

WE WILL NOT threaten you with discharge or other disciplinary action because of your support for, or activities on behalf of, the Union, or any other union.

WE WILL NOT threaten you with closing the hotel-casino because of your support for, or activities on behalf of, the Union, or any other union.

WE WILL NOT inform you that it would be futile for you to select the Union as your bargaining representative.

WE WILL NOT encourage you to make complaints, and promise you increased benefits and improved terms and

conditions of employment if you will refrain from supporting the Union, or any other union.

WE WILL NOT grant you increased benefits and improved terms and conditions of employment in order to encourage you to cease supporting the Union, or any other union.

WE WILL NOT issue you an unwarranted and undeserved disciplinary warning notice because of your activities on behalf of, and support for, the Union, or any other union.

WE WILL NOT impose more difficult working conditions on you because of your activities on behalf of, and support for, the Union, or any other union.

WE WILL NOT change your working conditions by more strictly enforcing a work rule against you because of your activities on behalf of, and support for, the Union, or any other union.

WE WILL NOT suspend, discharge, or otherwise discipline you because of your activities on behalf of, and support for, the Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL make Pablo Blanco whole for any loss of earnings and other benefits resulting from his unlawful suspension/discharge, less any net interim earnings, plus interest.

WE WILL make Socrates Oberes whole for any loss of earnings and other benefits resulting from his unlawful suspension/discharge (to the extent he has not already been made whole), less any net interim earnings, plus interest.

WE WILL rescind the unwarranted and undeserved disciplinary warning notices issued to Joe Trevino and Norma Quinones.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions/discharges of Pablo Blanco and Socrates Oberes, and the unwarranted and undeserved disciplinary warning notices issued to Joe Trevino and Norma Quinones; and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment action will not be used against them in any way.

ALADDIN GAMING, LLC

Joel C. Schochet, Esq. and *Mary C. Teer, Esq.,* for the General Counsel.

Douglas Sullenberger, Esq., of Atlanta, Georgia, and *Mark J. Ricciardi, Esq.,* of Las Vegas, Nevada, for the Respondent.

Kristin L. Martin, Esq., of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, from December 15 through 19, 2003,[1] and from January 13 through 15, 2004. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union or the Charging Party) filed an original and an amended unfair labor practice charge in Case 28–CA–18851 on July 11 and August 29, 2003, respectively, and filed an original and an amended unfair labor practice charge in Case 28–CA–19017 on September 25 and October 31, 2003, respectively.[2] Based on those charges as amended, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint on November 4, 2003. The complaint alleges that Aladdin Gaming LLC (the Respondent or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record,[3] my consideration of the briefs filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for the Respondent, and my observation of the demeanor of the witnesses,[4] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the Respondent's facility), where it has been engaged in the business of operating a resort hotel and gaming casino. Further, I find that during the 12-month period ending July 11, 2003, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000; and that during the same period, the Respondent purchased and received at its Las Vegas, Nevada facility goods valued in excess of $5000 directly from

[1] All dates are in 2003, unless otherwise indicated.

[2] See GC Exhs. 1(a), (b), (c), (d), (o), (p), (q), and (r).

[3] Counsel for the Charging Party filed with me an unopposed motion to correct the transcript. I grant that motion, and admit the document into evidence as CP Exh. 6. Accordingly, the transcript of this proceeding is corrected as reflected in the motion.

[4] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

points located outside the State of Nevada.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The General Counsel's complaint sets forth over 100 separate unfair labor practices allegedly committed by the Respondent. Specifically, 29 supervisors and agents are alleged in the complaint as having committed these violations of the Act. The alleged unfair labor practices enumerated in the complaint in general fall into the following categories: interrogating employees about their union sympathies; surveillance of union activities; promulgation and enforcement of an overly broad and discriminatory rule prohibiting employees from wearing union buttons or talking about the Union; threatening employees because of their union activity; telling employees that it would be futile for them to select the Union as their bargaining representative; promises of benefit in exchange for abandonment of union support; making changes in employees' terms and conditions of employment because of their union activity; and disciplining or discharging employees because of their support for the Union.

The Respondent takes the position that the Union's conduct preceding the incidents in question, in combination with the Union's filing of unfair labor practice charges in this matter, constitutes an abuse of the Board's process. Further, it denies the commission of any unfair labor practices, but alleges that if any such violations of the Act occurred, they should be viewed as nothing more than de minimis. According to the Respondent, it is the Union's conduct that has been egregious, allegedly involving a campaign of coercion and harassment of the Respondent.

B. Facts and Analysis

1. Background

The Respondent operates a major hotel and casino on the "strip" in Las Vegas, Nevada. The Respondent's overall work force is approximately 3000, and the housekeeping and food and beverages departments, which are involved in this proceeding, have a compliment of about 1300 to 1450 employees. Although the Union had apparently made some efforts to organize the Respondent's employees in the past, that effort was energized and became rather open and vocal when on May 30, 2003, various employees first appeared at work wearing union committee leader buttons. The Respondent contends that its managers and supervisors were surprised by this sudden appearance of employees wearing union buttons at work. It argues that the Union initiated this tactic in an effort to catch the Respondent's mangers and supervisors "off guard," and cause them to inadvertently commit unfair labor practices. According to counsel for the Respondent, the Union intended to use any complaint issued by the General Counsel in a "campaign of coercion and harassment." The Union has allegedly attempted to injure the Respondent's business by advising travel agents, customer groups, convention planners, and the media of the issuance of the complaint. Groups and individuals are then allegedly asked by the Union and its supporters not to patronize the Respondent's facility.

In the Respondent's view, the Union's actions have all been taken with the ultimate aim of forcing the Respondent to recognize the Union as the bargaining representative for a targeted group of employees. A letter seeking voluntary recognition was apparently sent by the Union to the Respondent on about June 19, 2003. The Respondent has declined to recognize the Union, and is allegedly insisting that if the Union believes it represents a majority of the employees in an appropriate bargaining unit, that the Union file for a representation election with the Board. It is the Respondent's contention that, rather than file for an election, the Union intends through its public campaign to force the Respondent to recognize the Union. The filing of unfair labor practice charges by the Union is, in the Respondent's opinion, just one part of that effort.

The Charging Party addresses the Respondent's "affirmative defenses" directly in counsel's posthearing brief. Counsel for the Union argues that her client has in no way abused the processes and procedures of the Board through the filing of unfair labor practice charges. Counsel claims this is patently true, in view of the fact that the General Counsel found merit to many of these charges. Counsel points out that there is no evidence or any finding that the Union has violated any provision of the law by its actions in attempting to organize the Respondent's employees, or to obtain recognition from the Respondent.

I agree with counsel for the Union. In filing charges with the Board, the Union is petitioning the Government. The First Amendment to the United States Constitution protects such petitioning. Even assuming, for the sake of argument, that the Union's action in filing unfair labor practice charges was for a retaliatory purpose, such filing would not impose a liability on the Union, unless the charges filed were also "objectively baseless." Correspondingly, filing charges that are "reasonably based but unsuccessful" reflect genuine grievances and give voice to public concerns. Accord: *BE&K Construction Co. v. NLRB,* 536 U.S. 516, 523 (2002).

Having reviewed the evidence in this case, I am convinced that the unfair labor practice charges cannot be characterized as "objectively baseless." That is not to suggest that ultimately all the charges will be found to have merit. However, they all seem to be, if not more, at least reasonably based. Further, as counsel for the Union points out, the Act protects public rights, not private interests. Thus, even if the Union had some "improper motives," it is the public right that must be vindicated and the statute that must be effectuated. The Board is not a "court of equity," and refusing to remedy a violation of the Act because a charging party stands with "unclean hands," would obviously be an abrogation of the Board's statutory duty. See *Goodyear Tire & Rubber Co.,* 271 NLRB 343, 346 fn. 10 (1984); *Precision Concrete,* 337 NLRB 211 (2001), enf. denied in part on other grounds 334 F.3d 88 (D.C. Cir. 2003).

Also, as counsel for the Union correctly points out, a labor

organization is not obligated to file an election petition with the Board. There is certainly nothing inherently wrong with the Union requesting voluntary recognition from the Respondent, and a "card check" to determine majority status is a well used and legitimate method of establishing whether a union has been selected by a majority of the employees as their collective-bargaining representative. *MGM Grand Hotel, Inc.,* 329 NLRB 464, 466 (1999). Of course, the Respondent is perfectly within its legal right to decline such voluntary recognition, instead insisting that the Union petition the Board for a representation election.

As the Respondent argued, it is clear from documents subpoenaed from the Union that the Union has attempted to publicize the complaint in this matter. It is fairly obvious that this has been done with the goal of embarrassing the Respondent and causing it economic harm. Thus, bringing pressure on the Respondent to settle the case in some manner acceptable to the Union. In any event, there can be no doubt that the Union has a First Amendment right to publicize its dispute with the Respondent, including through distribution of the complaint.

None of this relieves the Respondent of the obligation not to commit unfair labor practices. Like any other employer or union, the Respondent must exercise care not to violate the Act. Therefore, we are back where we began, with the General Counsel charging the Respondent with numerous unfair labor practices and the Respondent denying the commission of any such conduct. It now remains to be seen whether counsel for the General Counsel can meet his evidentiary burden.

As will be obvious below, I intend to follow the sequential outline of the complaint, and address each allegation in the complaint in chronological order.

2. Alleged 8(a)(1) violations

Complaint paragraph 5(a) alleges that on about May 30, 2003, the Respondent, through Gary Munsie,[5] interrogated its employees about their union membership, activities, and sympathies.

All parties agree that by design, the Union had its union committee leaders wear buttons identifying them as such at the Respondent's facility beginning on the morning of May 30, 2003. The Respondent takes the position that its managers and supervisors were "surprised" by this unexpected action, and some of them were uncertain whether employees were permitted under the Respondent's policies to wear such buttons while at work. Counsel for the Respondent appears to contend that until the Respondent's management was able to consult with legal counsel, any inadvertent comment by a supervisor about an employee's button was harmless, noncoercive and, at its worst, should be considered de minimis. I disagree. "Surprise" is simply not a defense to an employer's interference with employees' Section 7 rights. Each individual statement by a supervisor must be viewed under the particular circumstances of the incident in order to determine if the law has been violated, without considering whether or not the supervisor was surprised. That old adage that "ignorance of the law is no excuse" is accurate in this instance, although "surprise" can be substituted for ignorance.

It is axiomatic that in the absence of special circumstances, an employee's wearing of union buttons while at work is protected activity under Section 7 of the Act. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Burger King Corp.,* 265 NLRB 1507 (1982). Clearly, in finding that employees in most situations have the right to wear inoffensive union buttons while at work, the Supreme Court and the Board are attempting to balance the right of employees to express prounion sentiments under Section 7 of the Act, with an employer's right to operate its business. In the matter at hand, it is important to note that counsel for the Respondent never takes the position that for some reason the employees who wore union buttons while at work should not have been able to do so legally.

The General Counsel alleges that comments made by various supervisors to employees about their union committee leader buttons constituted unlawful interrogation. In determining whether a supervisor's questions to an employee about his union activities were coercive under the Act, the Board looks to the "totality of the circumstances." *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center,* 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House,* supra, were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Gary Munsie, assistant beverage manager, was an admitted supervisor of the Respondent during the dates in question. Irelda Reyes, cocktail waitress, testified that she first wore her union committee leader button on May 30. At approximately 1 p.m., while in a bar service well, she was approached by Munsie, who looked at her button and asked her if she were a "Communist." Reyes replied, "No, why would you say that?" According to Reyes, Munsie responded, "I think you are." Larry Johnson, bartender, testified that on that same day he also wore his union committee leader button for the first time. At about 12:30 p.m. he was working at the Sports Bar when approached by Munsie. According to Johnson, Munsie pointed to his button and asked, "What, are you a Communist now?" Johnson replied, "It's something I feel is right to do and I don't care to discuss it on company property." Munsie did not testify, and the Respondent did not deny that the words alleged by Reyes and Johnson were spoken by Munsie.[6]

[5] The complaint was amended numerous times during the course of the hearing to correct the spelling of names, change job titles, add allegations, delete allegations, and make other changes. The answer was also amended to make admissions and denials. All references to the complaint or answer are as finally amended.

[6] Michael Palladino, bartender, initially testified that on May 30 while wearing his union committee leader button for the first time, he was approached by Munsie who "probably" asked him if he were a "Communist." However, he admitted that he was "not certain," and when on cross-examination he was shown a copy of the affidavit that he had given to the Board, he retracted his earlier testimony.

Reyes and Johnson acknowledged that they had no further discussions with Munsie about this matter, and further that they were not prevented from continuing to wear the buttons. It is apparently the Respondent's position that the comments made by Munsie were intended either to be a joke, or an expression of personal opinion privileged under Section 8(c) of the Act. In either event, the Respondent contends that these comments did not constitute unlawful interrogation. I disagree.

Johnson testified that he did not believe that the comment was just a friendly joke. He felt the remark was intended to express the Respondent's belief that "the Union's against management," and that Communists and the Union were both bad. Similarly, Reyes testified that she did not think that Munsie was joking with her, and that, although she laughed, it was her attempt to handle the remark by "play[ing] it off." I share the feelings of Reyes and Johnson that Munsie's comment was not intended as a friendly joke. Rather, it would be reasonable for most employees to assume that such a comment was intended in a derogatory way.[7] Further, it would also be reasonable for most employees to perceive Munsie's remark as a veiled "threat of reprisal," thus, removing the remark from the privileged expression of personal opinion under Section 8(c) of the Act.

Based on the "totality of the circumstances," I believe Munsie's comments made to Reyes and Johnson were coercive under the Act. Here was the supervisor of the two employees making derogatory comments about them in relation to their wearing union buttons on the very first day they exercised their Section 7 rights by doing so. Munsie's comments were surely intended to elicit responses from the employees, containing privileged information about their union activity and that of others. Their reluctance to give him any privileged information does not detract from the coerciveness of Munsie's comments. *Rossmore House,* supra; *Westwood Health Care Center,* supra.

Counsel for the Respondent cites a number of Board cases which stand for the proposition that a supervisory inquiry that flows from the observation of a union button may not be unlawful interrogation when under all the circumstances the question does not reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Continental Can Co*., 282 NLRB 1363 (1987); *Spring City Knitting Co*., 285 NLRB 426 (1987); *UARCO, Inc*., 286 NLRB 55 (1987). However, these cases are distinguishable from the matter at hand, where the comments made by the supervisor were derogatory, threatening, and intended to place the employees in a position where they would likely feel it necessary to defend themselves, or to disclose privileged union activity. Simply put, Munsie's reference to Reyes and Johnson as Communists was intended to embarrass them and to "put them on the spot." As such, it would certainly tend to have a chilling effect on employee Section 7 rights.

Based on the above, I conclude that on about May 30, the Respondent, through Gary Munsie, unlawfully interrogated employees, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(a) of the complaint.

Paragraph 5(b) of the complaint alleges that on about May 30, the Respondent, through Michael Duhon, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons.

Michael Duhon was the Respondent's beverage supervisor. Julie Wallack, cocktail server, testified that on May 30 she wore her union committee leader button for the first time. She was working in the Zanzibar service well at the Respondent's facility at about 10:30 a.m. when, according to Wallack, Duhon approached and told her to "immediately" take the button off. She refused and Duhon repeated that she needed to "take it off now." Wallack testified that she told Duhon she had the right to wear the button, and he was violating the law by asking her to remove it. She alleged that Duhon replied that he did not know about that, and would check on it. However, Duhon did not further mention the matter to her.

Duhon's testimony is somewhat different. He acknowledged approaching Wallack on the date in question, observing that she was wearing the button, and asking her the question, "Can you be wearing that?" She replied in the affirmative, and Duhon allegedly said, "[O]kay." He subsequently checked with Brian Lerner, vice president of food and beverage, and was informed that Wallack had the right to wear a union button while at work. He said nothing further to her about the matter. Duhon specifically denied ever telling Wallack to remove the button.

I credit Wallack's version of this event. It is highly implausible that Duhon, a supervisor, would ask Wallack, an employee, whether she could wear a union button while at work. Of course, a supervisor does not generally ask an employee if she can behave in a certain way. Rather, supervisors generally tell employees how to behave. In my view, that is precisely what Duhon did, instructing Wallack twice to remove her union button. Further, even though Duhon finally told Wallack that he would check on her alleged right to wear the button, he had already directed her to remove it. The damage was already done, and was not simply rectified by his statement that he would check on the matter.

The Respondent's employee handbook, apparently distributed to all new employees, states that, other than name badges, "[n]o other pins or badges may be worn on the uniform, unless provided by the company." (R. Exh. 4, p. 25.) Such a rule is overly broad, and its maintenance is illegal, even if there is no evidence of enforcement.[8] *IRIS USA, Inc.,* 336 NLRB 1013 fn. 4 (2001); *Freund Baking Co*., 336 NLRB 847 fn. 5 (2001); *TeleTech Holdings, Inc*., 333 NLRB 402, 403 (2001); *Bruns-*

[7] While the undersigned has only empirical evidence, rather than statistical, to support this proposition, I feel confident that a significant majority of the American public would view being described as a Communist as a strongly derogatory comment. This is especially true when the person making the comment is a supervisor, who is directing the remark to a subordinate.

[8] While the complaint alleges numerous instances of supervisors promulgating and enforcing the rule, the complaint is silent as to the maintenance of the rule itself. As noted, the handbook rule is in evidence. However, the issue of the legality of the rule itself was never directly litigated. Counsel for the General Counsel never actually challenged the written rule, and counsel for the Respondent was never put on notice of having to defend it. Accordingly, I believe it would be inappropriate and a violation of due process for me to make a formal finding as to whether the maintenance of the rule in the employee handbook is a separate violation of the Act, and I decline to do so.

wick Corp., 282 NLRB 794, 795 (1987). A rule such as this clearly interferes with employees' Section 7 right to wear non-offensive union buttons while at work. *Republic Aviation Corp.,* supra; *Burger King Corp.,* supra. Further, blanket rules against wearing union buttons violate Section 7 rights, even without discrimination.[9] *Meyer Waste Systems,* 322 NLRB 244, 244 (1996); *St. Luke's Hospital,* 314 NLRB 434, 435 fn. 5 (1994); *Nordstrom, Inc.,* 264 NLRB 698, 701–702 (1982).

Counsel for the Respondent does not claim that supervisors were legally correct in instructing employees to remove their union buttons. Clearly, the rule maintained in the handbook and as promulgated and enforced by supervisors was overly broad and discriminatory. Having concluded that Duhon twice directed Wallack to remove her button, I am of the belief that his action constituted a violation of the Act. Also, Duhon's mere statement that he would "check" on the legality of wearing the union button, after ordering Wallack to remove it, did not constitute a "repudiation" of his previous order. This is especially true in light of his failure to ever followup with Wallack and advise her that the Respondent had no objection to her wearing the button. *Passavant Memorial Area Hospital,* 237 NLRB 138, 138–139 (1978); *Ark Las Vegas Restaurant Corp.,* 335 NLRB 1284, 1289 (2001).

Also, the fact that Wallack continued to wear the button, despite Duhon's directive to her to take it off, did not lessen the impact that his statement had in interfering with, restraining, and coercing employees in their exercise of Section 7 rights. Wallack's courage in continuing to engage in union activity cannot be construed in some way as demonstrating that the unlawful statement of her supervisor was merely de minimis. It would certainly have been reasonable for Duhon's statement to have a chilling effect on the willingness of employees to continue to wear union buttons at work.

Accordingly, I conclude that on about May 30, the Respondent, through Michael Duhon, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(b).

It is alleged in paragraphs 5(c)(1) and (2) of the complaint that on May 30, the Respondent, by Alberto Munoz, interrogated its employees about their union membership, activities, and sympathies; and threatened its employees with unspecified reprisals if they selected the Union as their bargaining representative.

Alberto Meza worked in the Respondent's steward department. He testified that on May 30, he first wore a union committee leader button at work. According to Meza, at about 3 p.m. he was cleaning the floor in the employee dinning room (the EDR) when he was approached by Executive Steward Aberto Munoz, who asked him to come to his office. On the way to the office, Munoz asked Meza if he was "comfortable" in his job. Mesa answered in the affirmative, after which Munoz questioned why Meza was "using the union button?" Meza responded that he had "decided to participate as an organizer." Allegedly, Munoz replied that he "felt betrayed."[10] After entering Munoz' office, Munoz is alleged to have told Meza that he "should think what [he] was doing, to think about [his] work, to think about [his] family, . . . to think about [his] future." Further, Munoz is alleged to have said that if the Union came into the facility that the Respondent would have to "pay more money for [the employees,] and . . . [the employees] would be less governable." After this comment, Meza returned to work.

Meza testified that the following day, May 31, at about the same time, Munoz, who was accompanied by Banquet Supervisor Leno Espinoza, again approached him.[11] The three men had a conversation behind the linen dock where, according to Meza, they told him about bad experiences that they and others had previously had with the Union. Munoz allegedly asked Meza "again to desist being a committee leader," and that he "could help [Meza not] have any kind of contact with the [Union]." That was essentially the end of the conversation.

However, the version of the conversation as told by Munoz and Espinoza is somewhat different. Munoz recalled only one such conversation with Meza, and that occurred on May 30, and was conducted in the presence of Espinoza in the back hallway near the EDR. According to Munoz, Meza approached them and asked if he could talk with them. Allegedly Meza complained that "he was getting a lot of looks from everybody that day" because he was wearing the union button. In his testimony, Munoz denied that he asked Meza why he was supporting the Union, but, rather, that Meza volunteered that "the reason why he joined the Union was because of the insurance." The three men then allegedly discussed medical insurance, with Munoz expressing his opinion that the insurance that the Respondent currently offered its employees was superior to that offered by employers with union contracts. According to Munoz, the conversation ended with him telling Meza that everyone was entitled to his or her own opinions, and with Meza expressing how comfortable he felt working for the Respondent. Munoz testified that he got along well with Meza, so well, in fact, that in July he nominated Mesa for employee of the quarter. Espinoza testified, substantially in support of Munoz' version of the conversation with Meza. He also recalled only the one conversation, which allegedly occurred on May 30.

I credit Meza's version of these events. The story told by Munoz and Espinoza was, in my view, not particularly plausible. It seemed artificial, and as if only a part of the story was being told, that part which was favorable to the Respondent. Further, although Espinoza acknowledged that he and Munoz were good friends, he testified that they had not spoken about the conversation with Meza since the events in question. This

[9] Although it is not necessary to show disparate application of the rule in order to establish a violation of the Act, there was some unrebutted testimony from employee witnesses that the Respondent had typically permitted small, innocuous personal pins to be worn on employee uniforms.

[10] Instead of "felt betrayed," the transcript reflects the words "betray bunny." Obviously, this is an error in transcription, and I will correct the transcript to reflect what the witness clearly testified was said.

[11] Munoz is an admitted supervisor. However, Espinoza is not alleged in the complaint, nor admitted by the Respondent, to be a supervisor.

simply defies credulity, and considering the similarity in their testimony, I suspect that Munoz and Espinoza not only consulted with each other, but also decided on a script for their appearance at the hearing. Meza's testimony was more genuine, and appeared to have the "ring of authenticity" to it.

Having credited Meza, I conclude that Munoz' conversation with him on May 30 constituted unlawful interrogation of Meza's union activity. When the "totality of the circumstances" are considered, Munoz' questions are coercive. *Rossmore House,* supra; *Westwood Health Care Center,* supra. Munoz removed Meza from his work and brought him to the supervisor's office, asking him along the way whether he was "comfortable" in his job and why he was wearing a union button. Further, Munoz' statement that he felt betrayed by Mesa's decision to support the Union was obviously intended to cause Meza maximum discomfort, and to elicit a response likely to include a disclosure of privileged information about the union campaign. The fact that the two men had a friendly relationship may very well have made the interrogation even more coercive. Under those circumstances, the statement of betrayal would have made Meza feel all the worse. See *Acme Bus Corp*., 320 NLRB 458, 458 (1995), enfd. mem. 198 F.3d 233 (2d Cir. 1999). Also, the interrogation occurred along with the threat of unspecified reprisals.

The credible testimony of Meza established that on both May 30 and 31, Munoz threatened him with reprisals because of his support for the Union. The statements made by Munoz in his office on May 30 that Meza should "think" about what he was doing, about his future, about his family, and about his work were all intended to leave Meza with the impression that if he continued to support the Union something bad would happen. There was nothing ambiguous about this statement, but just in case Meza missed the connection with the Union, Munoz mentioned that if the Union were successful in organizing the facility, it would cost the Respondent "more money" and the employees would be "less governable." Further, the following day, in the presence of Espinoza, Munoz suggested that Meza "desist being a committee leader," and informed Meza that he could help him leave the Union.

While I believe that the meaning of Munoz' words were plain and simple, if they were not entirely clear, the Board still holds employers liable for all threats that could reasonably tend to be coercive, even if the statement is oblique, ambiguous, or nonsensical. See *Fixtures Mfg. Corp.,* 332 NLRB 565, 565 (2000); *Boydston Electric,* 331 NLRB 1450, 1450 (2000); *Tim Foley Plumbing Service*, 332 NLRB 1432, 1433 (2000). When Munoz brought up Meza's future, his job, and his family in connection with the Union, what else could Meza have thought, but that if he continued to support the Union something unpleasant was going to happen? Based on Meza's credible testimony, I conclude that Munoz' statements to him on May 30 and 31 constituted threats of unspecified reprisals for continuing to support the Union. These threats undoubtedly had the capacity to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

Accordingly, I conclude that the Respondent, by Alberto Munoz, on about May 30, interrogated its employees about their union activities and threatened them with unspecified reprisals for supporting the Union, all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(1) and (2) of the complaint.

Paragraph 5(d) of the complaint alleges that on about May 30, the Respondent, through Marlene Nazal, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons under threat of suspension.

Joe Trevino was a food server at the Respondent's Zanzibar Café. He testified that he began to wear his union committee leader button at work on May 30. According to Trevino, Assistant Café Manager Marlene Nazal approached him at about 9:30 a.m. while he was working in the kitchen and said, "Do me a favor, take off that union button you are wearing." Trevino refused and began to explain that he had the right to wear the button, when Nazal interrupted him and said that he was not allowed to wear the button in the Café. He testified that Nazal further said that he "would probably end up having to be sent home," if he did not "take the button off." Trevino continued to refuse to remove the button, and Nazal indicated that she would be contacting Keith Kawana, Spice Market Buffet manager, about the situation. About 30 minutes later, Nazal returned to Trevino and told him that she had spoken with Kawana, who allegedly said that Trevino could continue to wear the button, but "was not allowed to coerce, intimidate, or force anybody to sign up for the Union."

Nazal's version of this conversation was somewhat different. She testified that she noticed Trevino wearing the button of May 30, because he twisted his body to make it more prominent to her. She approached him asking, "Where [did you] get that?" Trevino allegedly responded that he was a union representative and had a right to wear it. According to Nazal, she replied that "I'm gonna find out if you can wear that or not." She testified that it was her understanding that employees were not allowed to wear anything on their uniforms that was not approved by the Respondent. Nazal contacted Kawana to find out. She said that Kawana indicated that he would get back with her. However, from her testimony it appeared that she had no further conversation with Trevino about the button. In any event, she denied ever telling Tevino to remove the button, or to threaten him for wearing it.

I credit Trevino's version of this conversation. It simply seems more plausible to me. Frankly, both Trevino and Nazal were difficult witnesses, and both became rather testy on cross-examination. However, in this instance, Trevino's testimony appeared to me to "ring true," while Nazal's did not. I believe that she told him to take the button off, and warned him that if he did not do so, that he would probably be sent home. These words seem more likely to have been said by Nazal, rather than the sanitized version that she testified to.

As I have noted above, it is established Board law that employees have a Section 7 right to wear union buttons on the job. *Republic Aviation,* supra; *Burger King Corp.,* supra. Blanket rules against union buttons violate Section 7 rights, even without discrimination. *Meyer Waste Systems,* supra. This principle applies even to uniformed employees in contact with customers. *Ark Las Vegas Restaurant Corp*., 335 NLRB 1284, 1284 fn. 1 (2001). Therefore, Nazal's statements to Tevino

that he must remove his union button or face being sent home, which was an obvious euphemism for being suspended, would have likely had a chilling effect on the willingness of employees to engage in union activities. Thus, interfering with, restraining, and coercing them in the exercise of their Section 7 rights.

Accordingly, I conclude that the Respondent, by Marlene Nazal, on May 30, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons under threat of suspension, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(d) of the complaint.

Complaint paragraphs 5(e)(1), (2), and (3) alleges that the Respondent, through Brian Lerner, on May 30, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons under threat of suspension; threatened its employees with unspecified reprisals for wearing union buttons; and informed its employees that it would be futile for them to select the Union as their bargaining representative.

As set forth above, Marlene Nazal had already spoken to Joe Trevino about his union button on the morning of May 30. According to Trevino, about one hour later, he was again approached by Nazal, who informed him that Brian Lerner, vice president of food and beverage, wanted to see him in Lerner's office. Nazal instructed Trevino to transfer his tables to another server, and escorted him part of the way to Lerner's office. Immediately after Trevino entered the office, Lerner told Trevino that he "had a problem with a button [Trevino was] wearing." Lerner mentioned the Employer's policy against wearing any buttons or insignia that were not company related. Lerner asked Trevino to remove the union button and Trevino refused. He informed Lerner that he had the right to organize on behalf of the Union and to wear the button. Lerner continued to ask that Trevino remove the button, telling him that another server, Luis, had been asked to take off his union button and had allegedly done so willingly. As he was still refusing to take off his button, Lerner informed Trevino that he would "most likely be suspended pending investigation."

During the conversation, Lerner discussed his view of the Union's organizing effort. He told Trevino, "You guys are not going to win. You're not going to have your way by being hard-nosed about this. You guys won't be allowed to come in here. The Union won't be coming in here." It was at about this point that Lerner invited Keith Kawana, Spice Market Buffet, and Zanzibar Cafe Manager, into the meeting. With Kawana present, Lerner continued to ask Trevino to remove his button. Toward the end of the meeting Lerner said, "Joe, we're not your enemies. We just want you to take that button off." The meeting concluded with Lerner telling Trevino to go back to work, that he would speak with Trevino again later that day after he had a chance to confer with the Respondent's president, Bill Timmins, and the company attorneys about the union button. Later that day, Lerner told Trevino that he was still waiting to meet with Timmins and the attorneys, and he would be contacting him still later to tell him whether or not he could wear the union button.

According to Trevino, Lerner never did get back to him, nor inform him that he had the right to wear the committee leader button. It is important to note that Lerner did not testify at the hearing, and that although Kawana did testify, he did not discuss the meeting with Trevino in Lerner's office. Therefore, Trevino's testimony about this meeting was unrebutted.

As has been stated, the Respondent's employees had the right to wear the union committee leader buttons while at work. The Respondent's rule against the wearing of unauthorized pins and buttons, including union buttons, interferes with employee Section 7 rights. (Cases cited above.) Lerner promulgated and enforced the Respondent's illegal rule against the wearing of buttons when he directed Trevino to remove the union button under threat of suspension, or some other unspecified punishment. The fact that the Respondent's supervisors were not successful in getting some employees, such as Trevino, to remove their union buttons does not provide the Respondent with a defense. As the Board has indicated, " It is well settled that a violation of Section 8(a)(1) does not turn on whether the coercion succeeded or failed. Rather, the test is whether the conduct reasonably tended to interfere with the free exercise of employees' rights under the Act." *J. P. Stevens & Co.,* 244 NLRB 407, 408 fn. 8 (1979). Also, there was certainly no repudiation of the Respondent's unlawful rule, as Lerner never got back to Trevino to inform him that his Employer had no objection to his wearing the union button.

Further, Lerner made it clear to Trevino that the Union was not going to succeed in its efforts to organize the Respondent. His statements to Trevino were not in the context of expressing his own personal opinion. Such statements might have been protected as a free expression of personal views under Section 8(c) of the Act. Instead, the statements were made in the context of Lerner's demand that Trevino remove the union button and his threat to suspend Trevino unless he did so. Lerner's statements clearly contained a "threat of reprisal." Thus, specifically removing the statements from the protection of Section 8(c). By informing Trevino that the Respondent considered the Union's organizing effort as an act of futility, the Respondent was interfering with, restraining, and coercing employees in the exercise of their Section 7 right to support the Union.

Accordingly, I conclude that the Respondent, by Brian Lerner, on about May 30, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons under threat of suspension, or other unspecified reprisals, and informed its employees that it would be futile for them to support the Union, all in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(e)(1), (2), and (3).

It is alleged in paragraph 5(f) of the complaint that on about May 30, the Respondent, through Dimitrios Fotopoulos, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons.

Food server Abraham Mohamed and bus persons Dinora Hernandez and Eva Carrasco all wore union committee leader buttons on their uniforms on the afternoon of May 30. These employees testified that at a preshift meeting the Zanzibar Café manager, Dimitrios Fotopoulos, informed the assembled employees that he did not want anyone working on his shift to wear a union button. Hernandez described Fotopoulos as "very

serious" when he made this statement. Mohamed responded to his supervisor on behalf of the employees that no one was going to take his or her union button off, and apparently no one did. In any event, Fotopoulos said that he would check with his superiors about the propriety of wearing the buttons, and the employees worked their shift without further incident. Fotopoulos apparently never spoke to the employees again about this matter. Fotopoulos did not testify at the hearing, and the testimony of the three employees was unrebutted.

For the same reasons as I have expressed above, I continue to find that the statement by the Respondent's supervisor that employees were prohibited from wearing a union button on their uniforms at work constituted interference with, restraint, and coercion of the employees' Section 7 rights. Being told that they could not wear union buttons would naturally have a chilling effect on the employees' willingness to engage in further union activity. This was especially true where there was no effort made to retract or repudiate the unlawful statement.

Accordingly, I conclude that on about May 30, the Respondent, through Dimitrios Fotopoulos, violated Section 8(a)(1) of the Act by promulgating and enforcing an overly broad and discriminatory rule prohibiting its employees from wearing union buttons, as alleged in complaint paragraph 5(f).

Paragraphs 5(g)(1) and (2) of the complaint alleges that on about May 30, the Respondent, by Charles Clark, interrogated its employees about their union membership, activities, and sympathies; and engaged in closer supervision of its employees because of their union activities and support.

Charles (Chuck) Clark was a chef in the Respondent's Spice Market Buffet.[12] On May 30, Jose Beltran, a cook at the Italian station in the buffet, and Luis Herrera, a cook at the seafood station in the buffet, first wore union committee leader buttons at work. According to Beltran, at about 3 p.m. Chef Clark conducted a preshift meeting for approximately 15 to 20 employees. Clark looked at Beltran and asked him what he was wearing. Beltran replied that it was his union button, and Clark allegedly responded, "Oh, it's your union button." That was the end of the conversation about the button. Herrera testified that he was also present, and heard Clark address Beltran with an, "Oh, is that a union button?" Neither Beltran nor Herrera claim that Clark asked either man to remove his button. When he testified, Clark did not deny making a reference to Beltran's button.

I am of the view that Clark's reference to Beltran's union button was an innocent comment, which did not rise to the level of an unfair labor practice. There was certainly no interrogation of either Beltran or Herrera, and it was reasonable to expect that by wearing the committee leader buttons questions would be directed to these men by fellow employees and even supervisors. The Board has found a range of supervisory inquiries that flow from the observation of a union button not to constitute unlawful interrogation. *Continental Can Co*., 282 NLRB 1363 (1987) (employer lawfully asked employee whose hat displayed union buttons, "what's all that shit on top of your head?"); *Spring City Knitting Co.,* 285 NLRB 426 (1987) (employer lawfully asked employee why she was wearing union emblem); *UARCO, Inc*., 286 NLRB 55 (1987) (employer lawfully asked employees what they were doing wearing prounion buttons).

In any event, it is obvious that Clark's comment was nothing more sinister than a natural inquiry as to what an employee who worked in his buffet was wearing on the first day that the buttons appeared. Under the Board's "totality of the circumstances" standard, this did not constitute unlawful interrogation. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra.

This paragraph of the complaint also alleges that Clark engaged in closer supervision of employees because of their union activity. During their direct examination of witnesses, neither counsel for the General Counsel nor counsel for the Charging Party offered any probative evidence in support of this allegation. However, in her redirect examination of employee witness Jose Beltran, counsel for the General Counsel did attempt to elicit testimony in support of this allegation. Counsel for the Respondent objected on the basis that he had not gone into this matter on cross-examination of the witness, and, therefore, counsel for the General Counsel was attempting to raise matters on redirect examination that were beyond the scope of cross-examination. After hearing extensive argument from both counsels, I was in agreement with counsel for the Respondent, and I sustained the objection. Therefore, I precluded counsel for the General Counsel from questioning Beltran about this matter on redirect examination, and I shall strike any answer that he gave. There was no probative evidence offered by either counsel for the General Counsel or counsel for the Charging Party in their cases in chief in support of this allegation. Thus, the General Counsel failed to meet his burden of proof.

Accordingly, based on the above, I shall recommend the dismissal of complaint paragraphs 5(g)(1) and (2).

Complaint paragraph 5(h) alleges that on about May 30, the Respondent, by Gary Munsie, interrogated its employees about their union membership, activities, and sympathies. This paragraph is an exact duplication of the allegation contained in paragraph 5(a), which was considered above. I assume that the General Counsel merely inadvertently added paragraph 5(h) to the complaint. Accordingly, I shall recommend the dismissal of complaint paragraph 5(h).

It is alleged in complaint paragraph 5(i) that on about May 30, the Respondent, through Michael Welch, interrogated its employees about their union membership, activities, and sympathies.

Azucena Felix was employed by the Respondent in its material control department. Her immediate supervisor was Material Control Supervisor Michael Welch. Felix testified that she first wore a union committed leader button on May 30. On that day at approximately 11 a.m., she received a call on her in-house radio from Welch, who asked Felix to meet him near the elevators. They then walked to the linen dock. Initially, there was some discussion about Felix's request for a day off. Then Welch is alleged to have asked her "if [she] was with the Union." According to Felix, she responded, "Yes, just like my button said." Further, she testified that Welch asked her "to be very honest with him, and to tell him why [she] wanted the Company to have a Union." Felix explained that she would "feel safer" with the Union, and gave as an example her part-

[12] The various restaurant chefs are admitted supervisors.

time job at the Hilton, where she worked under a union contract and had the benefit of seniority. Felix testified that Welch responded that he "respected" her decision. Welch then went on to explain the Respondent's policy on discussing the Union with fellow employees while at work. (I will review the remainder of this conversation in a later part of this decision.) Welch recalled in general the conversation with Felix, but not the specific references to why she was supporting the Union.

I credit Felix that Welch questioned her about her support for the Union and why she felt that way. However, I do not believe Welch's questions constituted unlawful interrogation. The questions asked of Felix were certainly reasonable in view of her sudden appearance wearing a union button, and were asked by Welch in a nonthreatening or accusatory way. As noted above, the Board has upheld a range of supervisory inquiries that flow from the observation of a union button. See *Continental Can Co.,* supra; *Spring City Knitting Co.,* supra; *UARCO, Inc.,* supra. The conversation was friendly and occurred in the workplace, rather than in a supervisor's office. There was no effort made to elicit privileged information about Felix or other employees' union activity, and Felix answered the questions truthfully and without fear. Based on the Board's "totality of the circumstances" test, I conclude that Welch's questions were not coercive. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra.

Accordingly, I shall recommend the dismissal of complaint paragraph 5(i).

It is alleged in paragraphs 5(j)(1), (2), and (3) of the complaint that on about May 30, the Respondent, through Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; and threatened its employees with unspecified reprisals, because of their union activities and support.

As noted, Kawana was employed by the Respondent as the manager of both the Spice Market Buffet and the Zanzibar Café. Luis Velasquez was at the time of the events in question a waiter in the Spice Market Buffet.[13] He began to wear a union committee leader button at work on May 30. Velasquez testified that he was sitting in the employee dining room (EDR) at approximately 7 a.m. when he was approached by Kawana, who asked him what he was doing with "that button." Velasquez responded that he wanted to be a committee leader so that he could provide information to his coworkers, and that it would not interfere with his job. According to Velasquez, Kawana replied with a question, wanting to know how it was possible for Velasquez to do this to him, "after he had given [Velasquez] the job?" Additionally, Kawana asked Velasquez approximately three times to remove his union button. Velasquez refused, saying that he had a legal right to wear it. While Kawana testified at the hearing, he did not specifically address these items. Therefore, this part of Velasquez' testimony was unrebutted.

[13] The Respondent ultimately terminated Velasquez, and at the time he testified he was employed by the Union.

I am of the opinion that Kawana's questioning of Velasquez constituted unlawful interrogation. The tenor of the conversation was hostile and accusatorial, with Kawana suggesting to Velasquez that wearing a union button was a display of ingratitude for having been given a job by Kawana. Further, the questioning was accompanied by Kawana's repeated demands that Velasquez remove his button. This conversation was clearly coercive under the Board's "totality of the circumstances" standard. *Rossmore House,* supra; *Medcare Associates, Inc*., supra. Further, in demanding the removal of the button, which I have found that the employees had the legal right to wear, Kawana was promulgating and enforcing the Respondent's overly broad and discriminatory rule prohibiting the wearing of union buttons. *Republic Aviation,* supra; *Meyer Waste Systems,* supra; *Ark Las Vegas Restaurant Corp.,* supra.

Finally, in suggesting that Velasquez was disloyal and ungrateful because he wore a union button, Kawana was threatening Velasquez with unspecified reprisals. The Board has held that "[g]enerally an employer may not rebuke an employee by equating his prounion sympathies to disloyalty to the employer." *Ferguson-Williams, Inc*., 322 NLRB 695, 699 (1996); see also *Sea Breeze Health Care Center*, 331 NLRB 1131, 1132 (2000) (holding that manager's statement that she was "highly disappointed" with employee's union support was a "veiled threat of reprisal"); *Medcare Associates, Inc*., supra at 941 (manager illegally implied that employee would be regarded as disloyal if she did not oppose the union). It has also been held illegal for a supervisor to characterize union supporters as ungrateful to their employer. *House Calls, Inc.,* 304 NLRB 311, 313 (1991); *Equipment Trucking Co.,* 336 NLRB 277, 277 (2001) (statement that employee did not appreciate his job much was an unlawful threat of reprisal).

In is totality, Kawana's statements to Velasquez were designed to interfere with, restrain, and coerce him in the exercise of his Section 7 rights. He was interrogated about his union activity, accused of being disloyal, repeatedly told to remove his union button, and threatened with reprisals for refusing to do so. Further, the Respondent never repudiated Kawana's unlawful conduct. Although Velasqez was apparently not intimidated by Kawana's threats, since he continued to wear his union button, the coercive nature of Kawana's statements could not have had other than a coercive influence on the willingness of Velasquez and others to engaged in continued union activity.

Accordingly, I conclude that on May 30, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; and threatened its employees with unspecified reprisals because of their union activities and support, all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(j)(1), (2), and (3) of the complaint.

The General Counsel alleges in complaint paragraphs 5(k)(1), (2), and (3) that on about May 30, the Respondent, through Brian Lerner, interrogated its employees about their union membership, activities, and sympathies; promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; and threatened its em-

ployees with discharge because of their union activities and support.

Following Velasquez' early morning conversation with Kawana in the EDR on May 30, he had occasion to once again speak with Kawana when at about 10 a.m., he was summoned to Kawana's office. Velasquez testified that Kawana told him that Brian Lerner, vice president of food and beverage, wanted to talk with him, and the two men went to Lerner's office. According to Velasquez, Lerner started the conversation by saying, "What's happening with that button that you have there, it's not part of the uniform?" Velasquez explained that he was a union committee leader and that he had a legal right to wear the button, but that his union activities would not interfere with his job. In any event, Velasquez told Lerner that he should know all about these matters, as the Union was to have sent a letter to the Respondent providing the names of its union committee leaders. Lerner said that he knew nothing about this, and was unaware of a letter like the one mentioned by Velasquez reaching the Respondent. Just as Kawana had done earlier, Lerner asked Velasquez to remove the union button. At that point Velasquez told Lerner that since the Respondent had yet to be served with the letter, he would follow Lerner's order and "temporarily take off [the] button," until the document was received. That was the end of their conversation, at least for a while.

Around the middle of the same day, Lerner came to the station where Velasquez was working and got some coffee. By this time Velasquez had resumed wearing the union button, because he was of the understanding that the Union's letter had been delivered to the Respondent. Lerner told Velasquez that there was no problem with Velasquez wearing the button, but "to be careful not to be talking about the Union while [he] was working, because the fact is that they could fire [him] because of that." Velasquez told Lerner that he understood the rules, and the conversation ended.

Lerner did not testify at the hearing. Kawana testified, but not about the meeting with Velasquez in Lerner's office. Therefore, the testimony of Velasquez concerning these matters is unrebutted.

I find that Lerner's interrogation of Velasquez was coercive in nature. It occurred in Lerner's office in the presence of another supervisor, namely Kawana, in what was an accusatorial atmosphere. Lerner already knew from Kawana that Velasquez was wearing a union button. Never the less, he took the opportunity to put Velasquez on the spot, asking him, "What's happening with that button?" and reminding him that, "It's not part of the uniform." Under the Board's "totality of the circumstances" standard, the questions asked by Lerner were unlawful, and intended to elicit a response from Velasquez likely to disclose privileged information regarding his or other employees' union activity. This interrogation was all the more coercive as it was accompanied by other unfair labor practices, namely Lerner's demand that Velasquez remove the union button. Lerner's demand was a continuation of that same demand to Velasquez made earlier by Kawana. By this time, it was clear that there was a concerted effort by the Respondent's supervisors to coerce the various union committee leaders into abandoning their efforts to wear union buttons.[14] Of course, as has been noted repeatedly above, Velasquez and the other employees had the legal right to do so.

Further, in his midday conversation with Velasquez, Lerner continued with his coercive conduct, telling Velasquez that while he could wear his union button, he should be careful not to talk about the Union while at work, because he could be fired for doing so. I will deal later in this decision with what is obviously an overly broad rule against talking about the Union at work. However, for the present it is sufficient to conclude that Lerner's comment to Velasquez that he could be fired for talking about the Union was unlawful. It is interesting that even in the context of finally telling Velasquez that he had a right to wear his union button, Lerner apparently could not resist threatening Velasquez with possible discharge for engaging in union activity.

Lerner's several communications with Velasquez on May 30, interfered with, restrained, and coerced him and other employees in the exercise of their Section 7 rights. The statements were certainly likely to have a chilling effect on the willingness of employees to engage in future union activity. Accordingly, I conclude that on about May 30, the Respondent, by Brian Lerner, interrogated its employees about their union activities; promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; and threatened its employees with discharge because of their union activities; all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(k)(1), (2), and (3) of the complaint.

It is alleged in complaint paragraphs 5(l)(1) and (2) that on about May 31, the Respondent, through Brian Lerner, interrogated its employees about their union membership, activities, and sympathies; and threatened its employees with closure of the Respondent's facility because of their union activities and support.

As noted earlier, Julie Wallack was employed by the Respondent as a cocktail server. On May 31, she was wearing a union committee leader button when she was approached in the morning in the Zanzibar service well by Brian Lerner. Also present was bartender Michael Palladino, another union committee leader. According to the testimony of Wallack, Lerner asked, "[W]hy [they] were doing this, and that out of all the people, he was very surprised that [she and Palladino] were committee leaders." Wallack replied that "it was nothing personal against him. It's just [she] felt that [they] strongly needed the Union in [their] work place." She testified that Lerner said that he was "surprised," because they had "a good rapport," and he expected that he would have heard "about this ahead of time." Further, he said that he was "surprised that [they] didn't come and talk to him, and that the Union couldn't guarantee [them] anything that the hotel was [not] already giving [them] right now." Lerner cautioned them that by "going union, that could cause the hotel to go into serious debt, financial problems." Wallack indicated to Lerner that she was interested in the Union because she felt it would help her get "better job

[14] By virtue of the sheer number of unfair labor practices committed by the Respondent's supervisors on May 30, the contention that they were de minimis is merit less.

security, better benefits, more consistency." The conversation ended with Lerner informing the employees that "go[ing] culinary" was no guarantee of better benefits, that "it's strictly up to the hotel what they would want to give [them]." As Lerner did not testify, Wallack's testimony was unrebutted.

I believe that Lerner's statements were intended to put Wallack and Palladino "on the spot," and were, therefore, coercive. This was not merely an innocent conversation between a supervisor and employees who were openly wearing union buttons. Rather, Lerner intended to embarrass them by saying that "out of all the people, he was very surprised . . . [that they] were committee leaders." Also, he commented that he was "surprised" because they had such a "good rapport" with him, and because they had not come to him "ahead of time." He was certainly suggesting that by supporting the Union these two employees were being disloyal to him and to the Respondent. As noted earlier, generally an employer may not rebuke an employee by equating his prounion sympathies to disloyalty to the employer. *Ferguson-Williams Inc.,* supra; see also *Sea Breeze Health Care Center,* supra. It is also illegal for a manager to characterize union supporters as ungrateful to their employer. *House Calls, Inc.,* supra; *Equipment Trucking Co.,* supra. Therefore, I conclude that under the Board's "totality of the circumstance" standard, these statements were unlawful.

Further, the statements constituted interrogation because they were made in the context of other unfair labor practices. Lerner told Wallack that "by [them] going union, that could cause the hotel to go into serious debt, financial problems." This threat of financial problems was illegal because Lerner did not offer any objective evidence in support of it. *Daikichi Sushi*, 335 NLRB 622, 623–624 (2001) (speculation that business "might" close unlawful where manager did not cite any objective evidence that the union's demands would force business closure). Instead, Lerner was attempting to exacerbate a fear that employees had generally about the financial health of the Respondent.[15] In my view, this statement by Lerner was illegal as a not very subtle threat that the Respondent might be forced to close the facility if the prounion employees were successful in organizing the hotel-casino.

Once again, I find that Lerner's comments to employees, this time made to Wallack and Palladino, were an attempt by the Respondent to interfere with, restrain, and coerce them in the exercise of their union activity. Accordingly, I conclude that on May 31, the Respondent, by Brian Lerner, interrogated its employees about their union membership, activities, and sympathies; and threatened its employees with closure of the Respondent's facility because of their union activities and support; all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(l)(1) and (2) of the complaint.

The General Counsel's complaint alleges in paragraphs 5(m)(1) and (2) that the Respondent, through Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; and informed employees that it would be futile for them to select the Union as their bargaining representative.

Elisabeth Peuser was employed by the Respondent as a food server in the Zanzibar Café. She wore a union committee leader button on her uniform for the first time on May 31. On the afternoon of that day, she was folding napkins when approached by Keith Kawana. According to Peuser, he asked her, "Why are you doing this to me?" She replied, "Doing what?" Kawana said that he was "not for or against the Union," and that "a lot of people are doing this because of medical reasons, . . . medical benefits and stuff." Peuser acknowledged, "that's what [she was] looking for." Under cross-examination, she added that Kawana also said, "[W]hen [the facility] becomes new, we're not going to be union." Presumably, the reference to "new" was intended to mean when new owners took over the operation of the facility.[16] When Kawana testified, he denied ever having a conversation with Peuser about the Union.

Between the two, I credit Peuser over Kawana. She testified in some detail about the conversation with Kawana. I do not believe that she fabricated this alleged conversation "out of whole cloth." In fact, Kawana had a number of similar conversations with other employees where he questioned them about the Union. Therefore, I believe it more likely than not that he had this conversation with Peuser, and he has simply conveniently forgotten that it occurred.

I find that Kawana asked Peuser, "Why are you doing this to me?" He was clearly making reference to her wearing of the union committed leader button. As I have said above, it is generally illegal for an employer to rebuke an employee by equating her prounion sympathies to disloyalty to the employer. It is also illegal for a manager to characterize union supporters as ungrateful to their employer. Since this was precisely what Kawana was implying by his remark, I am of the view that he violated the Act. Under the "totality of circumstances" standard, his statement constituted unlawful interrogation, intended to interfere with the exercise of Peuser's Section 7 rights.

However, Kawana's statement that "when [the facility] becomes new, we're not going to be union" was too vague for an employee to reasonably have construed it to mean that it was futile to support the Union. In my view, this remark is simply too ambiguous to be considered a threat, or prediction that any union activities will result in nothing but an act of futility. It does not warrant the finding of an unfair labor practice.

Accordingly, I conclude that on May 31, the Respondent, through Keith Kawana, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(m)(1) of the complaint.

Further, I recommend dismissal of complaint paragraph 5(m)(2) of the complaint.

Complaint paragraphs 5(n)(1) and (2) alleges that on May 31, the Respondent, by Dimitrios Fotopoulos, interrogated its

[15] Tracy Sapien, the Respondent's vice president of human resources, testified that the Respondent was in bankruptcy proceedings. The bankruptcy was mentioned a number of other times during the hearing, and it appears to have been common knowledge among the employees.

[16] During the course of the hearing, there were numerous references to an impending sale of the hotel and casino to a new ownership group. This information appeared to be widely disseminated among the employees and managers.

employees about their union membership, activities, and sympathies; and promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons by means of physical force. Also, complaint paragraphs 5(o)(1) and (2) alleges that on the same date, the Respondent, by Fotopoulos, interrogated its employees about their union membership, activities, and sympathies; and informed its employees that it would be futile for them to select the Union as their bargaining representative.

As noted earlier, Joe Trevino, food server at the Zanzibar Café, wore a union committee leader button. He testified that on May 31, at about 1:30 p.m. in the main kitchen, Dimitrios Fotopoulos, the café manager, approached him. According to Trevino, Fotopoulos reached out and grabbed the union button he was wearing on his chest, clenched the button in his fist, and said, "No good, no good. Take it off, take it off." Allegedly Fotopoulos started to pull the button off, and then released his grip, just before he would have removed the button. Tevino testified that he then briefly went about his business, but less than 5 minutes later Fotopoulos came back over to him and asked, "Joe, what is going on with the Union?" Trevino tried to say that he was busy, but before he could get the words out, Fotopoulos proceeded to give what Trevino characterized as a "history lesson."

Trevino testified that Fotopoulos said, "[T]hat history has shown that other organizations, other regimes have . . . attempted to come in and conquer lands, nations. Alexander the Great tried, he failed. Stalin tried, he failed. You guys and the Union, you guys are trying to come in. You guys won't be able to get in here. You're going to fail too." When asked how he responded, Trevino said, "I bit my lip." That was the end of the incident. As Fotopoulos did not testify, Trevino's testimony went unrebutted.

It is obvious to me that Fotopoulos was promulgating and enforcing an overly broad and discriminatory rule against wearing union buttons at work when he grabbed Trevino's committee leader button and said, "No good, no good. Take it off, take it off." This was a continuation of the concerted efforts by a number of the Respondent's supervisors on May 30 and 31 to coerce the union committee leaders into abandoning their efforts to wear union buttons. As I have repeatedly indicated, the employees had every right to wear these union buttons at work. However, it was the words spoken by Fotopoulos, which violated the Act. He is obviously a very demonstrative individual, and grabbing the button was merely his way of expressing himself. I did not get the impression that Trevino was in way fearful that Fotopoulos would physically harm him. The violation occurred when the words were spoken, and it is not necessary it make more of this incident than it was. Therefore, while I find that Fotopoulos was promulgating and enforcing the overly broad rule by his spoken words, I specifically do not find that he was threatening to enforce the rule by means of physical force.

Further, it is clear that Fotopoulos unlawfully interrogated Trevino regarding his union activities. In the middle of his diatribe about unions and his demand that Trevino take off the button, Fotopoulos asked, "Joe, what is going on with the Union?" Under the Board's "totality of the circumstances" standard, this was much more than a simple supervisory inquiry directed to an open union supporter. It accompanied the other unfair labor practice of demanding the removal of Trevino's union button. Under these circumstances, the question about the Union was, I believe, intended to elicit privileged information about Trevino and other employees' union activity. As such, it reasonably would have a chilling effect on the willingness of employees to engage in future Section 7 activity. It was, therefore, a violation of the Act.

Finally, it is alleged that Fotopoulos informed employees that selecting the Union as their bargaining representative would be futile. I assume that by this allegation, the General Counsel is making reference to the "history lesson," which Fotopoulos gave to Trevino. Fotopoulos apparently viewed unions in the same light as Alexander the Great and Stalin. He was obviously suggesting that the Union would be no more successful at organizing the facility than these two historical figures were at world conquest. While one might see this as an amusing, if not interesting, analogy, it cannot be reasonably construed as a statement by management that supporting the Union was futile. When he testified, Trevino seemed, if anything, slightly amused by what he himself characterized as a "history lesson." Instead of responding to Fotopoulos, he merely "bit [his] lip."

Fotopoulos was, of course, entitled to his own view of world events, of unions in general, and of this Union in particular. His monologue about these matters was, I believe, merely the exercise of free speech, protected by Section 8(c) of the Act. It was really just hyperbole. The statement was not to be taken seriously, and certainly not to be considered as a pronouncement from the Respondent that support for the Union was an act of futility. Therefore, I find that this statement by Fotopoulos did not constitute a violation of the Act.

Accordingly, I conclude that on May 31, the Respondent, by Dimitrios Fotopoulos, interrogated its employees about their union membership, activities, and sympathies; and promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; all in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(n)(1) and (2).

Complaint paragraph 5(o)(1) is merely a repetition of paragraph 5(n)(1), which I assume was inadvertently duplicated. Therefore, I shall recommend the dismissal of paragraph 5(o)(1). Further, for the reasons stated above, I shall recommend the dismissal of complaint paragraph 5(o)(2).

It is alleged in complaint paragraphs 5(p)(1), (2), (3), and (4) that on about May 31, the Respondent, through Charles Clark, interrogated its employees about their union membership, activities, and sympathies; informed its employees that it would be futile for them to select the Union as their bargaining representative; threatened its employees with unspecified reprisals because of their union activities and support; and promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons.

It is alleged in complaint paragraph 5(q)(1) that on about May 31, the Respondent, through Charles Clark, interrogated

its employees about their union membership, activities, and sympathies.[17]

It is alleged in complaint paragraph 5(s) that on about May 31, the Respondent, through Charles Clark, interrogated its employees about their union membership, activities, and sympathies.

It is alleged in complaint paragraph 5(t) that later on about May 31, the Respondent, through Charles Clark, interrogated its employees about their union membership, activities, and sympathies. (I added underscoring for emphasis.)

Because of the similar allegations, and as Charles Clark is named in each paragraph, I will consider complaint paragraphs 5(p), (q), (s), and (t) together. As was noted earlier, Clark was a chef in the Spice Market Buffet. During the time of the events in question, Vilash Chitanich was a cook in the buffet. He testified that beginning on May 31, he wore a union committee leader button on his uniform. According to Chitanich, Clark approached him in the kitchen and asked if he had a "problem." Chitanich responded in the negative, at which point Clark asked what the button he was wearing meant. Chitanich told Clark that it meant he was a union committee leader. That was apparently the end of the conversation. While Clark did not specifically testify about this conversation, I believe that the version told by Chitanich is too vague and benign to serve as a basis for the finding of an unfair labor practice. I do not believe that asking if the employee had a problem and what his button meant constituted unlawful interrogation under the Board's "totality of the circumstances" standard. It was apparently a brief, passing conversation, which took place while Chitanich was working in the kitchen. In my view, it simply does not rise to the level of an unfair labor practice.

Later that day, at about 3:15 p.m., Jose Beltran, a cook in the Spice Market Buffet, was preparing to open his workstation, when he was approached by Chef Noe Banuelos. As noted earlier, Beltran first wore a union committee leader button the day before, May 30, on which occasion Chef Clark had commented about the button. Banuelos said that Clark wanted to see Beltran in his office, and the two men went there. The door was closed and Beltran was told to sit down. Using Banuelos as a Spanish language translator, Clark began to question Beltran. According to Beltran's testimony, Clark pointed to his union button and asked, "Why are you doing this?" Beltran replied, asking whether Clark meant his "union activity?" Clark responded, "Yes." Beltran told Clark that he was supporting the Union because the benefits the Union could obtain were better than those the hotel was presently providing. The men discussed the insurance package that the employees presently had, and Clark asked whether Beltran had ever previously worked in a union represented casino. As Beltran indicate no, Clark suggested that he talk with some coworkers who had previously worked in a union house, and they could tell him what it was like. Beltran replied that he was convinced that what he was doing was right. Just before the conversation ended, Clark is alleged to have asked Beltran whether he "needed something in [his] station to work better, or if [Clark] had treated [him] bad, or if [Clark] had harassed [him]?" The conversation concluded with Beltran saying that he "only wanted the Union because of the benefits."

Clark denied ever discussing union buttons with Beltran. However, in his post hearing brief, counsel for the Respondent, while disputing that this conversation between Beltran and Clark occurred, argues that even if it did, it did not constitute interrogation. I disagree, and fully credit Beltran's story. Clark had Beltran called to his office, and in the company of another supervisor, Banuelos, questioned Beltran about "why" he was supporting the Union. This went way beyond a supervisor innocently making inquiries of an open union supporter. Clark asked if he had treated Beltran badly, or had harassed him in some way. He was, in effect, rebuking Beltran by equating his prounion sympathies to disloyalty. *Ferguson-Williams, Inc.,* supra; *Sea Breeze Health Care Center,* supra. He was characterizing Beltran as being ungrateful. *House Calls, Inc.,* supra; *Equipment Trucking Co.,* supra. When considering the "totality of the circumstances," it is apparent that Clark's interrogation of Beltran was coercive. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra. Clark made his inquiries in an accusatory, hostile manner. Also, the questions were designed to elicit a response from Beltran likely to disclose his or other employees' union activity. As such, the interrogation was violative of the Act.

Still later that day, May 31, at about 4:40 p.m., Clark had a conversation with assistant buffet cook Luis Sotelo. Sotelo testified that he first began to wear a union committee leader button at work earlier on that date. According to Sotelo, he was eating in the EDR when Clark approached and asked Sotelo to go to his office. On the way, Clark apologized for refusing to shake his hand earlier at the preshift meeting, which was apparently the first time that Clark observed Sotelo wearing a union button. Banuelos was present in the office to act as a translator, and Clark began questioning Sotelo. Clark asked whether Sotelo had a "problem" with his supervisors, and if he understood about the company benefits. Sotelo replied that he did not like the benefits the Company provided, and that he was supporting the Union for the improvement of himself and his family. Clark told Sotelo that he felt "betrayed" by the wearing of the union button, and he asked if Sotelo were aware of the way the Union worked. Sotelo informed Clark that he was aware of how the Union worked, and that he previously worked at a union represented company. Clark mentioned that he had "never denied" Sotelo "a favor," or "a vacation." Sotelo replied that working hard was his way of repaying the Employer. Sotelo said that he felt badly, because Clark was taking his support for the Union personally, and it was nothing personal against the supervisors. He told Clark that he was his friend, and not to take it personally. The meeting ended with Clark and Sotelo shaking hands and giving each other a hug.

Clark denies ever talking with Sotelo about union buttons, or speaking with him about his union activities. However, I did not find Clark to be a particularly credible witness. I found his

[17] Counsel for the General Counsel withdrew complaint par. 5(q)(2). (GC Exh. 2.)

Also, the undersigned dismissed complaint paragraph 5(r) at the hearing. This paragraph was dismissed on the basis that the General Counsel had failed to meet his burden and establish that the named individual, Bruce Howard, a former employee, was an agent of the Respondent at the time of the events in question.

demeanor to be one of arrogance, and much of his testimony was inherently implausible. After observing him testify at some length, I think it likely that he did consider the wearing of union buttons by "his cooks" to constitute a personal affront to him. His hostile attitude was apparent by the demeanor of his testimony, as well as by the picture painted of him by his subordinate employees who were forced to listen to his harangues of May 30 and 31. Accordingly, I credit the testimony of Sotelo.

By asking if Sotelo had a "problem" with his supervisors, and by telling Sotelo that he felt "betrayed" by his wearing of the union button, Clark was clearly engaged in unlawful interrogation. He was accusing Sotelo of disloyalty, and as I have noted above, the Board has repeatedly found such conduct to constitute coercion. Additionally, by mentioning having "never denied" Sotelo a favor or vacation, and by linking it to Sotelo's perceived disloyalty, Clark was making a veiled threat of an unspecified reprisal if Sotelo continued with his union activity. *Medcare Associates, Inc.,* supra. The "totality of the circumstances" establishes that Clark's meeting with Sotelo would have reasonably had a chilling effect on the willingness of employees to engage in Section 7 activity. The fact that the meeting ended in a handshake and a hug is a testament to Sotelo's fortitude, and should not be considered to have lessened the coercive impact of Clark's conduct.

Apparently, Clark was not finished meeting with union supporters on May 31. Luis Herrera, a cook in the buffet, testified that he started wearing the union committee leader button on May 30. According to Herrera, the following day at about 5:15 p.m., Chef Banuelos summoned Herrera to Clark's office. The three men were alone in the office when Clark asked why Herrera had "put on the union button?" Clark further asked Herrera if he had a "problem working with him." Herrera tried to explain that he was only interested in better benefits, but Clark said that he did not believe Herrera. Clark wanted to know if Herrera understood the Union, and proceeded to offer the opinion that the "Union wasn't good for anything." Clark told Herrera that he "was going to have problems later on." Herrera testified that Clark pointed his finger at him and said, "You're going to take that button off right now." Herrera refused to do so, telling Clark that he was not doing anything illegal, but only fighting for his benefits. Allegedly, Clark laughed, and said that Herrera was "crazy." That apparently ended the conversation.

Clark denied having any discussion with Herrera about his union activity or the union button. He testified that he called Herrera, Beltran, and Sotelo into his office merely to discuss whether they needed any other equipment or supplies for their food stations at the buffet. He denied talking with any of them about the Union. However, it is simply illogical to conclude that in order to discuss such routine matters as supplies, Clark would call each of the three cooks into his private office, along with Banuelos acting as interpreter. Rather, it is much more plausible that the private interviews were for the purpose of questioning the cooks about their union activity. Timing strongly supports the stories told by the cooks, as they were summoned to Clark's office either the first or second day that they appeared at work wearing committee leader buttons on their uniforms. For all these reasons, I continue to find Cark to be an incredible witness. Accordingly, I credit the testimony of Herrera as to the matters discussed in Clark's office.

Considering the Board's "totality of the circumstances" standard, there is no doubt that Clark unlawfully interrogated Herrera. In asking Herrera why he was wearing a union button and whether he had a "problem" with him, Clark was attempting to elicit a response from Herrera that likely would disclose union activity. Clark went way beyond a simple supervisory inquiry directed to an open union supporter. Further, in telling Herrera that he "was going to have problems" in the future," Cark was making a direct threat of an unspecified reprisal for continuing to support the union. In directing Herrera to remove the union button, Clark was promulgating and enforcing the Respondent's overly broad and discriminatory rule prohibiting employees from wearing union buttons. This conduct by Clark directed toward Herrera would certainly interfere with, restrain, and coerce employees in the exercise of their Section 7 rights.

However, I do not find that Clark's comment to Herrera that the "Union was not good for any thing" rises to the level of an unfair labor practice. This comment is simply an expression of Clark's personal opinion, protected by Section 8(c) of the Act. In my view, it would not be reasonable for employees to construe this statement as a pronouncement from the Respondent that it would be futile for them to select the Union as their bargaining representative.

In an effort to clarify the various complaint allegations involving Chef Clark on May 31, the undersigned would note that the General Counsel claims that on four separate occasions Clark interrogated four employees about their union activities. The four employees involved were Chitanich, Beltran, Sotelo, and Herrera. As set forth above, I conclude that except for Chitanich, the Respondent, by Clark, did unlawfully interrogate the other three named employees. I also find that on May 31, Clark engaged in the other conduct alleged, with the exception of the claim that he informed employees that it would be futile for them to select the Union as their bargaining representative.

Based on the above, I conclude that on May 31, the Respondent, by Clark, threatened its employees with unspecified reprisals because of their union activities and support; promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons; and interrogated its employees about their union membership, activities, an sympathies; all in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(p)(3) and (4), 5(q)(1), (s), and (t).

Also, I recommend dismissal of complaint paragraphs 5(p)(1) and (2).

Complaint paragraph 5(u) was amended to allege that the Respondent on about May 30, by Brian Lerner and Michael Welch, and on about May 31, by Cheryl Pecpec, promulgated an overly broad and discriminatory rule prohibiting its employees from talking about the Union.[18]

I noted earlier in some detail the conversations that occurred on May 30 between Brian Lerner and Luis Velasquez. It was during the second conversation when Lerner told Velasquez

[18] See GC Exh. 2.

that he could wear his union button, but "to be careful not to be talking about the Union while [he] was working because the fact is that they could fire [him] because of that." As Lerner did not testify, Velasquez' testimony is unrebutted.

Also, I noted earlier the conversation on May 30 between Michael Welch and Azucena Felix where they discussed the Union. It was during that conversation that, according to Felix, Welch said that while he respected her feelings about the Union that, "he was only advising [her] to talk about the Union during [her] free time, before or after work, or during [her] break at lunch, at the ER." She testified that Welch then gave her an example, explaining that "if [she] talked about the Union during [her] work hours, it would be like if [she] would be selling Avon there, and commercializing a product." She was advised, "to talk about [the Union] only during [her] free hours." While Welch testified about this conversation, he equivocated about precisely what he said to Felix. However, it appears to me that he understood the Respondent's policy as prohibiting employees from talking about the Union while at work except when "on break." This was apparently what he told Felix. It is certainly similar to Felix's testimony, and I credit her version in full.

Jimmy Esteban was a porter in the Respondent's housekeeping department. He testified that he first began wearing a union committee leader button on May 31. On that date at approximately 12:45 p.m., he was eating lunch in the EDR when approached by Cheryl Pecpec, assistant housekeeping manager. She told Esteban she wanted to talk with him, and after he finished eating, he made his way to her office. Another housekeeping supervisor was also present. According to Esteban, Pecpec said that another employee had complained that Esteban was bothering her at work about the Union. Allegedly, Pecpec told Esteban that he was "not in trouble, but [he] cannot engage in union activity in the hallway." Esteban testified that he was not disciplined as a result of the incident. Pecpec testified that the complaint she received about Esteban concerned his attempt to get a fellow employee to sign a union card during working time. However, a written statement, which she apparently placed in Esteban's personnel file on approximately the same date as the incident occurred, contradicts her oral testimony. In this statement she does not mention union cards, but states that she told Esteban that, "he could talk about the union all he wanted in the EDR before or after work or during his lunch break but to please not be doing it upstairs." (R. Exh. 38.) I am of the view that Pecpec's written statement, being much closer in time to the incident, is likely more accurate than her testimony. It is similar to Esteban's testimony, which I find credible.

The Board has held that an employer violates the Act when it imposes talking restrictions in order to prevent employees from talking about the union. *Hausner Hard-Chrome of Kentucky, Inc.,* 326 NLRB 426, 428 (1998). While an employer may lawfully prohibit solicitation during working time, mere talking about a union does not constitute solicitation and, therefore, does not violate a "no solicitation" rule. *Industrial Wire Prods*., 317 NLRB 190, 190 (1995); *Lamar Industrial Plastics, Co.,* 281 NLRB 511, 513 (1986); *Sara-Tahoe Corp*., 216 NLRB 1039, 1042 (1975). The Respondent maintains a written policy against solicitation, however, that rule does not extend to mere talking.[19] (R. Exh. 4, p. 35.) Further, there was ample testimony from various witnesses that the employees customarily engaged in conversations about non-work related matters during working time. It is established Board law that an employer violates the Act when employees are forbidden to discuss unionization during working time, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign. *Jensen Enterprises,* 339 NLRB 1162 (2003); *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.,* 278 NLRB 402, 407 (1986). Such is the evidence in the matter before me.

I have accepted the testimony of the above-employee witnesses and conclude that Supervisors Lerner, Welch, and Pecpec each warned an employee that he/she was not permitted to talk about the Union during working time. In so doing, they were promulgating an overly broad and discriminatory rule prohibiting employees from talking about the Union. Accordingly, I conclude that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(u).

Complaint paragraphs 5(v)(1), (2), and (3) alleges that on about May 31, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities; and threatened its employees with unspecified reprisals because of their union activities and support.

Pablo Blanco was employed by the Respondent as a busboy in the buffet. He first wore a union committee leader button at work around May 31. He testified that Keith Kawana approached him on that date and asked him, "Why was [he] with a union?" Blanco responded that he was supporting the Union to get better insurance, and because the Union "could protect [him]." According to Blanco, Kawana asked, "[I]f he could help [Blanco] in any way?" Blanco told Kawana that he was fine, and allegedly Kawana replied that Blanco should "remember a favor that [Kawana] had done for [him]." That was apparently the end of the conversation. As Kawana did not specifically address these allegations when he testified, Blanco's testimony stands unrebutted.

In reviewing the statements made by Kawana in the context of the Board's "totality of the circumstances" standard, I am of the opinion that Kawana's inquiry as to why Blanco was supporting the Union constituted unlawful interrogation. This question cannot be considered merely an innocent inquiry directed at an open union supporter in light of the other statements made by Kawana, which constituted unfair labor practices. Kawana asked if he could help Blanco in any way. In the context of a conversation about the Union, this was clearly a solicitation of grievances. The Board has typically held that

[19] The policy defines solicitation to include "requesting charitable donations, invitations to social events, advertisements for home sales, parties, or requests for support for or agreement with an outside group, organization, cause or activity."

"[a]bsent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by a promise, express or implied, to remedy such grievances violates the Act." *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). When an employer solicits the grievances, but does not remedy them, there is nevertheless a rebuttable presumption that the employer is going to remedy them. Id. The promise need not be specific or explicit. *Grouse Mountain Associates II*, 333 NLRB 1322, 1324 (2001). As the Respondent did not rebut Blanco's testimony that the statements were made, nor offer any evidence that it had a past practice of soliciting grievances, I must conclude that the solicitation constituted a violation of the Act. Similarly, Kawana's statement that Blanco should "remember a favor" done for him was a not very subtle characterization of Blanco as an ungrateful union supporter. The Board has found such statements to constitute unlawful threats of reprisal. *Equipment Trucking Co.,* supra; *House Calls, Inc.,* supra.

Based on the above, I view Kawana's comments to Blanco in their totality to be coercive, and to clearly interfere with and restrain employees in the exercise of their Section 7 rights. Accordingly, I find that on about May 31, the Respondent, by Kawana, interrogated its employees about their union activities; solicited employee grievances and promised increased benefits if they refrained from union activities; and threatened employees with unspecified reprisals because of their union support; all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(v)(1), (2), and (3) of the complaint.

It is alleged in complaint paragraph 5(w) that in or about the end of May, the Respondent, by Marlene Nazal and Keith Kawana, engaged in surveillance of its employees to discover their union activities.

This allegation is apparently based solely on the testimony of employee Joe Trevino, who was a food server in the Zanzibar Cafe. He testified that since the union campaign began at the end of May, he has noticed Keith Kawana "following [him] throughout [his] work stations and [his] duties throughout the day more than what is considered . . . normal." According to Trevino, he has also observed Kawana talking with Trevino's customers, distributing business cards, and asking the customers "if anything's wrong" approximately five times since the end of May. Trevino indicated that Kawana had not engaged in this conduct before the commencement of the union campaign. Also, Trevino testified that since the start of the campaign, Marlene Nazal has been following him around as he performs his work. While the complaint plainly alleges that these were instances of surveillance by the Respondent in an effort to discover Trevino's union activity, the implication from Trevino's testimony was that Nazal and Kawana were more closely supervising him in an effort to uncover an act of misconduct for which he could be disciplined, and that Kawana was encouraging customers to file complaints against him.

Nazal denied following Trevino around the Café. Kawana testified at some length about his job duties and responsibilities. These include walking through the dining room and determining whether the guests are receiving proper service. He testified that 80 percent of his time is occupied interacting with guests, including handing out his business card. Kawana denied ever soliciting a written statement from a guest about poor service, but acknowledged that if a customer asked to make such a complaint, the opportunity would be provided to the customer. Kawana generally denied Trevino's accusations.

I do not credit these claims by Trevino. As counsel for the Respondent points out in his post-hearing brief, Trevino prepared eight "incident reports" for the Charging Party since May 30, where he reported on unusual or suspicious conduct by the Respondent's managers. However, these reports do not contain a single allegation that Nazal or Kawana were "following" him around the Café. It is at least somewhat suspect that Trevino did not consider them significant enough to mention in the reports apparently prepared with a view to filing unfair labor practice charges, but when testifying explained them as something highly unusual and out of the ordinary. I believe that with the passage of time, Trevino has embellished and exaggerated what in all likelihood was merely the normal performance of Nazal and Kawana's job duties.

Nazal was the Zanzibar Café assistant manager, and Kawana was the manager for both the Spice Market Buffet and the Zanzibar Cafe. They held responsible positions on behalf of the Respondent requiring them to spend considerable time in these restaurants ensuring that customers received excellent service, and that the restaurant employees properly performed their jobs. I see no credible evidence that these managers were doing anything other than performing their job duties to the best of their ability. There is simply no probative evidence that Nazal or Kawana were engaged in unlawful surveillance of Trevino in an effort to discover his union activity, as alleged in the complaint, or for any other reason violative of the Act.

Accordingly, I shall recommend dismissal of complaint paragraph 5(w).

Complaint paragraph 5(x) alleges that since in or about the end of May, the Respondent, by Keith Kawana, encouraged customers to complain about its employees because of their union activities and support. Complaint paragraph 5(y) alleges that since in or about the end of May, the Respondent, by Marlene Nazal, engaged in closer supervision of its employees because of their union activities and support. However, the allegations in these two complaint paragraphs were already covered fully in the discussion of paragraph 5(w). Once again, the only evidence offered was that of the testimony of Joe Trevino, whose testimony I found to be incredible. I am of the belief that regarding these specific matters, Nazal and Kawana were engaged in the lawful performance of their job duties, and were not in violation of the Act.

Accordingly, I shall recommend the dismissal of complaint paragraphs 5(x) and (y).

It is alleged in complaint paragraph 5(z) that on about June 1, the Respondent, by Charles Clark, interrogated its employees about their union membership, activities, and sympathies. However, I was unable to determine any evidence offered by either counsel for the General Counsel or counsel for the Charging Party in support of this allegation. Accordingly, I shall recommend the dismissal of complaint paragraph 5(z).

Complaint paragraph 5(aa) alleges that on about June 2, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies.

Dinora Hernandez and Eva Carrasco were employed by the Respondent as bussers in the Zanzibar Café. Both women testified about the same incident in essentially the same way. Each was a union committee leader who began to wear the union button at the end of May. On either June 1 or 2, at about 4 p.m., they were performing their duties when approached by Keith Kawana. He asked them to leave their workstations and speak with him in the hallway. According to Hernandez, once in the hallway he asked them if they had been "forced" to become union supporters. The women indicated that they supported the Union voluntarily. However, allegedly Kawana persisted and asked, "[W]hy [they] were doing this?" He also asked, "[I]f he had failed [them] in any way?" The women indicated that he had not failed them, but, rather, they were interested in the Union in order to obtain better benefits. Hernandez testified that she was "a little nervous" during the conversation, although she characterized it as friendly. According to Carrasco, the conversation ended with Kawana saying that he still considered them his friends, and giving each a hug. During his testimony, Kawana did not mention this incident. Therefore, the testimony of Hernandez and Carrasco stands unrebutted.

Once again, I must decide whether a conversation between a supervisor and employees constituted unlawful interrogation under the Board's "totality of the circumstances" standard. I believe that it did. Kawana did not merely ask open union supports why they were in favor of the Union. He began the conversation by asking if they had been "forced" to support the Union. He asked if he had "failed" them in some way, and that was why they had sought union support. In my opinion, these were probing questions intended to elicit information concerning the extent of the employees' union activity. For this reason, the questions were coercive. Further, in getting the employees to acknowledge that he had not "failed" them, Kawana was suggesting that they were being disloyal to him by their support for the Union. The Board holds such statements to be unlawful. *House Calls, Inc.,* supra; *Equipment Trucking Co.,* supra. The fact that Kawana acted in a friendly manner could have made the interrogation even more coercive, as the employees were more likely to believe that Kawana spoke for management. *Acme Bus Corp.,* supra.

I am of the view that this conversation would reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. Accordingly, I conclude that on about June 2, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(aa).

Paragraph 5(bb) of the complaint alleges that on about June 2, the Respondent, through Carrie Polaski, interrogated its employees about their union membership, activities, and support.

Sherry Lynn was employed by the Respondent as a bartender. She was a union committee leader who first wore her union button at work on June 2. According to Lynn, she was called to the office by her supervisor, Carrie Polaski, the beverage manager, shortly after she arrived at work. Lynn testified that Polaski started the conversation by asking whether she was happy working at the hotel. When Lynn responded in the affirmative, Polaski asked why she was supporting the Union. Lynn explained that the Respondent had been good to her, but not to some of her friends. According to Polaski, she asked for examples, and Lynn gave the substance of an incident with one of her friends who was allegedly told by a manager that she was too old to be a cocktail waitress. However, Lynn refused to name the employee involved when asked to do so by Polaski. Lynn indicated that the meeting ended on a friendly note, with the women hugging. She testified that during the meeting she had not been intimidated by Polaski, and that she was customarily in Polaski's office as much as once a month. For the most part, Polaski's testimony was similar to that of Lynn's testimony. According to Polaski, Lynn was frequently in her office, but she could not recall whether on this occasion she asked Lynn in, or whether Lynn simply came on her own. Polaski testified that she did not feel that her meeting with Lynn constituted interrogation, as she was merely asking "general questions."

I am of the view that Polaski's questions were more than just general. Rather, they were specific and intended to elicit a response from Lynn likely to disclose her or others' union activities. The subject of the Union was brought up in connection with whether Lynn was happy at the hotel. Lynn indicated that she was happy. However, after finding out from Lynn that some of her friends were unhappy, Polaski asked for examples, and she wanted to know the names of specific employees involved. This was more than simple "small talk." It was a conversation with a purpose. Polaski asked her questions with the intention of learning what she could about the involvement of Lynn and her friends in the union campaign. These questions went beyond merely asking an open union supporter for her personal feelings about the Union. Under the Board's "totality of the circumstances" standard, Polaski's questions constituted unlawful coercion. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra. The questioning occurred in Polaski's private office, and while Lynn had been there before, and testified that she was not intimidated, her fortitude in resisting Polaski's pressure did not diminish the coercive nature of the interrogation. The Board has held that the test of whether there is a violation of the law is whether the conduct reasonably tended to interfere with the free exercise of employees' rights under the Act. *J. P. Stevens & Co.,* supra.

The conversation in Polaski's office would reasonably tend to diminish the willingness of employees to engage in future union activity. Accordingly, I find that on about June 2, the Respondent, by Carrie Palowski, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(bb).

It is alleged in complaint paragraphs 5(cc)(1) and (2) that on about June 4, the Respondent, by Tracy Sapien, engaged in surveillance of its employees' union activities, and interrogated its employees about their union membership, activities, and sympathies.

Tracy Sapien was the Respondent's vice president of human resources. Sheri Lynn was employed by the Respondent as a bartender, and Julie Wallack was employed as a cocktail server. There is no significant disparity about the event over which

they testified. As noted earlier, Lynn and Wallack were union committee leaders.

On about June 4, Lynn and Wallack were having lunch together in the employee dining room (EDR). All employees, including supervisors and managers can eat in the EDR, and frequently do. While still on their lunch break, Wallack and Lynn engaged a number of buffet servers seated at a table next to them in conversation about whether they would like to sign union cards. As they did so, Sapien, who was apparently also eating lunch in the EDR, approached the table where the buffet servers were seated. Sapien excused the interruption and said, "I would like to make sure you have all of the facts before you sign that card." Further, Sapien said that an employee signing a union card should understand that what she was signing was "legal and binding," and that if the Union ever became the collective-bargaining representative, the "card authorizes union dues to start coming out of [the card signer's] pay check." Lynn assured Sapien that she had given the buffet servers all the facts, and she would not lie to them. There was then a conversation about union benefits including insurance, with Sapien offering the opinion that there was no guarantee that even if the union organizing campaign were successful that the hotel employees would get different medical insurance. Sapien explained the collective-bargaining process. She gave as an example the Respondent's warehouse employees, who were represented, but had retained the benefit package the hotel provided before there was a collective-bargaining representative. Sapien mentioned that union dues were $32.50 a month, and Lynn indicated that she had already told the servers about dues. Then Sapien said that it "looked like [Lynn] had all [her] bases covered," and she walked away. Wallack testified that the conversation with Sapien lasted about 8 minutes.

Sapien testified that when she walked over to the employees, she believed that she had the right to express her opinion on the union organizing campaign. Further, she indicated that in her capacity with the Respondent she had spoken with groups of employees about "all sorts of issues." Sapien ordinarily eats lunch in the EDR, but normally with human resource employees. She does not usually sit with uniformed employees. She acknowledged that as she approached the table the servers were seated at, she was aware they were talking about signing union cards, which were in plain view. It was Sapien's position that she approached the employees with the intention of giving them "the facts." She denied that her intention was to convince the employees that it was not in their best interest to sign union cards. Lynn testified that Sapien's presence made her "a little nervous," and Wallack described Sapien's manner as "very strong . . . very intimidating."

This issue does not revolve around credibility. I found Sapien to be a generally credible witness who, I am sure, had good intentions when she approached the employees. I have no doubt she intended to give the employees "the facts." Of course, it would be naive to assume that those facts would not have been tendered with a bias for the Employer. That was her job. This was not an employer that was welcoming the Union into its facility. It is clear from this record that the Respondent was opposing the Union's organizing efforts, which it had the right under the law to do. However, the question remains whether Sapien, with good intentions or not, violated the Act by her actions and statements.

To begin with, I do not believe that Sapien engaged in unlawful interrogation. She asked no questions of the employees. There was no effort to elicit any information from the assembled employees about union activities or sympathies. Still, the more difficult issue is whether she engaged in unlawful surveillance. There is no dispute that the employees were in a public place[20] conducting union business. Thus, their expectations of privacy should have been quite limited. Had Sapien merely walked by the table and said nothing, there would be no legitimate complaint of surveillance. The problem is she spoke up, offering her opinion on the propriety of signing a union card, its legal ramifications, the cost of union dues, the nature of collective bargaining, and the possible results of the Union successfully organizing the hotel.

The Board has held that while an employer does not necessarily violate the Act when a supervisor observes open union activity, it does when a supervisor acts out of the ordinary so as to interfere with lawful activity. See *Carry Cos. of Illinois*, 311 NLRB 1058 (1993); enfd. in pertinent part 30 F.3d 922 (7th Cir. 1994); *Eddyleon Chocolate Co*., 301 NLRB 887, 888 (1991); *Metal Industries,* 251 NLRB 1523 (1980). In the matter at hand, Sapien was acting out of the ordinary. She went up to a table of uniformed employees in the EDR, and proceeding to engage them in a group conversation. While this was unusual in itself, the topic she discussed with them was even more unusual, that being the signing of union cards. Sapien interjected herself into the conversation. She was not invited to participate by virtue of being asked a question. Rather, she observed what was going on, interrupted the flow of the conversation, and began to make statements that would certainly, at a minimum, cause employees to pause before proceeding to sign union cards.

Observing the activities of the employees without more was not surveillance, because the employees chose to conduct those activities out in the open. Also, I would have no problem with Sapien commenting about these matters, assuming she had been invited into the conversation. However, by interjecting herself she was in effect taking over the conversation. As the vice president of human resources, this was the logical consequence of participating in a conversation among employees. The incident was highly unusual, and it interfered with the conduct of the employees' legitimate union activities. I conclude that it constituted unlawful surveillance of the employees' Section 7 activity. It would certainly effect the willingness of employees to engage in further union activity.

Based on the above, I conclude that on about June 4, the Respondent, by Tracy Sapien, engaged in surveillance of its employees' union activities, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(cc)(1) of the complaint. However, I shall recommend that complaint paragraph 5(cc)(2) be dismissed.

It is alleged in paragraph 5(dd) of the complaint that on about June 6, the Respondent, by Joe Marzan, interrogated its

[20] The EDR was public in the sense that all employees had access to it, not the general public.

employees about their union membership, activities, and sympathies.

Joe Marzan was the Respondent's EVS[21] manager. Esther Duhart was employed as a lead porter in the EVS department. She was a union committee leader and wore a union button at work. According to Duhart's testimony, on June 6, at approximately 4:55 p.m., she was waiting for the elevators on the fifth floor when approached by Marzan. She was wearing her button at the time. Marzan allegedly said hello, looked at her button and asked, "[I]f [she] knew who and how many people had signed for the Union?" Duhart testified that she replied in the negative, and then Marzan asked her "why [she] did it?" She responded that she "did it because of the benefits, because of the medical insurance, and because [she] thought it was best for [her] and [her] co-workers." That allegedly ended the conversation. However, on cross-examination, counsel for the Respondent pointed out to Duhart that in an incident report that she gave to the Union on the date that the incident allegedly occurred, she placed the date as June 4, and the time of the incident at 9:20 a.m. She ultimately admitted that, while she was sure of the incident, she might be mistaken as to the date and time.

Marzan testified that he recalled only one conversation with Duhart where the subject of the Union was mentioned. According to Marzan, it took place one morning after the union buttons first appeared, at about 9 a.m. on the fifth floor, out side the supply room, and Manuel Vizcarra, an EVS supervisor, was present. Marzan testified that he only remembered the conversation "vaguely," but recalled saying "in general, "What do you think about all this?" Allegedly Duhart responded, "I think it's a little too late." He denied asking Duhart whether she or others had signed union cards. When he testified, Manuel Vizcarra basically supported Marzan's testimony. Vizcarra recalled Marzan asking only the question, "What do [you] think about what's going on?" He also claimed that this comment was made in general, and not directed to anyone in particular. Vizcarra denied hearing any question by Marzan about whether anyone was supporting the Union.

I did not find Marzan and Vizcarra to be credible. Their testimony was inherently implausible. It makes no sense that Marzan asked, allegedly in a vacuum, "What do you think about this?" There must have been something else said, probably both before and after the statement that Marzan testified about. If there had been nothing more said, it strains credulity to believe that Marzan and Vizcarra could have even recalled the conversation. I do not accept their sanitized version of the conversation. Rather, Duhart's version is much more plausible, and I believe that Marzan asked her who and how many people had signed union cards, and why she had done so. Such a statement would have been worth reporting to the Union, which was apparently what she did by submitting an incident report. The fact that by the time she testified she had perhaps forgotten the date and time of the incident is largely inconsequential. What is important is that she credibly testified about the substance of the conversation with Marzan and his questions directed to her.

Marzan's questions constituted unlawful interrogation. By asking who and how many people had signed union cards, and why she had done so, Marzan was obviously eliciting a response from Duhart intended to disclose privileged information about her and others' union activities. Under the Board's "totality of the circumstances" standard, Marzan's questions were coercive. The nature of the information sought by the supervisor went to the heart of employees' Section 7 actively, namely the number and names of those employees who had signed union cards. I can imagine few questions asked of an employee, which would be more likely to interfere with, restrain, or coerce that employee in the exercise of Section 7 rights. Marzan's questions would reasonably have a chilling effect on the willingness of employees to continue to engage in union activity.

Accordingly, I conclude that on about June 6, the Respondent, through Joe Marzan, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(dd).

It is alleged in paragraph 5(ee) of the complaint that on about June 6, the Respondent, by Stacey Briand, engaged in surveillance of its employees' union activity.

Stacey Briand was the Respondent's director of human resources. As noted earlier, employee Azucena Felix was a union committee leader. Felix testified that on June 6 at about 1: 50 p.m. in the EDR, she was speaking to a table of housekeepers, having been summoned while on break because one of the housekeepers, Adelia Bueno, wanted to sign a union card. According to Felix, as Bueno was signing the card, Briand came over to the table and directed some comments to Bueno. Briand said that "[Bueno] shouldn't be signing things that she wasn't sure about, because what she was signing was something like a contract, and that [Felix] was probably promising something that [Felix] wasn't going to be able to give her." Because Bueno did not understand much English, Felix translated for her. Briand asked what Felix was saying, and Felix said she was merely translating for Bueno. Briand then left the table.

While Briand testified at the hearing, she did not testify about this particular incident. Therefore, Felix's version of the conversation stands unrebutted. Also, as I have discussed earlier, the EDR is a public area in the sense that it is open to all employees, including supervisors, who use it during their lunch and break periods.

The employees who chose to conduct union activity in the EDR should have done so with a diminished expectation of privacy, because of the public nature of the room. However, while an employer does not necessarily violate the Act when it observes open union activity, it does when it acts out of the ordinary and interferes with lawful union activity. *Carry Cos. of Illinois,* supra; *Eddyleon Chocolate Co.,* supra; *Metal Industries,* supra. That is what Briand did when she stopped, uninvited at the table where union cards were being displayed, and attempted to discourage Bueno from signing a card. Discouragement is the only way to characterize Briand's statement to

[21] This was the housekeeping department where the housekeepers and porters worked.

Bueno. Certainly this constituted direct interference with the assembled employees' union activity. It was also out of the ordinary, as Felix testified that Briand had never previously spoken to her in the EDR.

Briand's words and unusual actions were calculated to dissuade Bueno from signing the union card, and created the impression that management was monitoring employees' union activities. Briand had gone way beyond merely observing an open display of union activity. She had, uninvited, interjected herself into that union activity with the obvious aim of putting a stop to it. Under these circumstances, Briand's actions, which were out of the ordinary, interfered with the employees' lawful union activity and were violative of the Act.

Accordingly, I conclude that on about June 6, the Respondent, by Stacey Briand, engaged in surveillance of its employees' union activities, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(ee) of the complaint.

Complaint paragraph 5(ff) alleges that on about June 6, the Respondent, by Tracy Sapien, interrogated its employees about their union membership, activities, and sympathies. The only evidence offered in support of this allegation was the testimony of porter Pedro Villareal. He was not a union committee leader, and did not wear a button.

Villareal testified that on June 6 at approximately 9:15 a.m., he attended a meeting of about 20 employees. Apparently a number of managers were present, including Tracy Sapien, the Respondent's vice president of human resources. According to Villareal, at some point Sapien asked, "What benefits could the Union give [him]?" He allegedly responded that "medical insurance was going to be better," and also that the employees were better protected with the Union representing them. However, Villareal does not place this question from Sapien in any context. He indicated that he recalled no other questions being asked.

Although Sapien testified, she did not comment on this incident. Therefore, Villareal's testimony is unrebutted. Even so, without more, the question from Sapien standing alone does not constitute unlawful interrogation. I assume the question did not occur in a vacuum, and that there was some discussion about the Union, which preceded the question. In that context, Sapien's question as to what benefits Villareal expected from the Union was not coercive. He was apparently surrounded by 20 fellow employees, and there was apparently no attempt made to single out Villareal, or to question him about his union activity or support. It does not seem that the question was asked in an accusatorial or hostile manner, and Villareal did not indicate that he ever identified himself as a union supporter, assuming he actually was one.

Under the Board's "totality of the circumstances" standard, Sapien's question, standing alone, did not constitute unlawful interrogation. It did not coerce Villareal in the exercise of his Section 7 activity. Accordingly, I shall recommend that complaint paragraph 5(ff) be dismissed.

The General Counsel alleges in complaint paragraph 5(hh) that in about mid-June, the Respondent, by Joe Marzan, Sandra Eastridge, and Tracy Sapien solicited employee complaints and grievances, and promised its employees increased benefits and improved terms and conditions of employment if they refrained from union organizational activities.[22] The General Counsel has never moved to amend this complaint paragraph. However, during the hearing the parties did stipulate that Frank Vinola was the Respondent's vice president of hotel services and a supervisor and agent of the Respondent within the meaning of the Act. This is significant, because the only evidence offered in support of this complaint allegation was an alleged statement made by Vinola. While counsel for the Respondent asks in his post-hearing brief that this allegation be dismissed since the complaint was never amended to correct the deficiency, he acknowledges that there was some evidence offered of Vinola's involvement. However, counsel for the Respondent argues that what ever Vinola said did not constitute a violation of the Act. In any event, counsel clearly meets the issue by offering rebutting evidence, and, so, the Respondent has not been prejudiced by the failure of the General Counsel to amend the complaint. As the issue was fully litigated before me, I decline to dismiss this complaint paragraph simply for the failure to add Vinola's name to the allegation.

Pedro Villareal testified about a second meeting for porters, held approximately 1 or 2 weeks after the first meeting. There were 25 to 30 employees in attendance and management was represented by a number of people including "Frank," a vice president. Allegedly, Frank said that he was present to listen to the employees' problems. One of the problems mentioned was "more time to get to the Aladdin before work hours." By this reference, Villareal apparently meant the desire that some employees had to be able to access the facility early, before they were scheduled to work. Villareal claimed that Frank asked how much time the employees need, and a number of employees offered suggestions. Finally, Frank is alleged to have directed someone from human resources to extend the time employees were permitted to arrive at the facility early by 30 minutes, to a total of 90 minutes.

While the Respondent offered no evidence directly rebutting the testimony of Villareal, there was indirect evidence offered. Stacy Briand testified that the Respondent's written policy on employee access to the facility prior to the start of an employee's shift has not changed since May 1, 2002. That policy states that an employee "may be on premises in back of house areas no more than one (1) hour prior to the start of his/her shift and no more than 30 minutes after his/her shift ends." (See R. Exh. 39.) Accordingly, it appears as if there has been no change in the Respondent's policy, along the lines that Villareal testified were ordered by Vinola.

I am of the view that the evidence offered by the General Counsel is inadequate to establish the alleged violation. I found Villareal's testimony somewhat dubious on the matters allegedly raised by supervisors at both meetings he attended. Although the Respondent did not specifically deny that the words alleged were spoken, Villareal was not able to identify the alleged speaker except by his first name, "Frank." Further, it is clear from Briand's testimony and the written record that the Respondent's policy has not been changed, as Villareal claimed that human resources was ordered to do.

[22] Counsel for the General Counsel withdrew complaint pars. 5(gg)(1), (2), and (3). See GC Exh. 2.

Therefore, I find that the evidence offered concerning this incident is too ambiguous to warrant the finding of an unfair labor practice. The General Counsel has failed to meet his burden of proof. Accordingly, I shall recommend that complaint paragraph 5(hh) be dismissed.

It is alleged in complaint paragraph 5(ii) that on about June 19, the Respondent, by Anthony Paul, interrogated its employees about their union membership, activities, and sympathies. The Respondent employed Paul as a chef. John CiCillo was employed as a food server in the Zanzibar Café. CiCillo was also a union committee leader, who began wearing a union button in early June.

About a week after he started wearing his button, CiCillo was approached by Chef Paul in the Zanzibar kitchen. According to CiCillo, Paul pointed to his button and asked, "What's this for?" CiCillo told Paul that he was not allowed to discuss it on the floor, to which Paul allegedly responded, "Well, have we been that unfair to you?" CiCillo replied that Paul had not been unfair to him, and that this had nothing to do with management, but rather with insurance benefits and pensions. Paul commented that he could understand that, at which point the conversation apparently ended. Paul did not testify, although the Respondent tried to rebut CiCillo's testimony by showing that CiCillo did not actually work on June 19, the date alleged in the complaint. (See schedule, R. Exh. 41.) However, whether CiCillo worked or not on June 19 is dispositive of nothing, as the complaint alleges only that the interrogation occurred on or about June 19. CiCillo testified in a credible manner, and the Respondent did not offer Paul's testimony. Thus, CiCillo's testimony remains unrebutted.

Again, I must determine whether the words spoken by a supervisor to an employee constituted unlawful interrogation. I am of the opinion that under the Board's "totality of the circumstances" standard, Paul's comments did tend to coerce CiCillo in the exercise of his Section 7 rights. Paul went beyond merely inquiring about the button that an open union supporter was wearing. He asked CiCillo whether management had been unfair to him. In so doing, Paul was suggesting that CiCillo's support for the Union constituted disloyalty to the Respondent. As noted above, the Board has found such a rebuke of an employee to be unlawful. *Ferguson-Williams, Inc.,* supra; *Medcare Associates, Inc.,* supra at 941. Paul's comment was intended to elicit a response from CiCillo likely to disclose privileged information about his or others' union activity.

Based on the above, I find that Paul's comments to CiCillo constituted unlawful interrogation. Accordingly, I conclude that on about June 19, the Respondent, by Anthony Paul, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(ii).

Paragraph 5(jj) of the complaint alleges that on about June 26, the Respondent, by Marlene Nazal and Brian Lerner, promulgated an overly broad and discriminatory rule prohibiting its employees from talking to one another.

Elisabeth Peuser was employed as a food server in the Zanzibar Café. She was also a union committee leader who wore a union button beginning on May 31. Peuser testified that around mid-June she had a conversation with her supervisor, Marlene Nazal, in which she complained that a busser who was working in a food server position was given "better stations" than the regular servers. Nazal allegedly defended the busser, saying that she did good work, and "everyone's jealous" of her. There was also some discussion about how the bussers and servers were impacted by tips. Nazal did not testify about this conversation, and, so, Peuser's testimony was unrebutted. However, it is important to note that there was no mention of the Union in the conversation.

According to Peuser, later in the afternoon, Nazal approached her and said that Brian Lerner, the Zanzibar Café manager, "[D]oesn't want anybody speaking with each other on the floor, any bussers or servers to each other." That was all that was said, and again it is important to note that there was no mention of the Union.

The General Counsel alleges that this statement by Nazal, supposedly from Lerner, promulgated an overly broad and discriminatory rule prohibiting employees from talking with each other. I disagree. In my view, this is "much ado about nothing." First of all, there was no mention of the Union, and no indication that this was an effort by the Respondent to prevent employees from discussing the Union. Nor does this appear to me to be an effort by the Respondent to prevent the employees from engaging in protected concerted activity by prohibiting them from discussing wages, hours, or working conditions.

Management in the Zanzibar Café was confronted with a disagreement between the bussers and the servers over the receipt of tips. In an effort to not have this disagreement become worse, and possibly effect service to customers, Nazal mentioned to Peuser that Lerner did not want the bussers or servers talking with each other. While the statement was inarticulately spoken, it should have been obvious to Peuser that Lerner meant talking about the tip dispute in the area where customers were served. There is simply no need to make more of this than was actually intended. I see no evidence that the "rule" was anything other than a one-time statement addressed to a specific problem. Nor was evidence presented which would establish that the statement would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

Accordingly, I shall recommend that complaint paragraph 5(jj) be dismissed.

It is alleged in complaint paragraphs 5(kk)(1), (2), and (3) that on about July 2, the Respondent, by Alberto Munoz, interrogated its employees about their union membership, activities, and sympathies; informed its employees that it would be futile for them to select the Union as their bargaining representative; and threatened its employees with discharge because of their union activities and support.

Alberto Munoz was employed as an executive steward. Javier Aguiree was employed as a dishwasher in the Zanzabar Café. Aguiree was also a union committee leader and first wore a union button around July 1. On the following day, he went to the office of his supervisor, Munoz. The purpose for his visit was to ask permission to leave work early that day. According to Aguiree, Munoz closed the door and asked Aguiree, "Why [he] had to use that button?" Aguiree said that he wanted to be "part of the Union." Munoz asked in what way

he had "failed" Aguiree, that Aguiree needed, "somebody to speak" for him. Aguiree testified that he replied that he was not against Munoz, he was just for the Union. Munoz again asked how he had "failed" Aguiree, and stated that he had "helped [Aguiree] a lot." Munoz said that Aguiree should "think about it" and if he "changed [his] mind," to talk with him.

As the conversation continued, Munoz told Aguiree that "the Union doesn't help you any . . . they don't help you at all." Further, according to Aguiree, Munoz said, "I'm the boss and I can fire anybody, even if the Union is here, and they will not help." At about that time, a women entered the office who Aguiree identified as a supervisor named Olga, but whose last name he did not know.[23] Munoz took the opportunity to have Olga comment about the Union. Aguiree testified that she said, "I have worked with the Union and it's no good. There were people that had been working for 18 years and were fired, and the Union didn't help them at all." At this point, she left. Munoz told Aguiree again that if he changed his mind about the Union to come and talk to him. Also, he said that Aguiree should "be very careful when [he had] to sign any kind of paperwork with the Union." The conversation ended with Aguiree telling Munoz that he felt "weird," because Munoz seemed to be saying that Aguiree had betrayed him, but that, in any event, he was going to continue supporting the Union. Munoz testified, but did not address the July 2 encounter with Aguiree. Olga never testified. Therefore, Aguiree's testimony stands unrebutted.

Looking to the Board's "totality of the circumstances" standard, I conclude that Munoz unlawfully interrogated Aguiree. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra. Although Aguiree went to Munoz' office of his own volition, Munoz took the opportunity to close the door and to begin questioning Aguiree about the Union. The questioning went way beyond a mere innocent inquiry directed to an open union supporter. The questioning took on an accusatory tone, with Munoz asking several times how he had "failed" Aguiree, and reminding Aguiree that he had "helped [him] a lot." Aguiree pointed out that Munoz was accusing him of having betrayed Munoz. As I have already noted numerous times above, the Board generally holds that rebuking an employee by equating his prounion sympathies to disloyalty to the employer constitutes a violation of the Act. *Ferguson-Williams, Inc.,* supra; *Medcare Associates, Inc.,* supra at 941. Further, Munoz' questions were intended to elicit a response from Aguiree likely to disclose his or other employees' union activity. Making the interrogation even more coercive was the commission of additional unfair labor practices during the same conversation.

These additional violations of the Act included informing Aguiree that even if the Union successfully organized the facility, "they will not help," and that as the "boss," Munoz "could fire anybody." In effect, Munoz was telling Aguiree that supporting the Union was an act of futility. In the context that these statements were made, it would have been reasonable for Aguiree to conclude that continuing to support the Union was a wasted effort. Also, the statement that Munoz could fire anybody was a fairly obvious threat that if Aguiree did continue to support the Union, he could be fired. Even if somewhat oblique, the Board traditionally holds employers liable for all threats that could reasonably tend to be coercive. *Tim Foley Plumbing Service.,* supra; *Boydston Electric, Inc.,* supra. Finally, in reminding Aguiree that Munoz had "helped [him] a lot," Munoz was suggesting that Aguiree was ungrateful, and the Board has found such a statement to constitute an unlawful threat of reprisal. *Equipment Trucking Co.,* supra; *House Calls, Inc.,* supra.

In its totality, Munoz' conversation with Aguiree would certainly have had the affect of chilling any interest Aguiree had in engaging in future Section 7 activity. Accordingly, I conclude that on June 26, the Respondent, by Alberto Munoz, interrogated its employees about their union membership, activities, and sympathies; informed its employees that it would be futile for them to select the Union as their bargaining representative; and threatened its employees with discharge because of their union activities and support, all in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(kk)(1), (2), and (3).

The General Counsel alleges in complaint paragraph 5(ll) that on about July 2, the Respondent, by Elizabeth Brandon, interrogated its employees about their union membership, activities, and sympathies by means of physical force. Brandon was one of the Respondent's chefs. Paul Darata was employed as a cook in the Zanzibar Café. Darata was also a union committee leader who first wore a union button in June. According to Darata, on July 2, at approximately 6:30 a.m., he was at his work-station talking with a co-worker when approached by Brandon. Allegedly, as she passed him, Brandon "pushed [Darata] on [his] union button," which was pinned to his chest. Darata testified that as she pushed the button, Brandon uttered the sound "huh." Darata said nothing in response, and did not mention the incident to Brandon. As Brandon did not testify, the testimony of Darata is unrebutted.

I do not construe Brandon's action as interrogation, or an unfair labor practice of any kind. Brandon spoke no words, but only uttered the sound "huh". There was no attempt to elicit any information from Darata, and the sound "huh" was ambiguous at most. Frankly, I do not know whether it denotes a term of displeasure or not. In any event, there was no indication that Darata was in any way coerced by the push and sound. Further, I do not believe that such conduct toward an open union supporter would reasonably tend to interfere with Section 7 activity.

The evidence concerning this incident is too ambiguous to warrant the finding of an unfair labor practice. Accordingly, I shall recommend that paragraph 5(ll) of the complaint be dismissed.

Complaint paragraph 5(mm) alleges that on about July 2, the Respondent, by dishwashing supervisor Olga, whose last name is unknown, informed its employees that it would be futile for them to select the Union as their bargaining representative. The substance of this allegation was covered above in paragraph

[23] There is some reference in the transcript and in the posthearing briefs to this person as Olga Vasquez. While that last name was never conclusively established, the Respondent did not deny the complaint allegation that Olga, last name unknown, was a supervisor as defined in the Act.

5(kk). As noted, Olga entered supervisor Alberto Munoz' office while he was discussing the Union with dishwasher Javier Aguiree. In response to a request from Munoz, Olga recited an incident she was apparently involved in where allegedly the Union "didn't help" employees who "had been working for 18 years, and were fired." As a result of having this experience, Olga told Aguiree that the Union was "no good." However, I consider this statement nothing more than an expression of Olga's personal opinion.

Section 8(c) of the Act protects the right of a representative or party to express an opinion without it constituting an unfair labor practice, as long as the opinion expressed is free of any threat of reprisal, or force, or promise of benefit. It is clear to me that Olga, who was apparently a supervisor, was doing nothing more than expressing her personal opinion, based on some alleged incident, that the Union was "no good." She was, of course, entitled to her "opinion," and I see no reason why Aguiree would have taken the statement for anything more than that. Olga said nothing that Aguiree could have reasonably considered to be a threat or promise of benefit. Further, her opinion expressed to Aguiree would in no way suggest that supporting the Union was futile. At most, the story she told could conceivably stand for the proposition that the Union was weak, and that employees should not rely on it to protect their jobs. In any event, the sentiments expressed by Olga were merely the kind of campaign propaganda typically heard during organizing efforts, which employees were quite capable of evaluating for themselves.

Based on the above, I conclude that Olga's statement did not constitute an unfair labor practice of any kind. Accordingly, I shall recommend that complaint paragraph 5(mm) be dismissed.

Paragraph 5(nn) of the complaint alleges that on about July 6 and 11,[24] the Respondent, by Michael Duhon, threatened its employees that he would engage in closer supervision of the employees because of their union activities and support.

The Respondent employed Duhon as a food and beverage manager. Piper Lewless was employed as a bartender. He was also a union committee leader who began to wear his union button at work on May 30. According to Lewless, at a preshift meeting held at 9:55 a.m. on July 6, Duhon announced to the assembled bar employees that he was giving each of them "a blanket verbal warning" for violations of the employee handbook. Duhon allegedly said that he "wanted everything by the book," and that the next infraction would result in a "written warning." However, he did not say which specific rules had been violated by the employees. On cross-examination, Lewless acknowledged that of the 15 or 20 employees present at the meeting that "the vast majority" were not wearing union buttons. Further, Duhon did not mention the Union at this meeting. This was the first time that Lewless had ever heard of "a blanket verbal warning."

Irelda Reyes was employed as a cocktail waitress. She was also a union committee leader who began to wear her union button at work beginning May 30. Reyes testified that she was present in mid-July at a preshift meeting at 9:55 a.m. when Duhon told the assembled employees that they were all getting "a group verbal warning." He told the employees that they should all be familiar with the rules in the employee handbook, and so he was "prewarning" them that any further infraction would result in a written warning. Reyes testified that Duhon mentioned such problems as employees chewing gum at work, taking personal items to the bar, being in restricted areas of the casino, and some other matters that she could not recall. Also testifying about this meeting was Julie Wallack, a cocktail server. She also was a union committee leader who started wearing her button on May 30. Wallack testified in substantial agreement with Reyes. However, she admitted that of the 5 to 10 employees at the meeting, they were not all committee leaders.

Duhon testified at the hearing, but did not deny that he informed assembled employees at the two meetings that they were all receiving " a blanket verbal warning." The General Counsel and the Charging Party take the position that Duhon's statement constituted a threat that he would engage in closer supervision of the employees because of their union activity. I disagree. I see no nexus with union activity. The majority of union committee leaders began to wear their buttons on May 30 or 31. However, Duhon's statement was made at least five weeks later. Further, there was no reference by Duhon to the Union, union activity, or buttons at or about the time the meetings were held. Most significant, the meetings were attended by all employees present, a majority of whom were apparently not wearing union buttons. I simply do not believe that Duhon's aim was to threaten union supporters, and in order to do so he was willing to also discipline non-supporters. This would certainly be a strange way for Duhon to make friends among those who were not supporting the Union.

As a beverage supervisor, Duhon is responsible for 20 to 30 employees, spread throughout the Respondent's facility at the various bars. He is responsible for ensuring that customers are properly serviced, and that the employees follow the employee handbook. It is undisputed that the Respondent maintains a progressive discipline system, the first step of which is a verbal warning. It does appear that Duhon's reference to "a blanket verbal warning" was rather unusual. No evidence was offered to show that there has been any further use of this term, after the two dates in July. It is unclear to the undersigned what precipitated Duhon's use of such a warning, although at least one witness testified about a number of rule infractions that Duhon raised with the employees. However, the reason that Duhon used this type of warning is really not relevant, as long as the reason had nothing to do with employees' union activity. I simply see no evidence that there was any connection between Duhon's statement and Section 7 activity. Without some nexus, I can find no violation.

Based on the above, I am of the view that the General Counsel has failed to meet his burden of proof and establish a connection between the conduct complained of and protected activity. Accordingly, I shall recommend that complaint paragraph 5(nn) be dismissed.

It is alleged in complaint paragraph 5(oo) that on about July 10, the Respondent, by Charles Clark, threatened its employees

[24] This paragraph of the complaint was amended to add the date of July 11. (GC Exh. 2.)

with discharge accompanied by physical force because of their union activities and support. As has been noted above, the Respondent employed Clark as a chef. Also as noted, Luis Herrera was employed as a buffet cook. His position as a union committee leader has also been previously explained.

According to Herrera, on July 10, at about 4:20 p.m., he was at his work place, the seafood station in the Spice Market Buffet. Herrera was approached by Chef Clark who said that, "he didn't want to tell [Herrera] a lot of times to clean the station, that he wanted everything clean." Herrera responded that it was "fine." However, at this point Clark allegedly put his finger on the top of the committee leader button that Herrera was wearing. Herrera asked why Clark was pushing him. Clark responded that if Herrera did not clean well, that he would be "fired." According to Herrera, Clark then added, "I'm going to fire you, and we'll see if the idiots from the Union are going to give you food to eat." Herrera replied that it was fine, at which Clark laughed and said he "wasn't afraid of [Herrera], and he wasn't afraid of anything." Herrera testified that he told Clark that if Clark pushed him again, he would take Clark to "human resources." Allegedly, Clark laughed and said that he wasn't afraid of Herrera and wasn't afraid of anyone from human resources. With that, the conversation apparently ended.

Clark denied that he ever spoke with Herrera about his union activity, asked him to remove his union button, or ever threatened him because of his union support. According to Clark, the only reason he had occasion to discuss Herrera's job tenure with him was because he routinely spoke to Herrera, and others, about keeping his work-station clean. However, I do not believe Clark. As I explained in detail above, I found Clark to be incredible. His demeanor was such that I believe he displayed the type of arrogance that Herrera testified to. Herrera's testimony was inherently plausible. It had the "ring of authenticity" to it. Based on the demeanor that he displayed when testifying, I have no doubt that Clark placed his finger on the union button, told Herrera he would fire him, called the union officials idiots, and said that he wasn't afraid of anyone, including human resources. Clark obviously took the union campaign personally, believing that the cooks who worked in the Spice Market Buffet and were union supporters were somehow being disloyal to him, because he was the chef and their supervisor.

I find that Clark did threaten Herrera with discharge because he was a union supporter. However, I do not believe that the threat was accompanied by physical force. Even though Clark placed his finger on Herrera's button, I did not get the sense that in some way Cark was threatening Herrera with physical harm. The finger was placed on the button for demonstrative purposes, Clark clearly being an emotional individual. While that act further demonstrates that it was Herrera's union button and support which had so upset Clark, not the cleanliness of his work-station, I do not believe that it was intended to physically intimidate Herrera. Further, I do not believe that it would have reasonably done so.

Accordingly, I conclude that on about July 10, the Respondent, by Charles Clark, threatened its employees with discharge because of their union activities and support, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(oo).

It is alleged in complaint paragraph 5(pp) that on about July 11, the Respondent, by Michael Duhon, threatened its employees that he would engage in closer supervision of employees because of their union activities and support. However, this allegation is virtually identical to the allegation in paragraph 5(nn). As I assume that this is an inadvertent duplication, I shall recommend the dismissal of complaint paragraph 5(pp).

Complaint paragraph 5(qq) alleges that in about mid-July, the Respondent, by Michael Duhon, engaged in closer supervision of its employees because of their union activities and support.

In support of this allegation, cocktail server Julie Wallack testified that after Supervisor Duhon gave her and others a group verbal warning, his behavior changed. She alleged that Duhon "wasn't as friendly . . . wasn't very personable," became "very serious, very unapproachable." Also, Duhon allegedly began to "walk around a lot with a note pad and a paper." Wallack observed that Duhon "was on the floor a lot more than usual . . . just really closely watching all the employees and writing things down on his note pad." She testified that this new behavior by Duhon lasted for about 2 to 3 weeks. On the other hand, Duhon testified that he has not changed his work routine with regard to taking notes since before May 30. He is responsible for 12 separate bars located throughout the facility. His basic routine has always been to go from bar to bar at the facility, making sure that each bar is properly stocked and staffed, and that customers are being well served. Ensuring that liquor supplies are properly ordered and delivered is especially important. According to Duhon, in order to keep everything accurate, it his custom to frequently make notes on what ever piece of paper may be available, even a napkin.

Duhon was the Respondent's food and beverage manager. This was a responsible position, which required that Duhon closely monitor 12 bars located throughout the hotel-casino. It would certainly seem reasonable to me that Duhon would need to move around the facility observing the operation of each bar, and would spend a substantial amount of time each day doing so. Further, I doubt the job could be properly performed without taking elaborate notes about the condition of each bar, especially the inventory of liquor. I assume it would be nearly impossible to perform this job without taking notes. Duhon's testimony in this regard was reasonable and credible. Therefore, I accept his testimony that he did not alter his daily routine following the start of the open union campaign. I see no credible evidence that Duhon engaged in closer supervision of anyone because of his or her union activity. In my view, Wallack was simply being melodramatic, if not somewhat paranoid, in believing that Duhon was more closely watching the work being performed by her and other union supporters.

Accordingly, I shall recommend that complaint paragraph 5(qq) be dismissed.

The General Counsel alleges in complaint paragraph 5(rr) that on about July 11, the Respondent, through Charles Clark, threatened its employees with disciplinary action because of their union activities and support.

The employee involved in this incident is once again Luis Herrera. As noted above, I have found that on July 10, Chef Clark threatened Herrera with discharge because of his union

activity, going so far as to place his finger on Herrera's union button for emphasis. The next day, July 11, Clark appears to continue with his efforts to bully Herrera. According to Herrera, he was eating in the EDR at approximately 5:25 p.m. when Clark appeared, snapped his fingers, told Herrera to "dump the food," and "go fast to the banquets." Herrera told Clark that he would go, but first he wanted to finish his food. Clark responded that if Herrera didn't go, that he was going to take Herrera "to the office." Herrera told Clark that wasn't fair, and Clark responded that he was "the chef," and Herrera needed to do what he was told. According to Herrera, he ate fast and then went to look for Clark in his office. Herrera found Clark and told him that he was ready to go help out in banquets. Clark curtly said, "forget it," and, so, Herrera left to finish his break.

Herrera testified that he then returned to his normal work location at the seafood station in the Spice Market Buffet. After about five minutes, Clark appeared and asked Herrera whether he had understood what he been told, or was he "just playing make-believe?" Herrera reminded Clark that he had gone to his office ready to help out in banquets, but that Clark had responded "rudely." Clark replied that he wanted "the station very clean, and that if [Herrera] didn't clean it, that he was going to give [Herrera] a hard time." Herrera told Clark that he would do his job. Allegedly, Clark responded by saying that "the next time if [Herrera] wanted a favor, that he wasn't going to give [Herrera] a favor." Clark ended the conversation by telling Herrera that the next time he didn't do what he was told that Clark would take him "to the office, and was going to give [Herrera] a warning." According to Herrera, he had never before been asked to help out in banquets.

Clark testified that it was not unusual to ask employees to help as needed in banquets, and that Herrera had refused because he was on break. Clark admitted that he was "frustrated" with Herrera, and acknowledged that he "sarcastically" said, "something about, you know when you need a favor from me, you know, something along that line." However, he continued to deny that these remarks had any thing to do with Herrera's wearing a union button or his union support. As I have now indicated repeatedly, I find Clark to be an incredible witness. I continue to credit the testimony of Herrera. His portrayal of Clark's actions is exactly the characterization of Clark that I would expect.

Clark was very upset with Herrera precisely because of his union activity. This had been apparent from May 31 when Clark confronted Herrera in his office about wearing a union button and ordered him to remove it. The harassment of Herrera continued on July 10 when Clark threatened him with discharge and placed his finger on the union committee leader button. It carried over to the next day, when Clark used the excuse of needing help in banquets to interrupt Herrera's break. Clark's manner was indicative of his true motives as he ordered Herrera to "dump the food" and "go fast to the banquets." I accept Herrera's claim that he had never before been asked to help out in banquets. Further, even Clark is forced to admit that he told Herrera not to expect any favors from him. I also believe that Clark threatened Herrera with future disciplinary action.

While Clark's threat to discipline Herrera was not directly made in connection with the Union, it is clear to me, as it would have reasonably been to Herrera, that it was all part of Clark's efforts to harass Herrera because he was a union supporter. Threats that are oblique, but occurring in the context of other coercive conduct, are still violative of the Act. See *McCorvey Sheet Metal Works, Inc.,* 326 NLRB 1066 (1998) (warning to union supporter not to "mess up" carried an implied threat of reprisal); *Boydston Electric, Inc.,* supra. The statement made by Clark, threatening Herrera with a future disciplinary warning, would likely have the affect of restraining employees from engaging in Section 7 activity.

Accordingly, I conclude that on July 11, the Respondent, by Charles Clark, threatened its employees with disciplinary action because of their union activities and support, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(rr).

It is alleged in complaint paragraph 5(ss) that on about July 12, the Respondent, by Nick Della Penna, threatened its employees with unspecified reprisals for wearing union buttons. Della Penna was employed by the Respondent as room service manager. Norma Quinones was a room service busser. Quinones had been discharged in April for forgetting to clock out at the end of her shift. She had appealed her termination through the Respondent's internal "open door" procedure, pursuant to which the Respondent's president, Bill Timmins, reinstated her. However, she did not return to the hotel immediately, as she was first given a period of maternity leave. Quinones returned to the hotel on July 5, and as a union committee leader, she began to wear the union button on that date.

On July 12, Della Penna called Quinones into his office. Also present was Room Service Supervisor Andre Moskopp. With the office door shut, Della Penna informed Quinones that she had violated the Respondent's clocking procedure by clocking out three times at the end of her shift. He proceeded to give Quinones a written "verbal" warning. (GC Exh. 7.) Quinones refused to sign the warning, arguing that employee relations specialist Lae Wong had told her that when she clocked out, "to be on the safe side," she should clock out more than twice. Apparently, the intention was to ensure that the clock out was recorded. According to Della Penna, he told Quinones that she must have misunderstood Wong.

In any event, Quinones asked if Della Penna was giving her a warning so soon after she returned to work, because he was upset that she had been reinstated over his objection. Quinones testified that Della Penna responded by saying that she had been reinstated, but returned wearing the union button. Further, he said that if the Union were "in the casino," she would not have gotten this "second chance." According to Quinones, she then replied that Della Penna had not given her this second chance, but, rather, Timmins had, and she would show him how grateful she was by doing her job and following the clocking procedures. Allegedly, Della Penna said, "[W]hen the president sees you with a button, wearing it, he will be very disappointed, very betrayed."

Della Penna's testimony was not much different, as he acknowledged telling Quinones that, "in my opinion, by wearing that union button you're not showing [Timmins] much grati-

tude." Quinones continued to refuse to sign the "verbal" warning, and it was given to her, bringing the meeting to an end. While I will have more to say about the "verbal" warning later in this decision, I must now decide whether the words spoken by Della Penna constituted a threat to Quinones of unspecified reprisals for wearing the union button. I conclude that it did.

There is not a significant dispute between Quinones and Della Penna as to what was said in his office. Della Penna admitted telling Quinones that "in [his] opinion," she was not showing Timmins "much gratitude" by wearing the union button. As noted earlier, the Board has consistently held that an employer may not rebuke an employee by equating his prounion sympathies to disloyalty to the employer. *Ferguson-Williams, Inc.,* supra; also *Sea Breeze Health Care Center,* supra (holding that manager's statement that she was "highly disappointed" with employee's union support was a "veiled threat of reprisal"). In telling Quinones that she was not showing gratitude to Timmins by wearing the union button, Della Penna was making an implied threat that her disloyalty would not serve her well in the future. Such a threat would reasonably tend to restrain Quinones in her willingness to engage in future union activity. The fact that Della Penna may have couched his threat in an "opinion" did not mitigate its coercive effect. *Clinton Electronics Corp*., 332 NLRB 479, 479 (2000). Quinones would have likely believed that the supervisor was speaking for the Respondent, regardless of whether Della Penna said it was his personal opinion or not.

Accordingly, I conclude that on about July 12, the Respondent, by Nick Della Penna, threatened its employees with unspecified reprisals for wearing union buttons, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(ss).

Complaint paragraph 5(tt) alleges that on about July 18, the Respondent, by Keith Kawana, threatened its employees with discharge or a preferred selection for hire based on their union activities and support. As noted earlier, Kawana was the Respondent's manager in both the Spice Market Buffet and the Zanzibar Café. Also noted was Luis Velasquez' previous position as a waiter in the Spice Market Buffet, and his role as a union committee leader. Velasquez returned to work on July 17, after having been discharged the previous month. (I will discuss this discharge at some length later in this decision.) Velasquez testified that at a preshift meeting following his return to work, Supervisor Kawana told the assembled employees that there were "some rumors" that the Union had returned "some people" to their jobs, and it was a "lie." According to Velasquez, Kawana said that he and Brian Lerner, vice present of food and beverage " had the power to fire anybody and to return them to work whenever they wanted to." While Kawana testified at the hearing, he did not specifically deny this allegation. Therefore, Velasquez' testimony on this issue was unrebutted.

In my view, when Kawana linked "some rumors" about the Union returning employees to their jobs, with management's right to fire and rehire, he was making an implied threat to render such decisions based on employees' union activities and support. Otherwise, why would he make such a connection? His words would reasonably be interpreted by the assembled employees to mean that if they supported the Union, the result would be discharge, from which only management could return them to work. Even if somewhat attenuated, this statement from a supervisor would likely have a coercive effect on employees' Section 7 rights. As noted earlier, the Board holds employers liable for all threats that could reasonably tend to be coercive, even if the statement is oblique, ambiguous, or nonsensical. *Fixtures Mfg. Corp.,* supra; *Tim Foley Plumbing Service, Inc.* I can imagine no other interpretation that employees who heard the statement could have reasonably reached.

Accordingly, I conclude that on about July 18, the Respondent, by Keith Kawana, threatened its employees with discharge or a preferred selection for hire based on their union activities and support, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(tt).

The General Counsel alleges in paragraph 5(uu) of the complaint, as amended, that on about July 18, the Respondent, by Hector Peralta,[25] threatened its employees with unspecified reprisals if they selected the Union as their bargaining representative. Alberto Meza, a steward, testified that on July 18, at about 3 p.m., he went to the office of his supervisor, Alberto Munoz, to pick up a form for a hotel discount. He was at the time wearing his union committee leader button. When he arrived at the office, Munoz introduced Meza to "a new supervisor for the casino," Hector Peralta. After the introductions, Peralta saw Meza's button, and, according to Meza, exclaimed, "uh huh. So you want to be a shop steward. Let him get into that and see how it goes." Apparently, that was the end of the conversation. Peralta did not testify, and although Munoz testified, he did not deny Meza's testimony concerning this conversation. Therefore, this testimony by Meza stands unrebutted.

Fully crediting Meza's testimony, I find that the evidence concerning this incident is too ambiguous to warrant a finding of an unfair labor practice. Meza was obviously an open union supporter, wearing his committee leader button. Seeing that button, Peralta commented that Meza must want to be a union steward, and would see whether he liked it, or words to that effect. So what? Those words do not seem to me to be threatening, or to even indicate anything disparaging about the Union. Frankly, the words do not seem to mean much of anything. Such a comment does not rise to the level of an unfair labor practice.

In my view, the words spoken by Peralta would not reasonably have interfered with, restrained, or coerced Meza or other employees in the exercise of Section 7 activity. Accordingly, I shall recommend that complaint paragraph 5(uu) be dismissed.

Complaint paragraph 5(vv) alleges that on about July 23, the Respondent, by Richard Alfarno, interrogated its employees about their union membership, activities, and sympathies. The Respondent employed Alfarno as a line cook supervisor. Paul

[25] In its answer to the complaint, the Respondent denies the supervisory and agency status of Hector Peralta. Although counsel for the Respondent amended the answer at various times to admit the supervisory status of various individuals, I could find no place in the record where such an amendment was made for Peralta. Further, counsel for the General Counsel did not offer any evidence to establish supervisory authority. However, in view of my decision to recommend dismissal of this allegation, the issue of Peralta's supervisory status is moot.

Darata was employed as a cook in the Zanzibar Café. He was also a union committee leader who began to wear the union button at work in June. Darata testified that on July 23, at about 11 p.m., as he came on shift, Alfarno approached him in the kitchen and asked, "[I]f [Darata] was at the rally earlier that evening?" Darata understood that Alfarno was making reference to a union rally, which had been held outside the facility earlier that day. Darata replied that he thought he was at the rally. In response, Alfarno said that he didn't really care, "[he] just wanted to know." That apparently ended the conversation. As Alfarno did not testify at the hearing, I will accept Darata's testimony as accurate.

Under the "totality of the circumstances" standard established by the Board, I believe that Alfarno's question asked of Darata constituted unlawful interrogation. While it is true that Darata was an open union supporter, and I assume was wearing the union button at the time, there was no indication that he wanted Alfarno to know about his specific union activity. It is important to consider that Alfarno raised the subject with Darata "out of the blue." The two men were not discussing the Union, but, rather, upon seeing Darata for the first time that day, Alfarno simply asked him the question directly. The question clearly caught Darata off guard, as he fumbled for an answer, ultimately saying that he thought he was at the rally. Of course, he either was or he wasn't. However, giving a less than candid answer, Darata was clearly indicating his discomfort with the question, and his desire to keep the matter quiet. Merely because Darata was an open union supporter did not entitle Alfarno to inquire as to the specifics of Darata's union activity. Under these particular circumstances, I find that Alfarno's question was coercive, likely to have a chilling effect on the willingness of Darata or others to engage in union activity. *Rossmore House,* supra; *Medcare Associates, Inc.,* supra.

Accordingly, I conclude that on about July 23, the Respondent, by Richard Alfarno, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(vv).

It is alleged in complaint paragraph 5(ww) that on about August 22, the Respondent, through Keith Kawana, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union activities and support. Complaint paragraph 5(xx) alleges that on about August 24, the Respondent, through Keith Kawana, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union activities and support. As these allegations are interrelated, they will be considered together.

As stated earlier, Keith Kawana was the manager of the Spice Market Buffet and of the Zanzibar Café. Socrates Oberes was a bus person in the Spice Market Buffet. Oberes became a union committee leader relatively late in the campaign, and testified that he first wore the union button to work on August 2. He apparently recalled the date because shortly thereafter, supervisor Lila Dang commented that he was "big time now," because he was wearing the union button. In any event, on August 22, at about 3:30 p.m., he happened to "cross paths" with Kawana in the kitchen. According to Oberes, Kawana stopped to talk and Kawana said that, "he could take care of [Oberes] now, to stop wearing a union button." Oberes testified that he understood this reference "take care of" to mean train him to become a server. He testified that Kawana had been training a number of bussers to become servers, but not him. Oberes felt that Kawana had "neglected" him. The two men agreed to meet the following day in the coffee shop to further discussion this matter. However, they did not actually meet for 2 days.

On August 24, at about 2:40 p.m., Oberes and Kawana met in the Zanzibar Café. According to Oberes, he asked what Kawana intended to do about an accusation that a server had made that Oberes was stealing her tips. Kawana responded that he would have Oberes and the server work different stations. Oberes mentioned trying to get a transfer to the beverage department. According to Oberes, Kawana said not to transfer because "he was ready to take care of [Oberes,]" and wanted to "put [Oberes] back on track," and he would "make sure [Oberes] was comfortable at work, if [Oberes would] go on this side." Oberes testified that he asked Kawana what he meant by "going on your side?" To which Kawana responded, "Just stop wearing the union button." Oberes said that he would think about the matter, and that was apparently the end of the conversation.

I was impressed with Oberes' memory and his grasp of detail. However, the same cannot be said for Kawana. To begin with, he recalled the conversation with Oberes as having occurred in May, and said that he wasn't sure if Oberes was wearing a union button at the time. He recalled talking with Oberes about the accusation that Oberes was stealing tips, but denied that there was any mention of removing the union button. Kawana denied offering Oberes a transfer, promotion, or any kind of job change in return for him abandoning his support for the Union. According to Kawana, they did discuss Oberes' desire to become a food server, with Kawana telling Oberes that he would first have to work "on call," which was not full time as it did not guarantee 30 hours of work per week. An employee who does not work full time over a 6-month period can lose benefits. However, on cross-examination by counsel for the Union, Kawana begrudgingly admitted that bussers who are being trained as servers are sometimes permitted to work as on call servers, while they continue to be employed as full-time bussers. This obvious contradiction in his testimony leads me to believe that Kawana was not testifying credibly about these conversations with Oberes. Further, Oberes' testimony was plausible and had the "ring of authenticity" to it. Accordingly, I credit Oberes' version of the two conversations.

Having credited Oberes, I find that Kawana did in fact offer Oberes the opportunity to train as a food server in return for removing his union button, thereby abandoning his support for the Union. It is well established Board law that "[a]bsent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by a promise, express or implied, to remedy such grievances violates the Act." *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000). In the matter before me, the Respondent's promise was even more obvious and blatant. Kawana's promise to make Oberes a food server was a quid pro quo for Oberes removing

his union button. These promises of benefit made on both August 22 and 24 were unlawful, as they would tend to interfere with Oberes and other employees' Section 7 rights.

Accordingly, I conclude that on about August 22 and 24, the Respondent, by Keith Kawana, promised its employees increased benefits and improved terms and conditions of employment if they refrained from union activities and support, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(ww) and (xx).

Paragraph 5(yy) of the complaint alleges that in about the end of August, the Respondent, by Keith Kawana, Pamela Garrett, and unnamed security guards, engaged in surveillance of its employees in order to discover their union activity. However, neither the General Counsel nor the Charging Party offered any evidence in support of this allegation. Accordingly, as the General Counsel has failed to meet his burden of proof, I shall recommend that this complaint paragraph be dismissed.

It is alleged in complaint paragraph 5(zz) that on about August 29, the Respondent, by Keith Kawana, interrogated it employees about their union membership, activities and sympathies. In support of this allegation, the General Counsel offered the testimony of Elmer Portillo who was employed in the Spice Market Buffet as a waiter. He was also a union committee leader who started to wear the union button at work on July 9. According to Portillo, on August 29 at about 2 p.m., he was at his workstation with four other waiters. The manager of the buffet, Keith Kawana, approached and addressing himself to Portillo asked, "[I]f [Portillo] was talking shit about the Union and Luis Carlos." Portillo testified that he assumed the reference was to another waiter, Luis Carlos Velasquez.[26] Portillo replied that he did not know what Kawana was talking about. Allegedly, Kawana responded with the question, "Are you lying to me again?" Portillo answered, "No sir," and that ended the conversation.

Kawana did not directly refute Portillo's testimony. Kawana only recalled an incident in May or June where Portillo, along with four other employees, were standing around talking, and Kawana asked them "if they could break [it] up and please get back to work." According to Kawana, Portillo had a "smirk" on his face, and in response to the smirk, Kawana asked Portillo "if [he was] getting into trouble." There was allegedly no discussion about, or mention of, the Union in this conversation.

There is a significant variance between the testimony of Kawana and Portillo. For the reasons that I have expressed above, I have found Kawana not to be a particularly credible witness. Also, the dates favor Portillo's version more so than Kawana's version, with the problems of Luis Carlos Velasquez occurring in the time frame recited by Portillo. As Portillo's version of the incident in question appears to be more plausible than Kawana's, I will credit Portillo. I am of the opinion that the incident, as reported by Portillo, does constitute unlawful interrogation. Although Portillo was an open union supporter, the question from Kawana appears to me to have been directed to the group of four or five employees. There was no evidence offered to suggest that they were all open union supporters. Further, the question of whether the employees were "talking shit about the Union and Luis Carlos," was an inquiry about whether the group of employees was engaged in union activity. This inquiry was more intrusive than a simple question directed to a union supporter as to why he was supporting the Union. Also, the inquiry took a rather hostile turn with Kawana asking whether Portillo was "lying" to him "again." Presumably the other employees present were able to hear the remark, and would likely understand it as the sort of hostile treatment they could expect from the Respondent, if they became known as union supporters.

I believe that under the Board's "totality of the circumstances" standard that the inquiry directed to Portillo and the other assembled employees was coercive and constituted unlawful interrogation. It would likely have a chilling effect on the willingness of employees to engage in union activity. Accordingly, I conclude that on about August 29, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(zz) of the complaint.

Complaint paragraph 5(aaa) alleges that on about August 30, the Respondent, through Lila Dang and Debbie Heslop, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from entering the EDR more than 1 hour before their shift or remaining more than 30 minutes after the end of their shift. Dang and Heslop were supervisors in the Spice Market Buffet. In support of this allegation, the General Counsel relied on the testimony of Elmer Portillo who, as noted earlier, was a waiter in the buffet and a union committee leader.

Portillo testified that prior to the time he started wearing a union button, there was no restriction on the amount of time that employees could spend during their off-duty hours in the employee dining room (EDR). He testified credibly that it had been his habit during the time that he worked at the hotel to remain in the EDR after his shift ended to watch the television show "Cops," which ran from 4to 5 p.m. Portillo normally worked a shift from 8 a.m. to 4 p.m., meaning that he was in the habit of remaining in the EDR for at least 1 hour after his shift ended. However, he testified that matters changed on August 30, at about 4:40 p.m., when he was approached in the EDR by Dang and Heslop. According to Portillo, Dang told him that he "wasn't supposed to be there" and pointed her finger to the door, meaning that he should leave. The following day, Dang called Portillo to the office at about 4 p.m., and with Heslop present showed him a "new policy that was in the book." This "policy" was apparently a reference to a page from the Respondent's Policy and Procedure Manual, which in pertinent part reads as follows: "Work Schedules . . . 8. A Team Member may be on premises in back of house areas no more than one (1) hour prior to the start of his/her shift and no more than 30 minutes after his/her shift ends." (R. Exh. 39.)

Dang did not testify. Heslop testified that these conversations with Portillo never occurred. However, I credit Portillo's testimony. The human resources director, Stacy Briand, testified that this policy has been in effect without change since May 1, 2002. Further, she indicated that the policy comes from

[26] Luis Carlos Velasquez was an open union supporter who is named in the complaint as a dischargee. More will be said about him later in this decision.

the Respondent's policy and procedure manual, which is not normally distributed to the employees, and although it is found on the Respondent's computer system, is not available to all employees. According to the testimony of the vice president of human resources, Tracy Sapien, this policy is not included in the Respondent's employee handbook, to which all employees do have access. Thus, I conclude that the conversations between Portillo and Dang and Heslop must have occurred substantially as testified to by Portillo, otherwise he would have been unlikely to have had any knowledge of this policy on employee presence in the EDR.

Also, I accept Portillo's testimony that the policy was not enforced against him until August 30. His story that he previously had a habit of remaining in the EDR for at least an hour after his shift ended in order to watch a favorite television program certainly had the "ring of authenticity" to it. His testimony was inherently plausible, and no probative evidence was offered to rebut it.

The timing certainly suggests that the enforcement of this apparently obscure policy on employee presence in the EDR was a result of Portillo's union activity and intended to limit that activity. The Board has held that a rule, which denies access to certain nonwork areas inside an employer's property, such as a cafeteria, to off-duty employees engaged in union activity is unlawful. *Panavision, Inc.,* 264 NLRB 1284, 1286 (1982). Also, in *Hudson Oxygen Therapy Sales Co*., 264 NLRB 61 (1982), the Board affirmed an ALJ who concluded that a blanket rule, which denied off-duty employees access to any of the plant's facilities, including a lunch room, was invalid. In part, the decision holding the rule invalid was premised on the employer's failure to justify the no-access rule based on business considerations.

Similarly, in the present case, the Respondent has made no effort to justify the rule limiting off duty access to the EDR based on business considerations. While the Respondent does not specifically argue that the rule is valid because it provides a "grace period" of 1 hour before and 30 minutes after the shift, the Board has held that such a period does not cause a presumptively invalid no-access rule to be lawful. *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 (2001) (30-minute grace period illegal), enf. denied 334 F.3d 99, 110–111 (D.C. Cir. 2003); *United Parcel Service,* 318 NLRB 778, 787–788 (1995) (15-minute grace period illegal).

There is no evidence that the Respondent maintained the rule through publication and distribution, since as noted, employees do not normally have access to the printed rule. It appears that the policy and procedure manual is maintained by the human resources department with access to it mainly by management.[27] In any event, what is alleged as unlawful in the complaint is the promulgation and enforcement of the rule on August 30, by Dang and Heslop. I agree that their conduct in limiting the amount of time Portillo could spend in the EDR both before and after his shift was unlawful. This appears to have been a change in the past practice as testified to by Portillo, and the timing strongly suggests that it was directly related to Portillo's union activity.

I find that in limiting Potillo's off duty access to the EDR, Dang and Heslop were interfering with his right to engage in union activity. Accordingly, I conclude that on about August 30, the Respondent, by Dang and Hesolp, promulgated and enforced an overly broad and discriminatory rule prohibiting its employees from entering the EDR more than one hour before their shift or remaining more than 30 minutes after the end of their shift, in violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(aaa) of the complaint.

Complaint paragraphs 5(bbb)(1) and (2) alleges that on about September 5, the Respondent, by Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; and threatened its employees with unspecified reprisals because of their union activities and support. In support of this allegation, the General Counsel offered the testimony of buffet busser and union committee leader Socrates Oberes. I have already set forth in detail the incident between Oberes and buffet manager Kawana, which occurred on August 22 and 24. For the reasons explained above, I credited Oberes over Kawana and concluded that Kawana had promised Oberes benefits for abandoning his support for the Union. I also noted Oberes' concern as expressed to Kawana that he was being accused by at least one server of stealing tips.

According to Oberes, he learned on September 5 that "security" was taking statements from employees on the theft of tips allegation. He testified that at about 9 a.m., he crossed paths with Kawana. As they passed each other, Kawana allegedly pulled on Oberes' shirt and asked, "When [are] you going to take off your union button?" Kawana then mentioned to Oberes that, "right now six servers [are giving] statements, and that he's the only one [who] could help [Oberes] now." Oberes testified that he did not respond, but merely went about his work.

Kawana denied ever asking Oberes to take off his union button, or to suggest to Oberes that if did so, Kawana could help him with a complaint that some servers made about Oberes stealing their tips. According to Kawana, Oberes had been upset about these accusations, and had spoken with Kawana about the matter. Kawana alleged that he tried to put Oberes' mind at ease and told him that even though these accusations had been made, that since no one saw Oberes steal anything, nothing could be proven.

As has been reflected above, I have found Kawana to be generally incredible. I found his testimony to be highly self serving and implausible, especially as compared to the employee witness who disagreed with his assertions. I continue to so find. Oberes' testimony is inherently plausible, especially in light of his previously credited testimony that Kawana had made a number of efforts to get him to remove his union button. The incident of September 5 appears to be a continuation of those efforts by Kawana. Oberes' testimony is all the more plausible as he places the union button remark in the context of the taking of statements from the servers. Kawana's denial is

[27] The complaint did not allege the maintenance of the rule to be a separate violation of the Act, nor did the General Counsel seek to have the rule rescinded. As the printed rule appears to not have been distributed or made available to employees, and because the validity of the printed rule was not litigated before me, I will make no finding as to the legality of the printed rule limiting employee access to the EDR.

rather nebulous, in that it does not establish a reasonable time frame as to when they discussed the servers' accusations. Kawana places the conversation as having occurred in May, which date seems badly out of sequence.

Having credited Oberes, I find that Kawana's question to him as to "when" he was going to remove his union button constituted unlawful interrogation. It was not simply an inquiry made to an open union supporter about why he was supporting the Union. Rather, it was a question seeking a response that would indicate the employee was abandoning his support for the Union. Also, the question was asked in the context of Kawana's remark that only he could help Oberes avoid the consequences of the investigation of the stolen tips. In making this statement, Kawana was telling Oberes that unless he abandoned the Union, something bad was likely to happen to him in connection with the investigation. This was a threat of an unspecified reprisal. Under the Board's "totality of the circumstances" standard, the question from Kawana about the union button, and accompanying threat about the investigation, constituted unlawful interrogation.

Kawana's remarks were made in the context of ongoing unfair labor practices by that supervisor. His question and remark would have reasonably caused Oberes to consider abandoning his union activity. As such, it would affect the willingness of employees to engage in Section 7 activity. Accordingly, I conclude that on about September 5, the Respondent, through Keith Kawana, interrogated its employees about their union membership, activities, and sympathies; and threatened its employees with unspecified reprisals because of their union activities and support; all in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(bbb)(1) and (2) of the complaint.

It is alleged in paragraph 5(ccc) of the complaint that on June 13, the Respondent, by Keith Kawana, granted its employees a benefit by implementing a shift change with the object of encouraging them to cease supporting the Union.[28] The General Counsel offered the testimony of John DiCillo in support of this allegation. He was a waiter in the Zanzibar Café, and a union committee leader who first began to wear his union button at work about May 31.

DiCillo testified that the year before the start of the union campaign, he had worked a shift that permitted him to have Wednesdays and Thursdays off. However, in October 2002, he submitted a bid on a new schedule, which would allow him to have Fridays and Saturdays off. Shortly thereafter, Café manager Keith Kawana informed him that he had been awarded the bid. In November, when his schedule had still not changed, DiCillo asked Kawana about it, and was told to be patient and Kawana would get to it. Still, throughout the rest of 2002 and the beginning of 2003 there was no change in DiCillo's shift. DiCillo testified that he next heard about this matter from Kawana when, shortly after he began to wear his union button, DiCillo received a phone call at his home. In the phone conversation, Kawana "apologized" for not taking care of the schedule change earlier, and informed DiCillo that he would be getting his requested days off starting that week. DiCillo estimated the call as having been made about the middle of June. This time the shift change went into effect as promised.

Kawana testified, but did not deny the substance of DiCillo's testimony. Therefore, I will accept the testimony of DiCillo as being unrebutted. Earlier in this decision, I concluded that Kawana illegally promised busser Socrates Oberes the opportunity to train for a position as a server, if he would abandon his support for the Union. Now I am of the belief that in a similar fashion, Kawana changed DiCillo's shift in an effort to induce him to abandon his support for the Union. The Respondent never offered a credible explanation for why this change in DiCillo's shift was not made for approximately 7 months after being awarded, but only instituted 2 weeks following DiCillo's wearing of the union button. The logical explanation is that the benefit was granted with an object of causing DiCillo to abandon his support for the Union.

The Board has held that a benefit granted during a union campaign is presumptively unlawful. However, an employer may avoid liability by showing that the benefit was planned prior to the commencement of union organizing activity. *Noah's Bay Area Bagels, LLC,* 331 NLRB 188, 189 (2000). Still, the crucial question in this case is why the benefit was not granted until after the start of the union campaign, where a decision had originally been made prior to the campaign. It is established Board law that "the grant of a benefit may constitute a violation because of the time it is given, regardless of when it was planned." *Emery Air Freight Corp*., 207 NLRB 572, 576 (1973); also *Revco Drug Centers of the West*, 188 NLRB 73, 77 (1971) (holding that, "[t]he crucial fact to evaluate is not whether the company would have increased wages at some time or another, but whether the increase was granted when it was because of the union activities").

In the matter before me, the timing of the shift change is strong evidence that Kawana implemented the change, 7 months after it was allegedly awarded, only in an effort to coerce DiCillo into abandoning wearing the union button, which he had started to wear 2 weeks earlier. The Respondent does not offer a plausible explanation to rebut the General Counsel's evidence. Accordingly, I conclude that on June 13, the Respondent, by Keith Kawana, granted its employees a benefit by implementing a shift change with the object of encouraging them to cease supporting the Union, in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(ccc).

3. Alleged 8(a)(3) violations

The General Counsel alleges in complaint paragraph 6(a) that in about the end of May, the Respondent imposed more onerous working conditions upon its employee Luis Herrera by requiring him to work periods of time by himself after sending the other two workers at his station on break at the same time. Herrera testified in support of this allegation. As noted above, he was employed as a cook in the Spice Market Buffet, specifically at the "seafood station." On weekends, which are busier, three employees usually staff this station. The employees take their hour-long lunchbreaks one at a time, and the chefs decide on the break schedule.

May 31 was the second day that Herrera wore his union committee leader button, and, as set forth in detail above, the

[28] Par. 5(ccc) was added to the complaint as an amendment. GC Exh. 2.

date when Herrera had a confrontation with Chef Clark about his button. I earlier concluded that during their meeting on May 31, Clark violated the Act by unlawfully interrogating Herrera, threatening Herrera with reprisals, and promulgating and enforcing an overly broad rule prohibiting employees from wearing union buttons, all in an effort to get Herrera to remove his union button. According to Herrera, on May 31, which was a Saturday, some time after the confrontation in Clark's office, the two other cooks were sent on their breaks at the same time, leaving Herrera to staff the station alone. He testified that prior to that date he had never before been left alone to work the station. Since then he has allegedly been left alone from four to six times.

The General Counsel takes the position that as Herrera was an open union supporter who had been illegally threatened and interrogated, that forcing him to work an understaffed station was an adverse employment action, because it made his job more difficult, increasing the risk that he would make a mistake and be disciplined. It is argued that timing is a strong indicator of discriminatory intent, as the interrogation and threats directed toward Herrera were made by Clark earlier on the same day that Herrera was first left alone to man the station.

Of course, the Respondent sees this matter differently, with counsel arguing in his posthearing brief that there was no connection between the alleged threats by Clark and the alleged onerous working conditions. Counsel points out that Herrera was somewhat unclear as to when these incidents of being left alone occurred and also of the precise number, as Herrera could not say for certain whether there were four, five, or six occasions. Also, without specifically saying so, counsel appears to be making a de minimis argument, as he notes that over the course of 6 months, the alleged onerous working conditions complained of occupied no more than 4 to 6 hours.

The Respondent operates a massive hotel-casino, employing thousands of employees. These alleged incidents involve one employee, who allegedly was required to work his station alone for a total of 4 to 6 hours over a 6-month period. The Board is obviously not expected to tell this Employer, or any employer, how best to run its business. Of course, the mission of the Agency is to enforce the Act and remedy unfair labor practices. However, were I to conclude that by assigning breaks to its cooks in such a way as to require Herrera to work alone at his station on four to six occasions the Respondent was violating the Act, I would be micromanaging the Respondent. This was not what the Act intended.

I see no obvious connection between Herrera's union activity and the Respondent's scheduling of breaks for the cooks. There is simply insufficient evidence to conclude that the Respondent's action imposed more onerous working conditions upon Herrera because he engaged in Section 7 activity. The nexus with his union activity is missing. Further, I am of the opinion, that even assuming a connection exists, the incidents are insignificant, and do not warrant the finding of a violation.[29]

[29] There is no contention that as a result of being left alone, Herrera was unable to handle his station and was for that reason disciplined or threatened with discipline.

Based on the above, I conclude that the General Counsel has failed to meet his burden and establish that the Respondent imposed more onerous working conditions upon Herrera because of his union activity. Accordingly, I shall recommend that complaint paragraph 6(a) be dismissed.

It is alleged in complaint paragraph 6(c) that on about June 2, the Respondent denied its employee Pablo Blanco work opportunities by removing him from the work schedule and placing him on on-call status.[30] As noted earlier, Blanco was employed as a busboy. He was also a union committee leader who began wearing the union button on May 30. I have already found that on May 31, Keith Kawana violated the Act by interrogating Blanco about his union activities, threatening him with reprisals because of those activities, and promising him a benefit for abandoning his support for the Union.

Blanco testified at length about his work schedule and whether he was a full-time or on-call employee. Preliminarily, I should note that I found Blanco's testimony very hard to follow. It was disjointed and, frankly, some of it made no sense. Blanco testified through a Spanish language interpreter. However, I do not believe that this contributed to the problem, because the majority of the General Counsel's witnesses testified through an interpreter, and there was no difficulty in understanding any of their testimony.[31] In any event, to the best of my ability to understand Blanco's testimony, he was complaining that for 1 week he had been promoted from on-call to full time, and then demoted because of his union activity.

Each week, the buffet managers post a work schedule for employees. Apparently, full-time employees' names are listed on the top of the list, and on-call employees' names are listed at the bottom of the list in order of seniority. There is a separate daily list of employees' work assignments, not separated by full-time or on-call status. According to Blanco, with the exception of 1 week, he has always been an on-call employee. However, for 1 week in May, before he began to wear the union button, Blanco's name was allegedly moved to the full-time position. He testified that in June, after he put on the union button, his name was returned to the on-call position on the list.

Kawana testified that Blanco had always been an on-call employee in the buffet. According to Kawana, during the summer of 2003, Blanco was scheduled for a substantial number of hours as an on-call employee because he was near the top of the on-call list, and because there were other employees on "leave." Blanco was, therefore, given the opportunity to fill in for absent full-time employees. Kawana testified that Blanco "really doesn't understand sometimes." He tried "to make things very clear" to Blanco, often having to tell Blanco things "two or three times." Kawana indicated that he was concerned with having Blanco work these extra hours in the summer of 2003, so he "physically show[ed] him, this is where you'll be

[30] Counsel for the General Counsel withdrew complaint par. 6(b). Initially, he also withdrew par. 6(c). However, following an objection from counsel for the Union, the General Counsel agreed to reinstate par. 6(c). See GC Exh. 2.

[31] I found the Spanish language interpreter who was used throughout the hearing to have done an excellent job. All parties were assisted by fluent Spanish speakers, and there were very few objections raised to the translation of witness testimony.

working" on the list. According to Kawana, he placed Blanco's name on the swing shift on that part of the schedule where full-time employee names went. He testified that he placed Blanco's name on the full-time portion of the list, "just to make sure he knew exactly where he would be." Thereafter, when the absent employee returned, Blanco's name went back to the on-call position, because "[h]e was always on-call." Kawana denied that Blanco was ever anything other than an on-call employee, denied that he was ever promoted to full time, and denied that he was ever demoted to on-call.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

The Board in *Tracker Marine, L.L.C*., 337 NLRB 644 (2002), affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co*., 303 NLRB 638, 649 (1991).

In the matter before me, it is somewhat difficult to know precisely what transpired with Blanco's schedule. While Blanco's testimony was confusing, I have previously determined that Kawana was not a credible witness. However, even an incredible witness has the capacity to tell the truth on occasion. Between the two versions of the event in question, I find Kawana's version more plausible. Had Blanco's work status been changed from on-call to full time, this would surely have been considered a "promotion," and it is highly likely that Kawana would have specifically informed Blanco that he was being promoted. Congratulations would have been warranted. But Blanco did not testify that he was informed about a promotion, congratulated, or told anything by Kawana. Blanco's testimony was simply that his name was moved to the full time part of the schedule. This makes no sense. Somewhat more probable was Kawana's testimony that he had concerns with Blanco understanding the additional hours that he was to work in the place of absent employees, and so he added Blanco's name to the full time part of the schedule and physically showed him on the list the days and hours that he was working. In effect, Kawana placed Blanco's name in the category where the name of the absent employee would normally go. As I was able to observe Blanco's confusion when testifying, I have some understanding of Kawana's concern about Blanco understanding a schedule, which called for him to work more hours than usual. I believe that there existed a legitimate basis for that concern.

Having accepted Kawana's testimony that Blanco's status was never changed from on-call to full time, I must conclude that he never suffered an adverse employment action. This is one of four necessary elements in the General Counsel's case. Having failed to establish the existence of an adverse employment action, the General Counsel has failed to establish a prima facie case. *Tracker Marine,* supra. The evidence does not support the allegation that Blanco was denied work opportunities as a result of his union activities. Accordingly, I shall recommend that complaint paragraph 6(c) be dismissed.

Paragraph 6(d) of the complaint alleges that on about June 3, the Respondent issued its employee Joe Trevino an unwarranted and undeserved disciplinary warning. As previously noted, Trevino was a food server in the Zanzibar Café, and a union committee leader who wore the union button. I earlier found that his supervisor, Marlene Nazal, violated the Act on May 30 when she promulgated and enforced an overly broad and discriminatory rule prohibiting Trevino from wearing a union button under threat of suspension.

According to Trevino, on June 1, he was given a written warning, termed "Coaching Document" from Nazal. (GC Exh. 3.) At the time he was approached by Nazal, Trevino was in the dining room. She said that Keith Kawana had instructed her to give it to him. Nazal informed Trevino that Kawana had seen Trevino "conducting union business on company time" with fellow food server Pat Burrell on the previous Monday. Trevino testified that regarding Burrell, he had "signed her up in the employees' dining room." By this reference, I assume he meant that he had obtained a signed union authorization card from Burrell. In any event, Trevino told Nazal that he had Mondays off, so he could not have done as Kawana suggested. She said that she would speak with Kawana about the dates. About 5 minutes later, she returned to Trevino and told him that Kawana indicated that it was actually the previously Saturday that he had seen Trevino with Burrell. Nazal changed the incident date on the coaching document, and got Trevino to sign it. While both Nazal and Kawana testified, neither denied the substance of Trevino's testimony. Therefore, his testimony is unrebutted.

The coaching document indicates that Trevino "was observed by a department head discussing union organizing in the kitchen during business hours with another team member who was attempting to work." (GC Exh. 3.) Of course, Trevino testified that his involvement with Burrell occurred in the EDR, where she signed a union card. Since that testimony was unchallenged, except indirectly by the written warning, I credit Trevino's testimony that the conduct complained of occurred in

the EDR, not in the kitchen. It is axiomatic, that an employee can lawfully engage in union activity, including soliciting signatures on union cards, on the employee's nonworking time, such as while on lunch or breaks in the EDR.

I am of the belief that the Respondent, through Nazal and Kawana, issued a written warning to Trevino for soliciting Burrell to sign a union card while on break in the EDR. This was unlawful. Since there is no dispute as to the reason for the discipline,[32] this is not a dual motivation case, and the *Wright Line* analysis is not appropriate.[33] Rather, in these circumstances, the proper analytical framework is that found in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In that case, the Supreme Court affirmed the Board's rule that an employer violates the Act by discharging or disciplining an employee based on its good faith but mistaken belief that the employee engaged in misconduct in the course of protected activity. Accord: *La-Z-Boy Midwest*, 340 NLRB 80 (2003).

Accordingly, I conclude that on about June 3, the Respondent issued its employee Joe Trevino an unwarranted and undeserved disciplinary warning because of his union activity, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(d) of the complaint.

It is alleged in complaint paragraph 6(e) that on about June 4, the Respondent changed the working conditions of its employee Elisabeth Peuser by changing her breaktime. As noted above, Peuser was a food server in the Zanzibar Café, and was also a union committee leader who wore a union button. I previously found that on May 31, Keith Kawana unlawfully interrogated Peuser about her union activity.

Peuser testified that her shift normally runs from 8 a.m. to 4 p.m., and that she takes her 1-hour break no earlier than 11 a.m. Employees who begin work earlier, normally take their breaks before Peuser. According to Peuser, on approximately June 4, she was directed by supervisor Marlene Nasal to take her break at 9:40 a.m., which was earlier than employees who had started work before Peuser. It is alleged that requiring her to take a break at an earlier hour caused Peuser to endure more onerous working conditions, as she, thereafter, needed to work without a break from 10:40 a.m. until the end of her shift at 4 p.m.

Nasal testified on cross-examination that she could not specifically recall whether on one particular day Peuser was asked to take her break only about 1 hour after she started her shift. (Although, as noted above, Peuser actually took her break after she had been at work for 1 hour and 40 minutes.) The Respondent denies that Peuser's breaktime was in any way related to her union activity. Further, counsel for the Respondent argues in his posthearing brief that the allegation, even if true, does not rise above the level of de minimis importance. I must agree with the Respondent.

Peuser testified that this incident on June 4 was the only time she has been asked to take her break prior to 11 a.m. Not surprisingly, Nazal credibly testified that she could not even recall the matter. I see no evidence connecting this change in Peuser's usual breaktime with her union activity. There is no clear nexus. At this point in time, who can say why Peuser was asked to take her break earlier than normal? There may have been a dozen different legitimate reasons for it. Frankly, it would certainly not be reasonable to expect that a supervisor testifying 6 months later would have any memory of what really appears to have been a rather insignificant event.

I am of the view that counsel for the General Counsel has failed to meet his burden of proof, and has not established a nexus between the event and Peuser's union activity. Further, I believe this one time event to be too insignificant to constitute an adverse employment action. It simply does not rise to the level of an unfair labor practice. Accordingly, I shall recommend that complaint paragraph 6(e) be dismissed.

Complaint paragraph 6(f) alleges that on about June 6, the Respondent imposed more onerous working conditions on its employee Jose Beltran by requiring him to work periods of time by himself at his station. As mentioned earlier, Beltran was employed as a cook in the Spice Market Buffet, and was a union committee leader who wore the union button. I previously concluded that on May 31, Chef Clark unlawfully interrogated Beltran about his union membership and activities.

According to Beltran, Clark's attitude changed after Beltran began to wear the union button. On June 5, at a preshift meeting, Clark greeted the assembled employees with the statement, "Welcome to the Revolution everybody." There then followed a change in Beltran's "working conditions." Beltran works the "Italian station" at the buffet, which has a pizza side and a sauté side. On the weekends, which are typically busy, there are usually three employees working the Italian station. However, on this date,[34] which Beltran recalls as a Friday, Clark scheduled employee breaks so that Beltran found himself working the station alone. After Beltran struggled working the station alone for about 25 minutes, Clark came over to the station and began to count out loud the number of empty dishes, which Beltran had not yet had an opportunity to refill. Beltran testified that Clark said that when he hired Beltran he had been told that Beltran was a cook, but apparently Beltran wasn't, because Beltran could not handle the two sections well. Further, Clark said that if Beltran couldn't maintain both sides of the station well, that he would move Beltran to another station. According to Beltran, before that date he had never been asked to work the station alone.

Clark denied that he ever left Beltran with inadequate assistance, that he ever assigned Beltran any unusual duties, or that he ever made it difficult for him to do his job. For the reasons that I expressed earlier, I continue to find Clark to be incredible. On the other hand, I believe Beltran's testimony, and his characterization of Clark's conduct fits the pattern of hostility that Clark exhibited toward the cooks who wore the union button. For Clark, the wearing of the union button by his cooks had obviously become a personal matter.

[32] I was unable to find any defense of the Respondent's conduct in issuing this warning in counsel for the Respondent's posthearing brief.

[33] I conclude that even assuming the *Wright Line* analysis were appropriate, the General Counsel has established by a preponderance of the evidence all the elements of a prima facie case, including union activity, knowledge, adverse employment action, and nexus. The Respondent has failed to rebut that evidence.

[34] While Beltran may have mistaken the exact date that these events occurred, the sequence of events is the significant matter.

Clark followed his interrogation of Beltran on May 31 with the statement of June 5 about the "revolution," which I believe was a reference to the union activity of the employees. There then followed the incident of leaving Beltran to man the Italian station alone, which had never been done before. By itself, the incident might have passed unnoticed, as simply the random scheduling of breaks by the supervisor. However, when associated with Clark's sarcastic comment to Beltran about his not being a cook, if he could not handle the station alone, I believe Clark's aim was clear. Clark was harassing Beltran because he wore the union button.

Under the *Wright Line* standard, the General Counsel has established a prima facie case. Beltran obviously had union activity, which was well known to Clark. Clark assigned Beltran a more onerous job task, namely the manning of the Italian station alone, which constituted an adverse employment action. Clark had previously demonstrated by his interrogation of Beltran and the other cooks his animus toward the Union. The timing of Beltran's isolation at the station, along with Clark's sarcastic remarks about Beltran's abilities as a cook, is further evidence of a nexus with Beltran's union activity. Further, I am of the view that the Respondent has failed to rebut the General Counsel's evidence. I do not believe that Beltran would have been left alone at the station, were it not for his union activity.[35]

Accordingly, I conclude that on about June 6, the Respondent imposed more onerous working conditions on its employee Jose Beltran by requiring him to work periods of time by himself at his station, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(f) of the complaint.

The General Counsel alleges in complaint paragraph 6(g) that on about June 13, the Respondent changed the working conditions of its employee Azucena Felix by prohibiting her from using air freshener in performing her work duties so as to hold her up to ridicule by her coworkers. As I discussed earlier, Felix worked as a material control employee. Specifically, she worked in the area of the linen chute, down which the dirty linen travels on its way to the laundry. Felix was also a union committee leader who wore the union button. I previously concluded that on May 31, Supervisor Welch promulgated an overly broad and discriminatory rule prohibiting Felix from talking about the Union.

Felix testified that in the course of performing her job duties, she was required to clean the chute and surrounding area. She has allegedly been trained to use a cleaning/disinfecting solution poured into her mop bucket to clean, and to use a spray bottle of deodorizer to improve the smell in the area around the linen chute. Apparently, the linen chute area has a particularly strong odor. In any event, on June 13 she was performed her duties with fellow employee Wenceslao Sanchez, when stopped by Welch, who was at the time holding a meeting for other employees. Felix testified that Welch directed his comments to her and said that she should not be using the deodorizer, because she was wasting it, and "at five cents per bottle, it was expensive." Allegedly, she told Welch that the deodorizer was needed to freshen the foul air in their work area, but Welch again admonished Felix not to use the chemical. She contends that at this point the employees with whom Welch was meeting began to laugh at her. Pursuant to Welch's instructions, Felix discontinued use of the deodorizer, which she had been using for the previous 3 years. Sanchez testified, and substantially supported the testimony of Felix.

Welch's story is somewhat different. He testified that he observed Felix with the deodorizer in her mop bucket, which he was able to determine because of the pink color of the fluid. According to Welch, he merely told Felix and Sanchez not to use the deodorizer to clean, because it was not made for that purpose. Secondarily, the deodorizer is more expensive, costing about "20 cents a quart" more. Welch testified that all the employees like to use the deodorizer because it smells good, but it has always been the policy of the department that it should only be used to deodorize and not to clean or disinfect. It was not designed for those purposes, and his intention was merely to explain that to Felix and Sanchez. Employees, including Felix, may still use the deodorizer to spray it in the air. Welch testified that he "didn't see it as a big thing, [he] was just making [Felix and Sanchez] aware if they weren't already aware that [it's] not a clean[ing] agent."

In my opinion, the General Counsel has made a "mountain out of a molehill" regarding this matter. Regardless of which version is more accurate, Felix or Welch's, or a combination of the two, this matter does not rise to the level of an unfair labor practice. Even assuming Felix's testimony was accurate, the General Counsel has failed to meet his burden of proof and establish a prima facie case. I do not believe that prohibiting Felix from using the deodorizer constitutes an adverse employment action, nor do I see any connection with her union activity. *Tracker Marine,* supra. There is no probative evidence that, as suggested by the counsel for the General Counsel and counsel for the Union, the Respondent instituted the alleged denial of deodorizer use in an effort to humiliate Felix in front of fellow employees. Why would it constitute a humiliation? The theory of this allegation makes no sense to the undersigned. Surely, the Respondent has the right to decide which particular product its employee maintenance personnel use in the course of performing their job duties. Even fully crediting Felix, I do not believe that she suffered any detriment by being prevented from using the deodorizer as could reasonably be considered an adverse employment action under the Act. Accordingly, I shall recommend the dismissal of complaint paragraph 6(g).

It is alleged in complaint paragraph 6(h) that on about June 14, the Respondent changed the working conditions of its employee Elisabeth Peuser by more strictly enforcing a work rule against her regarding having her hair pulled back or cut. As is noted above, Peuser was employed as a food server in the Zanzibar Café, and was a union committee leader who first wore the union button on May 31.

Peuser testified that previous to the union campaign, she had worn her hair about at collar length with no difficulty. How-

[35] I do not believe that there is any inconsistence with my decision in the matter of Luis Herrera, complaint par. 6(a). The Herrera incidents lacked the nexus to union activity, which obviously existed with Beltran. Clark's sarcastic comments to Beltran established that the harassment was an effort to punish Beltran because he wore the union button.

ever, on June 14, she was approached at work by Café Manager Nazal who told her that she had to either get her haircut, or clip it up on the top of her head. She objected, telling Nazal that, "some of the other girls' hair is down." Nazal replied that she would talk to these servers. Apparently she did, because a fellow server indicated to Peuser that she was upset with Peuser for mentioning to Nazal that her hair was not up. In any event, Peuser felt compelled to pull her hair up on the top of her head starting the following day. She continued to wear her hair in that fashion, and was never told by Nazal that it was not necessary.

Nazal testified that Peuser's hair was "very long," and she told Peuser to "pull her hair up," in order to comply with the "dress code policy." When Peuser pointed out another employee whose hair was as long, Nazal directed that employee to also pull up her hair. Nazal testified that while she was aware that Peuser wore a union button, it was "later on," meaning after the hair incident, and also that she never saw the other employee wearing a union button.

The employee handbook merely states that for women, "Long hair must be kept away from the face and should not fall forward while performing normal job duties." (R. Exh. 4, p. 25.) While Nazal indicated that customer complaints about hair in their food had precipitated her concern about hair length, she did not claim that she had identified the hair as coming from Peuser. In any event, this dispute essentially comes down to credibility. Was Peuser's hair collar length as she testified, or longer, as testified by Nazal?

Earlier, I found Nazal not to be a particularly credible witness. She was a difficult and testy witness on cross-examination, and I got the feeling that she testified with an "agenda," which was designed to favor the Respondent. On the other hand, Peuser seemed generally credible. I have already found that Nazal committed unfair labor practices prior to this hair incident with Peuser, and I especially do not credit Nazal's testimony that she only noticed Peuser wearing a union button after the incident. To the contrary, I credit Peuser that she began to wear the union committee leader button 2 weeks earlier, and I have no doubt that Nazal noticed it immediately. Her union animus was already apparent, as she had on May 30 promulgated and enforced an overly broad and discriminatory rule prohibiting employees from wearing union buttons.

Considering these various factors, I believe that the General Counsel has established the necessary elements of a prima facie case. Peuser had union activity, and I believe that activity was known to Nazal. Requiring Peuser to either cut her hair or wear it on the top of her head was an adverse employment action, as presumably Peuser did not want to do so, and complied only under the implied threat of disciplinary action. Further, based on the timing and Nazal's union animus, I conclude there is a fairly obvious nexus with her union activity. Thus, the General Counsel has met his evidentiary burden. *Tracker Marine,* supra.

I am also of the belief that the Respondent has not overcome that evidence by showing that the action would have been taken, even without Peuser's union activity. The fact that Nazal spoke to another employee, who was not an obvious union supporter, about her hair shows only that Nazal was trying to "disguise" her discriminatory conduct. This other employee was spoken to only after Peuser raised the issue of the other employee's hair length. Further, there is no claim that the Respondent's hair length policy had been changed, yet Peuser was being required to alter her hair style, which she had utilized without challenge for some time. The only thing that had changed was Peuser's involvement with the Union. Therefore, the Respondent has failed to rebut the presumption that the adverse employment action violated the Act. *Mano Electric,* supra; *Farmer Bros. Co.,* supra.

Accordingly, I conclude that on about June 14, the Respondent changed the working conditions of its employee Elisabeth Peuser by more strictly enforcing a work rule against her regarding having her hair pulled back or cut, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(h) of the complaint.

It is alleged in complaint paragraph 6(i) that on about June 20, the Respondent changed the working conditions of its employee Azucena Felix by reducing the time she was permitted to clean up at the end of her work shift. As has been indicated above, Felix was employed in the material control department, and was a union committee leader who wore her union button at work. Her immediate supervisor was Michael Welch.

Felix testified that on June 20 near the end of her shift, she was in the women's bathroom washing up in preparation for leaving work. While she did not allege that her shift was over, she seemed somewhat confused over precisely what time she was in the bathroom. In any event, it is undisputed that the shift ends at 5 p.m., and the controversy is over whether she was entitled to take 5 or 10 minutes to clean up. While in the bathroom, Felix was observed by Sandra Eastridge, director of housekeeping services. Felix, who was in the process of washing up, jokingly commented that she had to bathe before going home. Eastridge smiled and exited the bathroom, and Felix soon followed, after allegedly spending a total of 4 minutes in the bathroom. When she returned to her work area, Welch said that Eastridge had complained to him that Felix should not be taking "so much time to clean [herself, and she] was supposed to work till the last minute of [her] shift." In her defense, Felix said that when she was trained for the job, her trainer had told her that she could use 10 minutes at the end of her shift to clean up. She reminded Welch that working with the dirty linen and near the linen chute caused her to get quite dirty, and she asked him how much time she was entitled to take to clean up. According to Felix, Welch told her she could take "five minutes, and no more."

Welch testified that the Employer has no written policy concerning clean up time for employees at the end of a shift. He indicated that Felix was not the only employee that he had spoken to about excessive clean up time. Welch recalled that following Eastridge's complaint, he told Felix that she needed to remain at her workstation until either her shift ended, or a supervisor released her.

After hearing their testimony, it appeared to me that neither Felix nor Welch had a particularly good recollection of what was said on the afternoon of June 20. Felix especially seemed to have some difficultly with time, being unclear and contradictory about the precise time she entered the bathroom and for

how long she remained.[36] However, the dispute really comes down to whether the Respondent changed the amount of time Felix could spend cleaning up at the end of her shift from 10 to 5 minutes; and, if so, whether the reduction was because of her union activity.

As I indicated earlier, Felix was a union supporter, and the Respondent was aware of her union activity. Welch had spoken to her about her support for the Union, and he committed an unfair labor practice by promulgating an overly broad and discriminatory rule prohibiting her from talking about the Union with other employees. Thus, under *Wright Line*, the General Counsel has established three necessary elements to make a prima facie case, namely union activity, knowledge, and animus. However, the fourth element, that being an adverse employment action, is only established if the evidence supports a finding that the Respondent reduced Felix's cleanup time from 10 to 5 minutes. I do not believe the evidence supports such a finding.

It is undisputed that there is no written policy on the subject of cleanup time. Apparently, it is simply left up to each department to decide the matter. Felix testified that Welch told her she could take 5 minutes at the end of her shift to clean up, which she claimed was less than the 10 minutes she has been told by her "trainers" that she could take. However, counsel for the General Counsel never called any further witness or offered any additional evidence to establish that Felix had ever been so directed by her "trainers," or even that she or other maintenance department employees had any such past practice. Certainly there was no evidence offered to show that Welch or other supervisors were aware that Felix was taking 10 minutes to clean up. I do not believe that Felix's testimony alone is sufficient to establish a past practice of 10 minutes, because I find her testimony on this subject to be unreliable. She seemed confused over the times involved in the incident of June 20.

The General Counsel has not met his evidentiary burden and established that Felix had a past practice of taking 10 minutes to clean up at the end of her shift. Concomitantly, the General Counsel has failed to establish that there was any change in Felix's working conditions when Welch directed her to take no more than 5 minutes to clean up at the end of her shift. Accordingly, I shall recommend that complaint paragraph 6(i) be dismissed.

Complaint paragraph 6(j) alleges that on about June 28, the Respondent discharged its employee Pablo Blanco. As was discussed in detail above, Blanco was employed as a busboy in the Spice Market Buffet. He was also a union committee leader who wore a union button on a regular basis starting about May 31.

Blanco testified that he arrived at work on June 28 at 3 p.m., and went to the hostess station to look at the schedule and determine where he was supposed to be working. However, he could not locate the schedule, and went into the kitchen to ask a fellow employee where the list was located. This employee, Sylvia, was also unaware of the location of the list, and so Blanco decided to just help her with a dish cart. They brought the dishes into the buffet from the kitchen, left them in the dessert section, and returned the cart to the kitchen.

At about 4 p.m. that day, Blanco was told to report to the office. He went to Keith Kawana'a office where, in addition to Kawana, he found supervisors Marlene Nazal, and Debbie Heslop. According to Blanco, Heslop asked him where he had been at 3:30 p.m. that day. Blanco replied that he had been working. However, Kawana told Blanco that he was being investigated for disappearing from work. Blanco indicated that this was unfair, and he left the office with the intention of bringing back a fellow employee who could support Blanco's claim that he had been working. He returned with employee Jose Alvarez, but Kawana was allegedly not interested in hearing from Alvarez. Kawana had a security guard escort Blanco out of the facility. According to Blanco, on June 30, he received a call from Kawana who informed him that he was fired. Blanco utilized the Respondent's "open door policy" to appeal his dismissal. He was eventually reinstated to his job by the Respondent's vice president, Brian Lerner, and returned to work on July 19. However, he did not receive backpay for the time he was suspended and discharged.

The Respondent failed to offer any evidence in opposition to Blanco's testimony. Therefore, I accept Blanco's testimony as unrebutted. The evidence is undisputed that Blanco was an open supporter of the Union, and the Respondent's supervisors were well aware of his union activity. Further, the Respondent's supervisors, including Kawana and Nazal, had as of June 28 engaged in numerous unfair labor practices by which the Respondent's animus toward the Union was obvious. Equally clear, the suspension and subsequent termination of Blanco was an adverse employment action. Thus, the General Counsel has established by a preponderance of the evidence that a motivating factor in the Respondent's decision to suspend and terminate Blanco was his union activity. Having established a prima facie case, the burden shits to the Respondent to show that the adverse employment action complained of would have been taken, even in the absence of Blanco's union activity. *Tracker Marine,* supra.

The Respondent offered no evidence to support its contention that the suspension and discharge of Blanco were justified. From Blanco's testimony, it appears that the supervisors were not really interested in hearing from fellow employees who might have established that Blanco was working, as he claimed, during the time the supervisors thought him to be missing. The Board has held that "[a]n employer's failure to adequately investigate an employee's alleged misconduct [is] an indication of discriminatory intent." *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). This certainly appears to be the situation at hand. I suspect that was why, to his credit, Brian Lerner reinstated Blanco under the Employer's internal open door policy. However, the damaged had been done. Blanco's employment record reflected a suspension and discharge, and Blanco was not made whole for his lost wages and benefits.

The Respondent has failed to meet its burden of proof by a preponderance of the evidence that it would have taken the adverse employment action against Blanco, even in the absence

[36] During Felix's testimony there was some confusion as to whether she left the bathroom at 4:54–4:55 p.m. or 4:44–4:45 p.m., a 10-minute discrepancy. Her earlier affidavit given to the Board lists the time as 4:55 p.m.

of his protected conduct. *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). In fact, there has been no evidence offered that would establish anything of the sort. Accordingly, I conclude that on about June 28, the Respondent discharged Pablo Blanco because of his union activity, in violation of Section 8(a)(1) and (3) of the Act, as alleged in complaint paragraph 6(j).

Complaint paragraph 6(k) concerns the alleged discharge of employee Luis Velasquez on July 6. However, as there are a number of complaint paragraphs involving adverse employment action taken against Velasquez, I will consider all these allegations together, later in this decision.

It is alleged in paragraph 6(l) of the complaint, as amended, that on about July 6 and 11, the Respondent issued a group warning to, and imposed more onerous working conditions on, its beverage department employees. This allegation is premised on the same set of facts upon which complaint paragraphs 5(nn) and (pp) are based. When considering those earlier allegations, I came to the conclusion that while Supervisor Michael Duhon had issued a blanket verbal warning to assembled employees at two preshift meetings, a rather unusual action, that there was insufficient evidence to establish that the action was taken because of the employees' union activity. Paragraphs 5(nn) and (pp) alleged the Respondent's conduct to constitute a threat to engage in closer supervision in violation of Section 8(a)(1) of the Act. In paragraph 6(l) the same conduct by the Respondent is alleged as a violation of Section 8(a)(3) of the Act, as an imposition of more onerous working conditions. However, the underlying evidence is exactly the same.

Having already concluded that the evidence failed to establish a nexus between the conduct of Duhon in issuing the blanket warning and the employees' union activity, I must also conclude that there is insufficient evidence that the imposition of more onerous working conditions by means of the blanket verbal warning was connected to protected activity. Counsel for the General Counsel has failed to show a nexus between the adverse employment action and union activity, one of the necessary elements in order to establish a prima facie case. *Tracker Marine,* supra. Thus, the General Counsel has failed to show by a preponderance of the evidence that the employees' union activity was a motivating factor in the imposition of more onerous working conditions. Accordingly, as I did with complaint paragraphs 5(nn) and (pp), I shall recommend the dismissal of complaint paragraph 6(l).

Complaint paragraph 6(m) alleges that on about July 11, the Respondent imposed more onerous working conditions on its employee Luis Herrera by telling him to work at the banquet hall while he was on his lunch break. This allegation is premised on the same set of facts upon which complaint paragraph 5(rr) is based. In considering the allegation in paragraph 5(rr), I found that the Respondent, through Chef Clark, threatened Luis Herrera with disciplinary action because of his union activity. I found that on earlier occasions Clark interrogated and threatened Herrera because he wore the union button. Then on July 11, Clark specifically threatened Herrera with disciplinary action because he had failed to immediately end his lunchbreak, "dump the food," leave the EDR, and "go fast" to help out in banquets. This incident is more fully explained above in the section concerning paragraph 5(rr) in which I concluded that Clark's conduct constituted a violation of Section 8(a)(1) of the Act. However, the same set of facts also establishes a violation of Section 8(a)(3) of the Act.

Herrera's union activity in wearing the committee leader button was obvious. Equally clear was the Respondent's knowledge of that activity. Further, Clark's union animus as demonstrated by his unlawful interrogation and threat to discipline employees is now legend. The final element in the General Counsel establishing a prima facie case is the existence of an adverse employment action. I believe that Clark's order to Herrera to immediately end his lunchbreak, dump his food, leave the EDR, and go to banquets was such an action. As noted above, I specifically credited Herrera that he had never before been told that he had to work in banquets. Further, the timing of Clark's demand, coming as it did the day after he placed his finger on Herrera's union button and threatened him with discharge, is further evidence that his demand was not legitimately based on the Employer's need. Therefore, I find that the General Counsel has established by a preponderance of the evidence that a motivating factor in Clark's demand that Herrera immediately go help out in banquets, cutting short his break time, was Herrera's union activity. *Tracker Marine,* supra.

The Respondent has failed to rebut the General Counsel's prima facie case and establish that it would have taken the action complained of, even in the absence of Herrera's union activity. The only evidence offered in support of Clark's demand was Clark's own testimony that it was not uncommon for cooks to help out in banquets. However, I found Clark to be incredible for the reasons previously expressed at length, and find this statement by him, with no supporting evidence, to be equally incredible. Accordingly, I find that on about July 11, the Respondent imposed more onerous working conditions on its employee Luis Herrera by telling him to work at the banquet hall while he was on his lunchbreak, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(m) of the complaint.

It is alleged in complaint paragraph 6(n), as amended, that on about July 12, the Respondent changed the working conditions of its employees, Jose Beltran,[37] and Luis Herrera, by requiring them to wear hairnets under threat of suspension. Of course, both Beltran and Herrera were cooks employed in the buffet, and union committee leaders. Herrera testified that on July 12 at a preshift meeting attended by about 20 employees, Chef Clark informed the assembled employees that they would have to use hairnets. However, later at the seafood station, Clark told Herrera individually that he "needed to use a hairnet" and if Clark saw him the next day without the hairnet that he would be given a "suspension or a warning." Being upset about the order, Herrera went to see Anthony Paul (Chef Anthony),

[37] I granted the General Counsel's motion to amend the complaint by adding Beltran's name to this allegation, over the objection of counsel for the Respondent. The addition was closely related to the existing allegation, and arose from the same facts and legal theory. *Payless Drug Stores*, 313 NLRB 1220 (1994). Further, the Respondent was not prejudiced by the amendment as it had adequate time to prepare its rebuttal, and the additional allegation was fully litigated at the hearing. *Pincus Elevator & Electric Co*., 308 NLRB 684 (1992).

whom Herrera testified was Clark's "boss." According to Herrera, he explained his problem and asked Anthony if he needed to wear a hairnet. Anthony had Herrera remove his cap, examined his hair, and said that Herrera did not need to wear a hairnet. Herrera testified that he has never worn a hairnet while working, and except for the two occasions on July 12 when spoken to by Clark, he has never been asked to wear a hairnet. Further, he testified that his hair length on July 12 was the same length as on the day of the hearing.

Beltran testified that at a preshift meeting on a date he could not recall, Clark told the assembled employees that they had to wear hairnets. Then Clark told him individually that he needed "to wear a hairnet now." He also heard Clark tell Herrera the same thing individually. Beltran claimed that at the time, his hair was above the collar, which was allegedly within the Respondent's allowable length. He has never worn a hairnet at work. Further, he has never heard Clark tell any employee individually that the employee needed to wear a hairnet, with the exception of himself and Herrera.

Clark testified that he had received a number of complaints about hair being found in the food, and so during a preshift meeting he asked "everybody who had long hair or hair that was disheveled, either to wear a hairnet or, the other option, to get a hair cut." He admitted speaking to both Beltran and Herrera and "extending the option" to them. Allegedly, quite a few other employees who worked in the buffet were wearing hairnets. According to Clark, Beltran protested that his hair was above the collar in length. Clark recalls Herrera protesting not at all, and came to work the following day with his hair cut. Nobody was disciplined for having excessively long or disheveled hair. Clark testified that his boss, executive chef Mark Sherline, asked him to "let [the matter] lie for now," until they had a chance to discuss it further, and came up with a "viable solution" for the problem. On cross-examination, Clark testified that prior to talking with Beltran and Herrera, he had once asked another cook to wear a hairnet or cut his hair, however, he could not recall this employee's name. Further, he was forced to admit that sus chef Wordell Freeman, who wears his hair in braids, does not wear a hairnet.

As I have done repeatedly, I continue to find Clark not to be credible. On the other hand, I credit both Beltran and Herrera, as I find their testimony inherently plausible. The statements attributed to Clark fit his pattern of seeking to harass those of his cooks who were supporting the Union. Under the *Wright Line* standard, the General Counsel has established a prima facie case. Clearly Beltran and Herrera were open union supporters and Clark was aware of their sympathies. Clark's aggressive animus toward the Union has been set forth in detail above. Further, the timing of Clark's remarks to Beltran and Herrera place them in that several day period during which Clark was committing other unfair labor practices, including threatening union supporters with discharge. Having credited Beltran and Herrera that they were spoken to individually, I conclude that Clark was treating them in a disparate fashion in requiring that they wear hairnets. The wearing of hairnets was an adverse employment action, as it required altering the appearance of the employees in a way they viewed as unpleasant. The nexus with their union activity has been established through Clark's union animus, the timing of the incident, and the disparate treatment of Beltran and Herrera.

The General Counsel having established that union activity was a motivating factor in Clark's requirement that Beltran and Herrera wear hairnets, the burden shifts to the Respondent to show that the action would have been taken, even in the absence of protected activity. *Peter Vitalie Co.,* supra. However, the Respondent has failed to do so. The only evidence offered to rebut the General Counsel's case was Clark's testimony, which I have found incredible. There is simply no credible evidence that Beltran and Herrera were treated the same way as the other buffet employees. Further, there is no credible evidence that their hair was, in fact, either excessively long or disheveled. As Chef Paul did not testify, Herrera's testimony that Paul told him his hair did not require the wearing of a hairnet remains unrebutted. Also, by Clark's own testimony, Chef Sherline felt the matter did not require immediate attention.

The Respondent having failed to establish by a preponderance of the evidence that it would have required Beltran and Herrera to wear hairnets, even in the absence of their union activity, the General Counsel's prima facie case has not been rebutted. Accordingly, I conclude that on about July 12, the Respondent changed the working conditions of its employees Jose Beltran and Luis Herrera by requiring them to wear hairnets under threat of suspension, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(n) of the complaint.

Complaint paragraph 6(o) alleges that on about July 12, the Respondent issued its employee Norma Quinones an unwarranted and undeserved verbal warning. This allegation is premised on the same set of facts upon which complaint paragraph 5(ss) is based. In regard to paragraph 5(ss), I previously concluded that room service manager Nick Della Penna threatened busser Norma Quinones with unspecified reprisals for wearing a union button, in violation of Section 8(a)(1) of the Act. In paragraph 6(o) the General Counsel alleges that the same conduct by Della Penna also constitutes a violation of Section (8)(a)(3).

As is set forth in more detail above, I found that on July 12, during an interview with Quinones to determine why she had clocked out of her shift more than once, Della Penna made numerous references to her union button. She had only recently been reinstated to her position by Bill Timmins, after being discharged for failure to follow proper clocking procedures. According to Quinones, Della Penna mentioned that if the Union had been the employees' collective bargaining representative, she would not have been given a "second chance." Further, Della Penna told Quinones that when Timmins saw her wearing the union button, he would "be very disappointed, very betrayed." Even Della Penna admitted telling Quinones that by wearing the button she was "not showing [Timmins] much gratitude."

In the process of making these statements, which I concluded constituted an unlawful threat of unspecified reprisals for wearing a union button, Della Penna presented Quinones with a "Coaching Document." (GC Exh. 7.) However, it is clear from the face of the document that it constituted a "verbal" warning, reduced to writing, for a "Violation of Com-

pany/Department Rules & Procedures." The rules allegedly violated were, of course, the Respondent's clocking procedures. Although requested to do so, Quinones refused to sign the document.

As was noted earlier, Quinones had significant union activity, demonstrated by her wearing the union button. Of course, Della Penna was aware of her union activity, commenting specifically about her button. As those comments by Della Penna were unlawful by themselves, they establish union animus. The receipt of the "verbal" warning was an adverse employment action under the Respondent's progressive disciplinary system. As the warning was issued at the same time Della Penna made his unlawful threat of reprisals, the nexus with Quinones' union activity is obvious. Thus, the General Counsel has demonstrated the necessary four elements to establish a prima facie case that Quinones' protected activity was a motivating factor in the Respondent's decision to issue her a "verbal" warning. *Tracker Marine,* supra.

The Respondent has failed to rebut the General Counsel's evidence. There was no probative evidence offered to show that the issuance of the "verbal" warning was unrelated to Quinones' union activity.[38] Of course, counsel for the Respondent takes the position that the "Coaching Document" (GC Exh. 7) was just that, and not a disciplinary warning of any kind. Such an argument makes no sense, as it "flies in the face" of the printed document. Under the heading "Type of Coaching," are a number of categories from "verbal," which was the box checked, to "Suspension." If the use of this form did not denote disciplinary action, than why would the form offer the option of suspension? It would not.

The Respondent has failed to establish that it would have issued a "verbal" warning to Quinones, even absent her union activity. Thus, the General Counsel's prima facie case has not been rebutted. Accordingly, I conclude that on July 12, the Respondent issued its employee Norma Quinones an unwarranted and undeserved verbal warning in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(o) of the complaint.

There are three separated complaint paragraphs regarding disciplinary action taken by the Respondent against employee Luis Velasquez. As these actions are related because they ultimately lead to Velasquez' discharge, I will consider them in sequence. The three paragraphs are as follows:

Complaint paragraph 6(k) alleges that on about July 6, the Respondent discharged its employee Luis Velasquez and failed to reinstate him until on about July 17.

Complaint paragraph 6(p) alleges that on about August 9, the Respondent issued its employee Luis Velasquez an unwarranted and undeserved final disciplinary warning.

Complaint paragraph 6(q) alleges that on about September 3, the Respondent discharged its employee Luis Velasquez.

Luis Velasquez began his employment with the Respondent on August 1, 2000. His last date of employment with the Respondent was approximately September 3, 2003. For much of that time he was employed in the Spice Market Buffet as a food server. However, it is important to note that when he testified at the hearing, the Charging Party had employed him for the previous 3 months. As was noted earlier, during part of his employment with the Respondent, Velasquez was a union committee leader. He began to wear the union button on May 31, the start of the Union's open organizing campaign.

It is the Respondent's position that Velasquez was terminated because over time he demonstrated numerous instances of poor service toward customers. Further, the Respondent contends that during his employment Velasquez was given repeated opportunities to improve his work performance, but failed to do so. As the Respondent's defense is premised on this argument, it is necessary to review his employment record both prior to and after the time he engaged in union activity.

On direct examination, Velasquez admitted being generally aware of customer complaints against him before the start of the union campaign. Specifically, buffet supervisor Debbie Heslop testified that on April 25, Velasquez had served a table with extremely dirty glasses, and that the customers had complained to her. She testified that the customers were very upset, going so far as to suggest to Heslop that because of the filthy condition of the glasses that they might get "Aids." The guests filled out an incident report, and Heslop decided she would refund their money in an effort to mollify them. As a result of this incident, the Respondent presented Velasquez with a "Coaching Document." This document reflected on its face that it was a "Final" warning for "substandard workmanship." (R. Exh. 32A.) Of course, this incident occurred approximately 1 month before the start of the Union's open organizing campaign. Also, there was no evidence presented that Velasquez was in any way involved with the Union at this period of time, or that the Respondent had any such indication. In any event, as part of the discipline, Velasquez was given additional training. (R. Exh. 33.) Heslop testified that this "retraining" with an experienced, proficient server lasted several hours.

Following the date on which Velasquez began to wear the union button on a regular basis, he again was the target of complaints by customers. On July 5, two men at Velasquez' station complained about receiving dirty flatware. Velasquez testified that he saw buffet supervisor Pamela Garrett speaking with the two men, and she told him about their complaint. According to Velasquez, he replaced the flatware and apologized to the customers. However, he testified that he overheard Garrett ask the customers several times whether they wanted to fill out a complaint against him, and each time the customers refused, indicating that every thing was fine. According to Heslop, she got involved in this incident when the buffet hostess, Rachel Bonatafico, complained that Velasquez was trying to blame her for putting the dirty flatware on the table. Heslop testified that at first the guests appeared satisfied that the flatware had been replaced, but about 15 minutes later, one of the two customers asked her why the server (referring to Velasquez) was mad at

[38] The Respondent never adequately explained how Quinones' habit of multiple clock outs, as opposed to a failure to clock out, was a significant problem for the Respondent. Where there were multiple clock outs, Quinones was certainly not trying to "steal time" from the Respondent, as the earliest of the times would be considered as the actual time she clocked out. Quinones had testified that the reason she had started to use multiple clock outs was because employee relations specialist Lae Wong had suggested this as a method to avoid failing to clock out, which had led to Quinones' original termination.

them. He was concerned enough to ask whether the server might "spit" in the drinks. Later, the customer indicated that he was still bothered by the way the server was acting. He allegedly told Heslop that the server kept coming up to the table and asking if they saw who put the dirty silverware on the table, and insisting that it wasn't him.

Heslop testified that she was concerned enough to take Velasquez off the table, telling him to stay away from the customers. However, on the way out, the customer continued to complain and Heslop asked him whether he would like to speak with the buffet manager, Keith Kawana. The customer indicated he would, but Kawana was unavailable. As an alternative, the customer wrote a statement of complaint.[39] In that statement, the customer described his server as being "hostile and upset," and his attitude as "unpleasant and unprofessional." (R. Exh. 27, "Voluntary Statement.")

As a result of this incident, Velasquez was called to Kawana's office and in the presence of Heslop and Garrett questioned about the complaint. Velasquez denied setting the table. However, on the basis of the written complaint, Velasquez was given an "Investigative Suspension." (R. Exh. 27, "Coaching Document.") Both Heslop and the hostess, Rachel Bonatafico, submitted written statements. (R. Exh. 27, individual statements.) Two days later, Velasquez was terminated for the incident. The "Personnel Action Form" indicated that he had previously received a final written warning and retraining. (R. Exh. 28.)

Velasquez utilized the Respondent's internal grievance process known as the "open door," by which he sought to be reinstated. According to Velasquez, he met with Vice President of Food and Beverage Brian Lerner and Human Resource Representative Lai Wong on July 16. As a result, Lerner ordered him reinstated with full backpay and benefits. The "Management Open Door Tracking Form" signed by Lerner indicates that the "suspension [is] reduced to a written warning about attitude only." (R. Exh. 29.) Velasquez returned to work the following day. Unfortunately, this was not the end of customer complaints for him.

Heslop testified that when she arrived at work on August 7, the cashier told her that there had been an incident the previous day with some customers and Velasquez. The cashier informed Heslop that Supervisor Pam Garrett had handled the matter by having the customers return on this date for a complementary meal. Heslop was being given this information so that she could make sure the customers got excellent service. When these customers arrived they specifically asked to not be placed in Velasquez' station, and to be seated "as far away from him as [possible.]" Heslop described these guests as a husband and wife in their mid-30s from Chicago. After Heslop apologized for the service they had received the day before, the husband indicated that his wife was "absolutely terrified" of the server from the previous day. He said that he couldn't believe how the server had "intimidated" his wife. The husband indicated that they had repeatedly asked for beverage refills and their plates to be picked up, but the server failed to do it. Heslop seated them at another server's station. However, prior to leaving, the husband indicated a desire to speak to some high management official. Brian Lerner was not available, and as an alternative the customers were give the option of filing a written complaint. The husband indicated he wished to do so, as long as the server could not find out who they were, their address, or phone number, as the wife was allegedly "terrified" of the server. The husband then wrote out a complaint. (R. Exh. 26, "Voluntary Statement.") According to Heslop, the following day she and Supervisor Lila Dang met with Velasquez to discuss the customers' complaints. After the meeting Velasquez was issued a "Coaching Document," which indicated that he was being given a "final" warning for poor job performance. (R. Exh. 26.) On the document, Velasquez wrote down his contention that he had given the customers good service.

Velasquez was in the process of scheduling another meeting with Brian Lerner under the open door policy to seek to have his latest warning rescinded, when he received another complaint. This incident occurred on August 30. According to Heslop, the customers were a father and son. They complained that their server, who was Velasquez, had failed to bring them orange juice as requested, and had given poor service. They had paid for the champagne buffet, but allegedly Velasquez had not mentioned the champagne to them, informed them where it could be found, or even where to go for food. They said that they had never received such poor service before, and they were highly upset. Heslop testified that it is the server's responsibility to find out whether the customer wants an alcoholic drink, and, if so, to tell the customer where the champagne bar is located. After the customer gets his first alcoholic drink from the bar, the server will get refills for the customer. Velasquez disputes this and contends that it is the hostess' responsibility to inform the customer of the champagne and the location of the bar.

In any event, the customers, who according to Heslop turned out to be VIPs, asked to speak with her "boss." Velasquez had by this time given the customers their juice, and he told Heslop that there was "nothing wrong," and everything was "fine." However, from the customers' point of view this was apparently not so, as they continued to ask to speak to someone of importance, like the hotel "president." In an effort to mollify the guests, Heslop invited them back the following day for a complimentary meal. They returned, but continued to complain about the service from the day before. As Heslop could not provide them with a high management official, she asked whether, in the alternative, they would like to file a complaint. They decided to do so, and one of the men wrote out their complaint about poor service. (R. Exh. 25, "Voluntary Statement.") In his testimony, Velasquez disputed the contention that he failed to give the customers good service. He indicated that any failure to promptly serve the customers was simply the result of having to provide service first to others.

That same day at the end of the shift, Keith Kawana and Heslop met with Velasquez in the buffet office to discuss the latest customer complaint. Ultimately, he was given a "Coaching Document" with the punishment indicated as "Investigative

[39] Over the objection of counsel for the Union, I permitted the Respondent to excise the names of customers from complaint statement documents in an effort to maintain their privacy.

Suspension" to begin September 3, as a result of "substandard workmanship." The document reported the complaints that the customers made against Velasquez. (R. Exh. 25.) Several days later, approximately September 3 to 5, Velasquez was informed that he had been terminated. Subsequently, Velasquez availed himself of the open door policy. However, both Brian Lerner and the Respondent's president, Bill Timmins, rejected his appeal. Finally, the appeal was denied at "peer counseling," which is apparently the final step in the Respondent's internal grievance process.

It is the Respondent's position that Velasquez was terminated as a result of the cumulative effect of the various customer complaints, and the disciplinary action that resulted. In addition to the incidents of April 25, July 5, and August 6 and 30, all of which have been discussed above, Heslop mention several other incidents with customers, which resulted in Velasquez being disciplined. She testified about an incident on March 3, after which Velasquez was disciplined for failing to properly service a guest. He was originally issued a written coaching, however, it was ultimately reduced to a verbal coaching. (R. Exh. 36.) Then again on March 13, Velasquez was accused by customers of poor service. This also resulted in discipline, initially a "final" coaching, but ultimately reduced to a written coaching. (R. Exh. 37.) As with the April 25 incident, these two incidents in March occurred prior to the time that Velasquez was engaged in union activity.

Under the *Wright Line* standard, the General Counsel has established a prima facie case that Velasquez' union activity was a motivating factor in the Respondent's decision to issue the three disciplinary actions against Velasquez alleged in the complaint. He was a union committee leader, and wore the union button on a regular basis. Further, the Respondent was aware of his union activity. Obviously, the three disciplinary actions alleged in the complaint, two discharges and a warning, constituted adverse employment actions. I believe that the fourth necessary element, a nexus between his protected activity and the discipline has also been established. As should be apparent by this point, the Respondent's supervisors committed numerous unfair labor practices beginning with the start of the organizing campaign on May 30. Among others, these included repeated acts of unlawful interrogation, threats, promulgation and enforcement of a discriminatory and overly broad rule against wearing union buttons or talking about the union, surveillance of union activities, promises of increased benefits to abandon the union, establishing more onerous working conditions for union supporters, and the unlawful discharge of at least one employee. Accordingly, I conclude that the General Counsel has established by a preponderance of the evidence, that a motivating factor in the Respondent's decision to discipline Velasquez was his union activity. *Tracker Marine,* supra.

The General Counsel having established a prima facie case, the burden now shifts to the Respondent to show that it would have taken the disciplinary action against Velasquez, even in the absence of his union activity. *Senior Citizens Coordinating Council of Riverbay*, 330 NLRB 1100 (2000); *Regal Recycling, Inc*., 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* supra. In my view, the Respondent has met this burden.

It is apparent to me, after hearing witness testimony and reviewing the various disciplinary records, that Velasquez had a significant problem with his attitude in interacting with customers. This was not an insignificant problem, as the primary goal of a food server is to make the customers happy. Velasquez, to the contrary, seemed on a fairly regular basis to make his customers unhappy. So unhappy at times that they saw fit to register written complaints with the Respondent. Of the six disciplinary actions taken against Velasquez and discussed above, three of them, the two in March and the one in April, took place before there was any protected activity on the part of Velasquez. Thus, the General Counsel and the Charging Party are unable to suggest that for these earlier incidents the Respondent's supervisors "set up Velasquez" by soliciting the customer complaints. That argument is used for the incidents occurring after May 30. However, I do not believe the evidence supports the argument. While I did not always find that Heslop was credible, I did accept her testimony that she did not solicit the complaints, or do anything out of the ordinary in trying to mollify the angry customers. Her testimony was inherently plausible, and supported by the various written customer complaints. It is certainly reasonable to assume that a complaining customer would want to talk with a manager, and when that manager was not available, would be given the option of submitting a written complaint. The written complaints submitted by customers in the Velasquez incidents certainly seem to show genuine unhappiness with the service they were provided by Velasquez.

In her posthearing brief, counsel for the Union contends that the Charging Party was prejudiced by my ruling revoking her subpoena request for the complaining customers' contact information. I am of the view that the privacy interests of the individual customers out way any potential injury to the Charging Party or Velasquez by my denial of the information sought by counsel. After all, the customer complaints were not admitted into evidence for the truth of the matters asserted in those documents, for which they would have surely constituted hearsay, but, rather, to show that a complaint was registered, upon which management's action was based. An examination of those customers could have only benefited the Union minimally, but it had the potential to greatly inconvenience the customers, who were totally removed from this proceeding.

Counsel for the Respondent asks the question in his posthearing brief, "How many chances should one employee get?" It is a good question in connection with Velasquez. As noted above, the Respondent issued at least six disciplinary actions against him for poor work performance from the period of March to September, 6 months. Clearly, this was an average of one a month. This was quite a number, especially where the Employer utilizes a system of progressive discipline. In fact, had the Respondent not exercised leniency and reduced the disciplinary level of several of the actions, Velasquez would have been at the discharge stage in the process much earlier. As noted above, the first discharge on July 6 was rescinded and reduced to a written warning. There were several other such reductions as mentioned above, and after one, the Respondent went through the trouble of "retraining" Velasquez, who should have been by this time an experienced server. In my view,

these were not the actions of an employer, which was interested only in retribution. Rather, it is apparent to me that the Respondent's managers held out hope until the end that Velasquez could be a productive employee.

The Charging Party's counsel argues that the Respondent treated Velasquez in a disparately harsh manner. I see no evidence of this. To the contrary, as I have just indicated, if anything the Employer's supervisors repeatedly gave Velasquez chances to improve his performance, which he was not technically entitled to under the progressive discipline system. Also, it is difficult to compare Velasquez' discipline with that of other employees, as there was no indication that any other server had as many customer complaints registered against him.

In an effort to show disparate treatment, counsel for the Charging Party attempted to introduce rebuttal testimony from food server Elmer Portillo, who had apparently served Supervisor Brian Lerner beverages in dirty glasses. I sustained an objection from counsel for the Respondent that such evidence was not proper rebuttal evidence. However, in her posthearing brief, counsel for the Charging Party has cited a Board case standing for the proposition that the General Counsel is not required to prove disparate treatment as part of the initial showing of antiunion discrimination. *Avondale Industries,* 329 NLRB 1064, 1066 fn. 9 (1999). Having reviewed that case, it is apparent to me that my ruling excluding the testimony as rebuttal evidence was in error. However, I consider it to have been "harmless error." The offer of proof by counsel was that if given the opportunity to testify, Portillo would say that after giving Lerner the dirty glasses, he was told by Supervisor Keith Kawana to correct his deficiencies, but "not to worry about it," and that no discipline was issued. Assuming that Portillo would have testified as counsel indicated in her offer of proof, does not in my view establish disparate treatment. The situations are not analogous. Lerner was a supervisor, not a customer, and while he should certainly not be served beverages in dirty glasses, the Respondent would not be in jeopardy of losing Lerner's business, as it would by making such a mistake with a private customer. I can certainly see how the Respondent's supervisors would have reasonably judged the situation with Lerner not as significant as when an outside customer was involved.

This brings me back to the heart of the Respondent's argument. Velasquez' customer relations skills appeared to be awful. From the number of customer complaints, he had failed in the food server's most basic requirement, making the customer happy. It did appear that a significant number of his customers were quite unhappy with the service they received from him. Half the customer complaints against Velasquez, of which I am aware, occurred before he was engaged in any union activity. This greatly undermines the General Counsel and the Union's argument that he was being "set up" by management because he engaged in protected activity. The Respondent has persuasively established by a preponderance of the evidence that it would have made the same three decisions to discipline Velasquez, including the final decision to terminate him, even without any protected activity. *T & J Trucking Co*., 316 NLRB 771 (1995).

In summary, I find and conclude that counsel for the General Counsel has established a prima facie case that union activity was a "motivating factor" in the Respondent's three decisions to discipline Velasquez as alleged in the complaint. However, I further find that the Respondent has established by a preponderance of the evidence that it would have made the same three decisions to discipline Velasquez, including the final decision to terminate him, even in the absence of his union activity. Accordingly, I shall recommend that complaint paragraphs 6(k), (p), and (q) be dismissed.

It is alleged in complaint paragraph 6(r) that on about September 9, the Respondent discharged its employee Socrates Oberes. As I have noted in detail above, Oberes was employed as a busser in the buffet. He was also a union committee leader who began to wear the union button relatively late in the organizing campaign, on August 2. I previously concluded that Buffet Manager Keith Kawana violated the Act on August 22 and 24 by promising certain benefits to Oberes if he would abandon his support for the Union, and on September 5 by interrogating and threatening Oberes with reprisals because of his support for the Union. It is important to bear these dates in mind, because shortly thereafter, on September 9, Oberes was terminated.

Oberes testified that on August 28 he requested a day of "paid time off" (PTO) to attend a cash drawing at the casino. Unfortunately, he made a mistake when filling out the request form, listing the day he wished to take off as November 7, rather than the correct date of September 7. (GC Exh. 12.) In the belief that he had the day off, Oberes attended the cash drawing on September 7. After the drawing he went home, but returned to the hotel that evening. It was then that a coworker informed him that he was in trouble for missing work that day. Oberes sought out Supervisors Lila Dang and Pamela Garrett in the buffet, and Dang told Oberes that he had been listed as a "no-call, no-show," and he should speak with Keith Kawana the following day. The next day, Oberes explained to Kawana that he had not intentionally missed work, and he showed Kawana the cash drawing announcement, and told him about the mistake on his PTO form. However, according to Oberes, Kawana ignored his explanation, said that he was required to follow procedure, and gave Oberes a notice suspending him indefinitely. On September 9, Kawana called Oberes and informed him that he was fired. Oberes appealed his discharge through the Respondent's internal grievance procedure, the "open door." As a result of that appeal, he was eventually reinstated with backpay by the Respondent's president, Bill Timmins.

Kawana did not testify about Oberes' termination, and there was no evidence offered by the Respondent in defense of the discharge. Oberes' testimony stands unrebutted.

Under the Board's *Wright Line* standard, the General Counsel has established a prima facie case that Oberes' union activity was a motivating factor in the Respondent's decision to fire him. Oberes was a union supporter and the Respondent was well aware of his union sympathies. Obviously, the termination was an adverse employment action. Further, I believe that equally obvious was the nexus with Oberes' union activity. The timing of the discharge was highly suspect, coming within

a matter of several weeks to several days of the time that Kawana was committing unfair labor practices directed to Oberes. Animus toward the Union by Kawana and certain other of the Respondent's supervisors has been amply demonstrated. It also appears that there was disparately harsh treatment of Oberes, who had inadvertently missed one day of work. He testified that busser Nancy Portillo had missed a scheduled day of work on October 5, but was neither suspended nor fired. Finally, it does not appear that the Respondent bothered to follow its progressive discipline system in disciplining Oberes. There was no evidence offered to show that he had received any other discipline prior to the termination, nor any evidence that missing one day of work warranted immediate termination. (GC Exh. 5, "Policy and Procedure Manual.")

The General Counsel, having met his burden of establishing that the Respondent's action in discharging Oberes was motivated, at least in part, by antiunion considerations, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* supra; *Regal Recycling, Inc.,* supra. The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* supra. Having offered no evidence at all about the Oberes termination, the Respondent has obviously failed to meet its burden.

The record simply does not support the firing of Oberes for what appears to have been nothing more than an innocent mistake. The termination is in contradiction to the Respondent's established, written progressive discipline policy, and certainly seems unduly harsh and disparate. The General Counsel's prima facie case has not been rebutted, as the Respondent offered no evidence in its defense. The reason given to Oberes for the termination is pretextual. It is, therefore, appropriate to infer that the Respondent's true motive was unlawful, that being because of union activity. *Williams Contracting, Inc*., 309 NLRB 433 fn. 2 (1992); *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982); *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1966). Accordingly, I conclude that on about September 9, the Respondent discharged its employee Socrates Oberes, in violation of Section 8(a)(1) and (3) of the Act, as alleged in paragraph 6(r) of the complaint.[40]

C. Summary

As is reflected above, I recommend dismissal of the following paragraphs of the complaint: 5(g)(1) and (2), (h), (i), (m)(2), (o)(1) and (2), (p)(1) and(2), (r), (w), (x), (y), (z), (cc)(2), (ff), (hh), (jj), (ll), (mm), (nn), (pp), (qq), (uu), (yy); and 6(a), (c), (e), (g), (i), (k), (l), (p), and (q).

Further, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in the following complaint paragraphs: 5(a), (b), (c)(1) and (2), (d), (e)(1), (2), and (3), (f), (j)(1), (2) and (3), (k)(1), (2), and (3), (l)(1) and (2), (m)(1), (n)(1) and (2), (p)(3) and (4), (q)(1), (s), (t), (u), (v)(1), (2), and (3), (aa), (bb), (cc)(1), (dd), (ee), (ii), (kk)(1), (2), and (3), (oo), (rr), (ss), (tt), (vv), (ww), (xx), (zz), (aaa), (bbb)(1) and (2), and (ccc). Also, I find that the Respondent has violated Section 8(a)(3) and (1) of the Act as alleged in paragraphs 6(d), (f), (h), (j), (m), (n), (o), and (r) of the complaint.

Counsel for the General Counsel withdrew complaint paragraphs 5(q)(2), (gg)(1), (2), and (3); and 6(b), and (s).

CONCLUSIONS OF LAW

1. The Respondent, Aladdin Gaming LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL–CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Interrogating its employees about their union membership, activities and sympathies.

(b) Promulgating and enforcing an overly broad and discriminatory rule prohibiting its employees from wearing union buttons.

(c) Threatening its employees with unspecified reprisals if they continued to support the Union.

(d) Threatening its employees with unspecified reprisals for wearing union buttons.

(e) Informing its employees that it would be futile for them to select the Union as their bargaining representative.

(f) Threatening its employees with discharge or other disciplinary action because of their union activities and support.

(g) Threatening its employees with closure of the facility because of their union activities and support.

(h) Promulgating and enforcing an overly broad and discriminatory rule prohibiting its employees from talking about the Union.

(i) Soliciting employee complaints and grievances, and promising its employees increased benefits and improved terms and conditions of employment if they refrain from supporting the Union.

(j) Engaging in surveillance of its employees' union activities.

(k) Promulgating and enforcing an overly broad and discriminatory rule limiting the amount of time its employees can spend in the employee dinning room (EDR) before their shifts begin and after their shifts end.

(l) Granting its employees a benefit by implementing a shift change in order to encourage them to cease supporting the Union.

4. By the following acts and conduct the Respondent has violated Section 8(a)(3) and (1) of the Act:

(a) Issuing its employee Joe Trevino an unwarranted and undeserved disciplinary warning.

(b) Imposing more onerous working conditions on its employee Jose Beltran by requiring him to work periods of time by himself at his station.

(c) Changing the working conditions of its employee Elisabeth Peuser by more strictly enforcing a work rule against her regarding hair length.

[40] The General Counsel withdrew complaint par. 6(s). See GC Exh. 2.

(d) Discharging its employee Pablo Blanco.

(e) Imposing more onerous working conditions on its employee Luis Herrera by telling him to work during his lunchbreak.

(f) Changing the working conditions of its employees Jose Beltran and Luis Herrera by requiring them to wear hairnets.

(g) Issuing its employee Norma Quinones an unwarranted and undeserved verbal warning.

(h) Discharging its employee Socrates Oberes.

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

6. The Respondent did not otherwise violate Section 8(a)(1) and (3) of the Act.

REMEDY

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

I have found the Respondent to have discriminatorily suspended/discharged its employees Pablo Blanco and Socrates Oberes. However, an order of reinstatement is not required, as at the time of the hearing both employees testified that they had already been reinstated to their former positions. Further, Oberes indicated that he had been reinstated with full backpay and other benefits. On the other hand, Blanco testified that his reinstatement was without back pay and benefits. Therefore, my recommended order requires the Respondent to make Blanco whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his suspension/discharge to the date the Respondent reinstated him, less any net interim earnings as prescribed *in F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

I have also found the Respondent to have discriminatorily issued disciplinary warning notices to its employees Joe Trevino and Norma Quinones. Therefore, the recommended order requires the Respondent to remove from its records any reference to the suspension/discharge of Blanco and Oberes, as well as to the disciplinary warning notices issued to Trevino and Quinones. The Respondent shall provide the four employees with written notice of such expunction, and inform them that the unlawful conduct will not be used as a basis for further personnel actions against them. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Further, the Respondent must not make reference to the removed material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the removed material against the four employees in any other way.

Finally, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Aladdin Gaming, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, and sympathies.

(b) Promulgating and enforcing an overly broad and discriminatory rule prohibiting its employees from wearing union buttons.

(c) Threatening its employees with unspecified reprisals if they continued to support the Union.

(d) Threatening its employees with unspecified reprisals for wearing union buttons.

(e) Informing its employees that it would be futile for them to select the Union as their bargaining representative.

(f) Threatening its employees with discharge or other disciplinary action because of their union activities and support.

(g) Threatening its employees with closure of the facility because of their union activities and support.

(h) Promulgating an overly broad and discriminatory rule prohibiting its employees from talking about the Union.

(i) Soliciting employee complaints and grievances, and promising its employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union.

(j) Engaging in surveillance of its employees' union activities.

(k) Promulgating and enforcing an overly broad and discriminatory rule limiting the amount of time its employees can spend in the employee dinning room (EDR) before their shits begin and after their shifts end.

(l) Granting its employees a benefit by implementing a shift change in order to encourage them to cease supporting the Union.

(m) Imposing more onerous working conditions on its employees because of their union activities and sympathies.

(n) Changing the working conditions of its employees by more strictly enforcing work rules because they engaged in union activities.

(o) Issuing its employees unwarranted and undeserved disciplinary warnings because of their union activities and support.

(p) Suspending, discharging, or otherwise discriminating against any of its employees because of their union activities or support.

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

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

(a) Make Pablo Blanco whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspensions/discharges of

[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Pablo Blanco and Socrates Oberes, and the unwarranted and undeserved disciplinary warning notices issued to Joe Trevino and Norma Quinones, and within 3 days thereafter notify them in writing that this has been done and that the unlawful employment action will not be used against them in any way.

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

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix"[42] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 30, 2003.

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

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

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