Gruma Corporation d/b/a Mission Foods *and* United Food and Commercial Workers International Union Local 99, CLC. Cases 28–CA–17946, 28–CA–18056–1, 28–CA–18112, 28–CA–18112–2, 28–CA–19076, and 28–CA–20202

July 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On March 29, 2006, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

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

I. INTRODUCTION

This case arose in the wake of an organizing campaign and representation election among the Respondent's employees at its Tempe, Arizona food manufacturing facility in 2001. In 2004, the Board certified the Union as the employees' exclusive collective-bargaining representative. The complaint alleges, and the judge found, that the Respondent committed various unfair labor practices during the 2001 to 2004 time period.

Specifically, the judge found, and we agree for the reasons set forth in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by taking the following actions without giving the Union notice and an opportunity to bargain: (i) eliminating a bargaining unit position from the sanitation department; (ii) transferring employee Michaela Burgara from the sanitation department to another department; (iii) subcontracting the sanitation department work; and (iv) eliminating its employee-of-the-quarter award. We also agree with the judge's findings that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its method for determining whether to grant an annual wage increase and by unilaterally failing to grant a wage increase in 2002, but we clarify the judge's rationale.[3] Similarly, although we agree with the judge's dismissal of the complaint allegations that the Respondent unlawfully suspended and discharged employee Ramon Marquez, we do so only for the reasons discussed below.

II. THE FAILURE TO GRANT A WAGE INCREASE IN 2002

Beginning no later than 1998, the Respondent maintained a practice of granting employees annual wage increases during the first quarter of every calendar year. According to the Respondent's employee handbook, an employee's total wage increase consisted of any combination of three parts: (1) a merit increase; (2) a "structural scale increase," based on the Respondent's assessment of the local job market; and (3) a "step" increase, i.e., a job promotion. The Respondent determined the amount of the structural scale increase by conducting a telephone survey of other area companies to assess wage levels in the local market.

In September 2001, 1 month after winning the representation election, the Union wrote to the Respondent, insisting that any wage "increases be implemented in the normal course of business" and that the Union "be given advanced notice of and an opportunity to bargain regarding any such [wage] increases." Notwithstanding the

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by maintaining handbook rules prohibiting employees from: (i) remaining in nonwork areas when they are off duty; (ii) leaving the premises, their assigned work areas, or ceasing work, without authorization; (iii) distributing literature of any kind on company property or on customer premises during nonworking time and in nonworking areas; and (iv) making false statements concerning the Company, its employees, or its products and services. Also, in the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to provide the Union with requested information that was relevant to its representational duties.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to our findings and to the Board's standard remedial language.

[3] As the judge noted, at the time of the hearing, the Respondent was challenging the validity of the Union's certification. Thus, the Respondent had refused generally to recognize and bargain with the Union; the Board had issued a decision finding that the Respondent's conduct violated Sec. 8(a)(5), see *Mission Foods*, 345 NLRB 788 (2005); and the Respondent had filed a petition for review of that decision in the United States Court of Appeals for the District of Columbia Circuit (the Board filed a cross-application for enforcement). Following the hearing and the issuance of the judge's decision, the D.C. Circuit, in an unpublished judgment, denied the Respondent's petition for review and granted the Board's cross-application for enforcement. See *Mission Foods v. NLRB*, 200 Fed.Appx. 4 (D.C. Cir. 2006) (per curiam).

Union's request, the Respondent, without giving the Union notice or an opportunity to bargain, unilaterally decided that no structural increases would be given in 2002.

The Respondent also unilaterally changed the methodology it used for determining whether to grant employees a structural increase. First, in place of the local market survey, the Respondent used a survey that included employers throughout the State of Arizona. Second, the Respondent did not conduct the wage survey until October, although its past practice had been to conduct the survey during the first quarter of the year. Third, the Respondent considered not only the results of the wage survey, but also its recruitment and retention needs. There is no evidence that those factors had been considered prior to 2002.

In analyzing whether the Respondent's conduct violated Section 8(a)(5) and (1) of the Act, the judge applied the multifactor analysis set forth in *Dynatron/Bondo Corp.*,[4] and found that the Respondent had an established practice of granting first-quarter "merit" increases to employees. The judge further found that, given this practice, the Respondent had an obligation to bargain with the Union before deciding not to grant a "merit" wage increase in 2002, and that by failing to do so, the Respondent violated Section 8(a)(5) and (1) of the Act. The judge also found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its method for determining whether to grant such an increase. We agree with the judge's unfair labor practice findings, but not his entire rationale.

Initially, we agree with the Respondent that the judge mischaracterized the wage increase withheld in 2002 as a merit-based increase. In fact, the record shows that it was a structural scale increase.[5] The judge's error, however, does not warrant a different result.

It is well settled that an employer violates Section 8(a)(5) and (1) if it unilaterally changes a term or condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). "This is so even if the Union has only won an election, but has not yet been certified as the bargaining representative of the company's employees." *NLRB v. Talsol Corp*., 155 F.3d 785, 794 (6th Cir. 1998). A wage increase program constitutes a term or condition of employment when it is an "established practice . . . regularly expected by the employees." *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). Factors relevant to this determination include "the number of years the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof." *Rural/Metro Medical Services*, 327 NLRB 49, 51 (1998). "[I]t is the unilateral change in the terms and conditions of employment that results in the finding of an 8(a)(5) violation, not the type of wage increase that is continued or discontinued." *Daily News of Los Angeles,* supra, 315 NLRB at 1239.

Here, the record shows that the structural wage increase was a term and condition of employment. Thus, the Respondent had granted a structural wage increase to employees for at least 4 years prior to 2002. In addition, the timing of the increase was fixed, as the increases were consistently granted during the first quarter of each year. Further, the sole criterion for determining the amount of the structural wage increase was fixed (the local wage survey). Finally, the majority of the Respondent's employees—at least 80 percent—received this annual first-quarter wage increase, and those increases fell within a narrow range.[6] Taking all of these factors into account, we find that the annual structural wage increase was an established term and condition of employment by 2002.

That being the case, the Respondent was obliged to maintain the fixed elements of the structural wage increase program—the local wage survey and its timing—and to negotiate with the Union over the discretionary element of the structural wage increase—the amount. *Daily News of Los Angeles*, supra, 315 NLRB at 1239. The Respondent, however, failed on both counts.

First, the Respondent unilaterally changed its established method for determining whether its employees were entitled to a structural wage increase. As described, prior to 2002 the Respondent conducted a telephone survey of local companies to assess area wages. In 2002, the Respondent switched to a statewide market survey. In addition, the Respondent changed the timing of the

[4] 323 NLRB 1263 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999). In *Dynatron/Bondo*, the Board found that the employer had a past practice of granting merit-based wage increases, and that the employer violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain over the discontinuance of the program. In determining that the raises at issue were an established past practice, the Board found the following factors relevant: (1) the sole, fixed criterion for granting a raise was merit; (2) the timing of the increase was fixed; (3) the amount of the raise, although discretionary, fell within a narrow range; (4) the majority of employees received the increase; and (5) the increases had been consistently granted over a significant period of time. Id. at 1264.

[5] The General Counsel never alleged that the Respondent violated the Act by failing to grant any increase other than the structural scale increase.

[6] In 2000, employees received structural wage increases ranging from 1.56 to 7.10 percent; in 2001, the structural wage increases ranged from 3.17 to 7.69 percent. See *Dynatron/Bondo Corp.*, 323 NLRB 1263 fns. 6–9 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999) (increases ranged from 1.5 to 8.5 percent).

wage survey from February/March to October. Further, for the first time, the Respondent considered not only the wage survey, but also its recruitment and retention needs. By unilaterally making these changes, the Respondent violated Section 8(a)(5) and (1) of the Act. See *Hyatt Regency Memphis*, 296 NLRB 259 fn. 2, 285–286 (1989), enfd. 939 F.2d 361 (6th Cir. 1991) (unilateral changes to wage adjustment plan); see also *J. P. Stevens & Co. v. NLRB*, 623 F.2d 322 (4th Cir. 1980), enfg. in part 239 NLRB 738 (1978) (unilateral alteration to method of computing holiday pay).

Second, the Respondent failed to give the Union notice and an opportunity to bargain regarding the amount of the increase, i.e., its determination that no structural wage increases would be given to employees in 2002. By such unilateral conduct, the Respondent additionally violated Section 8(a)(5) and (1). *Daily News of Los Angeles*, supra.[7]

III. THE SUSPENSION AND DISCHARGE OF EMPLOYEE MARQUEZ

Unit employee Ramon Marquez began working for the Respondent in 1994. Marquez engaged in union activity during the organizing campaign in 2001. The Respondent suspended and then discharged him in July 2002 after he damaged a piece of manufacturing equipment. The complaint alleges that it was Marquez' union activity, not the equipment damage, that motivated his suspension and discharge, and that the Respondent thereby violated Section 8(a)(3) and (1) of the Act.

The judge, however, dismissed those complaint allegations. The judge found that the General Counsel did not meet his initial *Wright Line*[8] burden of showing that Marquez' union activity was a motivating factor in the Respondent's decision to suspend and discharge him. Specifically, the judge found that the management official primarily responsible for the adverse actions again Marquez had no knowledge of his union activities. The judge further found that, even assuming the General Counsel had satisfied his initial burden, the Respondent established that it would have suspended and discharged Marquez in any event based on the equipment damage. We agree with the judge's dismissal of these allegations, but we rely only on the General Counsel's failure to establish that the Respondent had knowledge of Marquez' union activities.

The Respondent's suspension and discharge of Marquez was handled by Human Resources Manager Elizabeth Laytong, who had only recently joined the Respondent, in April 2002. Laytong suspended Marquez, investigated his alleged damage to equipment, and recommended his discharge to Vice President Jim Needles, who approved it without further inquiry.

The judge specifically credited Laytong's testimony that she had no knowledge of Marquez' prior union activity in 2001. Although there is testimony that Needles had knowledge of certain employees' union activity, he denied having knowledge of Marquez' union activity, and there is no evidence to the contrary.[9]

In these circumstances, we find that the General Counsel failed to establish that the Respondent knew about Marquez' union activity when it suspended and discharged him. In particular, Human Resources Manager Laytong's credited testimony establishes that she had no such knowledge, and it was Laytong who suspended Marquez and effectively recommended his discharge. In addition, the General Counsel has not shown that Vice President Needles, who made the final discharge decision, was aware of Marquez' prounion sentiments. Further, we agree with the judge that the record as a whole does not provide a basis for inferring knowledge. Absent evidence of knowledge, the General Counsel failed to satisfy his initial *Wright Line* burden of demonstrating that the suspension and discharge were discriminatorily motivated. See, e.g., *Tomatek, Inc*., 333 NLRB 1350, 1353 (2001) ("[C]redible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive.").

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth below, and orders that the Re-

[7] Chairman Battista notes that there was no notice to the Union and opportunity to bargain. If there had been, he would conclude that the Respondent's action would have been lawful, even if impasse had not been reached. See his position in *Neighborhood House Assn.,* 347 NLRB 553, 555 at fn. 8 (2006).

We shall leave to the compliance stage of this proceeding the determination of how much of a structural wage increase employees would have received in the absence of the Respondent's unlawful conduct. See *Hyatt Regency Memphis*, supra, 296 NLRB at 259 fn. 2.

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] We recognize that, in sec. VIII,B, par. 2 of his decision, the judge stated that a human resources representative, Ludy Tamayo, testified that she became aware of Marquez' union activity in August 2001, shortly before the election, and that she reported this information to higher management, including Vice President Needles. The record shows, however, that Tamayo testified that she remembered passing this information to only one person—her supervisor, Karen Larsen. There is no evidence that Tamayo or Larsen shared their knowledge of Marquez' union activity with any other members of management. Thus, contrary to the judge's statement, Tamayo's testimony does not establish Needles' knowledge of Marquez' union activity. Further, with respect to Larsen, the record shows that she left the Respondent's employ in about September 2001, some 7 months before Laytong was hired and some 10 months before Marquez' suspension and discharge.

spondent, Gruma Corporation d/b/a Mission Foods, Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Food and Commercial Workers International Union, Local 99, CLC, by changing employees' terms and conditions of employment, including discontinuing the employee-of-the-quarter award, withholding the annual structural wage increase, changing the method for determining whether to grant a structural wage increase, and failing to bargain over the amount of the structural wage increase, without first giving the Union notice and an opportunity to bargain.

(b) Refusing to bargain collectively with the Union by eliminating a bargaining unit position from the sanitation department, by transferring employee Michaela Burgara from the sanitation department to another department, or by subcontracting the sanitation department work, without first giving the Union notice and an opportunity to bargain.

(c) Failing and refusing to provide relevant information requested by the Union for the purpose of carrying out its representational duties.

(d) Maintaining in employee handbooks, or anywhere else, rules that: (i) prohibit employees from remaining in nonwork areas when they are off duty; (ii) prohibit employees from leaving the premises, their assigned work areas, or ceasing work, without authorization; (iii) prohibit employees from distributing literature of any kind on company property or on customer premises during nonworking times and in nonworking areas; or (iv) prohibit employees from making false statements concerning the Company, its employees, and its products and services.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time TQ techs, sanitation techs, receivers, customer service reps, mechanics, production operators, production packers, production sweepers, production ingredients, production maseca dumpers employed by the Respondent at its facilities located at 5860 South Ash Avenue, Tempe, Arizona, and all full-time and regular part-time warehousemen employed by the Respondent at its facilities located at 840 West Carver Road, Tempe, Arizona; but excluding all other employees, office clericals, guards, and supervisors as defined in the Act.

(b) Make the unit employees whole for any loss of earnings and other benefits they may have suffered by reason of the Respondent's failure to grant structural wage increases in 2002. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Rescind the unlawful rules contained in the employee handbook that: (i) prohibit employees from remaining in nonwork areas when they are off duty; (ii) prohibit employees from leaving the premises, their assigned work areas, or ceasing work, without authorization; (iii) prohibit employees from distributing literature of any kind on company property or on customer premises during nonworking times and in nonworking areas; and (iv) prohibit employees from making false statements concerning the Company, its employees, or its products and services.

(d) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules. *Jupiter Medical Center Pavilion*, 346 NLRB No. 61, slip op. at 4 (2006).

(e) Discontinue subcontracting bargaining unit work in the sanitation department and notify and, on request, bargain with the Union over any decision to subcontract out bargaining unit work.

(f) Restore the janitorial functions in the sanitation department as they existed prior to September 2003.

(g) Within 14 days from the date of this Order, rescind the unilateral transfer of employee Michaela Burgara from the sanitation department and offer her full reinstatement to her former position as it existed before the unlawful action, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(h) Make Michaela Burgara whole for any loss of earnings and other benefits she may have suffered as a result of the unlawful changes in terms and conditions of employment resulting from eliminating her unit position in the sanitation department. Backpay is to be computed in accordance with *Ogle Protection Service*, supra, with

interest as computed in *New Horizons for the Retarded*, supra.

(i) Rescind the unilateral change made by terminating the employee-of-the-quarter award, restore the award, and make unit employees whole for any loss of earnings and other benefits they suffered as a result of this unilateral change. Backpay is to be computed in accordance with *Ogle Protection Service*, supra, with interest as computed in *New Horizons for the Retarded*, supra.

(j) Furnish the Union the information it requested in its August 7, 2002 letter.

(k) 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.

(l) Within 14 days after service by the Region, post at its facility in Tempe, Arizona, copies of the attached notice marked "Appendix."[10] Copies of the notice written in both English and Spanish, 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 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, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in both English and Spanish to all current employees and former employees employed by the Respondent at any time since September 2001.

(m) 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 is dismissed insofar as it alleges violations not specifically found.

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

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 refuse to bargain collectively with United Food and Commercial Workers International Union, Local 99, CLC, by changing employees' terms and conditions of employment, including discontinuing the employee-of-the-quarter award, withholding the annual structural wage increase, changing the method for determining whether to grant a structural wage increase, and failing to bargain over the amount of the structural wage increase, without first giving the Union notice and an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by eliminating a bargaining unit position from the sanitation department, by transferring employee Michaela Burgara from the sanitation department to another department, or by subcontracting the sanitation department work, without first giving the Union notice and an opportunity to bargain.

WE WILL NOT fail and refuse to provide relevant information requested by the Union for the purpose of carrying out its representational duties.

WE WILL NOT maintain in employee handbooks, or anywhere else, rules that: (i) prohibit you from remaining in nonwork areas when you are off duty; (ii) prohibit you from leaving our premises, your assigned work areas, or ceasing work, without authorization; (iii) prohibit you from distributing literature of any kind on company property or on customer premises during nonworking times and in nonworking areas; or (iv) prohibit you from making false statements concerning the Company, its employees, and its products and services.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, before making any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time TQ techs, sanitation techs, receivers, customer service reps, mechanics, production operators, production packers, production sweepers, production ingredients, production maseca dumpers employed by us at our facilities located at 5860 South Ash Avenue, Tempe, Arizona, and all full-time and regular part-time warehousemen employed by us at our facilities located at 840 West Carver Road, Tempe, Arizona; but excluding all other employees, office clericals, guards, and supervisors as defined in the Act.

WE WILL make you whole for any loss of earnings and other benefits, including interest, you may have suffered by reason of our failure to grant structural wage increases in 2002.

WE WILL rescind the unlawful rules contained in the employee handbook that: (i) prohibit you from remaining in nonwork areas when you are off duty; (ii) prohibit you from leaving the premises, your assigned work areas, or ceasing work, without authorization; (iii) prohibit you from distributing literature of any kind on company property or on customer premises during nonworking times and in nonworking areas; and (iv) prohibit you from making false statements concerning the Company, its employees, or its products and services.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

WE WILL discontinue subcontracting bargaining unit work in the sanitation department and notify and, on request, bargain with the Union over any decision to subcontract out bargaining unit work.

WE WILL restore the janitorial functions in the sanitation department as they existed prior to September 2003.

WE WILL, within 14 days from the date of the Board's Order, rescind the unilateral transfer of employee Michaela Burgara from the sanitation department and offer her full reinstatement to her former position as it existed before the unlawful action, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Michaela Burgara whole, with interest, for any loss of earnings and other benefits she may have suffered as a result of the unlawful changes in terms and conditions of employment resulting from eliminating the unit position in the sanitation department.

WE WILL rescind the unilateral change made by terminating the employee-of-the-quarter award, WE WILL restore the award, and WE WILL make you whole, with interest, for any loss of earnings and other benefits you suffered as a result of this unilateral change.

WE WILL furnish the Union the information it requested in its August 7, 2002 letter.

GRUMA CORPORATION D/B/A MISSION FOODS

John Giannopoulos, Esq., for the General Counsel.
Gerard Morales, Esq., Jacqueline Mendez Soto, Esq., and *Lisa Coulter, Esq.,* for the Respondent.
Martin Hernandez, for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. The General Counsel's second consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining various handbook provisions since September 18, 2004; Section 8(a)(1) and (3) by suspending and discharging employee Ramon Marquez in 2002; and Section 8(a)(1) and (5) by failure to award quarterly bonuses, failure to provide annual wage increases, elimination of a bargaining unit position in the sanitation department, subcontracting the eliminated work to a third party, and transfer of the unit employee to an unlike classification in a different department without affording the Union an opportunity to bargain about the conduct and the effects of the conduct; and the failure to provide the Union with information relevant to the performance of its duties as the unit's collective-bargaining representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent, an Arizona corporation, manufactures tortilla and chip food products at a facility located in Tempe, Arizona. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Food and Commercial Workers International Union Local 99, CLC[2] (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] This matter was heard at Phoenix, Arizona, on April 18–20 and November 30, 2005.

[2] The Union's name is amended to reflect the disaffiliation of the United Food and Commercial Workers International Union from the AFL–CIO effective July 29, 2005. *Mission Foods*, 345 NLRB 788, fn. 1 (2005).

II. BACKGROUND

A. Respondent's Supervisory Organization

At all relevant times, Plant Manager Paul De La O headed the Respondent's Tempe plant supervisory hierarchy. Santiago Armstrong reported directly to De La O and supervised the production department. German Ahumada reported to Armstrong, and oversaw the corn department.

Ludy Tamayo was the Respondent's first-line human resources representative at the plant. She reported directly to the plant human resources manager. From April 2002 until May 2003, the plant human resources manager was Elizabeth Laytong. Karen Larsen had been the previous human resources manager. She quit her employment with the Respondent at approximately the end of 2001. During the period after Larsen quit and Laytong commenced her duties, Tamayo was chiefly responsible for the plant's human resources duties. She did, however, harmonize her activities with Rosa Flores, the Respondent's corporate director of human resources. Flores works at the Respondent's headquarters in Irving, Texas. Jim Needles was the Respondent's vice president of human resources and reported directly to Respondent's president. Needles officed in Irving, Texas, and was responsible for the Respondent's human resources operations in the United States and Europe. The Respondent stipulated that De La O, Armstrong, Ahumada, Needles, Flores, Laytong, and Tamayo were, at the relevant times, supervisors and agents of the Respondent within the meaning of Sections 2(11) and 2(13) of the Act.

B. The Union's Election Campaign

On July 13, 2001, the Union filed a petition with the Board for a representation election in a unit of Respondent's Phoenix area production and warehouse employees. The Respondent opposed union representation of the employees and conducted a campaign to convince the workers that they did not need such representation. An outside consultant, Carlos Restrepo, worked with Needles in conducting the antiunion campaign. Needles testified that both before and after the election Respondent's managers received information about the Union, including how individual employees felt about the Union. This information would then get "fed back" to Needles. For example, Tamayo received information about the Union which she would discuss with Needles. Needles, in turn, would share some of this information with Restrepo and De La O.

C. The Election

The Board conducted a representation election at the Respondent's Tempe facility on August 23, 2001. The Union won that election. Over 3 years later, on November 22, 2004, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time TQ techs, sanitation techs, receivers, customer service reps, mechanics, production operators, production packers, production sweepers, production ingredients, production maseca dumpers employed by the Respondent at its facilities located at 5860 South Ash Avenue, Tempe, Arizona, and all full-time and regular part-time warehousemen employed by the Respondent at its facilities located at 840 West Carver Road, Tempe, Arizona; but excluding all other employees, office clericals, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative of the unit employees under Section 9(a) of the Act.

Commencing in 2002, the Union filed various unfair labor practice charges against the Respondent including those that are the subject matter of the present litigation. Three weeks after its election victory, the Union demanded bargaining and insisted that Respondent refrain from making any unilateral changes with respect to unit employees' terms and conditions of employment. The Respondent, however, ignored the request because it had filed objections to the election. On August 27, 2005, the Board issued a decision that found that the Respondent violated Section 8(a)(1) and (5) of the Act by unlawfully failing and refusing to bargain with the Union and to furnish the Union with necessary and relevant information requested by the Union. *Mission Foods*, 345 NLRB 788 (2005). The Respondent continues to refuse to bargain with the Union and has appealed the Union's certification. That matter is presently before the United States Court of Appeals for the District of Columbia Circuit, along with the Board's cross-application for enforcement.

On December 29, 2004, the original consolidated complaint was issued by the Regional Director. The Respondent filed a Motion for Summary Judgment and the Board issued an Order dated March 15, 2005, granting in part, and denying in part, the Respondent's motion.

III. EMPLOYEE HANDBOOK RULES

A. Rules Background

The Respondent has maintained an employee handbook for a number of years. The handbook, printed both in English and Spanish, applies to all of its Phoenix area employees and contains rules of employee conduct. New employees are educated as to the contents of the handbook and are required to sign an acknowledgement that they have been given a copy and will obey its rules. The General Counsel alleges that the following rules contained in the Respondent's handbook are violations of Section 8(a)(1) of the Act. The Respondent asserts that the rules are common policy statements required to maintain orderly business operations.

B. No-Access Rule

The Respondent's handbook contains the following no-access rule:

> *NON-WORKING EMPLOYEES . . .*
>
> Employees after punching out must leave [the] premises immediately and should not come back to [the] premises unless requested by your immediate supervisor. Premises is defined as on company property, and includes lunch room and parking areas.

The Board stated the following standard regarding no-access rules in *TeleTech Holdings, Inc.,* 333 NLRB 402, 404 (2001):

> A no-access rule for off-duty employees is valid only if it lim-

its their access solely with respect to the interior of the plant premises and other working areas; it is clearly disseminated to all employees; and it applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. In addition, a rule denying off-duty employees access to parking lots, gates, and other outside nonworking areas is invalid unless sufficiently justified by business reasons. *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also, e.g., *Fairfax Hospital*, 310 NLRB 299, 308–309 (1993).

The Respondent's no-access rule is not limited to the interior of the plant and nonworking areas, but extends to its entire property including parking areas and nonworking areas. The Respondent presented no evidence of a business justification for prohibiting off-duty employees from its parking lots, gates, or other outside nonwork areas. I find, therefore, that the General Counsel has shown by a preponderance of the evidence that the Respondent's no-access rule is a violation of Section 8(a)(1) of the Act. *Mediaone of Greater Florida, Inc.,* 340 NLRB 277 (2003); *Hudson Oxygen*, 264 NLRB 61, 72 (1982).

C. Rules Relating to Leaving Assigned Work Area and Premises

Respondent's handbook contains two rules prohibiting employees from leaving the premises, their work area, or ceasing work, without prior authorization. These rules read as follows:

> *MAJOR OFFENSES*
>
> The following offenses are cause for immediate discharge upon their occurrence, without further notice or warning: . . .
>
> 27. Leaving company premises without authorization.
>
> *GENERAL OFFENSES*
>
> The following offenses may result in a verbal or written warning . . . may also be accompanied by a disciplinary suspension. Receipt of more than one (1) warning . . . in a twelve (12) month period may be cause for further disciplinary action up to and including discharge: . . .
>
> 3. Leaving assigned work area or ceasing work without authorization.

The General Counsel argues that both rules are overly broad because they intrude upon the employees' rights to engage in protected, concerted activities, such as an employee walk-out to protest working conditions or to engage in an unfair labor practice strike. The Respondent asserts that these rules are reasonable and permissible work rules.

In determining whether a respondent's maintenance of a work rule violates Section 8(a)(1), the Board uses the analysis set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). In that case, the Board stated:

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Where a rule is likely to have a chilling effect on Section 7 rights, the Board may conclude that its maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation v. NLRB,* 324 U.S. 803 fn. 10 (1945).

The Respondent's rules subjecting an employee to punishment for leaving his work area, ceasing work without authorization, or leaving company premises without permission are unambiguous prohibitions that do touch upon Section 7 rights. Situations where employees engaged in protected concerted activity such as leaving a work area to complain to supervision about wages, hours, or working conditions would fall within the meaning of the rules. Likewise, a protected walk-out from work would fall within the ambit of these disciplinary mandates. I find that the employees would reasonably construe these rules to prohibit Section 7 activity, that these rules would tend to chill Section 7 rights, and I, therefore, conclude that the rules violate Section 8(a)(1) of the Act.

D. No-Distribution Rule

Another "General Offense" rule contained in the Respondent's employee handbook states that employees are subject to discipline up to discharge for:

> 7. Distribution of notices, pamphlets, booklets or bulletins of any kind on company property or on customer premises.

A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful. *MTD Products,* 310 NLRB 733 (1993); *Our Way, Inc*., 268 NLRB 394 (1983). The mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced. *Brunswick Corp.*, 282 NLRB 794, 795 (1987). When a rule is presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time. *Ichikoh Mfg*., 312 NLRB 1022 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994).

The Respondent's rule goes beyond the standards established by the Board and courts in restricting its employees' Section 7 rights regarding distribution of union materials. It includes, without definition, the Respondent's entire premises. No evidence was presented that the Respondent communicated or applied the rule in a way that demonstrated to employees a clear intent to permit distribution of literature in nonworking

areas during nonworking time or that special circumstances justified such a rule. The rule also prohibits, without definition, its employees' distribution of literature at customers' premises. I find, therefore, that the Respondent's no-distribution rule is overly broad and a violation of Section 8(a)(1) of the Act. *TeleTech Holdings, Inc.,* supra at 403, and cases cited therein.

E. Rule Prohibiting False and Malicious Statements

The final rule that the General Counsel alleges as unlawful is the "General Offense" rule 16, that prohibits Respondent's employees, under the threat of discipline, from, "[m]aking false, vicious or malicious statements concerning any employees, the company, or its products and services."

A rule that prohibits and punishes merely false statements is unlawful per se because the Act protects merely inaccurate employee statements. *Tawas Industries,* 321 NLRB 269, 276 (1996). The Board has found that the maintenance of rules similar to Respondent's rule 16 violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) ("Making false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.); *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988) ("false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product."); *Spartan Plastics*, 269 NLRB 546, 552 (1984) ("false, vicious, or malicious statements concerning any employee, supervisor, the Company, or its products."). I find that, insofar as Respondent's rule 16 prohibits employees from making false statements it has a reasonable tendency to chill protected activity and, therefore, violates Section 8(a)(1) of the Act.

IV. INFORMATION REQUEST

On August 7, 2002, the Union sent Respondent a letter requesting that the company provide it with the following information:

> 1. a list of every worker currently employed in the unit, including his or her name, date of hire, rate of pay, job classification, current address, and phone number;
>
> 2. a copy of any and all current company rules, policies, practices or procedures applicable to workers employed in the unit;
>
> 3. a complete description, including any summary plan description as well as the plan itself for any benefit plan, including pension, savings profit sharing, severance stock incentive, vacation, health and welfare, training legal services, child care or any other benefit plan relating to the workers employed in the unit. Also provide the employee's cost share, if any, of such benefits; and
>
> 4. a copy of the current job descriptions relating to workers employed in the unit.

The Respondent replied to the Union's request a week later stating that it did not recognize the Union as the representative of its employees, and therefore refused to provide the requested information.

Information relating to wages, hours, and terms and conditions of employment of unit employees is presumptively relevant for purposes of collective bargaining and must be furnished on request. *Metro Health Foundation, Inc.,* 338 NLRB 802, 803 (2003). The Board has previously found that the specific type of information requested by the Union in its August 7 letter is presumptively relevant, and that the Respondent has violated the Act by not producing the information after the Union's certification. *Mission Foods,* supra. slip op. at 5, 8–10. I conclude that the Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to provide the information it has requested. *Sevakis Industries, Inc.,* 238 NLRB 309, 313 (1978).

V. UNILATERAL CHANGES IN THE SANITATION DEPARTMENT

A. Facts

Respondent's unit employee Michaela Burgara, worked in the sanitation department, where she cleaned offices, bathrooms, and the dining room. On September 29, 2003, Burgara was informed by way of a memorandum that her position was eliminated and the work was being subcontracted to an outside party. The Respondent offered Burgara a job in the production department, or "should you decide not to take the position you will be paid all of your earned vacation and will be eligible for unemployment." Respondent never provided the Union with notice or an opportunity to bargain about any of these decisions or their effects.

Burgara accepted the Respondent's offer for employment in the production department. Burgara worked an average of 41 hours per week during the 12 pay periods immediately preceding her transfer to the production department. The Respondent's records demonstrate that in the first 12 pay periods immediately after her transfer, Burgara averaged 35 hours per week.

B. Analysis—Elimination of Unit Job, Subcontracting Work, and Transfer of Employee

A union must be given notice and afforded a meaningful opportunity to bargain before any changes are made in unit employees' wages, hours, and terms and conditions of employment. *Crane Co.*, 244 NLRB 103, 114 (1979). This obligation extends to the elimination of bargaining unit positions, *Kansas AFL–CIO,* 341 NLRB 1015, 1027 (2004); and to transferring a bargaining unit employee, *Wellman Industries,* 222 NLRB 204, 206 (1976), enfd. 549 F.2d 830 (D.C. Cir. 1977), cert. denied 434 U.S. 818 (1977). It also applies to subcontracting bargaining unit work, when such subcontracting does not constitute a change in the scope, nature, or direction of the enterprise, but only involves the substitution of one group of workers for another to perform the same work. *Socidad Española de Auxilio Mutuo Beneficencia de P. R.,* 342 NLRB 458, 459 (2004). A Respondent acts at its peril by making unilateral changes while its election objections are pending. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974).

The Respondent substituted a third party to perform the janitorial functions such as cleaning of the offices, restrooms, floors, carpet, etc. The Respondent did not offer any evidence that the subcontracting was either a change in the scope and direction of the enterprise, or that there was a compelling economic reason that would have justified the unilateral changes. I find, therefore, that by unilaterally eliminating Burgara's job in the sanitation department, subcontracting the work to a third party, and transferring Burgara to a different department where

she performed different job functions and initially received lesser hours of work, the Respondent violated Section 8(a)(1) and (5) of the Act.

VI. ELIMINATION OF THE EMPLOYEE-OF-THE-QUARTER AWARD

A. Facts

For several calendar quarters prior to the August 2001 representation election the Respondent maintained an "employee-of-the-quarter" award program that awarded employees a $100 cash award each quarter. Employee nominations for the awards were made to the human resources department and several employees per quarter were selected to receive the awards, their names were announced in employee meetings and the names were engraved on a plaque that was displayed on a bulletin board. The Respondent gave this award for at least six consecutive quarters during 2000–2001, with 47 such awards being granted in 2000 alone.

Respondent gave its last award after the second quarter of 2001, and ended the program in September 2001, just after the Union's election victory. The Respondent's posthearing brief notes that, "The Quarterly Award for the third quarter would have been issued in September-October 2001." Respondent never announced to its employees that it was ending the program and the Respondent does not dispute that the discontinuance of the award program was never discussed with the Union. The Respondent asserts that the program was stopped because Human Resources Manager Larsen resigned around the time the quarterly award for the third quarter would have issued and her replacement, Laytong, was not hired until April 2002. Laytong testified that, at the time she was hired she did not know about the quarterly award and learned about the program several months after she was hired while assisting legal counsel with the investigation of the charges.

B. Analysis—Discontinuation of the Employee-of-the-Quarter Award

If an employer has an established service award program that is based on job performance, and not linked to the employer's financial condition, it is a violation of the Act to unilaterally discontinue the program. *Mr. Potty, Inc.,* 310 NLRB 724, 729 (1993) (violation to unilaterally discontinue $25 sales bonus that was based on job performance); *Conval-Ohio, Inc.,* 202 NLRB 85 (1973) (violation to unilaterally discontinue a cash award program for years of service). The Respondent's employee-of-the-quarter award was a cash award that was not linked to Respondent's financial condition but was based upon employees' job performance. Awards were made for six consecutive quarters and given to at least 47 employees. The employees, thus, had a reasonable expectation that the awards would continue. *Waxie Sanitary Supply*, 337 NLRB 303 (2001) (employer's conduct by paying three consecutive bonuses raises the employees' reasonable expectation that the bonus will continue).

The Respondent does not dispute that was not recognizing the Union at the time it unilaterally stopped the awards program or that it did not give the Union notice of the programs discontinuation. The Respondent argues, however, that the employee-of-the-quarter is another matter over which it had no obligation to bargain as the Union was not certified at the time. As noted above, this argument is rejected because the Respondent acted at its peril in not informing or bargaining with the Union about this mandatory subject of bargaining. *Mike O'Connor Chevrolet*, supra. I conclude, therefore, that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally discontinuing the employee-of-the-quarter program without providing the Union notice and an opportunity to bargain. *Mr. Potty, Inc.*, supra.

The Respondent further argues that the allegation about the awards program is barred because the Union filed the underlying charge on May 17, 2002, more than 6 months after Respondent discontinued the bonus in September 2001. Section 10(b) of the Act provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

The Board has held that the 10(b) limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005); *Allied Production Workers Local 12 (Northern Engraving Corp.)*, 337 NLRB 16, 18 (2001) (The 6-month period provided by Sec. 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice.); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). The party asserting the 10(b) defense has the burden of showing actual or constructive notice. *Courier-Journal*, 342 NLRB 1093–1104 (2004).

I find that the Respondent has not met its Section 10(b) burden of proof. The Respondent was refusing to recognize the Union at the time it discontinued the program, and it has not shown that it provided any actual notice to the Union regarding the program's termination. As to constructive knowledge of the unilateral change the record shows that the discontinuation of the award was never announced to the employees nor is there any showing that the Union had representatives at the plant who gained knowledge of the program's cessation. The Board has held that the fact that unit members may know of a change in working conditions cannot be imputed to a union where, as here, the employer is refusing to bargain with the union, and there is no union steward at the facility. *Adair Standish*, 295 NLRB 985, 986 (1989), enfd. 914 F.2d 257 (6th Cir. 1990) (employees' knowledge of a change cannot be imputed to the union where the employer is refusing to recognize the union); *St. George Warehouse, Inc.,* 341 NLRB 904 (2004) (no constructive notice where employer was refusing to bargain with the union and the union did not have a steward in the shop to police working conditions). I find, therefore, that the Respondent has not met its burden of showing that the allegation involving the award program is time barred by Section 10(b) of the Act.

VII. ELIMINATION OF THE ANNUAL WAGE INCREASE

A. Facts

The Respondent has a long-term practice of giving employ-

ees annual merit wage increases known as "wage structure" or "scale" increases. These raises have been given every year since at least 1998 with the exception of 2002. The increases are put into effect during the first quarter of every calendar year based on an evaluation of each employee's individual performance. Over the period since 1998 the raises ranged from approximately 1 to 8 percent and were given to a vast majority of the employees each year.

Prior to 2002 the Respondent conducted a telephone salary survey of other area companies to ascertain the wage market. Laytong was hired as the Respondent's Human Resources Manager in April 2002. Laytong testified that she did not evaluate the wage scales for the 2002 year until approximately 6 months later. Laytong decided to use a different method of determining wage increases and relied upon an Arizona Employer's Council, Inc., survey focusing on the unskilled assemblers job classification for her analysis. Laytong testified that she relied on the Arizona survey when it was decided not to give merit wage increases in 2002. She continued to use this method of assessing merit raises in the years subsequent to 2002.

On September 14, 2001, the Union wrote to the Respondent and noted that the Union had been recently selected as the unit employees' collective-bargaining representative. The letter stated in part that the Union insisted that normal wage increases be given to employees and that it be "given advance notice of and an opportunity to bargain regarding any such increases." The Respondent did not give employees any merit raises in 2002 in accordance with its past practice and it did not notify the Union of its decision to withhold the wage increase.

B. Analysis—Deletion of 2002 Merit Wage Increase

An employer violates the Act if it makes unilateral changes in wages, hours, and terms and conditions of employment, without notifying the union or giving it a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). When an employer has a pattern and practice of granting its employees wage increases based on merit, employees view these increases as fixed terms and conditions of employment which cannot be altered without providing the Union notice and opportunity to bargain. *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1266, 1273 (1997), enfd. in relevant part 176 F.3d (11th Cir. 1999), citing *Daily News of Los Angeles,* 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). In determining whether such increases are part of the employees' existing wage structure the following factors are relevant: (1) whether the criteria for granting the increase is based on merit; (2) whether the timing of the increase is fixed; (3) whether the amount of the increase, although discretionary, falls within a narrow range; (4) whether the majority of eligible employees receive the increase; and (5) whether the increase has been granted over a significant period of time. Id.

The record shows that the Respondent relied on merit in granting the wage increases, that they were regularly given in the first quarter of each year, the raises ranged within a narrow range of 1 to 8 percent the vast majority of employees always received the raises, and they had been granted since 1998. The raises were denied employees in the months following the Union's victory in the representation election and the change was made without notice to or bargaining with Union. I find, therefore, that the Respondent did have an established practice of granting first quarter merit wage increases to employees when it discontinued such raises for the 2002.

The Respondent contends it had no obligation to bargain with the Union about the wage issue because it was contesting the Union's certification at the time. It is axiomatic that an employer acts at its peril if it determines to make unilateral changes during the pendency of election objections. *Mike O'Connor Chevrolet,* supra; *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 654 (5th Cir. 1981); *Sundstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257, 1259 (7th Cir. 1976). The peril to the employer is that if the Board rejects the employer's objections and certifies the union, the employer's duty to bargain relates back to the date of the election and its unilateral actions while the objections were pending can be found as violations of the Act. Id. The Respondent chose to ignore its bargaining obligations as to the annual merit wage increases and unilaterally decided to not give such raises in 2002. I conclude, therefore, that the Respondent did violate Section 8(a)(1) and (5) of the Act by such unilateral action.

The Respondent also argues that it did not change anything when it decided not to grant merit raises in 2002. Thus, it is asserted that a survey was taken and the resulting conclusion was that raises were not necessary. This argument misses the point that the Respondent was under an obligation to bargain about not granting any raises and that the survey method for reaching its conclusion had changed from prior years. I find that the Respondent made an unlawful unilateral change when it used a different means for accessing area wages. I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act when in 2002 it unilaterally changed the method by which it surveyed salaries to determine the need for merit wage increases. *Daily News of Los Angeles*, supra at 1237.

VIII. SUSPENSION AND DISCHARGE OF RAMON MARQUEZ

A. Background

Ramon Marquez was employed by the Respondent from 1994 until his discharge in July 2002. Marquez worked as a packer in the corn department where he tied tortilla packages using a machine known as a Tie-Matic. The Tie-Matic was described as being a heavy metal machine that was attached to a 3-by-3 foot steel table. When Marquez encountered a malfunction to the machine, the conveyor belt that supplied him with tortilla packages did not stop. The result was the packages would accumulate and eventually fall to the floor.

B. Marquez' Union Activity

Marquez became interested in union representation in spring 2001. At that time he attended union meetings with fellow employees and he hosted four to five such meetings at his residence.

Tamayo testified that shortly before the representation election was held in August 2001 employee Susana Perez told her that Ramon Marquez had attended a union meeting along with his brother and coworker Antonio. Perez also told Tamayo that the Union's organizing committee was holding meetings in

Antonio's house. Actually the union meetings were being held at Ramon's house, and Tamayo admitted that Ramon may have told her this sometime in 2001. Tamayo testified that she reported information she obtained about the Union to her superiors in management, including her manager and Needles, Respondent's vice president of human resources.

Needles was in overall charge of the Respondent's antiunion campaign leading to the election. He testified that he knew that Ramon and Antonio Marquez were brothers, and that he knew Antonio was a union supporter and was soliciting fellow employees to support the Union. Needles acknowledged that he was also told that Antonio was holding union meetings at his home. Needles shared this information with Plant Manager De La O and the Respondent's labor consultant, Carlos Restrepo. Needles, however, denied that he suspected Ramon Marquez was a union supporter.

C. Ramon Marquez' Suspension and Termination

On July 4, 2002, the Respondent accused Ramon Marquez of intentionally damaging the Tie-Matic machine. The Respondent suspended him on that day and terminated him on July 9.

Marquez testified that while he was working on July 4 using the Tie-Matic it malfunctioned. The credited record evidence shows that he became angry and pushed the machine aside in order to replace it with another machine.

Employee Roberto Munoz was working nearby and saw that Marquez was having problems with his machine. Munoz went to aid Marquez and began hand tying the packages. Munoz watched as Marquez pushed the malfunctioning Tie-Matic to one side, and pulled a replacement into his work area. Munoz testified that he did not observe Marquez try to overturn the machine or hit it with his fists.

Shortly after Marquez replaced the broken machine a lead person, Rolando Trevino, came to his workstation and accused him of hitting the machine. Marquez denied hitting the Tie-Matic and told Trevino that he had simply pushed the machine out of the way in order to replace it with another. Trevino, however, left and complained to Department Supervisor German Ahumada that Marquez had hit the errant machine and been rude to him. Marquez was then summoned to the office and Ahumada questioned him about what had happened. Marquez told him that he only pushed the machine out of the way in order to get a new one into use. Marquez denied that he had hit the machine. Ahumada told Marquez that he was being suspended for 3 days while Respondent investigated the incident.

Respondent's employee Arturo Hernandez, an industrial mechanic, was summoned on July 4 to fix Marquez' broken Tie-Matic. He had not witnessed what Marquez did with the machine but Hernandez testified that it was his opinion that the machine broke because its continuous operation loosened the screws keeping the motor together, and a screw had jammed the motor. Hernandez stated that the problem was a result of the screws being too small and they could not sustain the amount of torque required of them. Hernandez repaired the machine by tightening the screws. As he was fixing the problem, his lead arrived and Hernandez explained the situation to him. The lead then assisted him in making the necessary repairs. Hernandez estimated that it took the men about 20 to 30 minutes to fix the problem. Hernandez was never interviewed by the Respondent about his observations regarding the problem with the Tie-Matic machine on July 4.

Part of Hernandez' job was to prepare a report detailing any repairs he made to machinery and the amount of time devoted to the job. Hernandez testified that he prepared such a report detailing his work on July 4 to Marquez' Tie-Matic and gave it to the lead. Counsel for the General Counsel subpoenaed this report but the Respondent was unable to produce any repair reports for the Tie-Matic.

D. Laytong's Initial Investigation

Laytong testified that she was at home on July 4, when she received a telephone call from Ahumada regarding Marquez and the problem with his machine. Laytong instructed Ahumada to suspend Marquez. Laytong subsequently began an investigation into the incident. She testified that she reviewed Marquez' personnel file and did not find any recent reprimands or disciplinary actions. She also interviewed Trevino and employee Susana Perez and typed their statements in English and Spanish.

Perez' statement reads in part:

> Ramon has demonstrated throughout a . . . long period of time not to have any patience. This 4th of July I saw that he was pushing the Tie-Matic machine as though he . . . he wanted to push it onto the floor or throw it onto the floor. This machine is placed on a table. Ramon pushed the table. The machine . . . did not completely tip over to the floor. It was sustained by some pallets. Upon throwing . . . the table, the machine became loose from the table and that is why I believed that the screws broke.

Trevino's statement given to Laytong reads in part:

> I went to get my tools when I saw Ramon Marquez, who was pushing the Tie-Matic. He pushed the machine. This machine is sustained or supported by a table and the table was stopped by pallets. He was out of control. He was using bad words, saying—he said to hell with this, this piece of shit doesn't work.

E. Rolando Trevino's Affidavit–Evidentiary Ruling

Trevino not only gave a statement to Laytong but he also provided an affidavit to the Respondent during the investigation of the unfair labor practice charges in this case. The following discussion details my rulings and reasoning in regard to Trevino's affidavit when the Respondent attempted to introduce it into evidence at the hearing.

On April 20, 2005, the hearing was adjourned sine die in order to give counsel for the General Counsel time to obtain enforcement of Respondent's subpoena ad testificandum served upon Trevino. He had not appeared at the hearing as directed by the subpoena.

The subpoena was duly enforced in Federal District Court and Trevino was served with the court order and a copy of my order setting the continued hearing for September 13, 2005. Respondent's counsel represented he was told by Trevino that he was prepared to appear and testify at the hearing. The hear-

ing, however, was postponed and rescheduled for November 30, 2005. Respondent's counsel stated that an attempt to serve Trevino by mail with a copy of the new hearing order was not successful as the certified letter was returned noting that Trevino had moved and left no forwarding address. The Respondent next tried to personally serve Trevino at his last known address. Respondent's counsel further represented that he was informed that Trevino no longer resided at that address and that his new residence was unknown.

Trevino was not present at the November 30, 2005 resumption of the hearing. Thus, the Respondent's counsel offered into evidence an affidavit apparently obtained from Trevino on July 31, 2002. Counsel for the General Counsel objected to the offer as hearsay that did not meet any of the exceptions permitted by Fed.R.Evid. 804(b). I sustained the objection and rejected the proffered exhibit. At the request of the Respondent's counsel the affidavit was placed in the rejected exhibit folder. The Respondent in its post-hearing brief again argues that the affidavit should have been received into evidence. I affirm my ruling at trial and reject the receipt of Trevino's affidavit.

As stated on the record, I ruled that Trevino was an "unavailable" witness under the terms of Fed.R.Evid. 804(a). That rule provides in pertinent part:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
>
> (a) Definition of unavailability.
> "Unavailability as a witness" includes situations in which the declarant—
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.

The Respondent argues that since Trevino was declared an unavailable witness that his affidavit should then be received into evidence under the exception enumerated in Fed.R.Evid. 804(b)(1). That exception states:

> (b) Hearsay exceptions.
>
> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given *as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law* in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [Emphasis added.]

I found that while Trevino was unavailable his affidavit did not meet the definition of former testimony because the General Counsel was not present and did not have an opportunity to develop the testimony by direct, cross, or redirect examination. Trevino's statement was not the result of testimony given in any formal proceeding nor was it obtained in a deposition. A key requirement for the former testimony exception is that the party against whom the evidence is now offered must have had a reasonable opportunity to cross-examine the declarant at the time of the former testimony. While the Respondent argues that the General Counsel was given a copy of the affidavit during the course of the investigation this does not substitute for the opportunity to develop, in a hearing or deposition, the witness' first-hand knowledge, opportunity to observe, motive for telling the truth, competency, bias, prejudice, admissions, etc. that form the underpinnings of cross-examination. I, therefore, affirm my ruling at hearing that the affidavit is not admissible under the exception stated in Fed.R.Evid. 804(b)(1).[3]

The Respondent's brief repeats its argument made at trial that because the affidavit was not allowed under the exceptions in Fed.R.Evid. 804(b)(1) then it should be received under "Section 805 of the Rules of Evidence." I took counsel to mean Fed.R.Evid. 807, which was formerly Rule 805, and likewise rejected the offer under that rule. Fed.R.Evid. 807, known as the "residual exception," is a catch all permitting the admission of hearsay evidence if it is otherwise deemed as having equivalent circumstantial guarantees of trustworthiness to the enumerated hearsay exceptions found in Rules 803 or 804. To qualify for the residual exception the offered evidence must, among other requirements, be shown to meet the standard that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." In the present case the Respondent offers a hearsay affidavit taken from a witness who was unwilling to appear at hearing pursuant to a subpoena. That affidavit is offered for the truth of the matter asserted on a key point—Marquez' disputed handling of his Tie-Matic on the day in question. I find that the affidavit does not serve the interests of justice, does not provide sufficient guarantees of trustworthiness and does not possess sufficient probative weight or value to assist me, as the trier of fact, in accurately deciding what occurred. I, therefore, affirm my ruling that Trevino's affidavit is not admissible under the residual exception stated in Fed.R.Evid. 807.

F. Additional Investigation

Laytong's investigation also included a July 4 e-mail she received from Corn Department Supervisor German Ahumada. The e-mail detailed what Trevino had reported regarding the incident involving Marquez. The e-mail states that Trevino had observed Marquez being upset and hitting and pushing the machine. Ahumada's e-mail also notes that he left a written statement on Laytong's notebook that had been prepared by Jose Sarabia who also witnessed at least part of what happened. Sarabia's statement relates that Marquez pushed the broken Tie-Matic to the side and he then pulled in a working Tie-Matic. Sarabia saw that as Marquez pushed the broken Tie-Matic, its table hit a wooden pallet.

[3] The Respondent argues in its brief that Trevino's affidavit is the "functional equivalent of in-court testimony." In support of that assertion the Respondent cites *U.S. v. White*, 502 U.S. 346 (1992). I find *White* to be inapposite authority for the cited proposition because in that case the Supreme Court held that the prosecution was not required to produce the 4-year-old victim of a sexual assault at trial or to have the trial court find that the victim was unavailable for testimony before the out-of-court statements of the child could be admitted under the spontaneous declaration and medical examination exceptions to the hearsay rule.

Laytong did not interview Sarabia or Munoz as part of her investigation. It is not clear from the record that Laytong was aware that Munoz may have witnessed the incident. Laytong at first testified that Sarabia was not mentioned as a witness but when shown Ahumada's e-mail mentioning that Sarabia's statement had been left for her, Laytong testified that somehow she had not paid any attention to the statement.

Laytong also received a July 8 e-mail from Production Manager, Santiago Armstrong concerning an interview with Marquez. Armstrong's e-mail states that he concluded based on the interview that Marquez had used his machine as a push tool to move an empty pallet, which was an unsafe act, and that Marquez should have moved the pallet by lifting it or using a pallet jack.

Laytong testified that she also received a note from Maintenance Supervisor Celio Rodriguez that detailed a variety of repairs done to "the" Tie-Matic machine. This note is undated and it is unclear what specific Tie-Matic machine is the subject of the report. The record shows that there were two manual tying machines that were attached to tables. The one that Marquez was having problems with was attached to a table. Rodriguez' note states that the repair he was commenting on took 3.5 man hours to complete and involved replacing and custom fitting screws, including drilling out screws, repairing and replacing arms, replacing damaged guide covers, followers and stop cover, and straightening, aligning and balancing the machine stand. Rodriguez' report does not state who did the repair, and how Rodriguez concluded that the machine had been damaged by "abusive treatment." If this account of repair refers to Marquez' machine and the events of July 4 it is at odds with the description of repairs made by Hernandez on that date. Celio Rodriquez was not presented as a witness by the Respondent. I, therefore, do not find that the memo is evidence sufficient to support Respondent's adverse action against Marquez.

Laytong relied on the various interviews and reports she had received concerning Marquez' conduct on July 4 and determined that he should be discharged for damaging company equipment. Laytong then called Respondent's Texas home office and conferred with Rosa Flores, the director of human resources and Jim Needles, vice president of human resources. She informed them of her discharge recommendation and they both concurred.

On July 9 Laytong talked to Marquez and informed him that he was being discharged. Marquez, as he had done when interviewed previously, denied having damaged the machine. Laytong also sent Marquez a letter dated July 9, 2002, stating that he was being discharged because he had violated Respondent's rules of conduct, rule 3 (gross negligence in the use of company equipment) and rule 8 (sabotage of, or intentional damage to, company equipment).

G. Analysis of Marquez' Suspension and Termination

The General Counsel contends that the Respondent suspended and discharged Marquez because he had engaged in union activities and that his discharge was based on pretext in order to conceal that motive. The Respondent defends its actions as being the result of Marquez' misconduct concerning company equipment and that this was the sole reason for his termination.

It is well settled that an employer violates the Act by taking an adverse employment action in order to discourage union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir.1981); see also *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 401–404 (1983) (approving the *Wright Line* test). Under a *Wright Line* analysis the General Counsel has the initial burden of establishing that union activity was a motivating factor in the adverse employment action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once the General Counsel has established a prima facie case, the burden shifts back to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of protected activity. *Wright Line*, supra. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996); *Willamette Industries*, 341 NLRB 560, 562 (2004). The ultimate burden remains, however, with the General Counsel. *Framan Mechanical Inc.*, 343 NLRB 408, 412 (2004) (citing *Wright Line*, 251 NLRB at 1088 fn. 11).

The *Wright Line* test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied on, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). It is the General Counsel's burden to show that the Respondent's stated reason for the adverse action was pretextual, see *New York Telephone*, 300 NLRB 894 (1990), enfd. mem. sub nom. *Fouhy v. NLRB*, 940 F.2d 648 (2d Cir. 1991).

There is no dispute that Marquez did engage in union activity and that he suffered an adverse action by his suspension and termination from employment. The Parties differ greatly, however, as to whether Marquez' suspension and discharge were fair treatment for his conduct on July 4. The focus of my analysis must be, not the fairness of Marquez' discipline, but whether there was a motivational link between his union activities and his discharge. Based on the record as a whole, I conclude that such a connection has not been established by a preponderance of the evidence.

Laytong's investigation was the subject of severe attack by the General Counsel. Of particular controversy was Laytong's failure to speak to all potential witnesses and her conclusion that Marquez was responsible for some purposeful damage to the machine. The comprehensiveness and fairness of an employer's adverse action investigation is a legitimate subject for scrutiny in an unfair labor practice proceeding. E.g., *Burger King Corp.*, 279 NLRB 227, 239 (1986) (Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in findings of discriminatory motivation.) I have taken this issue into serious consideration in reaching my decision on the matter. Laytong's investigation was not exhaustive but neither was it shown to

have been irrational or its conclusions meritless. She got the initial report of the Marquez incident in a telephone call to her residence on a holiday. Marquez' reported conduct was troubling enough to Laytong so as to cause her to immediately suspend him pending investigation. On her return to work, Laytong promptly conducted her investigation. She received reports from multiple sources that suggested varying degrees of misconduct by Marquez. Laytong chose to rely on these reports in making her recommendation for termination. While the severity of Marquez' conduct is in much dispute, it is not disputed that he pushed his machine and it ultimately needed repair in order to again function. It is impossible for me to determine the underlying cause for the needed repairs or whether Marquez' actions exacerbated the machine's problems. What I do conclude, however, is that while Laytong's investigation was less than perfect, it was not indefensible under all the circumstances. *Merillat Industries*, 307 NLRB 1301, 1303 (1992). (A respondent must establish its *Wright Line* defense only by a preponderance of evidence. The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it.) I find that the investigation has not been shown to have been so deficient as to form the basis for inferring the reasons given for adverse action against Marquez were a pretext. I conclude that Laytong had a reasonable belief that Marquez abused his machine and that she acted on that belief in recommending the adverse action against him.

The next consideration is the Respondent's knowledge of Marquez' union activities and what, if any, part that played in his discharge. The Respondent had some knowledge of Marquez' union activities. Thus Tomayo was cognizant of his union activities and admittedly passed this information to higher management during the election campaign. It is also noted, however, that the uncontroverted evidence shows that Tamayo played no part in the termination of Marquez.

Laytong recommended Marquez' termination. Counsel for the General Counsel concedes that there is no direct evidence that Laytong had knowledge of Marquez' union activities. It is argued, however, that because others in management admittedly knew of his activities, particularly around the time of the election, that I should infer that Laytong possessed such knowledge. *Sears, Roebuck & Co.,* 337 NLRB 443, 450 (2002) (knowledge of union activity can be established by circumstantial evidence or inferred from the circumstances which, taken together, show that an employer had knowledge of the activities.) The record as a whole does not convince me that such an inference is justified. Laytong was not employed by the Respondent until April 22, 2002, some 8 months after the election. She testified that she was unaware of the union activity at the plant until charges were filed subsequent to her hiring. Laytong credibly denied any knowledge of Marquez' union activities. She no longer works for the Respondent and appeared to be an honest witness who responded to questions to the best of her recollection. While she was uncertain of some details concerning Marquez' discharge, I found her uncertainty to be genuine, not designed to veil the facts and not surprising as she was attempting to recall events that were 3-1/2 years remote to her testimony. In sum, I found Laytong to be a persuasive witness and I credit her testimony that she had no knowledge of Marquez' union activities at the time she recommended his discharge to her superiors. I conclude, therefore, that the General Counsel has not shown that the person who recommended Marquez' discharge had knowledge that he had engaged in union activities.

The General Counsel argues that Needles was admittedly aware that Marquez' brother was a union activist and, therefore, it is reasonable to infer that he had knowledge or belief that Marquez was a union supporter. Needles denied that he had such knowledge or belief. The argument continues that Needles had final authority over Marquez' discharge and could have prevented it from happening. This argument misses the point that he was not shown to have any part in the matter until after Laytong had suspended Marquez, investigated and made her recommendation. Even assuming knowledge on the part of Needles that Marquez was a union supporter, I find the record does not show that Needles' approval of the discharge recommendation was motivated by antiunion animus directed at Marquez or that there was evidence of an overriding reason why he should have reversed Laytong's recommendation for firing Marquez.

Another element necessary to the General Counsel's prima facie case is timing. Marquez was shown to be active on behalf of the Union at the time of the election. The record does not show with specificity what, if any, union activities he may have pursued in proximity to the time of his discharge. While the discharge was some months following the election this is only one consideration in determining if the General Counsel has made the required *Wright Line* showing. I do not find, therefore, the timing between Marquez' union activities and his discharge as being dispositive of the matter. See *Flannery Motors,* 321 NLRB 931 (1996) (lapse of time between protected activity and discharges was insufficient to overcome other evidence of antiunion motive), enfd. mem. 129 F.3d 1263 (6th Cir. 1997).

In examining the element of animus the record shows that the Respondent has unlawfully refused to bargain with the Union, made unilateral changes in employees' wages, hours, and working conditions and maintained certain unlawful employee handbook rules. *West Michigan Plumbing & Heating, Inc.,* 333 NLRB 418 fn. 2 (2001) (employee handbook which violated Sec. 8(a)(1) evidences antiunion animus); *U.S. Marine Corp.,* 293 NLRB 669, 671 (1989), enfd. 944 F.2d 1305 (7th Cir. 1991), cert. denied 503 U.S. 936 (1992) (animus established, in part, by numerous 8(a)(5) violations). Thus, there has been sufficient evidence presented of general animus in regard to the Union. *K. W. Electric, Inc.*, 342 NLRB 1231 (2004). There is, however, no credible evidence that the Respondent took Marquez' union activity into consideration in either suspending him or terminating his employment. Laytong, the person primarily responsible for the adverse action against Marquez, has been found to have had no knowledge of his union activity. There is no evidence that her superiors had anything to do with her decision to suspend Marquez on July 4 or that she was in anyway influenced by Marquez' union activities in making the recommendation that he be fired. Even if it is assumed that Laytong's superiors had knowledge of Marquez' union sympa-

thies, there is insufficient evidence that this was the motivation for their approval of his discharge.

After a full review of the record and the Parties' briefs I find that the General Counsel has not proven its required prima facie showing that the motivation for the adverse action against Ramon Marquez was because of his union activities. I further find that, even assuming such a prima facie showing was found, that the Respondent has demonstrated that Ramon Marquez would have been suspended and discharged regardless of his union activities. I conclude, therefore, that the preponderance of the evidence does not establish that the suspension and discharge of Ramon Marquez in July 2002 were violations of Section 8(a)(1) and (3) of the Act. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. The Respondent, Gruma Corporation d/b/a Mission Foods, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food and Commercial Workers International Union Local 99, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

[Recommended Order omitted from publication.]