Albertson's, LLC *and* Yvonne Martinez *and* United Food and Commercial Workers Union, Local 1564. Cases 28–CA–023387 and 28–CA–023538

July 2, 2013

DECISION AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On May 24, 2012, Administrative Law Judge William L. Schmidt issued the attached decision. The Acting General Counsel and the Respondent filed exceptions, supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order Remanding, and to adopt the recommended Order as modified and set forth in full below.[3]

1. We adopt the judge's finding that the Respondent's labor relations director, Danny Ma, violated Section 8(a)(1) of the Act by soliciting grievances during his one-on-one meeting with employee Talia Perea during the union campaign.

Perea was working at her cash register when Ma arrived at the store to give presentations to employees. Perea had never seen him before at the store and did not know who he was. After Ma went upstairs where the administrative offices and employee breakroom are located, Perea's supervisor, Lucinda Andablo, told Perea that "H&R's [sic] up there; they're your friends, not ours. If you have any problems with your schedule or if you guys want to complain, now is the time." Perea went upstairs and was directed to the breakroom, where she found Ma and Store Director Merritt waiting. Ma introduced himself, told her it was open enrollment season with respect to company insurance, asked if she had any questions about the insurance, and then asked if she "had any concerns . . . ." The record does not indicate whether Perea answered this question, but she testified that Merritt was "right there. I was already uncomfortable—if I had issues or problems, I'm not going to tell [Ma] if [Merritt] is standing right there." Perea added that one-on-one meetings of this kind had never been held before with labor relations officials.

Settled Board precedent prohibits employers from soliciting grievances during union campaigns where the solicitation carries with it an implicit or explicit promise to remedy the grievances and "impress[es] upon employees that union representation [is] . . . [un]necessary." *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Traction Wholesale Cen-*

[1] No exceptions were filed to the judge's recommended dismissal of complaint allegations that the Respondent: (1) maintained and orally promulgated rules during meetings with employees on August 20, 2010, that prohibited them from soliciting on behalf of the Union, talking about the Union, and possessing unon cards at work; (2) orally promulgated rules during meetings with employees on April 7 and 8, 2011, that prohibited them from engaging in union activity while "on the clock" and engaging in union activity at work; (3) solicited grievances in May 2011; (4) granted wage increases to employees for the purpose of dissuading them from supporting the Union; (5) requested that employees report the union activities of their coworkers; (6) threatened to discharge Talia Perea during her phone conversation with Alice Andrick in May 2011; and (7) discriminated against Perea.

The Acting General Counsel excepts to the judge's finding that his posthearing brief did not address par. 5(k) of the complaint and to the judge's consequent failure to rule on the allegation that "on or about May 7, 2011, the Respondent . . . orally promulgated and has since maintained an overly-broad and discriminatory rule prohibiting employees from engaging in Union activities." We find merit in this exception.

The Acting General Counsel's brief to the judge addressed this allegation in Sec. III, A(f) and Sec. IV, H(a). Relying on the testimony of employee Perea, the Acting General Counsel argued that Store Director Don Merritt violated Sec. 8(a)(1) of the Act by orally imposing a "no-talking" rule during a conversation with Perea that had the effect of prohibiting her and other employees who worked at the front-end section of the store from discussing the Union. Merritt denied imposing such a rule.

Because the judge failed to address this allegation, the resolution of which turns on credibility determinations that he must make in the first instance, we shall sever this allegation and remand it to the judge to make the necessary credibility resolutions and determine whether an 8(a)(1) violation has been established.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 361 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding under the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Sec. 8(a)(3) and (1) by suspending and discharging Yvonne Martinez on the asserted basis that she violated the discount gift coupon policy, we find that the Respondent's animus is demonstrated not only by the 8(a)(1) surveillance violation but also by the pretextual reasons for the discharge, as well as its timing. *Gestamp South Carolina, LLC*, 357 NLRB 1563, slip op. at 1572–1573 (2011), and cases cited therein; *Approved Electric Corp.*, 356 NLRB 238, 239–240 (2010). We find it unnecessary to rely on the judge's finding that union animus is also demonstrated by the Respondent's expressed opposition to the organizing campaign during meetings with employees in August and September 2010. Nor do we rely on the judge's implicit finding that the Respondent treated Martinez disparately by failing to discipline the courtesy clerk who the judge found observed the generated discount coupon but failed to destroy it. It is unclear from the videotape in evidence that the courtesy clerk observed, or was attentive to, the sales transaction that resulted in the discharge of Martinez.

[3] We shall modify the judge's recommended Order to conform to our findings and to the decision in *Latino Express, Inc.*, 359 NLRB 518 (2012). We shall substitute a new notice to conform to the Order as modified.

ter Co., 328 NLRB 1058, 1058–1059 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. See *Amptech*, above, 342 NLRB at 1137. The inference that the employer will remedy grievances is "particularly compelling" when the solicitation constitutes a significant deviation from the employer's existing practice of addressing employee complaints. See *Center Service System Division*, 345 NLRB 729, 730 (2005), enfd. in relevant part 482 F.3d 425 (6th Cir. 2007); *Amptech, Inc.*, 342 NLRB at 1137. Here, the one-on-one meeting with employee Perea conducted by Ma, a high-level official of the Respondent, was a significant change from the Respondent's usual reliance on its existing practice of addressing employee grievances through its telephone hotline. Under well-established principles, the Respondent's solicitation of grievances during the organizing campaign violated Section 8(a)(1).

Citing *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1086 (1984), the Respondent contends that a finding of unlawful solicitation of grievances under Section 8(a)(1) is foreclosed here because Perea did not voice any complaint in response to Ma's query about her workplace concerns. It is settled, however, that the legality of employer conduct under Section 8(a)(1) does not turn on an employee's subjective reaction, but rather on whether, under all the circumstances, the employer's conduct had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under the Act.[4] That an employee remained silent in response to a solicitation of grievances, for example, does not negate the objectively coercive tendency of the solicitation itself, which depends on the employer's message considered in context. The employee's silence may simply reflect a fear of reprisal for speaking up or being identified as a union supporter, as Perea's testimony here suggests. See *KOFY TV-20*, 332 NLRB 771, 771 (2000) (employer told employee who responded to solicitation of grievances that she could have been fired years ago and she was subsequently unlawfully fired).

Accordingly, in cases decided before and after *Wm. T. Burnett & Co.*, the decision relied upon by the Respondent, the Board has found solicitation of grievances unlawful without any showing that the solicited employee actually articulated a grievance.[5] Not surprisingly, then, the judge's contrary suggestion in *Wm. T. Burnett & Co.* was not supported by any Board precedent, and the *Burnett* decision has never been cited subsequently for such a proposition. In those circumstances, we find that, to the extent *Burnett* holds that the solicitation of grievances cannot be found unlawful if the solicited employee fails to raise a grievance in response to the solicitation, it is contrary to the weight of Board precedent and to the policies of the Act. Accordingly, we overrule *Burnett* on that point.

2. The Acting General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) when, on two occasions, its attorney interviewed employee Sebastian Martinez without providing him assurances against reprisals as set forth in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). We find merit in the Acting General Counsel's exceptions and find the violation.

In *Johnnie's Poultry*, the Board struck a balance between a respondent employer's need to interview employees to investigate unfair labor practice charges or prepare for a hearing, and the right of employees to be free of coercion in the exercise of their statutory rights. The Board determined that both interests could be satisfied by requiring the employer to provide the employee certain safeguards. As relevant here, these safeguards require the employer to: (1) communicate to the employee, before the interview begins, the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; and (3) obtain the employee's participation in the interview on a voluntary basis. *Johnnie's Poultry*, 146 NLRB at 775; see also *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001), enf. denied on other grounds sub nom. *Stage Employees IATSE v. NLRB*, 334 F.3d 27 (D.C. Cir. 2003). Once the interview begins, the employer's questioning "must not be itself coercive in nature." *Johnnie's Poultry*, 146 NLRB at 775.

Martinez was employed in the dairy section of the store. After the initial complaint issued in April 2011,

[4] See, e.g., *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999); *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995); *Sunnyside Home Care Project*, 308 NLRB 346, 346 fn. 1 (1992); *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[5] See, e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1325–1326 (2010), enfd. 646 F.3d 929 (D.C. Cir. 2011) (violation found notwithstanding absence of evidence that casino dealers tendered grievances in response to management inquiry as to the "best way we can satisfy the dealers"); *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564, 576 (2005) (no response by employee Wickey to Vice President Guttersen's question, "What would it take to make the drivers happy?"); *Villa Maria Nursing & Rehabilitation Center*, 335 NLRB 1345, 1345 fn. 2, 1353 (2001), affd. 49 Fed. Appx. 289 (11th Cir. 2002), cert. denied 538 U.S. 922 (2003) (respondent's distribution of survey asking whether employees were satisfied with working conditions found unlawful, notwithstanding absence of evidence that employees responded); *Atlas Microfilming*, 267 NLRB 682, 688 (1983), enfd. 753 F.2d 313 (3d Cir. 1985).

the Respondent prepared its defense by interviewing Martinez on four occasions regarding his knowledge of various events alleged in the consolidated complaint.

The judge found, and it is undisputed, that the Respondent satisfied the *Johnnie's Poultry* safeguards with respect to the first two interviews with Martinez, which were held at the store in April and May 2011. Danny Ma, an attorney and the Respondent's labor relations director, conducted the first interview, and Thomas Stahl, an attorney with the law firm that represented the Respondent, conducted the second interview. Both of them questioned Martinez about complaint allegations that management officials made several unlawful statements to employees during PowerPoint presentations opposing the Union's organizing campaign.

The third and fourth meetings were conducted on September 21 and November 1, 2011, at the law firm's office, by Firm Attorney Glenn Beard. Beard admitted that he did *not* provide Martinez the *Johnnie's Poultry* assurance against reprisals at either interview or tell him the purpose of the interviews.

Martinez testified that he attended the third meeting "against his will" because he wanted to remain at the store to correct deficiencies that a corporate level representative had discovered in the dairy department. Martinez expressed this concern to the store director, Don Merritt, who told Martinez that he "had to go" to the meeting. Ma was also at this meeting, and after Martinez again indicated his reluctance to be there and that it was "important for [him] to get back to the store," Ma texted Merritt about Martinez' concern. Ma told Martinez that Merritt had sent a responsive text stating that Martinez would experience "no retaliation or rebuttal" for being at the meeting. Beard then proceeded to question Martinez mainly about matters covered at the first two meetings.

Beard resumed his questioning on these subjects at the fourth and final meeting with Martinez on November 1, while the hearing in this proceeding was still underway. On this occasion, Beard also asked Martinez about an incident that had not been raised during the prior interviews, i.e., whether Martinez had reported to management that a nonemployee union organizer had been soliciting employees in the store.

The judge found that because Martinez was perceived by the Respondent as "favorably predisposed to its point of view" and because the subjects of the questioning at the third and fourth interviews were mostly the same as those at the earlier interviews, when he received the *Johnnie's Poultry* assurances, Attorney Beard's failure to repeat the assurances did not violate Section 8(a)(1). The judge separately found that Merritt did not coerce Martinez into attending the third meeting. We disagree with both findings.

The Board has held that compliance with *Johnnie's Poultry* safeguards constitutes the "minimum required to dispel the potential for coercion" in cases where an employer questions employees in preparing for a Board hearing. *Standard-Coosa-Thatcher, Carpet Yarn Division*, 257 NLRB 304, 304 (1981), enfd. 691 F.2d 1133 (4th Cir. 1982), cert. denied 460 U.S. 1083 (1983). By excusing the Respondent's compliance with these safeguards on the basis that the assurances were previously given, the judge effectively created an exception to the Board's established "bright-line approach" in enforcing the *Johnnie's Poultry* requirements. *Freeman Decorating*, supra, 336 NLRB at 14. For the reasons explained by the Board in *Le Bus*, 324 NLRB 588, 588 (1997), we reject the judge's rationale. There, employee Meadows, like Martinez here, was "perceived as an ally of the Respondent" and had been provided the *Johnnie's Poultry* assurances in previous interviews with the respondent's attorneys. Nevertheless, the Board found that the failure to provide the assurances in subsequent interviews violated Section 8(a)(1) because it was "not shown that those earlier interviews were close in time to, and encompassed the same subject matter as, the instant questioning of Meadows."

We reach the same conclusion here. Several months elapsed between the April and May interviews when Martinez received the *Johnnie's Poultry* assurances and the September and November interviews when he did not. In view of these long intervals, in combination with the change in both the identity of the questioner and the location of the interview, we find that the previous assurances did not reasonably diminish the risk that the subsequent interviews were coercive. Further, those interviews did not cover the same subject matter that Martinez was asked about at the first two interviews. As the judge acknowledged, Beard raised a new subject by asking Martinez at the fourth interview whether he had reported to management that organizing by nonemployees was taking place in the store.

Contrary to the judge, we also find that this question, in the context of the ongoing hearing and prior to Martinez being called by the Respondent as a witness, plainly interfered with Martinez' Section 7 rights by coercing him to reveal that he had been an active opponent of the organizing efforts of his coworkers. *Gene's Bus Co.*, 357 NLRB 1009, slip op. 1010 (2011) (attorney's questioning of Gomez unlawful because his "answer would have indicated whether the information he would provide was adverse" to the employer). Thus, even if Beard had provided Martinez the *Johnnie's Poultry* assurance against

reprisals, his interview violated the requirement that the questioning "must not be itself coercive in nature." 146 NLRB at 775.

Similarly, Beard's breach of his *Johnnie's Poultry* obligations rendered the third meeting coercive for the additional reason that it was not obtained "on a voluntary basis." See, e.g., *General Die Casters*, 359 NLRB 89, slip op. 92 (2012). Martinez made clear to Merritt that he did not wish to attend this meeting; rather, he wanted to remain at the store to correct problems that had been discovered in his department. But Merritt instructed him that he "had to go." Martinez testified that he acceded to Merritt's directive "against his will."

In these circumstances, where even the judge acknowledged that Merritt acted in a "heavy handed" manner by requiring Martinez to attend the meeting, Martinez' "participation cannot be deemed to have been voluntary." *General Die Casters*, slip op. at 4. Contrary to the judge's finding, the coercive effect of Martinez' required presence at the meeting was not cured by Ma's pledge, assertedly originating from Merritt, that Martinez would "have no retaliation . . . for being" at the meeting. Martinez testified that his concern was not Merritt but rather the corporate level official who had faulted him for "neglecting [his] duties" in the dairy department. Noting Martinez' testimony that he was only "somewhat" relieved by Merritt's assurances and that he did not see the text message from Merritt, we conclude that the entirety of Martinez' third interview with Beard was never voluntary.

For the foregoing reasons, we find that the Respondent was obligated to comply with the requirements of *Johnnie's Poultry* in questioning Martinez on September 21 and November 1. By failing to do so, it violated Section 8(a)(1).

ORDER

The National Labor Relations Board orders that the Respondent, Albertson's, LLC, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting complaints and grievances from employees in order to discourage them from supporting the United Food and Commercial Workers Union, Local 1564, or any other labor organization.

(b) Engaging in surveillance of employee union or protected concerted activities or creating the impression that employee activities are under surveillance.

(c) Implicitly threatening any employees by informing them that management was attempting to make them quit their job.

(d) Coercively interrogating employees about matters that are the subject of unfair labor practice proceedings.

(e) Suspending and discharging employees because they engage in activities on behalf of United Food and Commercial Workers Union, Local 1564, or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer Yvonne Martinez full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Yvonne Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as modified.

(c) Compensate Yvonne Martinez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Yvonne Martinez, and within 3 days thereafter notify her in writing that this has been done and that her suspension and discharge will not be used against her in any way.

(e) 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.

(f) Within 14 days after service by the Region, post at its store 917 in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[6] 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

[6] 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."

and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 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 allegation pertaining to whether Store Director Don Merritt imposed a "no-talking" rule in violation of Section 8(a)(1), is severed and remanded to the judge. The judge shall make credibility determinations and factual findings necessary to resolve this issue, and shall prepare and serve on the parties a supplemental decision setting forth those determinations and findings, conclusions of law, and a recommended Order based on those determinations, findings and conclusions. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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

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 solicit complaints and grievances from you in order to discourage you from supporting the United Food and Commercial Workers Union, Local 1564, or any other labor organization.

WE WILL NOT engage in surveillance of your union or protected concerted activities or create the impression that your union or protected activities are under surveillance.

WE WILL NOT implicitly threaten you by telling you that we are attempting to make you quit your job.

WE WILL NOT coercively interrogate you about matters that are the subject of unfair labor practice proceedings.

WE WILL NOT suspend or discharge you because you engage in activities on behalf of United Food and Commercial Workers Union, Local 1564, or any other labor organization.

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

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

WE WILL make Yvonne Martinez whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL compensate Yvonne Martinez for the adverse tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, with 14 days from the date of the Board's Order, remove from our files any reference to our unlawful suspension and discharge of Yvonne Martinez, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that her suspension and discharge will not be used against her in any way.

ALBERTSON'S LLC

David Garza and *Sophia Alonso, Attys.,* for the Acting General Counsel.

Thomas Stahl, Glenn Beard, and *Jeffrey Lowry, Attys. (Rodey, Dickason, Sloan, Akin & Robb, PA),* for Albertson's, LLC.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I conducted 8 days of hearing in this consolidated proceeding between September 27 and December 6, 2011, at Albuquerque, New

Mexico. Yvonne Martinez (Martinez or Charging Party Martinez) filed the original charge in Case 28–CA–023387 on March 3, 2011. Martinez amended her charge on April 29, 2011, and, that same day, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or the Board) issued a complaint alleging that Albertson's, LLC (the Respondent or the Company) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act or the NLRA).[1] On June 6, 2011, the United Food and Commercial Workers Union, Local 1564 (the Union, Local 1564, Charging Party Union) filed the original charge in Case 28–CA–023538 also alleging that Albertson's violated Section 8(a)(1) and (3) of the Act. Local 1564 amended its charge on August 12. On August 16, the Regional Director consolidated the pending cases and issued a consolidated complaint (the complaint). The Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged. At the hearing, counsel for the Acting General Counsel (the General Counsel) moved to amend the complaint twice to allege additional violations of Section 8(a)(1).[2] I granted those motions over the Respondent's opposition.

Having now carefully considered the entire record, the demeanor of the witnesses, the reliability of witness testimony, and the arguments set forth in the briefs filed by the General Counsel and the Respondent, I make now the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware limited liability corporation, with offices and places of business in various States of the United States, including a facility located at 1625 Rio Bravo Boulevard, SW in Albuquerque, New Mexico (store 917), has been engaged in the retail sale of groceries, meats, and related products. During the 12-month period ending March 3, 2011, Respondent derived gross revenues in excess of $500,000 at store 917. During the same period Respondent purchased and received at store 917 goods valued in excess of $50,000 directly from locations outside the State of New Mexico. Based on the foregoing admitted facts, I find that it would effectuate the policies of the Act for the Board to exercise its statutory jurisdiction to resolve this labor dispute.

[1] Sec. 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." The pertinent part of Sec. 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all such activities." The pertinent portion of Sec. 8(a)(3) prohibits employers from discriminating against employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

[2] See GC Exhs. 34 and 42.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Albertson's operates numerous supermarkets mostly in the western United States. It is administratively organized into divisions. The Company's southwest division, headquartered in Phoenix, Arizona, oversees the operation of 105 stores. It includes all of the Company's stores in Arizona, Colorado, and New Mexico, as well as two stores in Utah and three stores in the El Paso, Texas area. Store 917 is the only facility involved in this proceeding. Approximately 80 employees work at that store. Local 1564 represents the meat department employees who work there, but the remaining employees are unrepresented. This case arose from an aborted attempt by Local 1564 to organize those other employees.

As detailed below, the various managers in the southwest division played key roles in the events at issue here. These individuals include Mark Blankenship, the director of human resources manager; Danny Ma, the labor relations manager; and Angelita (Angel) Seydel and Katina Wood, both associate relations managers. Blankenship described Ma, a member of the Arizona Bar, as his "employment lawyer," the person he consults when there are legal issues within his zone of responsibility. Seydel, who reports to Ma, has responsibilities that include the stores in the division where some or all of the employees are represented by a labor organization. The division is administratively divided into districts, each with its own manager. store 917 is in the district headed by Tom Houston. Houston visits the stores in his district from time to time and provides ongoing direction to the store managers by email.

Don Merritt became the store director for store 917 in January 2010. His management staff at the store includes Jeromy Garcia, assistant store manager/grocery manager who substitutes for Merritt in his absence; Lucinda (Cindy) Andablo, the service operations manager (aka front-end manager or customer service manager); Domeguita Gutierrez, general merchandise manager; and Mike Mares, the meat department manager. The Company admits these individuals are supervisors within the meaning of Section 2(11) of the Act. The parties disagree about the statutory status of Alice Andrick, one of three assistant front-end managers at store 917 and a central figure in some of the more important aspects of this case. Andrick reported to Andablo during the relevant times. The General Counsel alleges that she is both a statutory supervisor and an agent of Albertson's at the store.

Charging Party Martinez worked 25 years for Albertson's prior to her discharge on December 4, 2010. She worked at store 917 for the past 7 or 8 years. At the time of her termination (which is alleged as an unfair labor practice in violation of Sec. 8(a)(3)), Martinez was the second most senior cashier at store 917. The other alleged discriminatee, Talie Perea, has worked for Albertson's for 9 years. She works as a cashier and has been assigned to store 917 for the past 4 years. Perea's husband also works at store 917 as a meatcutter and belongs to the unit represented by Local 1564.

B. Local 1564's Organizing Campaign

In July 2010, Juan Vasquez, a Local 1564 representative, made visits to store 917 ostensibly to speak with meat department employees. He also visited other stores and soon gained the attention of company officials. The first clear indication that the Company knew of his efforts is contained in a July 28 email that District Manager Houston sent to several store directors, including Merritt at store 917. That email describes Vasquez as a "disgruntled x Meat Mgr" now working for the Union "soliciting associates trying to get our people interested in the union." The email warned the store directors to make sure that the Company's solicitation policy was posted and to be on the "lookout for him." (GC Exh. 26.)

Around the same time, Assistant Store Manager Garcia passed along reports he had received from a couple of senior employees about efforts by Vasquez to generate their interest in unionizing. Shortly thereafter, Merritt encountered Vasquez inside the store speaking with the represented meat department employees in the "meat back room." Merritt introduced himself, and proceeded to explain the Company's solicitation policy. Subsequently, Merritt reported his exchange with Vasquez in an email to Houston with copies to Labor Relations Manager Ma and Associate Relations Manager Seydel. Seydel, in turn, contacted Merritt for more detail and, based on the information she received from him, she provided further defensive instructions to Merritt and arranged for Merritt to schedule meetings for her to speak with the employees the following week.

Seydel's email reflects a palpable sense of urgency. The defensive instructions she provided to Merritt counseled that his assistant and the night-closing managers should be "walking the departments and the parking lot when he was not there;" that he review the solicitation policy with department managers and instruct them to "monitor" the departments; and finally, that the last names of employees be dropped from employee schedules. As described below, employees soon noticed the extent to which the store management went to be watchful of their conduct. In addition, managers from the division level conducted three captive audience meetings that sought to impress on employees the pitfalls they faced if they went along with the organizing drive as well as the number of benefits they already had.

C. The 8(a)(1) Allegations

The complaint, as twice amended during the hearing, contains 20 separate allegations that the Respondent's supervisors or agents violated Section 8(a)(1). They are as listed here in the order in which they will be considered:

1. Seven allegations (5(a)–(c), (f), (g), (j) and (k)) aver that the Respondent established overly broad and discriminatory work rules to chill union activities among employees.

2. Four allegations (5(d), (e), (i) and (o)) charge that the Respondent solicited employee grievances and implicitly promised to remedy them or promised other benefits in order to dissuade employees from engaging in union activities at the store.

3. Two allegations (5(p) and (q)) claim that the Respondent offered, promised, or provided benefits to employees to dissuade them from engaging in union activity.

4. One allegation (5(h)) claims that the Respondent asked certain employees to report to management about their colleagues engaged in union activity.

5. Two allegations (5(l) and (n)) aver that an alleged supervisor threatened employees while speaking with them about union activity.

6. Three allegations pertain to the General Counsel's assertion that the Respondent engaged in surveillance of employees' protected activity (5(h) and (r)) or created the impression that it was engaged in surveillance (5(m)) of employee union activities.

7. Two allegations (5(s) and (t)) claim that the Respondent, through its store director and lawyers, unlawfully interrogated an employee during its hearing preparations.

As noted, the Respondent admits the statutory supervisor or agent status of all of those individuals named as being responsible supervisors or agents for the conduct detailed in the various 8(a)(1) allegations, save for the allegation that concern the conduct of Alice Andrick. The parties are in sharp disagreement as to her status. Andrick is specifically named as the responsible supervisor or agent in four (or five, depending on how you count inasmuch as complaint par. 5(n) has two subparagraphs) of the 8(a)(1) allegations. I start with the resolution of her status as the evidence shows that she knew about the early efforts to organize the nonmeat employees and that she also played a key role in the Martinez discharge.

1. Andrick's statutory status

Complaint paragraph 4 alleges that Andrick, one of the assistant front-end managers, is a supervisor within the meaning of Section 2(11) and an agent of the Respondent within the meaning of Section 2(13) of the Act. The Respondent's answer denies that compound allegation. As I have concluded for reasons detailed below that Andrick is clearly an agent of the Respondent within the meaning of Section 2(13), I find it unnecessary to resolve the more problematic question as to whether she is also a supervisor within the meaning of Section 2(11).[3]

Unlike other portions of NLRA Section 2, Section 2(13) pertaining to the concept of agency is more of a statutory directive than a definition. As with other claims pertaining to a person's

[3] Sec. 2(11) defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Although some evidence shows that Andrick occasionally assigned work tasks, took corrective action against the store's cashiers and courtesy clerks, and possessed authority to rule on incidental tardiness excuses, there is a paucity of evidence establishing that the authority she exercised went very beyond they type of routine direction given by an experienced individual.

status under Section 2, the burden of establishing that an individual is an agent of another rests with the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

Under the NLRA, an employer is responsible for the actions and statements of persons acting as its agents. Section 2(2) provides that "the term 'employer' includes any person acting as an agent of an employer." The existence of an agency relationship is a fact question. *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 265 (D.C. Cir. 1998).

Section 2(13) provides that in "determining whether any person is acting as an 'agent' of another person so as to make (the principal responsible for the acts of an agent), the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." In cases where, as here, there is no known express authorization by the principal, the Board examines whether the alleged agent acted with the "apparent authority" of the principal. In these situations, the Board applies the common law principles of agency to determine whether an individual is acting with the apparent authority of her/his employer when evaluating a particular statement or action by the putative agent. *Cooper Industries*, 328 NLRB 145 (1999). In *Pan-Oston Co.*, 336 NLRB 305, 306 (2001), the Board summarized these principles as follows:

> Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.,* 315 NLRB 725 (1994) (and cases cited therein). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988) (citing Restatement 2d, *Agency*, § 27 (1958, Comment a)).
>
> The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World,* 286 NLRB at 426–427 (and cases cited therein). The Board considers the position and duties of the employee in addition to the context in which the behavior occurred. *Jules V. Lane,* 262 NLRB 118, 119 (1982).

In short, the Board finds apparent authority exists when the individual is placed "in a position where employees could reasonably believe that he spoke on behalf of management." *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538 (D.C. Cir. 2006). The evidence shows that Albertson's put Andrick in just such a position and, therefore, it is responsible for her conduct because she regularly acts as its agent when dealing with store 917 employees.

Andrick's official title under the Respondent's personnel classification nomenclature is "Service Operations Assistant." But neither Andrick nor the store employees are familiar with the title.[4] Instead, those who work in the store's front-end operation repeatedly referred to her and her colleagues performing the same job as "assistant front-end managers," a traditional title in the industry. Andrick said that she reports to Store Director Merritt even though she is subordinate to Lucinda (Cindy) Andablo, the front-end manager, aka, the service operations manager, a person the Respondent conceded was a 2(11) supervisor.

In addition to Andrick, Anthony (Tony) Candelaria and Ken Chavez served as the other assistant front end managers during the same period.[5] The work schedules characterize Andablo, Andrick, Candelaria, and Chavez as the "Front End Management" and segregate them from the other front-end employees. (See GC Exhs. 11–18.)

As a rule, Andrick works a 10 a.m. to 4 p.m. shift; at other times she works a 4 p.m. to midnight shift. The work schedules in evidence show that less than a majority of Andrick's worktime overlapped with Andablo's work schedule. In Andablo's absence, Andrick acted as the front-end manager. She estimated that Andablo would not be present at all "maybe three times a week" but in fact the schedules show that Andrick worked for considerable periods of each day where she was on duty when Andablo was not present. The front-end managers do not wear the standard maroon polo shirt with tan or black slacks worn by rank-and-file employees; instead, they wear white blouses or shirts with black trousers or slacks.

By Andrick's own description of her duties, she runs "the front-end, the cashiers, the courtesy clerks" in the sense that she gives them tasks to perform and tells them when they are free to take their breaks and their lunch periods. She also insures that the cashiers have the proper level of cash at their checkout counters, and resolves problems that arise between the cashiers and customers about coupons or product prices. Andrick has the combination to the store safe to secure the cash she collects from the cashiers. She is occasionally invited to attend management meetings but, more importantly, she meets regularly, if not several times a day, with Store Director Merritt where he provides her with guidance and direction in carrying out store policies. She distributes policy memos provided by management and, if an employee signature is required, she obtains it. When a problem occurs at a register, she, in her own words, "[steps] in and [tries] to fix what I can. Try to fix it. Try to take over for [the cashier having a problem]."

Andrick obviously acted in Albertson's interest in connection with the events that lead to the suspension and discharge of Yvonne Martinez. In addition to her own role and conduct, her presence in Merritt's office when Mark Zbylut, Albertson's district loss prevention manager, questioned Martinez about the details of the incident that eventually led to her discharge, signals her alignment with the interests of Albertson's manage-

[4] When asked about her position, Andrick answered, with a degree of obvious puzzlement, "I'm an assistant—what is it called—service operation manager." Even this vague recollection of her official job title appears to be technically incorrect.

[5] Andablo left the store in July 2011. Susan Juarez replaced her. Juarez did not work at the store when the events under consideration here occurred.

ment that undoubtedly would be obvious to any employee. Later, she told cashier Talie Perea about aspects of the Respondent's close oversight of the Local 1564's activities learned from her routine meetings with Merritt.

Based on the evidence reflecting Andrick's close alignment with management (including her inclusion with management on the weekly work schedules and other incidental matters such as her presence with Merritt in his office for Martinez' investigatory interview on December 1), her daily direction of the cashiers and courtesy clerks whether routine or not, her job functions that support management objectives in the department such as the distribution of written company policies and the collection of signed acknowledgments by employees, her daily substitution for an acknowledged supervisor, and her management style uniform, I am completely satisfied that employees at the store "would reasonably believe that [Andrick] was reflecting company policy and speaking and acting for management." For these reasons, I have concluded that Andrick is an agent of the Respondent within the meaning of Section 2(13) and that Albertson's is responsible for her conduct. *Ohmite Mfg. Co*., 290 NLRB 1036 (1988).

2. The alleged unlawful rules

The Board has long construed broad rules barring conduct that could include Section 7 activities during work hours, as opposed to worktime, as presumptively invalid. *Our Way*, *Inc.*, 268 NLRB 394 (1983), citing *Essex International, Inc.,* 211 NLRB 749 (1974). *Essex International* case holds that work rules barring protected activities during "working hours" are presumptively invalid because that term connotes periods from the beginning to the end of work shifts that may include the employees' own time whereas the words barring such activities during "working time" are presumptively valid because that term connotes periods when employees are actually performing job duties, but not those periods during the workday that are the employees' own time, such as lunch and break periods.

An employer violates Section 8(a)(1) by maintaining workplace rules that tend to chill employee Section 7 activities. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). The Board established an analytical framework in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that fact finders must use when deciding the lawfulness of workplace rules under the NLRA. It provides that rules explicitly restricting Section 7 activities violate Section 8(a)(1). However, where a rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. Trial judges (and for that matter, the General Counsel and the Regional Directors) must give any disputed rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights. Id. at 646.

If a workplace rule publicized to employees explicitly infringes the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard to when it was established or whether, if ever, the employer applied the rule to the detriment of an employee. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 375–376 (D.C. Cir. 2007). Hence, an unlawful rule appearing in an employee manual written long ago and never enforced may still be subject to a proscriptive order under Section 10.

a. Complaint paragraphs 5(a), (b), and (c)

The General Counsel relies on the "mere maintenance" principle to bring the first three allegations. On August 20, 2010, in direct response to the Union's organizing activity at store 917, Associate Relations Manager Seydel traveled from her office in Denver to meet with employees at store 917 to conduct meetings with small groups of the store's unorganized employees. Attendance by employees was mandatory, a feature that lead unions and others to label these types of paid assemblies as "captive audience" meetings. During the meetings Seydel conducted, she presented the Company's initial response that contained numerous arguments for resisting the ongoing unionization efforts. In effect, she served as the Company's first responder that directly engaged the store employees after the organizing drive began at store 917.

Complaint paragraphs 5(a), (b), and (c) aver that Seydel orally promulgated overly-broad and discriminatory rules during her August 20 meetings that prohibit employees from soliciting on behalf of the Union, talking about the Union, or even possessing union cards at work. Respondent challenges these allegations on the ground that they are barred by the 10(b) statute of limitations and that, in any event, they lack merit.[6]

Seydel arranged to meet with the unrepresented store 917 employees in groups of 10 or so. During her presentations, Seydel worked largely from a PowerPoint presentation she had prepared. (See R. Exh. 3.)

Yvonne Martinez attended one of Seydel's presentations. Martinez reported that Seydel told the employees at the meeting she attended that the workers "could not talk about the union while we were at work and we could not solicit union activity or we would be violating company policy." (Tr. 571.) Later on, Martinez refined her answer by saying that Seydel did not say anything about "working time." Instead, she said that Seydel simply said they "could not solicit Union activity or we would be violating company policy and said we couldn't be passing out cards." (Tr. 666.) The General Counsel adduced no evidence to corroborate Martinez' account.

Seydel denied that she told employees that they could not talk about the Union or solicit for the Union at work. She also denied that she discussed the Company's solicitation policy at all during the employee meetings. (Tr. 1527–1528.) She and some of the employee witnesses recalled that Albertson's solicitation policy (R. Exh. 4) had been posted at the front entrance to the store around this time. Seydel admitted that she reviewed that official policy in a meeting with the store director and the department supervisors in a separate meeting during

[6] Sec. 10(b) provides, in pertinent part, that: "no complaint shall issue based upon any unfair labor practice occurring more than 6 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."

this visit.[7] As for the employee meetings, Seydel denied that her presentations diverted from the matters covered in her PowerPoint set up. In addition, Seydel said she lacked the authority to alter the official solicitation policy.

On these points, I find Seydel's account more reliable than Martinez' recollection. Given Seydel's detailed, preprepared presentation during this visit, I find it more probable than not that a reference of some kind would appear in her PowerPoint presentation had she actually addressed the Company's solicitation policy or any related topic. Its absence provides some support for Seydel's denials.

Furthermore, the evidence gives no hint that any employee questioned the unusual statements Martinez attributed to Seydel, either during the meetings or later. I find that a very improbable scenario in view of the obvious statements to the contrary in the posted solicitation policy, and the likelihood that at least some employees would likely know better as a result of their long association with the unionized meat department. Those facts, coupled with the lack of evidence lending support to Martinez' recollection, have lead me to conclude that Seydel's assertions about the meetings are credible. Accordingly, I find that the General Counsel failed to prove these allegations.

In addition, I find merit to the Respondent's argument that these allegations are barred by Section 10(b). In pertinent part, the specific allegations state as follows:

> (a) Since on or about *September 3, 2010*, the Respondent, at the Respondent's facility, has *maintained* an overly-broad and discriminatory *rule* prohibiting its employees from engaging in Union solicitation activity at work which, was *orally promulgated by . . . Seydel. . . . at a meeting with employees on or about August 20, 2010*.
>
> (b) Since on or about *September 3, 2010*, the Respondent, at the Respondent's facility, has *maintained* an overly-broad and discriminatory ***rule*** prohibiting its employees from talking about the Union while at work, which was *orally promulgated by Seydel at a meeting with employees on or about August 20, 2010.*
>
> (c) Since on or about *September 3, 2010*, the Respondent, at the Respondent's facility, has *maintained* an overly-broad and discriminatory ***rule*** prohibiting its employees from having Union cards on their possession at work, which was orally promulgated by *Seydel at a meeting with employees on or about August 20, 2010.*

[Emphasis added.] The obvious question is this: If Seydel promulgated a rule at a meeting on August 20, why does the General Counsel claim that the Respondent began maintaining such a rule 2 weeks later on September 3? The obvious answer is in the first paragraph of this decision. Martinez filed the initial charge in this consolidated proceeding on March 3, 2011. Hence, if the General Counsel alleged that Seydel merely made statements that violate Section 8(a)(1) at the August 20 meeting, the allegations would be barred by the 6-month statute of limitations in Section 10(b). By pleading her alleged statements as "rules," the General Counsel obviously sought to make an end run around the statute of limitations with the assertion they were rules "maintained" during the 10(b) period.

In my judgment these allegations are little more than a pleading artifice. Here, the General Counsel's pleading acknowledges that the so-called rules were promulgated outside the 10(b) but cites two cases which hold the maintenance and enforcement of rules originally promulgated outside the 10(b) period nonetheless violate 8(a)(1). Both of the cases are factually distinguishable.[8] But that aside, I also these pleadings unsuccessful for reasons other than Seydel's denials that I have previously credited.

Thus, if it is assumed that Martinez' recollections about this matter were reliable, I have concluded that the General Counsel, by using this pleading artifice, adopted the burden of proving that Seydel, quite clearly a mid-level manager by any measure, possessed authority to "promulgate" rules on behalf of this large corporate entity. In my judgment, the undeniable inference warranted from a careful consideration of this record in its entirety, especially that portion established by the General Counsel's extensive and unwise use of 611(c) witnesses, is that this Company's rules are the product of lengthy horizontal and vertical consultations and approvals. In this context, a finding that off-the-cuff remarks by a manager, at whatever level, translate into a binding corporate "rule" would be irrational. This is especially true where, as here, the remarks vary from widely distributed written rules clearly adopted by the Company.

Accordingly, I find the General Counsel failed to prove the factual and legal underpinnings for these three allegations by a preponderance of the credible evidence. Specifically, I find the General Counsel failed to prove that Seydel said or did anything at the August 20 meeting that amounted to promulgating a workplace rule. To the extent that Seydel actually made the remarks attributable to her by Martinez, I find that allegations claiming that those statements violated Section 8(a)(1) are barred by Section 10(b). Hence, I recommend that complaint paragraphs 5(a) through (c) be dismissed.

b. Complaint paragraphs 5(f) and (g)

On April 7 and 8, 2011, Danny Ma, the Respondent's labor relations director, conducted meetings with groups of employees at store 917 similar to those Seydel had conducted the previous August. He also utilized the PowerPoint presentation technique. Complaint paragraphs 5(f) and (g) assert that Ma, acting on behalf of the Respondent, "orally promulgated" an overly-broad and discriminatory rule that prohibited employees from engaging in union activity while "on the clock," and from engaging in union activity "at work."

[7] This policy is also set out in the employee handbook. No claim is made by the General Counsel that Albertson's official rule relating to solicitation is unlawful.

[8] The cases cited by the General Counsel are *Varo, Inc.*, 172 NLRB 2062 fn. 1 (1968), and *Alamo Cement Co.*, 277 NLRB 1031, 1036–1037 (1985). Both involved longstanding workplace rules formally adopted by company management and distributed to employees in written form, and *enforced during the 10(b) period*. Neither the historical rule publication aspect, nor the element of enforcement within the limitations period, a factual aspect lending strong support for finding a violation based on mere "maintenance," are present here.

Dean Olivas, a produce clerk at store 917, attended one of these presentations on April 7. Olivas testified as follows in support of these allegations:

> A. He said more than likely that's up to us if (union representatives) approach us, that they would probably ask us is if we were interested in signing a card or whatever.
>
> Q. Did he say anything about when you could talk to them?
>
> A. Make sure it was just done *on our own time*.
>
> Q. Did he make any reference as to when your own time was?
>
> A. *No company time, just make sure we're not on the clock, just do it on our own time*.

(Tr. 738) (Emphasis added).

Karry Jolly, the receiving coordinator at store 917, attended one of the Ma meetings. She recalled that he told the employees that they could engage in union activities anytime "when we were off the clock." She went on to explain that Ma stated that what employees did "off the clock, on our time . . . was fine." Jolly also said Ma told them that "we shouldn't discuss such matters at work, because we do have a business to run, but if we choose to [we could do so] on breaks, lunches and off the clock." (Tr. 715.)

Talie Perea also attended one of the meetings. She said that Ma informed the employees that they could "talk and discuss the union when you were on break, when you were at lunch" but they "were not allowed to discuss it when you were on worktime." She recalled that he went "over the no-solicitation policy" with those at the meeting she attended. (Tr. 738.)

Cashier Albert Sanchez attended one of the meetings but he exhibited obvious difficulty recalling Ma's remarks. This is the sum of his recollection about Ma's statements concerning union solicitation at the store.

> Q. Okay. And what else? Did he discuss that union card?
>
> A. He said that—I'm trying to remember what was said at that meeting.
>
> Q. That's okay. What do you remember him saying about the union card or about the union during the meeting?
>
> A. That the—
>
> Q. Did he say anything about solicitation at the meeting?
>
> A. That we can't solicitate (sic) in the store or—
>
> Q. What did he say about that?
>
> A. That we're not supposed to have the cards in the store.

(Tr. 1006.) He repeated this claim on cross-examination when he testified as follows:

> Q. And are you positive that in this meeting, Mr. Ma talked about solicitation?
>
> A. Solicitating [sic]?
>
> Q. Union solicitation?
>
> A. Uh-huh.
>
> Q. At the store?
>
> A. That we're not allowed to solicitate (sic) in the store.
>
> Q. Okay. Didn't he say you're not allowed to solicit on working time?
>
> A. I believe so. Yes.

(Tr. 1043.) Sanchez said nothing in his prehearing affidavit about Ma discussing the Company's solicitation policy during this meeting.

Ma delivered a PowerPoint presentation at the April 7 and 8 employee meetings designed to convince the employees that they should not unionize. (R. Exh. 11.) Before meeting with the employee groups, Ma conducted training sessions with the department managers covering "dos and don'ts" the line supervisors need to follow during an organizing campaign. At those sessions, Ma distributed copies of Albertson's solicitation policy and explained it in detail. Ma did not distribute the solicitation policy at the three employee group meetings and he claimed that the subject never came up during those meetings. He also denied that he strayed into topics not included on his PowerPoint slides. He specifically denied that he told employees in the meetings or at any other time that they could not talk about union matters while "on the clock" or that they could not engage in union activity "at work." He conceded such statements would have been inconsistent with Albertson's solicitation policy that has been in effect, he said, as long as he has worked for the Company. (Tr. 1606.)

I have concluded that the General Counsel's evidence is too unreliable on which to find that these allegations have been proven by a preponderance of the credible evidence. The General Counsel did little more than adduce magic words contained in his complaint allegations from the witnesses he called but even then nearly all became confused and ultimately contradicted themselves before finishing their testimony.

Sanchez in particular exhibited difficulty recalling what had been said and seemed susceptible to virtually any suggestion by counsel. Jolly did not fare much better. Her claims that Ma told employees that they had to solicit authorization cards "off the clock, on our time" and that they could not do so "at work" was soon contradicted by her explanation that they could engage in such protected activities during their lunch and work breaks. In the context of a written solicitation rule that had been posted at the store for a lengthy period of time, the long history of unionization in the meat department that would make it more likely that even long-term, unorganized employees would be familiar with store rules on this subject, and an organizing campaign that had been on-going for months without significant discipline related to the solicitation policy, I have concluded that the employee reports detailed above, while honest attempts to recount what they thought had been said, really amounted their own loose interpretation rather than Ma's actual words. Any notion that he sought to establish rules separate and apart from apart from the Company's longstanding, lawful solicitation policy is highly improbable. Accordingly, I recommend dismissal of allegations 5(f) and (g).

c. Complaint paragraphs 5(j) and (k)

These two allegations allege that Alice Andrick, found above to be a low-level agent of the Respondent, orally promulgated overly-broad and discriminatory rules prohibiting employees from engaging in union activities on two separate occasions in May 2011.

The General Counsel's brief never makes any reference to complaint paragraph 5(k). His brief refers to complaint paragraph 5(j) under a heading entitled "Threats and Impression of Surveillance." (GC Br. 24–25.) There, counsel for the General Counsel makes reference to testimony about several conversations between Andrick and Perea in early May about "gossip."

The Respondent denies that Andrick ever established any rule prohibiting employees from engaging in union activity at work and asserts that the General Counsel failed to adduce any evidence to support such allegations. In support, the Respondent cites the testimony of Perea of denying that she ever heard Andrick say that employees could not engage in union activity at work. (R. Br. 51; Tr. 913.)

I agree with Respondent's contention. I find the General Counsel failed to adduce evidence to support these two allegations. Accordingly, I recommend dismissal of complaint paragraphs 5(j) and (k).

3. The allegations about soliciting grievances

The Board has long held that an employer's solicitation of employee grievances in response to a union organizing campaign coupled with an express or implied promise to resolve them violates the Act. In *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001), the Board reiterated its rationale on this subject:

> Board law in this area is clear:
>
> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act . . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation . . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is [sic] rebuttable one.
>
> *Maple Grove Health Care Center*, 330 NLRB 775 (2000). Further, "the Board has found unlawful interference with employee rights by an employer's solicitation of grievances during an organizational campaign although the employer merely stated it would look into or review the problem but did not commit itself to specific corrective action; the Board reasoned that employees would tend to anticipate improved conditions of employment which might make union representation unnecessary." *Uarco Inc.*, 216 NLRB 1, 1–2 (1974).

a. Complaint paragraphs 5(d) and (e)

Complaint paragraph 5(d) alleges that the Respondent violated 8(a)(1) merely by maintaining a 1-800 telephone number to solicit grievances in order to dissuade employees from engaging in union activities. Complaint paragraph 5(e) avers that around September 20, 2010, Mark Blankenship, the Respondent's director of human resources, solicited employee grievances and promised employees increased benefits and improved terms and conditions of employment to dissuade them from supporting the Union.

On September 20 Blankenship went to store 917 where he conducted meetings with small groups of employees. He worked from a 21-slide PowerPoint presentation. (R. Exh. 10.) The presentation, in effect, introduced the employees to the managers in the labor and associate relations, and the human resources groups within the southwest division by providing their names, phone numbers, and a short summary of the work performed by these departments. The next half dozen slides recounted the Company's history and expressed certain values promoted by the Company within its management and among its workers. The next three slides detailed the various benefits the Company provides its employees. That is followed by the slide that is central to this allegation. It is headed "Addressing Associate Concerns" and states that "Albertsons policies that prohibit discrimination, harassment and retaliation are strictly enforced." It goes on to state that employees can "get help if you have a problem" by contacting a supervisor, using the Company's "Open Door Policy," contacting the division office including labor relations or human resources, or using the Associate Hotline 800 number.[9] Employees Martinez and Perea both acknowledged that they had long known about these resources for the resolution of workplace problems, including the 800 number, and have used them on occasion.

The Respondent's officials had not conducted meetings similar to this before. Generally, it had communicated such information to its employees by way of the handbook it distributes to employees or, as in the case of the hotline number, by way of posters around the store. Blankenship claimed preparations for conducting this presentation began in late 2009 after the divisional president returned from a meeting of company executives and presented him with the task of providing better service to the division. He said that the division president wanted him to "to get out and communicate with our associates and tell our associates why it's great to be an Albertson's employee and talk a little bit about customer service, talk about benefits, and those kinds of things." (Tr. 1080.) As a result, his department prepared the PowerPoint presentation for use at all 105 stores in the division. Blankenship stated, incredulously, that at the time he made the presentation at store 917 on September 21, he was unaware that a union organizing campaign was underway there. (Tr. 1083.)

The General Counsel argues that the Respondent violated the prohibition against soliciting grievances when Blankenship conducted a special meeting with employees after the start of the union organizing campaign where he called particular atten-

[9] It is the telephone number that is the subject of complaint par. 5(d).

tion to available employees for resolving their problems including the 1-800 hotline. The Respondent argues that Blankenship did not violate the Act by merely calling attention methods for resolving problems that had been in existence for many years.

Nothing in Blankenship's September 20 presentation or the testimony concerning his remarks at those meetings establishes that he did anything other than highlight existing employee benefits and longstanding problem-solving practices. It is well established that Section 8(c) protects the right of an employer to inform employees of lawfully granted benefits and practices even to influence the outcome of an organizing campaign.[10] *Raley's, Inc. v. NLRB*, 703 F.2d 410, 414 (9th Cir. 1983) Although Blankenship's obvious motive for conducting the meetings that day was to counter the Union's organizing campaign, that fact alone does not prohibit an employer from promoting its existing benefits and procedures for that purpose. To the contrary, the Board has held that a statement contained in a letter sent to employees 10 days after the start of an organizing campaign that it would, as before, "always remain ready to listen to your suggestions and grievances" did not amount to an unlawful solicitation of employee grievances. *Kingsboro Medical Group*, 270 NLRB 962 (1984). *Kingsboro* states:

> It is well established that an employer who has had a past policy and practice of soliciting employee grievances may continue such a policy and practice during a union's organizational campaign. *Mt. Ida Footwear Co.,* 217 NLRB 1011 (1975); *Reliance Electric Co.,* 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). In light of the General Counsel's failure to submit any evidence to establish that the Respondent's letter inaccurately reflected its past practice with regard to listening to its employees' suggestions and grievances we find that no violation of the Act occurred.

Id. at 963. By contrast, *Embassy Suites Resorts*, 309 NLRB 1313 (1992), cited by the General Counsel, is factually distinguishable. In that case, the employer finalized and announced a new dispute resolution process just days before a union organizing campaign culminated in an NLRB representation election.

Based on the foregoing, and in the absence of evidence that Respondent provided some explicit promise to resolve employee issues in a manner other than had always been its practice, I recommend dismissal of complaint paragraph 5(d).

b. Complaint paragraph 5(i)

This allegation claims that Labor Relations Director Ma unlawfully solicited employee grievances at meetings he conducted with store 917 employees in early April 2011.

As noted in the previous section Ma conducted a series of meetings with the store employees on April 7 and 8, 2011, using the PowerPoint presentation method. There is some evidence that management perceived that there had been an uptick in the union organizing effort around this time. Although Ma claimed that store visits are not unusual for him, seemingly this had been the first occasion he had visited store 917. The content of his presentation, quite similar to Seydel's presentation in August 2010, was aimed at blunting the union organizing effort. (See R. Exh. 11.) The General Counsel makes no claim that Ma unlawfully solicited grievances at his structured presentations to the store employees. Instead, the General Counsel's brief focuses on evidence of individual encounters Ma had with a particular employee, Talie Perea. This evidence the General Counsel argues establishes that Ma searched "out grievances more carefully than before." (GC Br. 54–55.)

According to Perea, prior to Ma's presentation, she met with Ma and Merritt in the employee breakroom. She said she declined the initial invitation by Ma to meet but later changed her mind after Front-End Manager Andablo told her "H&R's up there (in the store offices); they're your friends, not ours. If you have problems with your schedule or if you guys want to complain, now is the time." When Perea later met with Ma, he told her that it was open enrollment time and wanted to know if she had any questions about the Company's insurance or if she had "any concerns in the store." (Tr. 789–791.) Andablo never contradicted Perea's about her explanation of the purpose of employees meeting individually with Ma.

Ma asserted that he has visited stores many times during his career with Albertson's and its predecessor. However, he had no recollection of a visit to store 917 prior to April 2011. He also claimed that when he visits a store he ordinarily makes the rounds to speak with employees. However, he exhibited considerable evasiveness about any conversations he had with particular employees while visiting store 917. He acknowledged that he provided a prehearing statement to the General Counsel in which he said that he normally greeted the employees he encountered and asked them "How are things? Do you have any questions? How is it going?" Ma claimed to have no recollection of speaking with Perea as she reported above.

The General Counsel argues that the foregoing evidence establishes that the Respondent, by Ma, unlawfully solicited complaints and grievances in a manner out of character with its past practices. He argues that Ma's high-level position would convey a message to the ordinary store worker that he could resolve their complaints and thereby impliedly suggested to employees that he would resolve the issues they raised with him. The Respondent characterizes the meeting with Perea as "voluntary" and contends that Ma did not solicit any grievances during his one-on-one engagements with any of the store employees and certainly did not promise to resolve any of their complaints.

Although it is true that these individual meetings were voluntary, I am satisfied on the basis of Perea's account as to how she came to meet with Ma and Merritt on this occasion, whether by design or otherwise, shows that Ma's individual meetings could easily be perceived by employees as for the purpose of listening to their complaints and grievances in circumstances that implied remedies would follow. This conclusion is reinforced by Perea's report that Andablo told her she should go meet Ma if she had "problems with your schedule or if you guys want to complain, now is the time." Hence, Ma's individual meetings with employees while at the store for the purpose

[10] Sec. 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

of conducting group meetings coupled Andablo's explanation to employees about what to expect if they met with Ma individually merits the inference that Company's high-level management was making new and unusual efforts to resolve employee complaints so that union representation would not be necessary. It is this type of conduct that the Board has long held to be unlawful. *Reliance Electric Co.*, 191 NLRB 44 (1971). Accordingly, I find this conduct violated Section 8(a)(1) as alleged.

c. Complaint paragraph 5(o)

This allegation claims that Seydel unlawfully solicited grievances from store employees in an effort to dissuade them from engaging in concerted activities. The allegation relates to a meeting between Associate Relations Manager Seydel and Cashier Perea in May 2011.

As will be explained in detail in my discussion of the 8(a)(3) allegations below, Perea had been requested in late April or early May 2011 to substitute for other cashiers on three separate occasions. The substitutions were purportedly arranged by either Assistant Store Manager Garcia or Assistant Front-End Manager Andrick, or a combination of both. According to Perea, Front-End Manager Andablo confronted her on each occasion with repeated demands in quick succession seeking to learn who authorized the substitution and, in effect, ignoring Perea's requests for relief from her station for routine breaks. Perea eventually complained to Store Manager Merritt about Andablo. He apparently offered to take the matter up with Andablo but Perea expressed reservations about his doing so because she was fearful of further retaliatory conduct from Andablo.

Seydel claims that Perea left a phone message with her office around this time saying that she had "concerns" that she wanted to discuss. Seydel attempted to return Perea's call but could not reach her to address the matter. When Seydel visited store 917 a few days later, she arranged to meet with Perea. During their exchange, Perea recounted her problems with Andablo while Seydel took notes. At the end of their meeting, Seydel promised to take care of the matter but Perea never heard anything further about her complaints.

The General Counsel characterizes this allegation as one in which Seydel solicited Perea for grievances to dissuade her from supporting the Union. The Respondent expressed puzzlement at this allegation. I too am at a loss to understand the factual basis for this claim as the credible facts show Perea effectively initiated a discussion with Seydel about Andablo's conduct at the time. Hence, no basis exists to find that Seydel solicited Perea for her complaints or grievances on this subject. Accordingly, I recommend dismissal of complaint paragraph 5(o).

4. The allegations about providing benefits

As previously noted, Section 8(c) protects the right of an employer to engage in puffery concerning its existing wages, benefits, and employment practices as a counter to a union organizing campaign. *Raley's, Inc. v. NLRB*, supra, 703 F.2d at 414. However, an employer violates Section 8(a)(1) of the Act by granting employees benefits for the express purpose of dissuading them from exercising their Section 7 right to organize for collective-bargaining purposes or to act concertedly for their mutual aid and protection. *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). The next two allegation implicate these fundamental principles.

a. Complaint paragraph 5(p)

Complaint paragraph 5(p) alleges that the Respondent put on a barbeque party for employees on May 20, 2011, in order to dissuade them from supporting the Union. It is undisputed that the barbeque "party" took place at the store on May 20, that the Company paid for the supplies, and that the Company permitted employees to attend while on the clock. Planning for the barbeque took place at a store managers' meeting early in the month and appears to have been proposed by Assistant Store Manager Garcia as an employee appreciation event. The event was open to all employees, including the represented meat department employees. The meat department manager, himself a union member, provided the barbeque grill that Merritt used to cook food for the event.

Company-sponsored barbeques have occurred at store 917 before under prior managers but this was the first barbeque held under Merritt's stewardship. Merritt said two such events were held at the prior store he managed. In addition to providing all of the supplies for this event, the Company has also provided the main entre for employee potlucks held around the Thanksgiving and Christmas holidays.

The General Counsel argues that the timing of this event during a union organizing campaign and the fact that no such event had been held before while Merritt had been manager at store 917 merits an inference that the motive for this event was to dissuade employees from unionizing. The Respondent contends that the evidence establishes that such events have been held at many store in the past and in any event, this claim is de minimis.

I find that the General Counsel failed to meet his burden of proving that the May 2011 barbeque was motivated for the express purpose of defeating the Union's organizational effort. This event took place nearly 10 months after the Company became aware of the union organizing drive. Evidence concerning the ebb and flow of this organizing drive is virtually nonexistent except that which can be gleaned from incidental facts. For example, Perea said that employee interest in the union tumbled after Martinez' discharge in early December 2010. However, Ma conducted a captive audience meeting opposing unionization in April 2011. Regardless, events of this type have been held at this and other stores in the past and this particular event occurred long after the organizing drive began. Further detracting from the General Counsel's claim is the fact that store 917 is a hybrid store—one department organized, the others not—and this event included all of the store's employees. According, I conclude that this allegation lacks merit so I recommend its dismissal.

b. Complaint paragraph 5(q)

Complaint paragraph 5(q) alleges that the wage increase admittedly granted to the store 917 unrepresented employees on

May 29, 2011, was for the purpose of dissuading them from supporting the Union.

The Company instituted the same wage increases for its unrepresented employees at several other stores in northern New Mexico at the same time that the store 917 unrepresented employees received this increase. Separate increases were instituted in southern New Mexico and yet others were instituted in Colorado at the same time. The increases did not apply to all employees. Instead, the new wages schedule provided: (1) "[g]enerous increases at the top rate for most job classes;" (2) a new tier of wages for "most positions;" and (3) a separate service supervisor wage schedule. Employees who had not reached the top of the existing wage progression did not receive wage increases beyond those obtained by progressing to the next pay level. The new rates were applicable to the bakery department employees at 24 New Mexico stores and to clerks at 15 northern New Mexico stores, including store 917. (R. Exh. 38.)

Human Resources Director Blankenship explained that the internal wage review process leading to the May 2011 wage increase at store 917 actually began a year earlier pursuant to a company policy of conducting annual reviews of the wages paid at its nonunion stores to insure competitiveness in the various local labor markets where it does business. (R. Exh. 37.)

Associate Relations Manager Seydel conducted the reviews that resulted in the 2011 increases. She explained that the process begins with an initial review to determine whether company wages are below or might fall below those paid in the industry within a year. If the initial review leads to a conclusion that company wages are competitive and will remain so, the review process stops. If the initial review shows that the Company is not competitive or will likely become uncompetitive within the year, then a more detailed review is conducted to determine necessary wage adjustments to bring company wages in line with the industry competition. The last wage adjustments at the New Mexico stores prior to May 2011 occurred in late December 2008.[11] Seydel explained that the initial wage reviews covering 2009 and 2010 established that no adjustments would be necessary to remain competitive.

Blankenship emailed the new wage rate schedules to the store managers on May 25. (R. Exh. 38.) His email included instructions about communicating notice of the increases to the store employees. These instructions make no reference to using the event in order to promote the continued unrepresented status of the affected stores or anything else related to the recent unionization efforts. There is no evidence that Store Director Merritt or any other store director actually used the occasion to advance an antiunion agenda. There is no evidence of organizing activity at any of the affected stores other than the 10-month-old activity at store 917.

[11] For wage reviews, the company stores located in New Mexico are divided into northern and southern regions. The stores in Albuquerque are considered with other stores in the northern part of the State other than those in Santa Fe which are treated separately due to a local "living wage" ordinance.

If an employer grants benefits during an organizing campaign, the General Counsel argues, the Board will infer improper motivation and interference with employee free choice based on all the evidence presented and the employer's inability to establish a legitimate reason for the timing of the benefit. (GC Br. p. 61.) The Respondent contends, in effect, that there is no basis for such an inference because the wage increases at store 917 and 14 other northern New Mexico stores resulted from its routine annual wage review.

I have concluded that the General Counsel failed to prove that this wage increase was motivated by the Union's organizing campaign at store 917. No direct evidence links this increase to an unlawful motive and the circumstantial evidence strongly favors the Company's case. Thus, the increases occurred at store 917 and 14 other northern New Mexico stores pursuant to a regular review process that occurs annually. The increases did not apply to all employees. They came nearly 10 months after the start of the Union's campaign commenced at store 917. No evidence establishes that there were or had been organizing campaigns going on at any of the other stores where the wage increases were implemented. Hence, any inference that the wage increase at store 917 in May 2011 was motivated by the union activity at that particular store would not be warranted. Therefore, I recommend dismissal of complaint paragraph 5(q).

5. The surveillance allegations

Where employees openly engage in protected activities on the employer's premises, management officials may lawfully observe those activities but they may not do anything out of the ordinary to keep employee protected activities under watch. *Albertson's v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998). See also *Broadway*, 267 NLRB 385, 399–402 (1983), and the cases cited there. Statements by employer agents causing employees to reasonably assume that their protected activities are under surveillance also violate the Act. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *Electro-Voice, Inc*., 320 NLRB 1094 (1996). In certain cases, the same set of circumstances may amount to unlawful surveillance as well as an unlawful attempt to create the impression of surveillance. *Seton Co.*, 332 NLRB 979, 981 (2000).

a. Complaint paragraph 5(h)

This allegation claims that on or about April 7, 2011, Labor Relations Director Ma "asked employees to ascertain and disclose to Respondent the Union activities engaged in by other employees." Although not alleged as surveillance, the General Counsel's brief treats it as such.

The facts in support are quite focused. Cashier Perea claimed that in the portion of his April 7 presentation where Ma described the appearance and the effect of a union authorization card, he "told us that if you were approached by anybody to sign a card, that you needed to let [Store Director] Don [Merritt] know about it." (Tr. 788.) Later, during cross-examination, Perea recounted this portion of the meeting in the following manner:

> Q. All right. Well, let's get back to Mr. Ma's meeting then, where he had the meeting with the employees.

A. Yes.

Q. Okay? Walk us through what happened at that.

A. He was going over the company—the benefits. He had told us that if you—if anybody approached you with a union card to sign it, that you needed to let front-end manager know or Don, specifically Don, let Don know, and that you could talk about the union, discuss it if you were on break, on lunch, that that was considered your time, so you were allowed to do it, but you're not allowed to do it during working hours.

(Tr. 942–943.)

Ma denied several different renditions of the notion contained in Perea's testimony that he requested those present at the meeting to snitch on any union agent or employee attempting to solicit a union authorization card from the store employees. He testified as follows:

Q. In your meeting—in those meetings or at any other time at store 917, did you tell employees that they could not talk about union matters while on the clock?

A. I did not.

Q. Is that consistent with the policy?

A. It's inconsistent with the policy.

Q. All right. Did you tell employees that they couldn't engage in union activity of any kind at work?

A. I did not.

Q. Would that be consistent with your policy?

A. No.

Q. At any time at store 917, did you ask the employees to go out and ascertain and figure out what people are doing in terms of union organizing activities and report back to the store director or you?

A. No.

Q. Or to report back to anybody?

A. No.

Q. Would that be consistent with the TIPS and FOE that you taught people [in management] earlier?

A. It would be inconsistent with that.

Q. Well, did you ask it more subtly of people? Did you say, Hey, just keep an eye on things, and give me a call or something if you see—

A. No, I did not.

Q. Did you ask anyone to report to you who was doing the organizing in the store?

A. No.

Q. Did you ask employees to report to you or anyone else if they were asked to sign a union authorization card?

A. No, I did not.

(Tr. 1606–1607.)

The General Counsel argues that I should credit the employee witnesses in this case where their testimony conflicts with management witnesses because they testified credibly and corroborated each other. In contrast, the General Counsel characterized Respondent's witnesses as having provided implausible, inconsistent and evasive testimony.

In this instance, the General Counsel is hoisted on the petard of his own arguments. He points to the sequestration of witnesses and the fact that virtually all employee witnesses were employed by Respondent at the time they testified. To be sure, these arguments warrant some consideration but the General Counsel ignores the fact that this statement purportedly occurred in the presence of several other store employees but he provided no corroboration whatever to support Perea's claims even after Ma emphatically contradicted Perea's claims. Even though I may not be at liberty to draw an adverse inference from the General Counsel's failure to call corroborating witnesses, the absence of corroboration here detracts considerably from Perea's credibility on this issue.

Over the course of this hearing, Danny Ma impressed me as an adroit, well-informed labor relations lawyer who probably serves his client quite well. The PowerPoint presentation that he admittedly presented to the unorganized employees at store 917 on April 7 and 8 reflects the kind of professional presentation one would reasonably expect and often sees from skilled management lawyers in the context of a union organizing campaign in this day and age. But, this allegation virtually requires that I conclude that Ma's PowerPoint presentations to several groups of the store employees amounted, at least in part, to a cover for his inducement of employees to inform on those involved with the organizing effort. Although Ma impressed me with having sufficient personal and professional skills to do just that, the fact that his presentations were made to all of the store's unorganized employees makes it less likely that he made the kind of remark Perea attributes to him.

Both Ma and Perea are hobbled with unmistakable biases. As for Perea, she has an strong interest in the outcome here; at the very least, she had strongly supported this particular organizing effort. During her testimony, she exhibited a startling tendency to provide lengthy, desultory responses to nearly every question. Unquestionably, Ma clearly knew of Perea's strong, prounion sympathies by the time of his April captive audience meetings, a fact that would make the egregious statement she attributed to him uncharacteristically reckless. As further detailed below, I have been unable to accord the kind of carte blanche credibility to Perea's testimony that the General Counsel's office seeks in this instance. In this context, it is hard to imagine a situation that cried out for corroboration from at one or more of the other employees at the same meeting but the General Counsel provided none at all.

For these reasons, I am unable to conclude that Perea's testimony in support of this allegation is sufficiently reliable for me to conclude that Ma asked the employees who attended one or more of his meetings to become informers about the union activities of their fellow employees. Accordingly, I recommend dismissal of complaint paragraph 5(h).

b. Complaint paragraphs 5(m) and (r)

Complaint paragraph 5(r), added by amendment during the hearing (GC Exh. 34), alleges that the Respondent beginning about September 3, 2010, engaged in surveillance of employees' union and concerted activities at store 917. The essence of complaint paragraph 5(m) is that Assistant Front-End Manager Andrick made a statement on or around May 3, 2011, that created an impression employee union activities were under surveillance by the Company.

The General Counsel supports this allegation with wide ranging evidence beginning with the directive from Houston to the Albuquerque store directors, including Merritt, in late July 2010 that they become vigilant for the presence of union organizers. (GC Exh. 26.) Numerous communications followed between Merritt and his district manager as well as divisional staffers reporting ongoing union activities at the store. Merritt's reports included:

> 1. August 10: Merritt emailed Associate Relations Manager Seydel advising that a cashier had been approached by an unknown nonemployee union organizer in the store. Seydel immediately recommends to Ma that they "do 917 meetings."[12] [GC Exh. 24.]
>
> 2. August 12: Merritt emails Houston with a report that Union agent Juan Vasquez had visited the store and had spoken to Cashier Gloria Padilla and Dairy Manager Sebastian Martinez as well as some represented meat department employees. He copied Ma and Seydel with the message. [GC Exh. 26.]
>
> 3. Merritt admitted that in the weeks and months that followed, he continued to receive reports from Martinez and Padilla about once or twice a week. Merritt became confident from these employee reports that he had a good idea about the union organizing activities in his store. [Tr. 382.]
>
> 4. August 12: Seydel, reported to Ma that she discussed Merritt's report about Vasquez's activities and provides more graphic detail inferring that Merritt either questioned or been told about the encounter between Dairy Manager Sebastian Martinez and Union agent Juan Vasquez. Seydel instructed Merritt to "review with his assistant and the night closing managers that they should be walking the departments and parking lot when he is not there and addressing any issues. [GC Exh. 26.] She also instructed him to review the Company's solicitation policy with these managers and "remind them to monitor the departments." Finally, Seydel instructed Merritt to update the employees' schedules to ensure that only first names were used in order to limit the availability of contact information to workers at the store helping the union organizers. [GC Exh. 26.]

In addition to the early, just-noted emails containing detailed instructions, Merritt reported on the ongoing union activities by way of telephone calls to Seydel.[13]

After the start of the union organizing, employees observed noticeable changes in the conduct of the store supervisors. Cashier Perea observed Merritt spending unusually lengthy periods of time at the front windows watching what was going on in the parking lot. On one occasion after the union organizing was under way, she overheard Merritt telling Union Agent Vasquez to leave the store. (Tr. 782.) Soon after the initial meeting (the Pizza Hut meeting described below) between Vasquez and a small group of employees in late July or early August, Assistant Front-End Manager Andrick approached Perea upset because she had not been told about the meeting or asked to sign a union card. (Tr. 777.)

According to Perea, the cashiers, courtesy clerks, and others would chat among themselves, sometimes about unionizing, during the occasional intervals between customers. Store Director Merritt confirmed that employees talk about a wide range of subjects while around the checkout counters and admitted he does so himself. (Tr. 325–326.) But after management became aware of the organizing effort, Perea noticed that the managers' presence in the checkout area became much more frequent. She described it this way:

> Q. Now, you talked about being watched. Can you elaborate on what you mean by being watched?
>
> A. They were very observant to—especially, just for myself, they were very observant to me, watching when I would be talking, especially if it was me and Yvonne (Martinez) on the days that we did see each other and work together. They would pace across the front end, more frequently than we had seen them before, stopping at the registers, kind of just to observe what we were saying, telling us we could not be up there talking.
>
> Q. And when did this watching occur?
>
> A. That happened after the first meeting that was held with Angel (Seydel).

(Tr. 783.)

Receiving Coordinator Karry Jolly attended the early union meeting at the Pizza Hut. Perea told her about the meeting one day when she happened to be in the front of the store in the checkout area. Following the union meeting, Jolly also noticed Merritt paid careful attention to employee conversations. Thus, she recalled the following in graphic detail:

> Q. Now, since the Union meeting at Pizza Hut, did you notice any differences or changes in management's behavior?
>
> A. Just with Don Merritt.
>
> Q. What did you notice?
>
> A. Don Merritt was out bringing in shopping carts, you know, in the back, like policing the store basically.
>
> Q. Okay. And when you say policing the store, can you describe that a little further?
>
> A. Watching what the employees were doing, what they were talking about, just policing the store.
>
> Q. Okay.
>
> A. You know, one incident was, when we were, he was looking for somebody outside the bathroom and one of the other employees said, you know, he's in the bathroom, the man in the plaid shirt, where is he, he's in the bathroom.
>
> Q. Well, okay, so let's back up a little bit. So where were you when this happened?
>
> A. I was over by the dairy cooler.
>
> Q. Okay. And what did you see Don doing?

[12] Seydel's union information meeting took place shortly thereafter on August 20.

[13] Seydel made a preposterous claim that he never communicated with her about the union activity at the store between August 2010 and the time the UFCW filed charges with the NLRB in May 2011. Tr. 41–42. I find this claim by her to be false and misleading.

A. He was looking for somebody, a man in a plaid shirt.

Q. Okay. And who said that he was over by the bathroom?

A. Sebastian.

Q. Okay. And who is Sebastian?

A. He is a Dairy Manager.

Q. Okay. And what else did you, did you hear that day?

A. Well, then Sebastian turned around and said that, he's the Union rep, he went to the bathroom. That was the only—

Q. Okay. And did employees joke about Don during this time?

A. Yes.

Q. Okay. What was the joke?

A. The joke was he was always looking for the Union guy.

(Tr. 705–706.)

Yvonne Martinez also remembered that after the union organizing effort began, Merritt and Assistant Store Director Garcia began policing the parking lot and collecting shopping carts, and helping customers, tasks that had always been performed by the courtesy clerks. Before the organizing effort, Martinez never saw Merritt and Garcia engage in this type of work. (Tr. 566, 660.) Cashier Albert Sanchez noticed the same behavioral change by Merritt after the union organizing began in July 2010. (Tr. 1003–1004.)

It is evident that this close oversight continued for a considerable period. Two emails from Merritt to Seydel reflect that he was carefully monitoring both the union agents and store employees active in the organizing effort. One, sent on April 18, reads:

> Also Billy and the other union person have not been in since about Thursday of last week[.] [T]hey park in the lot and then leave in 1 vehicle and go towards Wal Mart then come back in the late afternoon and leave. Also Gloria (Padilla) said they have not bothered her for almost a week.

The other, sent on April 24, reads:

> Since I last email (sic) on the union they are not coming In to (sic) the store but now I have Tallie and Ivan Perea, Ken Chavez and Joseph Chavez and Zack. All are pushing real hard on the sackers. They keep trying to corner the sackers and Tallie was seen by (Assistant Store Director) Jeromy (Chavez) handing one of the sackers Vicente something. Today on Sunday I was told that Ken tried to get Douglass in a corner of the front end also. They are getting aggressive now.

(GC Exhs. 25 and 30.)

Perea said she had several conversations with Andrick in the spring of 2011 about management's claim that there was too much at the front end. Purportedly, Merritt called Andrick to his office on several occasions to warn her about gossiping with the cashiers, in particular Perea. Perea recalled a conversation with Andrick in early May 2011 shortly after Andrick came back from a meeting with Merritt in his office. Purportedly Merritt had admonished Andrick because there was too much "gossiping" around the checkout area. Andrick also told Perea that Merritt said, "[w]e have one down there that thinks that she's going to get her way" but that he knew "about all this union stuff." Andrick said she had also been cautioned against thinking that Perea was her friend and told Perea, "Well, you know what they're trying to do up there; they're trying to make you quit. They're trying to make you walk away from your job." (Tr. 794–796.)

The General Counsel argues that Merritt's "increased presence" in the areas of the store where employees discussed the union organizing effort from time to time "sent a clear signal to grocery employees, particularly cashiers that their protected activity was under scrutiny by management." (GC Br. 38–39.) The Respondent argues that the General Counsel failed to present evidence that it did anything more than lawfully observe "open, public union activity on or near its property." In my judgment, the Respondent's contention lacks merit.

The preponderance of the evidence establishes that the Respondent's store managers altered their ordinary work habits in order to aggressively spy on the employee organizing activities and the union agents assisting the employees. The heighten oversight by management became so apparent to several employees that they began joking about it. The connection and timing between the in-store managers' change of work habits and the directives of the division-level managers to closely monitor union activities could not be clearer. For this reason, I find the kind of aggressive oversight found here would tend to inhibit ordinary employee discussions with each other and with the union representative assisting their organizing effort. *International Paper Co.*, 313 NLRB 280 (1993). Likewise, I find Andrick's statements to Perea would tend to convey the message that management was carefully watching her in-store interactions and would also tend to inhibit her discussions with he coworkers. *United Charter Service*, 306 NLRB 150 (1992). Accordingly, I find merit to complaint paragraphs 5(m) and (r).

6. The threat allegations

It has long been settled that an employer, and by extension, the employer's agents and supervisors may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1968). As stated in *NLRB v. Neuhoff Bros. Packers, Inc.*, 375 F.2d 372, 374 (5th Cir. 1967):

> For despite the effort of management to keep its unsophisticated advocates within the narrow lines allowed . . . its supervisors, whether "out of zeal, ignorance, or otherwise * * * in championing the anti-union cause," made statements . . . which were outright, not subtle, transgressions of Section 8(a)(1). These included threats to discontinue bonuses, to fire union adherents, and persistent questions about known union meetings leading the employees to believe that they were under surveillance and their union activities known to management.

a. Complaint paragraph 5(l)

This allegation avers that Andrick threatened employees with discharge in a May 2011 telephone conversation.

The testimony provided to support this allegation involved a telephone conversation between Andrick and Perea in May outside their work hours. Perea said that during their conversation the two of them discussed several things "going on with Don," meaning Store Director Merritt, and "what a jerk" he was. (Tr. 913.) Perea added that two of them were in agreement on several matters relating to Merritt and that she ultimately told Andrick, "This is why we need the union." Andrick purportedly responded by saying, "Well, that's why I don't want Yvonne back." (Tr. 793.) Andrick provided no testimony concerning this claim and Perea provided no indication that she pursued the matter further.

The General Counsel argues that Andrick engaged in unlawful coercion by telling Perea that she did not want Martinez reinstated. The Respondent contends that this conduct fails to prove any of the allegations the General Counsel made with respect to Andrick.

I agree with the Respondent's argument. There is no evidence that Andrick initiated this telephone exchange. Instead, if the evidence establishes anything, it is that Andrick and Perea had a wide ranging discussion about Merritt in which they largely agreed with each other. Given the general tenor of their exchange, I am unable to conclude that Andrick's ambiguous remark toward the end of their discussion, even assuming that it actually occurred, sought to convey the message asserted by the General Counsel, i.e., that Perea would suffer the same type of recrimination as Martinez if she continued, as the General Counsel argued, to "make representations that the Union will resolve her problems." Accordingly, I recommend dismissal of complaint paragraph 5(l).

b. Complaint paragraph 5(n)

This is a two part allegation. Together, it asserts that on May 10, 2011, at store 917, Andrick threatened employees with "unspecified reprisals" and with discharge if they engaged in union activities.

The General Counsel points to a conversation between Andrick and Perea after Andrick returned from Merritt's office. As previously found, Andrick told Perea on one such occasion that Merritt had disparaged Perea because of her union organizing efforts, and warned Andrick against being friendly with Perea. Andrick purportedly followed this report with her own perception that the store management was trying to make Perea quit. (Tr. 794–796.) As previously noted, Respondent argues that Albertson's is not responsible for Andrick's conduct, an argument I have already rejected, and that the General Counsel failed to prove any of its allegations about Andrick. I disagree in this instance.

I find the General Counsel has proven Andrick implicitly conveyed a threat to Perea by with her message that her employment was imperiled because of her union organizing activities. Perea's uncontradicted report that Andrick informed her, in effect, that the Albertson's management resented her union organizing activities and was actively engaged in an effort to make Perea quit contains an unmistakable message that she was putting her job in jeopardy by engaging in union organizing activities. Accordingly, I find Andrick's remarks on this occasion violated Section 8(a)(1) as alleged in complaint paragraph 5(n).

7. The *Johnnie's Poultry* allegations[14]

The allegations in complaint paragraphs 5(s) and (t) implicate the Board's seminal decision in *Johnnie's Poultry Co*., 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). In that case the Board articulated safeguards necessary to privilege an employer from 8(a)(1) liability where either the employer or its counsel chooses to question employees on matters involving their Section 7 rights in preparation for a hearing on an unfair labor practice complaint. In summary, the *Johnnie's Poultry* safeguards require: (1) that the employer or its counsel obtain the employee's voluntary participation after explaining the purpose of the questioning and providing adequate assurances that no reprisals will occur; (2) that the questioning itself be free of coercion in a context free from employer hostility to union organization; and (3) that the questioning must not exceed legitimate purposes by prying into other union matters, including the employee's own subjective state of mind, or by otherwise interfering with employee rights. An employer loses the benefits of the privilege by transgressing the boundaries of these safeguards. Subsequent decisions establish that the *Johnnie's Poultry* does not apply to trial preparation inquiries unrelated to matters involving the exercise of Section 7 rights, for example questions about standard work procedures. See, e.g., *Delta Gas*, 282 NLRB 1315, 1325 (1987), and the cases cited there.

On November 8, 2011, the sixth day of hearing, the Respondent called store 917 dairy clerk Sebastian Martinez as a witness in its case. None of the parties claim that he is a supervisor or agent of the Respondent. Ample evidence in this record warrants the conclusion that Martinez had regularly and voluntarily spoken to Store Director Merritt about the ongoing union activities of other store employees. This conduct most likely identified him to management as a trustworthy employee favorably predisposed to its point of view. By the end of his testimony, Martinez had described four different occasions when he met with the Respondent's labor relations director, Danny Ma, himself an attorney, and the Respondent's outside counsel in this case. When the hearing next resumed on December 5, counsel for the General Counsel moved to amend the complaint to allege that these meetings violated Section 8(a)(1). I granted the motion to amend over the strong objection of the Respondent.

The initial complaint in this consolidated proceeding issued on April 29, 2011. It was based on the charge in Case 28–CA–023387 filed by Yvonne Martinez. That first complaint contained allegations pertaining to the PowerPoint presentations by Seydel and Ma in August 2010 and April 2011, respectively. It

[14] A significant error appears in the transcript of the testimony given in connection with this subject at p. 1650, L. 25. The answer reflected there was provided by the witness, Attorney Thomas Stahl, and the transcript is corrected to reflect that fact.

also contained an allegation pertaining to the 800 hotline as well as the 8(a)(3) allegations pertaining to Yvonne Martinez' suspension and discharge. The notice of hearing scheduled the hearing for June 7.

A series of postponements followed. On May 24, the Respondent's motion to postpone the hearing from June 7 to 8 was granted. (GC Exh. 1(k).) On June 6, the Union filed its charge in Case 28–CA–023538. The following day the Regional Director rescheduled the hearing to August 23 to permit time for the investigation of the new charge. (GC Exh. 1(n).) On August 16 the consolidated complaint issued. The notice of hearing included with it set September 27 as the new hearing date. (GC Exh. 1(r).)

At the hearing, the Respondent adduced testimony from Sebastian Martinez pertaining to its defenses. To a degree his testimony paralleled the testimony of other witnesses called by the Respondent. Among other matters, Martinez testified about the Respondent's Catalina coupon policy, an issue central to the complaint's 8(a)(3) allegation concerning Yvonne Martinez; the content of the captive audience meetings conducted by Seydel, Blankenship, and Ma; the solicitation policy and any ancillary prohibitions on the employee union activity at the store; statements management may have made about the effect union representation would have on the existing 401(k) plan; and the length of time he had seen 800 hotline posters around the store.

On cross-examination, counsel for the General Counsel focused largely on details related to the meetings Martinez had with the Respondent's lawyers, both Ma and the Company's outside counsel who appeared on its behalf at this hearing. In the first meeting, Martinez met at the store with Labor Relations Director Ma and Associate Relations Manager Seydel. Martinez explained that Store Director Merritt approached him at his work area shortly after Ma conducted his captive audience meetings with store 917 employees in April 2011 and "asked me if I would go in and talk to these couple of people that wanted to talk to me about something." Merritt sent Martinez to the "scan room," a nearby office in the back of the store that Ma and Seydel used when they spoke to Martinez. (Tr. 1170.)

According to Martinez, Ma and Seydel told him at the outset that they "wanted to ask him some questions" and that if he "thought the questioning was too far or too in-depth, (he) could ask them to stop and (they'd) stop the questioning." He recalled that they then began asking him about their PowerPoint presentations to store employees but he quickly added: "Offhand I can't exactly remember the conversation, but it was concerning that." (Tr. 1171.) Martinez also said that he was told at the outset of his questioning that it would be about "their slide shows" but when counsel pressed him for the words they used, he said, "I can't remember the exact words that they said. No." (Tr. 1172.) Martinez' testimony then continued as follows:

> Q. Okay. Did they explain that you had a choice in participating in the meeting or not?
>
> A. Yes, they did.
>
> Q. What did they say?
>
> A. They said I had a choice to be there or not to meet with them. If I no longer wanted to meet with them, it would be my choice not to do that anymore.
>
> Q. Well, did they say that before or after they said that you could ask them to stop?
>
> A. It would have to be after. The first questioning was they brought me into the room, explained they would be asking me some questions, and if I wanted them to stop, they would have to stop the questioning.
>
> Q. Okay.
>
> A. And then they said it was my choice to be in there, that conversation, or not.
>
> Q. Okay. And then is that all they said, prior to asking you the questions?
>
> (Intervening colloquy about an objection)
>
> THE WITNESS: Like I said, I don't remember the exact conversation that took place. It's been a while.
>
> Q. BY MS. ALONSO: well, after they made those two--after they said that you could stop--
>
> A. Right.
>
> Q. —them whenever you wanted to, and that it was your choice, did they say anything else before proceeding to the questions?
>
> A. No.
>
> Q. Okay. That was all they said.
>
> A. Uh-huh.
>
> Q. Okay. So then they did not tell you that there would be no reprisals taken against you. Right?
>
> A. Right.
>
> Q. And they did not tell you that you would—that there would be no reprisals taken against you for the substance of your statements. Right?
>
> A. Right.
>
> Q. And they did not tell you that you would not be disciplined if you chose not to participate. Right?
>
> A. Right.
>
> Q. Now, the questions that they asked you—I know this was a while ago. You said you don't remember when you first discussed it, but it was sometime in April. Right?
>
> A. It would have to be after April, after Danny Ma's slide show.
>
> Q. Okay. And when they asked you questions about what was going on at the store, did they asked if you signed a union card?
>
> A. I can't remember.
>
> Q. Do you think it's possible they asked you that?
>
> A. No, because that wasn't where it was—the conversation wasn't about that, so—
>
> Q. Okay. So why don't you tell me what they asked you about what was going on at the store at that time.
>
> A. They were asking me about solicitation.
>
> Q. What did they say about—what did they ask you about solicitation?
>
> A. I can't remember the exact words, but if there was a lot of people of solicitation going on in the store. That could be anywhere from purchasing/selling tamales to selling cars, I guess.

Q. Okay. And what else did they ask you about the activity at the store at that time?

A. Offhand, I just can't—it's been so long.

Q. Did they ask if you attended any union meetings?

A. No. I don't recall that happening. No. I—or even brought up. No.

Q. What else did they ask you at the meeting?

A. Honestly, I cannot recall. I can recall being at the meeting. They said, We're going to ask you some questions. You know, if you wanted to stop, you can stop. It was pertaining to the slide show, the meetings and the union coming in.

(Tr. 1172–1175.)

Later, Martinez said that he understood based on what Ma had said at the outset of the meeting that he had a choice as to whether to participate and that Ma also told him that nothing would happen to him if he refused to answer questions. He also said that Ma asked if he would be willing to testify and that he voluntarily agreed that he would. (Tr. 1216–1217.) Martinez also said that he understood there would be no retaliation if he declined to participate in the later interviews that the Respondent's trial counsel conducted. (Tr. 1219.)

Both Seydel and Ma recalled their meeting with Martinez in the scan office. Ma remembered that it occurred on May 6 but conceded that he might be off by a day or two. They were, Ma said, trying to identify potential witnesses for the upcoming unfair labor practice hearing. Ma said that he began by introducing Seydel and himself to Martinez. He then explained they wanted to talk with him because unfair labor practice charges had been lodged against the Company regarding the employee meetings that they had conducted and that they wanted to ask if he would be willing to be a witness at the upcoming hearing. Ma said he also told Martinez that his participation was "strictly voluntary," that it was "up to him." In addition, Ma said that he told Martinez that they would appreciate his participation but if he did not that was his "right" and that there would be no retaliation against him for refusing to participate.

After Martinez, said he would be willing to participate, Ma then proceeded to question him about the PowerPoint meetings that had been given. At the conclusion of his questioning, Ma asked whether Martinez would be willing to testify about those matters and Martinez said that he would. Ma denied that he questioned Martinez about his own union sympathies or activities, or those of any other employee. (Tr. 1614–1616.)

Seydel recalled that their meeting with Martinez occurred in May 2011 but was not more specific. She remembered that Ma conducted the meeting and that the office door remained open throughout the meeting. After the introductions, Seydel said that Ma told Martinez that he wanted discuss some allegations that came up in an unfair labor practice charge against the Company and specifically wanted to talk to him about the PowerPoint meetings they and Mark Blankenship held with the employees. She said that Ma told Martinez that his participation "was voluntary," that he didn't have to speak with them if he didn't want to, and that if he didn't want to talk with them, he could go back to work and there would be "no consequence for him" because he would not talk to them. (Tr. 1549.) Following that, Seydel said that a lengthy discussion ensued about the three store meetings the divisional managers conducted. She also denied that Ma ever questioned Martinez about his union activities or sympathies or the union activities or sympathies of other employees.

According to Martinez, he met three other times with the Respondent's lawyers. All these meetings, he said, took place at the law offices of Rodey, Dickason, Sloan, Akin & Robb (the Rodey firm) in downtown Albuquerque. Martinez claimed that Attorney Thomas Stahl and Ma were present for one meeting; Attorney Glenn Beard and Ma were present for the second; and that only Attorney Beard was present for the third.

Attorney Thomas Stahl, a managing partner of the Rodey firm and the lead defense counsel in this case, had a different recollection about the place and circumstances of his interview with Martinez. Stahl said that he met with Martinez at store 917 on May 26, 2011, which at the time would have been about 2 weeks before the hearing as scheduled at that time. Stahl said he interviewed Martinez in the store director's office and that no one else was present during the interview. Stahl explained that he interviewed Martinez in order to determine "whether he would be a witness we would use at this hearing." Stahl, who said the interview lasted about 45 minutes, provided this account of the start of their meeting:

Q. How did the meeting with Mr. Martinez start?

A. Mr. Martinez came up to the office area where I was, and I think I said, Are you Mr. Martinez. He said he was. And then I introduced myself, that I was Tom Stahl, and I was an attorney that—and I represented Albertsons. I explained to him that there was as National Labor Relations charge, complaint, against the company, and that there were some allegations in that complaint that I wanted to talk to him about. Specifically there were some allegations about various meetings held at the store and some things that were said by Albertsons' employees at those meetings, and I wanted to ask him about those things and what he heard them say. And then I also said, there's also an issue about Catalina coupons, and I wanted to ask his experience with Catalina coupons, knowledge of the policy, that sort of thing.

Q. Okay. Did you talk to him about the voluntariness of the meeting?

A. Yes. I did explain to him that it was completely up to him whether he wanted to talk to me or not. He could choose to leave if he wanted to, but I'd be happy if he'd talk to me. I told him that if he chose not to talk to me, there would be no retribution, no retaliation of any kind against him, and I explained to him also that if he did talk to me and whatever he said, there wouldn't be any retaliation against him. I told him we just want to hear the truth so we can prepare for this hearing.

Q. And how did Mr. Martinez respond to you, if he did?

A. He said he was very willing to help out, and he was glad to do so.

(Tr. 1642–1643.) Stahl went on to say that he questioned Martinez about the PowerPoint meetings and the Catalina coupon

policy that is relevant to Yvonne Martinez' case. He denied that he questioned Martinez about matters related to his union activities or sympathies or those of other employees. In fact, Stahl said that Martinez once started to get into those subjects but that he quickly cut him off. (Tr. 1644–1645.)

Following the postponement of the hearing scheduled for June, Stahl said that a change in Attorney Beard's schedule permitted him participate in the preparation of the Respondent's defense. Because of that development, Attorney Beard handled all further interviews of Martinez. However, Stahl had some recollection of sitting in on at least a part of one prehearing interview of Martinez conducted by Attorney Beard.

Counsel for the General Counsel never pursued Martinez' claim that he met with Stahl and Ma at the Rodey firm's office in any detail. Instead, most of Martinez' testimony about the meetings at that office focused his meeting with Attorney Beard and Ma. According to Martinez, the first he learned about that meeting came about when Store Director Merritt approached him at his work area in the store and told him that he needed to go downtown to meet with the Company's lawyers. In Martinez' mind, this timing was very problematic because a special operations representative (a person Martinez described as a department expert from the corporate office) had conducted an audit of his department only the day before and had been highly critical of Martinez for neglecting his department. Martinez protested saying that he could not leave work. However, Merritt told him that he had to go because Albertson's would be charged for the lawyer's time if he did not go. According to Martinez, Merritt provided him with the office address where he was supposed to go for the meeting. (This is one of the more significant facts supporting the conclusion I have reached that this meeting, which turned out to be primarily with Attorney Beard and Ma, was the first meeting Martinez had at the Rodey firm.) Martinez finally yielded to Merritt's insistence and went to the Rodey firm for the meeting.

When Martinez arrived at the Rodey firm, he met Attorney Beard and Labor Relations Director Ma. Even though neither of the lawyers said anything to him that day about his willingness to be present and participate, Martinez said that he told them at the time of their initial greeting that it was important that he get back to his work as soon as possible. This remark, Martinez claimed, prompted Ma to send a text message to Merritt about Martinez' concern about being absent from his work duties. Martinez described the start this way:

> Q. What exactly did he say?
>
> A. I explained to him that it was important for me to get back to the store. He texted Don (Merritt). Don texted back, saying there'd be no reprisals against me for me being there.
>
> Q. How do you know what the text message said?
>
> A. I don't.
>
> Q. Okay.
>
> A. I'm going that it's their word—
>
> Q. So you didn't read Danny Ma's text message.
>
> A. No, I did not.
>
> Q. Okay. What did he say to you?
>
> A. Danny Ma—
>
> Q. What were the words he used?
>
> A. Mr. Ma says, I texted Don, confirmed that you'll have no retaliation or rebuttal for being here, being present with me.
>
> Q. Okay. But he did not say that there would be no reprisals for not participating.
>
> A. No.
>
> Q. And he also—well, did he tell you that there would be no reprisals for the answers that you gave him?
>
> A. No.

(Tr. 1182.) The meeting then progressed. Martinez reported that the inquiry at that time focused mainly on Ma's PowerPoint presentation to employees in April 2011.

Both Attorney Beard and Ma testified about this interview but neither addressed Martinez' account of his initial reluctance or the text message exchange he described. Attorney Beard said that he interviewed Martinez on two occasions in preparation for the hearing. He said he first met with Martinez on September 21, or 5 days in advance on the opening of the hearing. Ma was present and Beard recalled that Stahl may have been in and out during the meeting. Attorney Beard said that when he interviewed Martinez, he closely followed an outline of subjects that Stahl had prepared following his interview with Martinez. He candidly acknowledged that he did not address *Johnnie's Poultry* assurances at this meeting. Attorney Beard explained that he did not do so because he knew that Martinez "had already agreed to testify" for the Company, that he planned to cover the same subjects that Martinez had earlier discussed with Stahl and Ma, and that he knew that Martinez "had been given the *Johnnie's Poultry* assurances by Mr. Stahl and/or Mr. Ma." (Tr. 1654.) Beard denied that he interviewed Martinez about his own union activities or sympathies or those of other employees.

Later, Merritt again sent Martinez to the Rodey firm where he met with Attorney Beard alone. This time, Martinez said, Beard explained that "they were coming to court" and that he may or may not be called as a witness but that he had to be at the hearing location at a particular time. Attorney Beard said that his second meeting with Martinez took place on November 1. At the time, the hearing had been adjourned following 4 days of testimony, and was set to resume on November 7. No one else was present for this meeting. Attorney Beard admittedly did not address the *Johnnie's Poultry* assurances at this meeting because he already knew that Martinez had voluntarily agreed to testify. Attorney Beard said that he covered the same subjects with Martinez that had been covered before with one exception. That added topic concerned Martinez' report to Assistant Store Director Garcia about seeing a nonemployee union organizer in the store, and whether he had subsequently heard Store Director Merritt speak with the organizer. This specific topic had been addressed during the first 4 days of hearing.

I found Martinez' testimony concerning the detail and quality of the assurances he received when he first met with Ma and later when he met with Attorney Stahl confused and self-contradictory to such a degree as to be largely unreliable where not corroborated by others. Plainly, Martinez served as a will-

ing informer all along, and save for his first meeting with Attorney Beard, he was undoubtedly a very willing, if not anxious, participant.

For purposes of resolving the issues raised here by complaint paragraphs 5(s) and (t), I have concluded that the various counsel interview Martinez interviewed four times, first by Ma with Seydel present, then by Attorney Stahl with no one else present, later by Beard with Ma present throughout and Stahl present part of the time, and finally by Beard alone. The credible testimony of Ma and Attorney Stahl establishes that both provided the requisite *Johnnie's Poultry* assurances prior to questioning Martinez. Attorney Beard admitted that he did not address the assurances because he had been told by Attorney Stahl that the assurances had been provided to Martinez previously after which he voluntarily agreed to testify about the subjects he covered in his interviews.

Although the Board generally requires strict adherence to the *Johnnie's Poultry* safeguards, it has noted that if has also found "unusual settings and special circumstances may "excuse or mitigate an employer's failure to give the required assurances." *Le Bus*, 324 NLRB 588 (1997), citing a single case, inapplicable here, for the exception. Regardless, in the context found here, I have concluded on the basis of the credible facts that Attorney Beard acted reasonably, properly, and lawfully even though he interviewed Martinez twice without repeating the required assurances that had had been give to this employee on two prior, closely-related occasions.[15]

But for the vagaries of litigation, Respondent may well have called Martinez as a witness well before Beard even became involved in the case. Even so, on the first occasion that Beard interviewed Martinez, everyone agrees that Ma, the attorney who first obtained his voluntary cooperation and agreement to participate as a witness in Respondent's defense, was present throughout. Moreover, after Martinez asserted at the first Beard meeting that he needed to be on the job rather that talking with the two attorneys, Ma promptly interceded to obtain an assurance from the store director that his absence would not be a problem and it was not. This all occurred a week before the start of the hearing, at a time when it could be reasonably anticipated that Martinez might be called as a witness before the first week of hearing was concluded. Moreover, there is no evidence this interview addressed any topic not previously addressed in the two prior meetings Martinez had with the company counsel.

The evidence regarding Attorney Beard's awareness of the events that may have occurred back at store 917 in Martinez' department prior to his first interview with Martinez is scant. What there is comes largely from Martinez' account about the texting back and forth between Ma and Merritt which, despite the ordinary, everyday means by which I "size up" a witness, I almost feel compelled to credit largely because none of Respondent's witnesses responded to his assertions. But at best, the concerns about being absent from the store that Martinez expressed to Merritt initially and then to the two attorneys after arriving at the Rodey firm on September 21 relate to the unfortunate timing of the meeting from his perspective rather than to his willingness to voluntarily cooperate with the defense lawyers. This conclusion is reinforced by the lack of evidence that Martinez had any concerns about meeting with Beard on November 1.

In addition, I find that nothing occurred at any of the meetings warranting a conclusion that the questioning of Martinez ever became coercive. After Ma's initial interview, the questioning at the subsequent meetings largely amounted to reviewing those matters that Ma initially discussed with Martinez. Beard's further inquiry on November 1 pertaining to Martinez' report to management of a union organizer in the store merely sought to determine whether Martinez might have been an eyewitness to a relevant matter already raised at the hearing. Nothing about this added matter indicates that it amounted to probing into Martinez' subjective state of mind, which company officials obviously already knew anyway, or that it was designed to interfere with his statutory rights.

Complaint paragraph 5(s) specifically charges Merritt with coercion. Counsel for the General Counsel questioned Martinez at length in an effort to determine whether Merritt had provided the relevant assurances to Martinez at those times when he sent him off to meet with the company's lawyers. Plainly, Merritt provided no *Johnny's Poultry* assurances nor, in my judgment, did he have a duty to do so. Merritt never questioned Martinez about substantive matters or his protected activities. He did not, for example, pre-screen him for his knowledge before sending him to meet with the defense counsel. Merritt served only as a conduit passing along instructions received from others about the time and place of the meetings. Even though he became heavy handed when Martinez resisted going to the September 21 meeting, Martinez' reluctance then had nothing to do with his willingness to cooperate with the defense.

For the foregoing reasons, I recommend dismissal of complaint paragraphs 5(s) and (t).

D. The 8(a)(3) Allegations

The complaint contains discrimination allegations related to two employees. Complaint paragraphs 6(a) and (b) pertains to the claim that Respondent discriminated against Yvonne Martinez by suspending her on December 1, 2010, and then discharging her on December 4. Complaint paragraphs 6(c) through (f) pertains to the claims that Respondent discriminated against Talie Perea by altering her lunch and break schedules as well as her shift schedule, by denying her request to trade work shifts with another employee, and by denying a leave request she allegedly made.

1. Yvonne Martinez' suspension and discharge

Relevant Facts: Store 917 is a standard Albertson's supermarket. It employs approximately 15 cashiers who work vari-

[15] At least two circuits have looked to the total circumstances in determining whether the questioning of an employee by an employer or its counsel in preparation for an unfair labor practice hearing is coercive. See *Central Transportation, Inc. v. NLRB,* 997 F.2d 1180 (7th Cir. 1993); *Retired Persons Pharmacy v. NLRB*, 519 F.2d (2d Cir. 1975).

ous schedules during the store hours.[16] It has 10 checkout counters equipped with two turntable type devices, one where shoppers place the goods they have selected for purchase and the other at the opposite end where the cashiers place the items for bagging after they have been scanned. In between is a small alcove where the cashier works scanning or entering the customer's items on a computerized system connected to a receipt printer. Also attached to that system is a device adjacent to the receipt printer that produces discount coupon strip(s) for qualifying customers. The coupon strips are known as "Catalina" coupons, named after the company that runs the promotion program. These two printers are on a countertop next to the bagging turntable just above the cash register drawer to the cashier's left when facing the customer aisle. To the right of the scanner is a counter that contains two drawers where miscellaneous items such as cash envelopes, rainchecks, the weekly store ad, scan giveaway forms, pencils, and other supplies are stored.

As noted, Yvonne Martinez worked for Albertson's for 25 years prior to her suspension and discharge in December 2010. Martinez' seniority as a cashier at the store was second only to Gloria Padilla.[17] The General Counsel claims that Albertson's unlawfully discharged Martinez because of her union and protected concerted activities. Respondent contends that it discharged Martinez for cause, i.e., her failure to tender a discount coupon to a customer, or subsequently destroy it, as required by the Company's standard operating procedures.

In the spring of 2010, Martinez and other cashiers discussed among themselves their growing dissatisfaction with the front end operation. These complaints included the failure of their managers to give greater consideration to seniority in scheduling shifts, the failure to post schedules in a timely manner, and the preferential treatment they perceived that management accorded Padilla. On this latter score, Yvonne Martinez and some others felt that Padilla was the only cashier consistently assigned a schedule with 40 hours of work on weekdays when all the others had no fixed schedule, frequently worked less than 40 hours, and often bore the brunt of the business need to reduce hours. Martinez registered a number of complaints to Cindy (Lucinda) Andablo, the front-end manager who prepared the weekly schedules for the cashiers.

Martinez' disenchantment with the scheduling process came to a head on June 19 when she overheard Store Director Merritt and Andablo nearby discussing the allocation of hours for the front-end operation. When she heard them, Martinez purportedly approached and said: "What about me? Why don't I get hours?" Merritt claimed that Martinez spoke with a loud voice and he concluded from her tone that she was being insubordinate. He promptly escorted Martinez to his office where he issued her a written warning for insubordination. (GC Exh. 28.)

The warning made matters worse. Martinez took her complaints about the scheduling and her warning to District Manager Tom Huston. She complained to him that both the scheduling process at store 917 and the writeup Merritt issued had issued to her were unfair. Shortly thereafter, Houston came to the store with a district overseer of the front-end managers. The latter reviewed the scheduling process and Houston spoke first with Martinez and then with Merritt. From Martinez' perspective, her complaint to Houston changed little other than a toned-down version of the written warning Merritt issued on June 19.[18]

A short while after the warning episode, Union Organizer Juan Vasquez approached Martinez in the store parking lot one evening after the end of her workday and asked if she would be interested in a union. When Martinez said that she would, Vasquez asked her to speak with other workers to learn if they would be interested in meeting with him at a nearby restaurant. She agreed to do so.

The following day Martinez began talking with other employees about meeting with Union Organizer Vasquez. She also enlisted Talie Perea to assist in canvassing the workers for that purpose. As a result of their efforts, Vasquez met with a group of about ten store 917 employees at a Pizza Hut located in the vicinity of the store. At this gathering, he explained the organizing process and how employees would benefit from union representation. Martinez asked Vasquez a number of questions during the meeting and later both she and Perea took extra union authorization cards to distribute at work.

When Perea went to work the day after the meeting, Alice Andrick approached her for an explanation as to why she had not been invited to the Pizza Hut meeting the previous evening. Andrick also pressed her for information about who had attended.

In the coming weeks, Martinez and Perea talked to their coworkers about unionizing. Their discussions took place in a variety of places around the store where they typically talked with one another about both work and nonwork matters, including the breakroom, the parking lot before and after work, and during brief encounters on the sales floor when they would be engaged in incidental tasks while there was a lull in the customer flow. Martinez distributed union authorization cards to those who specifically asked for one or who expressed at least some interest in unionizing. She gave the signed cards she received to the union organizers. The other store workers came to recognize Martinez and Perea as the employees most active with the union organizing effort.

Around the same time that Vasquez met Martinez, he made a few forays into store 917 attempting to establish contacts with the workers. Two employees in particular, Gloria Padilla and Sebastian Martinez, rebuffed his approach and promptly reported him to management. As found in earlier sections, Merritt passed along these and subsequent contacts, activities, and rumors as well as his own observations to Angel Seydel and Danny Ma as District Manager Houston instructed him to do.

[16] The store opens at 6 a.m. and closes at midnight 7 days a week.

[17] At various locations in the early portions of the transcript, Padilla is incorrectly referred to as Pedia.

[18] The original version of Martinez' warning (GC Exh. 28) stated that she had walked away from a customer in order to lodge her complaint about her hours. The revised version made no mention of customers. (GC Exh. 27.)

From August through the following April, Merritt and his subordinate managers became very watchful for union organizers in and around the store. They received plenty of help. A veritable network of employees kept regularly Merritt updated on various activities that heard and observed. This network included, in addition to Padilla and Sebastian Martinez, Service Manager Rose Trujillo, cashiers Tomo Chavez and Albert Sanchez, and lobby clerk Vangie Chavez. (Tr. 385–387, 391.) Merritt received information from one or the other of this group about once or twice a week and he passed the information he received along to Seydel and Ma.

Merritt admitted that he knew Yvonne Martinez had been active in the organizing drive prior to her discharged at the beginning of December. (Tr. 449–450.) This admission came on the second day of the hearing when Merritt was questioned by Respondent's counsel after counsel for the General Counsel called him as an adverse witness. Two months later when Respondent called Merritt as its own witness it questioned Merritt about this subject again and Merritt explained that a grocery manager from another store told him in early 2010 that Martinez had favored a union about 10 years ago. (Tr. 1469–1470.) I do not credit this subsequent explanation. Rather I find it reasonable to infer that Merritt learn of Martinez' union activities and sympathies from the network of informers he cultivated at store 917 during the organizing activities there as well as the careful observations he and other managers undertook between late July 2010 and the time of her discharge.

For the several years, the Company has held a special promotion around the Christmas shopping season utilizing the Catalina coupon system. Under this promotion, customers whose register receipts reach or exceed $100 receive a Catalina coupon entitling them to a $10 discount on the purchase of any of the gift cards available at the store. If for any reason the qualifying customer is not provided with the coupon or does not want it, the store employees have strict instructions to destroy it. This promotion in 2010 started on November 25 and ended on December 7, with the coupons issued in this period expiring on December 31. (R. Exh. 16.)

Cashiers periodically receive instructional materials regarding the procedures for handling a whole host of discount coupons redeemable at the Company's stores. (GC Exh. 10, Exhs. 1, 3, and 4.) Some are stunning in their detail. One labeled "Albertsons Coupon Acceptance Cashier Training" describes separate, detailed procedures that must be followed for seven different types of discount coupons, including the Catalina coupons. This particular document requires the cashier to initial an acknowledgment of the numbered instructions number by number. The bulk of the credible evidence shows that the front-end manager or the assistant substituting for that supervisor is expected to resolve any doubts cashiers encounter or actual disputes they have with customers in connection with all sorts of discount coupons.

Martinez began work at 6 a.m. on December 1, 2010, at checkout counter 8. Typically, Martinez said, the mornings are very busy at the checkout counters and the store security video confirms that to be the case that particular morning. (GC Exh. 29.) Throughout that morning she was ringing up a number of short orders interspersed with some large orders. Around 9 a.m., Martinez noticed that she had failed to give a customer the $10-Catalina discount coupon she earned by making a $100 + purchase. After she noticed the coupon she tore it off and set it on the counter to her right just above the supply drawers and continued with her work.

Shortly thereafter one of the customers gave Martinez a doughnut from the supply he had purchased, a courtesy that occasionally happens. Martinez took a plastic shopping bag and put it on the counter just above the supply drawer and set her doughnut on it. In between the following customers, Martinez ate from the doughnut. After she had eaten all she wanted, Martinez claims that she slid the sack with the remaining portion of the doughnut off into the storage drawer to keep until later. She speculated that the discount coupon may have gone into the drawer along with the bag and her left over pastry.

The security video shows that for the next 75 minutes or so, Martinez continued to have a number of customers but she also had several lag periods. On some occasions she simply stood at her register area. On a few occasions, she disappeared out of sight in the direction of the shopping area. On two or three occasions, she went briefly into the working area of the customer service desk. During nearly all of these lulls, no courtesy clerks or other employees can be seen in the immediate vicinity of Martinez' checkout counter.

Around 10:20 a.m., Assistant Front-end Manager Andrick came to Martinez' checkout counter and began rummaging through the supply drawers, ostensibly looking for packing tape.[19] Andrick claims that she found the plastic bag in the drawer and set it on Martinez' checkout scanner with a verbal instruction not to waste bags. Then Andrick said she found the discount coupon. Andrick took the coupon and left immediately without saying anything to Martinez about it. There is no indication on the security video that Martinez, who was waiting on a customer throughout her Andrick's presence, noticed her leave with the coupon in hand nor is there any indication that Martinez later opened the storage drawer between the time Andrick left with the coupon and the time she returned later to relieve Martinez for her lunchbreak.

The times generated by the receipt printer and the Catalina printer clearly are not synchronized. The transaction the Company's loss prevention officials identified as having generated the issuance of the $10-discount coupon at issue here shows that the register receipt printed 2 minutes after the Catalina coupon printed. (Compare R. Exhs. 12 and 26.) There is also evidence that the machines do not always print simultaneously and that they have to be serviced from time to time to correct that problem. The times recorded by the security camera that recorded relevant events are even further out of synch.

[19] Andrick claimed that Merritt instructed her to get the tape to use on the store ads that were being blown around by the wind. Supposedly, this direction occurred at checkout 7. Tr. 244. Her account does not appear consistent with her movements in the security video. It shows that she emerged from the safe room, went to look first in the storage drawer at checkout 7, and then went to checkout 8 where Martinez was waiting on customers. Merritt is not visible at checkout 7 or anywhere else in the security video around this time. (GC Exh. 29.)

The security video shows that, after finding the coupon, Andrick walked directly from the check stand, through the service area and into the safe room. Shortly thereafter, she emerged, spoke briefly to a clerk at the service area, and then return to the safe room. After a few moments, the same person that Andrick spoke to entered the safe area. Andrick explained that she had Vangie Chavez come into the safe room to witness that she put the coupon in the safe. (Tr. 248.) Before she did so, Andrick wrote, "Found In Cashiers Drawer" on the back of the coupon and initialed her writing. Chavez wrote, "I Saw Alice Put in Here" below her first name on the back. (R. Exh. 12.) Andrick said she used this procedure for handling the coupon discovery because some unnamed person claimed that Martinez' daughter had redeemed a couple of the discount coupons in the past. (Tr. 284–287.)

About 10 minutes after finding the coupon, Andrick relieved Martinez for lunch. When Martinez returned from her break, a grocery employee was near her checkout stand and told her that Merritt wanted to see her in the safe room. When she went there, Merritt told her "everything" had been taken care of and to go back to her register which she did. Sometime later Andrick approached Martinez with a copy of the Catalina coupon policy statement to sign. Martinez told her she had already signed one but agreed to sign another after Andrick insisted.[20]

Shortly after Martinez signed the Catalina coupon form, Andrick returned to her station, closed her off, and instructed her to go to Merritt's office. On the way, Martinez asked Andrick what Merritt wanted to see her about and Andrick told her, "Oh, I know what he wants to see you for but I'll let him tell you."

When Andrick and Martinez arrived at the store director's office, Merritt was present with District Loss Prevention Manager Mark Zbylut on a speaker phone. Zbylut questioned Martinez about the discount coupon found in her drawer and her familiarity with the company policy concerning them. After warning her that it was a very serious matter, Zbylut requested that she write an explanation in her own words of what had occurred. Martinez prepared a brief statement that merely said, "Was not aware of putting a coupon in drawer." At the end of the interview, Merritt informed Martinez that she would be suspended pending additional investigation and that he would call her later.

On December 2, Zbylut said that he went to store 917 and viewed the security video associated with the transaction. The next day he submitted his report concerning his telephone interview with Martinez and his review of the security video. Based on his review of the security video, Zbylut pegs the following important times as shown on the video timing system: (1) transaction triggering the issuance of the disputed coupon starts at 9:03:01; (2) Martinez gives the customer the receipt for the transaction but not the coupon at 9:04:06; (3) after checking out other customers while the courtesy clerk is present assisting her, Martinez removes the disputed coupon at 9:05:54 "and places it on the counter or in the drawer behind her." Zbylut noted that the courtesy clerk started to walk away just before Martinez reached over to tear of the coupon.[21] (R. Exh. 29.)

After Associate Relations Manager Seydel reviewed the Zbylut's investigation report, she recommended up and down the chain of command that the Company discharge Martinez for violating the Catalina coupon policy. The violations, as detailed by Seydel, included: (1) failing to give the coupon to the customer who earned it; (2) failing to destroy or discard the coupon after she realizing it had not been given to the customer; and (3) keeping "the coupon for personal use instead of discarding it." In her written recommendation to the Mark Blankenship, the human resources director, on December 3, Seydel reasoned that Martinez had violated the coupon policy by failing to give it to the customer and then placing "it in the check stand drawer." She continued, "[e]ven if her intent was not to use the coupon herself," Martinez "did not follow the policy by failing to give the customer the coupon and removing it and not tearing it up."[22] (GC Exh. 5.) About 90 minutes later, she notified Store Director Merritt of her recommendation that Martinez be terminated for failing to follow the coupon policy.

At the hearing, Seydel claimed that her discharge recommendation in Martinez' case was consistent with the action taken in all other instances where employee violated the Catalina coupon policy. Blankenship, however, recognized that Martinez' situation did not fit squarely with the enforcement precedent concerning that policy. He acknowledged that her situation was unlike all other instances where the Company dis-

[20] Andrick said that Merritt, who contacted Associate Relations Manager Seydel after learning of the coupon, instructed her to get Martinez to sign the form after she told him about finding the coupon. The Catalina coupon policy statement cashiers must sign provides:

> It is extremely important that all "Checkout Coupons" (Catalina Coupons) be given to the customers that they are intended for. Checkout Coupons are the coupons that print at the checkstand on the checkout Coupon Printer next to the cash register. These coupons are printed specifically for a certain customer, based on what the customer purchases.
>
> It is important that all employees understand and follow the Company policies with respect to Checkout Coupons:
>
> 1. The cashier must tear off *any* Checkout Coupons that have been printed at the end of each order and give them to the customer along with the receipt.
>
> 2. If for any reason *you* fall to do #1 above, then the coupons printed for a previous customer must be destroyed by tearing them in half lengthwise and discarding them. They are not to be given to another customer or kept for personal use.
>
> 3. Coupons are to be given to the customer for use on future orders; they are not to be applied to the current order.
>
> 4. In the event a coupon is found or offered from a customer, an associate cannot accept or use it.
>
> Associates violating the Company's Checkout Coupon Policy will be subject to termination without further warning.

Martinez signed copies of this statement three times: November 11, 2008, and December 1, 2009, and December 1, 2010, the latter after Andrick discovered the coupon.

[21] The courtesy clerk was never identified. There is no evidence anyone spoke to this clerk during the investigation leading up to Martinez' discharge.

[22] However, at the hearing Seydel reiterated her belief that Martinez kept the coupon for her personal use. Tr. 53.

charged an employee for violating the policy in that she did not have personal possession of the coupon and she had not attempted to use the coupon. Seemingly for that reason, Blankenship hesitated in signing off on Seydel's recommendation until after seeking District Manager Houston's opinion via an email on early on December 4 inside 2 hours of the time of the scheduled discharge. Houston argued that Martinez had handled the whole matter deceptively and had "changed her story 3 times when questioned by Don." Although he agreed to go along with a "last and final" warning as Blankenship proposed, Houston clearly favored the discharge recommendation and Blankenship finally decided to go along. (GC Exh. 7.)

After receiving Seydel's recommendation on December 3, Merritt telephoned Martinez and requested that she meet with him at the store on the next day at 10 a.m. When she arrived, Merritt met with her in the bookkeeper's office and informed her of her discharge for violating the coupon policy. He claims that Martinez began shouting at him. She claims that she demanded a copy of the policy and her discharge papers. In response, Merritt told her that he would call the sheriff if she refused to leave. Martinez subsequently protested to Blankenship but to no avail.

Analysis and Conclusions: The outcome here turns on Respondent's motive for discharging Martinez. The General Counsel argues her union activity motivated her discharge. Respondent argues that her discharge was for cause, namely, the failure to adhere to the Catalina coupon policy. Based on the analysis below, I have concluded that Respondent discharged Martinez because of her union activities and sympathies, and her protected concerted activities.

The Board employs a causation test in determining the motive underlying an employer's adverse action against an employee. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Later, the Supreme Court approved *Wright Line* in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). As refined over the years, that test first requires the General Counsel to persuade that a substantial or motivating factor for the employer's challenged decision was prohibited by the Act. If that burden is met, the burden of persuasion then shifts to the employer to prove as an affirmative defense that it would have taken the same action even in the absence of the employee's protected activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), and the cases cited there.

To carry his burden, the General Counsel must establish by either direct or circumstantial evidence that (1) the employee engaged in a protected activity; (2) the employer knew of that activity; and (3) the employer took adverse action against the employee motivated in substantial part by the employee's protected activity. *FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994). If he succeeds, then the burden of persuasion shifts to the employer who must show that the same action would have been taken even in the absence of the employee's protected conduct. An employer does not carry its burden by merely showing a legitimate reason for imposing discipline against an employee; instead it must persuade by a preponderance of the evidence that the same action would have been taken even absent the employee's protected activity. *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

I find ample evidence to support a conclusion that the General Counsel met his *Wright Line* burden of showing that Martinez' discharge was motivated in substantial part by her union and protected concerted activities. Martinez took an active role and vocal on two fronts, the discontent among the cashiers over the store's scheduling process, and the Union's subsequent efforts to organize the remainder of store 917. Both are core activities guaranteed by Section 7.

The credible evidence shows that she and other employees discussed their grievances concerning the store's scheduling practices that they felt were strongly skewed in favor of the most senior cashier at the expense of the others as well as the inability of management to post their weekly work schedule in a timely manner. Obviously, when employees work random schedules, the timely completion of the scheduling process takes on considerable significance. The precipitous written warning issued to Martinez in the mid-June for her edgy comment about the distribution of hours, which Merritt impetuously labeled as insubordination, illustrates the remarkable degree of animus that even a basic level of employee dissent generated here. It also identified Martinez as a troublemaker.

Martinez' warning and Houston's unwillingness to do anything significant about it, at least from her perspective, segued easily into the favorable reception Martinez gave to Union Agent Vasquez' approach about organizing the rest of store 917. She quickly signed on to that idea and arranged for a core group of employees to meet with Vasquez and initiate an organizing effort among the other store employees. Martinez steadfastly assisted in this effort by promoting the Union to her fellow employees and by obtaining signed authorization cards from those who shared her interest in unionizing the rest of the store.

Unquestionably, the Company knew about Martinez' participation in the organizing effort. Merritt's untruthful effort to explain away his early admission early that he knew about Martinez' union activities before her discharge coupled with the unceasing surveillance of the organizing efforts and the cadre of employee informers make this conclusion entirely unavoidable. Merritt's generally unconvincing demeanor and his attempt to claim that his knowledge of Martinez' union sympathies was essentially stale and unrelated to Local 1564's ongoing organizing campaign was made all the worse by the suggestion that he learned of it out of the blue in a conversation with another manager. In addition, Merritt acknowledged without any significant qualification that he kept Ma, Seydel, and Houston apprised of nearly everything he learned about the organizing campaign from these sources. Their efforts to deny they knew of Martinez' involvement with the union involvement prior to her discharge are disingenuous.

There is also ample evidence of union animus on the Company's part. The unlawful surveillance I have found here came about largely at the encouragement of the Company's district and division management. Moreover, even the lawful activities the Company swiftly employed in response to Local 1564's organizing drive (such as Seydel's presentations in August 2010, Blankenship's promotional about various company bene-

fits, and the barring of Vasquez from the store) exhibit the kind of strong and swift opposition the Board and the courts rely on to establish the animus element of the General Counsel's case. See, e.g., *Healthcare Employees Union*, 441 F.3d 670, 681 (9th Cir. 2006), citing *Tim Foley Plumbing Service*, 337 NLRB 328 (2001).

For the foregoing reasons, I find the General Counsel has provided an ample basis to infer that Martinez' discharge, after 25 years of service, resulted in substantial part from a combination of her concerted and her union activities in the summer and fall of 2010. In the wake of the General Counsel's evidence, Respondent was required under *Wright Line* to show persuasively that the same action would have been taken even absent her protected activities.

I have concluded for the following reasons that the Company failed to meet its *Wright Line* burden. First, as noted above Merritt was untruthful about his knowledge of Martinez' union activities. Worse yet, Ma claimed that he first learned of her claim that she had been involved with the Union when she filed an unfair labor practice charge about her discharge in March 2011. His blithe assertion on this critical point is not at all credible considering the record as a whole.

Secondly, I have concluded that Zbylut's so called investigation is little more that a cover for the managers seeking to discharge Martinez. I have reviewed the security video in evidence several times, occasionally with the aid of a magnification device. Although I have no basis to quarrel (with a single exception addressed below) about some of his basic observations detailed in his final report, the incomplete nature of what he represented in his report supports my conclusion that it has significant gaps. His testimony did not convince me otherwise.

From the perspective I have been able to observe from the video in evidence, Martinez almost never looked squarely at the receipt and Catalina printers. Rather, in the period described in Zbylut's report, she appears to be largely engaged with the customers and their purchases. When the printers functioned, she almost always appears to reach back to her left at what could be reasonably described as a 7:30 or 8 a.m. position from her primary direction and place her left hand on the receipt printer. What I observed on the critical transaction is a receipt that appears to be nearly a foot long, quite unlike the abbreviated (3 inch or so) document in evidence. Furthermore, I am unable to conclude from the security video that Martinez even looked in the direction of the receipt printer or the Catalina printer when she tore the receipt from the printer and handed it to the customer.

Later, at the time Zyblut identified in his report as Martinez' coupon discovery moment, his report strongly implies that the courtesy clerk assisting Martinez was walking away. This implies that Martinez waited until the courtesy clerk left before she dealt with the coupon that had been printed three customers ago. That is clearly not the case. In fact, at the time Zyblut identifies as the time when Martinez put the coupon "on the counter or in the drawer," the courtesy clerk was in the customer aisle looking in her direction almost within an arm's length of Martinez in the cashier's cove.

Worse yet, Zyblut's report skips the 75-minute interval from the time of the coupon generating transaction to Andrick's discovery while rummaging through the storage drawer. In this interval, the security camera shows numerous opportunities available to Martinez while alone and unobserved around the checkout counter to remove it from the drawer and put it in her pocket, if as Andrick, Seydel, and other managers so quickly charged, she harbored an intention to convert the coupon to her own use. I find this defect in the investigative report seriously undermines the conclusion harbored by those in the management chain that carried out the discharge (with perhaps the exception of Blankenship) that Martinez sought to appropriate the coupon to her own use. On the contrary, it supports the conclusion I have reached, based on Martinez' account, her testimonial demeanor, and the nearly conclusive video evidence, that she never really gave the coupon much thought at all in view of the customer traffic at the time. In fact, even after Andrick rummaged through the storage drawers at her register, Martinez made no moves that indicate that she harbored a concern for the whereabouts of the coupon.

Third, the conduct of management (again with the exception of Blankenship for a short time on the morning of December 4) from Andrick all the way up the chain of command, shows a single-minded focus on Martinez and a remarkably rigid application of the Catalina coupon policy as to her. But in rigidly applying the policy, they all overlooked the fact that the plain terms of the policy shows that it applies to *all employees* even though the policy obviously establishes primary responsibility in the cashiers. Hence, the record contains anecdotal evidence about employees and managers of all sorts finding coupons on the floor or still uncut from the printer and destroying them as required by company policy. However, the security camera here shows that the courtesy clerk assisting Martinez stared straight in the direction of the coupon printer through the generating transaction and two more transactions without doing anything to the $10-discount coupon that supposedly was at the printer for more than 2 minutes before Martinez removed it. Insofar as is known, none of the participants in the decisionmaking circle made any effort to even identify the courtesy clerk and question or correct him about his failure to destroy the coupon he would have obviously observed. One can easily conclude, as I have, that the explanation for this remarkable omission lies in the fact that Martinez was targeted for some reason other than her failure to give the coupon to the customer and her subsequent failure to destroy it, all of which the courtesy clerk could have done also.

Other evidence suggests that Martinez had a target on her back as far as the Company was concerned. Andrick, the assistant front-end manager who would later tell another active unionist that the Company was looking for a reason to get rid of her, handled the discovery of the coupon in such an officious manner as to suggest that the Company wanted to pin something on Martinez. She never bothered to seek an explanation from Martinez; instead, she dragooned a witness from the service desk and secured coupon in the store safe along with other valuables. Merritt's first instinct appears to nail Martinez by requiring that she sign a current copy of the coupon policy

statement and contact Seydel for directions before he even spoke to Martinez. All this suggests a single-minded effort to build a case against Martinez that would warrant discipline. The conduct of the store managers and the other company officials in connection with the discharge of Martinez simply fail to persuade me that the object of Martinez' severe discipline was to preserve the integrity of the Company's coupon policy.

As I have concluded that Respondent failed to meet its burden under *Wright Line* with a persuasive case, I find that Respondent violated Section 8(a)(1) and (3) by suspending and discharging Martinez.

2. The Perea discrimination allegations

The complaint paragraphs 6(c)–(f) allege that Respondent discriminated against Perea by (1) altering her lunch and break schedule on May 2, 2011; (2) altering her shift schedules on May 10 and 14; (3) denying her request to trade shifts with another employee on May 30; and (4) denying her request for leave on May 31. Respondent denies these allegations.

Relevant facts about complaint paragraphs 6(c) and (d): Talie Perea, a cashier, has been employed by Albertsons for 9 years. The last 4 years of her tenure she has worked at store 917. Perea's husband, Ivan, works in the meat department at store 917 and is a member of the unit represented by Local 1564. The Pereas have seven children, a fact that affects at least Talie's availability for work at times.

As noted before, Martinez enlisted Perea's help in canvassing other store employees' interest in unionizing. Perea willingly agreed to help. She also attended the initial Pizza Hut meeting, promoted the Union to her fellow employees and distributed authorization cards to employees who expressed an interest. She spoke to Assistant Front-End Manager Andrick about attending the Pizza Hut meeting the following morning and the two talked about the Union on other occasions. Merritt specifically identified Perea in one of his reports to Seydel that I have quoted above at p. 25.

Under company policy, the employees, including the cashiers, receive lunchbreaks or 15-minute breaks, depending on the length of their shift. Employees working up to 6 hours get a 15-minute break but no lunchbreak. Those working between 6 and 8 hours get one short break plus the meal period. Those working 8 or more hours get two short breaks and a meal period. The break periods are paid but the meal period (half an hour) is not paid. The cashiers are relived from their stations by the front-end manager in charge, be it Andablo or one of her assistants. Under established policy, supervisors are supposed to make an effort to give the paid break as near as possible in the middle shift or the middle of the period the employee works before and after lunch. As the lunchbreak is unpaid, employees clock out and back for lunch.

The Company utilizes a specialized software program (Visual Labor Management (VLM)) to schedule employees. At relevant times Front-End Manager Andablo used that program to schedule the front-end employees. When preparing a work schedule, the supervisor enters all approved requests for time off and any known shift limitations that can be accommodated so the program will prevent the scheduling of an employee for work during those periods. Next, the supervisor calculates the total work hours available for assignment from information provided by the store director about the projected sales for the upcoming week. The scheduler in turn selects 3 weeks with similar sales out of the past 8 weeks and the program then calculates the total work hours available for assignment. Once completed, the supervisor allocates available hours by seniority. The schedule will reflect the unpaid lunchbreak usually at the midpoint in the employee's workday but it does not reflect the 15-minute paid breaks.

Andablo said that either she or one of her assistants will release the cashiers for their short breaks based on the amount of customers at the time and the availability of relief personnel. Although lunchbreaks are reflected on the weekly schedule, Andablo said that they too can be adjusted occasionally to meet both the store needs and the worker's preference.[23] After the front-end manager completes the schedule and corrects any mistakes, the store director reviews it to confirm that it conforms to the allowable labor expenditures, that there is adequate manpower coverage for the anticipated business, and that the senior employees have been allocated the most hours. Following that review, the printed schedule is posted, usually by Friday afternoon.

Perea linked the events that form the basis for complaint paragraph 6(c) with the events that underlie complaint paragraph 6(d). This series of events begins with Perea's claim that Front-End Manager Andablo became quite agitated over the fact that Assistant Store Manager Garcia and Assistant Front-End Manager Andrick selected Perea as a substitute for "Lori Kenton" one day in late April when that cashier was absent. According to Perea, Kenton's shift, as adjusted by Garcia at Perea's request, ran from 8 a.m. to 4:30 p.m. Based on reasonable inferences from Perea's account, Andablo became upset at all involved with this substitution because she felt it was the front-end manager's prerogative to select substitutes and she had not been consulted.[24] (Tr. 806–809.)

By Perea's account, Andablo ignored Perea's repeated requests to be relieved for the breaks called for by Kenton's schedule. After calling Andablo about three times to be relieved for a break, Perea claims that Andablo finally closed her register and sent her on break. Perea said she then worked for only about half an hour after returning from the morning break before Andablo told her to take the lunchbreak provided by the schedule.

Supposedly, Perea also covered two shifts that same week for another cashier, Tomisita Chavez when this worker was absent because of an illness.[25] Again, Perea claimed, Garcia

[23] Andablo occasionally adjusted Perea's meal break to coincide with her husband's.

[24] As a defensive measure against the organizing campaign, the store quit using employee surnames when preparing work schedules. No one named "Lori" appears on the VLM schedules but they do show a cashier named "Laura." I have presumed that Laura on the VLM schedule is the "Lori" Perea referred to in her testimony. I have also presumed that Laura is a relatively junior employee as her name appears near the bottom of the VLM weekly schedules.

[25] No one named "Tomisita" appears on the VLM schedules but they do list a cashier named "Tommy." I presume that Perea's reference to Tomisita is the same person named "Tommy" on the VLM schedules. I

and Andrick made the arrangements for her to substitute for Chavez. These shifts, by her account, ran from 8 a.m. to 2 p.m. Perea asserted that Andablo again hassled Garcia, Andrick, and herself over these substitutions. (Tr. 812–814.) On both of these occasions, Perea said, she had to pester Andablo for her break periods.[26] Andablo flatly denied that she drastically altered the break schedule as described by Perea. She also denied that Perea ever complained to her about the release times for her breaks and for her lunch. (Tr. 1353–1355.)

The following week Perea complained to Store Director Merritt the about the treatment she perceived that she had received from Andablo the previous week. She claims that she told Merritt of Andablo's agitation with her and the persistent difficulty she encountered in getting relieved for breaks. According to Perea, Merritt promised to speak to Andablo about her concerns but Perea supposedly cautioned him against doing so for fear that Andablo would retaliate against her through the scheduling decisions. Beyond that, Perea said that Merritt then launched into a lecture about the excessive gossiping at the front end. Merritt did not testify about this meeting and it is not clear if he ever spoke to Andablo about Perea's complaints.

Andablo then scheduled Perea for a total of 39-work hours the following week. The schedule called for her to work every day of the week. On 2 of those days, her shifts ran relatively late. Thus, Perea's May 10 shift ran from 5 to 10:30 p.m., and it ran from 6 to 11 p.m. on May 14. Merritt said that Perea complained to him about her late shift on May 14 but said nothing about the lateness of the May 10 shift or any other aspect of her schedule. As a result of his efforts, Perea's May 14 shift was switched to another employee. As a result, she did not have to work at all on May 14.[27] Perea's made only a vague reference to this fact that confirms Merritt's account.

Perea also called Associate Relations Manager Seydel in Denver about her schedule that week. The next time that Seydel went to store 917 she (along with Assistant Store Director Garcia) met with Perea. In this meeting, Perea complained about the scheduling of late shifts the previous week and about Andablo's failure to release her for breaks in a timely manner.[28] Perea attributed Andablo's animosity toward her to personal disagreements between the two of them that had existed for years. Seydel said that Perea made no claim that her involvement with the union organizing campaign contributed to the Andablo's hostility. (Tr. 1534–1535.) Seydel said she looked into Perea's work schedules and found that she always worked numerous different shifts. She also found occasions when Perea worked as late as 10 or 10:30 p.m. (R. Exh. 36.)

Analysis and Conclusions: I have reviewed the cashiers' weekly schedules for the entire months of the April and May 2011. (GC Exh. 31.) Counsel for the General Counsel makes no claim that these weekly work schedules in evidence are fabricated or otherwise unreliable. In fact, counsel for the General Counsel subpoenaed those weekly schedules covering a 6-month period, presumably examined them with a reasonable degree of care and then introduced them in evidence. I have concluded based on my detailed examination that they do not square with Perea's rambling and dramatic testimony.

The VLM schedules for April and May 2011 show that the Laura was only rarely scheduled to work morning hours. Laura's schedules in this period do not list any 8 a.m. to 5 p.m. shift, or any other shift starting 8 a.m. The bulk of her assigned shifts began around 2 p.m., or later, day in and day out. The April and May VLM schedules reflect that she was scheduled to work morning hours only on four occasions. The earliest time she started work was at 8:30 a.m. (Saturday, May 14), the day when Perea was originally scheduled to work from 6 to 11 p.m. but was later deleted due to Perea's complaint. On Sunday, May 1, Laura's shift began at 10 a.m. She was scheduled to start work at 11 a.m. on May 22 and 30. None of the morning starting times reflected in Laura's VLM work schedules fit the time and character of the situation Perea described at great length in her testimony.

In addition, on those days where the weekly schedule reflects that Laura would have qualified for a meal break by reason of the length of her shift, Perea was also scheduled for work. In the 2-month period I examined, Laura was scheduled to work sufficient hours on five occasions to qualify for a lunch period, April 22 and 23, and May 28, 29, and 30. Perea worked enough hours on all those same days to qualify for a meal period save for May 28 when she was not scheduled for work at all. (GC Exh. 31.) Based on this analysis, I am unable to conclude Perea's account about the bunching of the paid break with the lunchbreak is worthy of credit.

Similarly, I have reviewed the work schedules of Tomisita Chavez (Tommy) for the last 2 weeks of April and the first week of May. In the April 17–23 period, Perea would not have been available to replace Chavez because their schedules overlapped. She would have been available to work 1 day in place of Chavez during the April 24–30 workweek. On that day, April 27, Chavez' schedule called for her to work 8 a.m. to 4 p.m. with a lunch period from 11 to 11: 30 a.m. In the workweek of May 1–7, Chavez was scheduled for only 1 day where she had a meal break (May 4) but Perea was also scheduled to work 5 plus hours that same day.

Based on my analysis of the VLM records, Perea's emphatic testimony about the extensive harassment she supposedly suf-

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have further presumed that "Tommy" is a more senior cashier as her name appears second on the schedule just beneath Gloria Padilla, the most senior cashier. I have also presumed that "Tommy" is the other cashier Perea supposedly substituted for in late April.

[26] Perea testified: "She didn't want to send me to break. It was a battle with her. I had to call her on the phone. I had to beg for my break. I had to ask her several times for my break. Okay. In a minute, I'll give it to you. Well, that minute passed half an hour, an hour." Tr. 812–813.

[27] Merritt's testimony seems to imply that Perea may have worked another shift on May 14. However, Perea's time punch record for the month of May 2011 shows that not to be the case as she had no time punches for May 14. See R. Exh. 35. No evidence shows a complaint by Perea because she lost a shift that week. In any event, absent the May 14 shift, Perea's schedule would have called for 34 hours of work, a number not at all out of line with the amount of work assigned to her in other weeks.

[28] In her own testimony about her meeting with Seydel, Perea acknowledge almost off-handedly that her original schedule for late work on May 14 had been changed.

fered at the hands of Andablo over her break periods while substituting for these other two other employees has, as the saying goes, "no legs." I simply find it impossible to credit her testimony in the face of the contradictory documentary evidence. For this reason, and for the added reason that Merritt admittedly arranged to relieve her from the only late shift (May 14) about which she complained, I have concluded that the General Counsel failed to prove by a preponderance of the credible evidence that Perea suffered the adverse actions alleged in the complaint paragraphs 6(c) and (d). Accordingly, I find that the General Counsel failed to meet his *Wright Line* burden as to these complaint allegations. Hence, I recommend dismissal of complaint paragraphs 6(c) and (d).

Relevant facts about complaint paragraphs 6(e) and (f): Perea claims (and complaint par. 6(f) is meant to allege) that Andablo refused her request for an off day on Monday, May 30, 2011 (Memorial Day). Andablo claims that Perea never made the standard request to have the day off. Perea sort of contradicted this assertion. She said that she entered a request in Andablo's system to have that day off as early as February or March, probably on the back page of the form Andablo kept for this purpose. Perea said she knew that early that she would need to take Memorial Day off in order to accompany her son, who suffered from a bleeding problem in an ear, to an appointment with a medical specialist for treatment.

After learning that she had not been given the day off, Perea requested that Andablo switch her May 30 shift with Albert Sanchez' June 3 schedule. On May 30, Sanchez was scheduled to work from 8 a.m. to 4:30 p.m. Perea was scheduled to work from 9 a.m. to 5 p.m. Perea was not scheduled for work on June 3. Andablo refused to approve that request (see complaint par. 6(e)), in essence, because it would leave the store with inadequate coverage on May 30 because of the overlapping schedules of Perea and Sanchez on that day.[29]

The VLM schedules show that Andablo honored Perea's requests to be off work May 24, and June 3, 4, and 5. (GC Exh. 31.) The copy of the request book provided for employees who do not want to be scheduled for specific days reflects in Perea's own handwriting that she wanted those 4 days off. The book does not show any similar request by Perea, or any other employee for May 30, the Memorial Day holiday. (R. Exh. 43.)

The copy of the request book in evidence does not show a request by Perea to be off on May 30 that she may have entered on the back side of a page on an earlier date around the times she claimed in her testimony. This is because Respondent asserted, in response to the General Counsel's subpoena, that it could not locate the original of the request book and could only produce the copy it had in its possession. Respondent made no claim that the copy it produced contained anything other than what appeared on the front pages of the original request book. The copy that Respondent produced does not show any writing on the back of the pages where, according to Perea's claim, employees regularly made advance entries for time off and where she claims she made her original request to be off on May 30.

Analysis and Conclusions: Ordinarily an adverse inference would be warranted against Respondent for its failure to produce the original of the request book as requested by the General Counsel. But I do not believe the interests of justice would be served by drawing an adverse inference in the circumstances found here. I have reached this conclusion because Perea went out of her way to vividly describe the dire necessity for being off work that day because of the health of her son. She also described with nearly equal fervor the hostility that Andablo exhibited toward her in the early part of that very month that led her to complain bitterly to the store director and a divisional manager.

By continuing to advance the related allegations in complaint paragraphs 6(e) and (f) in the wake of overwhelming adverse evidence, the General Counsel seemingly seeks to have me believe that Perea entered requests for 4 days off on the front pages of the request book in the week before, the week during, and the week after May 30, all of which were granted, but did not enter a request to be off on May 30 for a desperately critical family purpose. Perea's, and by extension the General Counsel's, argument subsumes that she relied on Andablo's good faith to honor a request she made on the back side of a page months earlier. I find this position to be not at all believable, especially where, as here it is unsupported by a scintilla of evidence that there ever was a doctor's appointment as Perea claimed, or that her mother was pressed into service to keep the doctor's appointment with a child suffering from such a critical condition.

There is not a shred of credible evidence that Perea made any kind of timely request to be off on May 30 apart from her untruthful assertions that Andablo gave her repeated oral assurances to her that she would be off that day. I do not credit Perea's assertions (any of them) about her request for time off on May 30. Instead, I credit Andablo's claim that Perea never requested to be off on May 30 until well after the schedule for that week was prepared and posted. Where, as here, Andablo honored four requests by Perea to be off work in the days before and after May 30, I find it would be irrational to conclude that Andablo's motive for scheduling Perea for work that day was based on her union activities that had been going on for the past 8 months.

Additionally, the complaint allegation about Perea's belated effort to avoid working on May 30 by trading shifts with Sanchez also lacks merit. Although it is true that there is evidence that management regularly approved employee requests to exchange shifts, The General Counsel's argument that this request was "denied by Respondent without any viable business reason" for doing so simply ignores the evidence showing that Perea and Sanchez were scheduled to work virtually the same hours on May 30. Perea's proposed exchange would, in effect, have left the store one cashier short on that holiday.

Accordingly, I find, as to complaint paragraphs 6(e) and (f) that the evidence fails to show that Respondent took the adverse action claimed in that allegations. For this reason, I will recommend dismissal of those allegations.

[29] On May 30, Sanchez was scheduled to work from 8 a.m. to 4:30 p.m. Perea was scheduled to work from 9 a.m. to 5 p.m. Perea was not scheduled for work on June 3.

CONCLUSIONS OF LAW

1. By soliciting employee complaints and grievances in order to discourage them from engaging in union activities; by engaging in surveillance of employee union activities and by creating the impression that those employee activities were under surveillance; and by implicitly threatening employees, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By suspending and discharging Yvonne Martinez in December 2010 because of her union and protected concerted activities, Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3), and Section 2(6) and (7) of the Act.

REMEDY

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

As Respondent discriminatorily suspended and discharged Yvonne Martinez in December 2010, it will be required to offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

The Respondent will also be required to expunge from its records any reference to Martinez' suspension and discharge in December 2010, and to notify her in writing that this action has been taken, and that any evidence related to that suspension and discharge will not be considered in any future personnel action affecting her. *Sterling Sugars, Inc*., 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]