JD(SF)–11–25
Kent, WA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AUTO-CHLOR SYSTEM OF WASHINGTON, INC.

and Case 19-CA-313715

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 46

Carolyn McConnell, Esq. and *Lily Fried, Esq.,* for the General Counsel.
David Hannah, Esq., for the Charging Party Union.
Dennis Westlind, Esq., for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

BRIAN D. GEE, Administrative Law Judge. This case was tried before me in Seattle, Washington, on December 17 and 18, 2024. Based on a charge filed by the International Brotherhood of Electrical Workers Local 46 (the Union) on March 9, 2023, and amended on May 1, August 18, and December 12, 2023, the General Counsel issued a complaint and notice of hearing on March 4, 2024, which was amended on November 29, 2024 (the complaint).[1] Respondent filed answers to the complaint on March 18 and December 3, 2024 (Respondent answer).

The complaint alleges that Auto-Chlor System of Washington, Inc. (the Respondent or Auto-Chlor), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining overbroad provisions in its handbook, interrogating employees, soliciting employee grievances, threatening employees in response to their Section 7 activity, making statements of futility, creating the impression of surveillance, and disparately removing union stickers from employees' clipboards.[2] Respondent denied that it committed any unfair labor practices.

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[1] In its third amended charge dated December 12, 2024, the Union withdrew its allegations that Respondent violated Section 8(a)(5) by failing to recognize the Union and Section 8(a)(3) by issuing discipline to two employees. On the first day of hearing, I granted Counsel for the General Counsel's motion to dismiss pars. 6 and 8 of the complaint. (Tr. 5.) In its charge, the Union also added the allegation that Respondent violated Section 8(a)(1) by maintaining certain provisions in its employee handbook.

[2] On Day 2, at the close of their case-in-chief, Counsel for the General Counsel moved to amend the complaint to allege that Respondent violated Section 8(a)(1) through Scott Wagar, on a specific date between October 18 and November 30, 2022, at the loading dock of the facility by threatening its employees with the loss of previously promised wage increases if they selected the Union as their bargaining representative. Respondent opposed this motion, arguing that granting the motion would be unfair and prejudicial to them. The motion was premised on

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.[3] Based on a careful review of the entire record, including the posthearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Washington State Corporation with an office and place of business in Kent, Washington, that has been engaged in the manufacture and nonretail sale of commercial dishwashers and chemical products. During the 12 months prior to November 29, 2024, Respondent derived gross revenues in excess of $500,000 and purchased and received at the facility goods valued in excess of $50,000 directly from points located outside of the State of Washington. Respondent admits, and I find that during the times material to the complaint Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7). The parties admit, and I find, that the International Brotherhood of Electrical Workers Local 46 is a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, the National Labor Relations Board (the Board) has jurisdiction over this matter, pursuant to Section 10(a) of the Act.

II. STATEMENT OF FACTS[4]

A. Background and Respondent's Operations

Since its founding in 1938, Auto-Chlor has produced and marketed commercial dishwashing machines which automatically dispense chlorine and other chemical sanitizers into the rinse water. Over the years, the company expanded into other fields, such as commercial laundry, housekeeping, surface cleaning, and disinfecting. It now operates approximately 160 branches in 11 states located across the country and provides equipment, products, and services to restaurants, breweries, commercial laundries, and housekeeping companies.[5] (Jt. Exhs. 17, 18, 22, Tr. 249–250.)[6] Respondent admits and I find that, during the times material to the complaint, the following individuals held the specified positions and were Section 2(11) and/or Section 2(13) agents of Respondent. Regional Vice President Aaron Vanderbilt, Regional

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additional testimony on Day 1 of the hearing adduced by the Administrative Law Judge. To determine the appropriateness of the amendment mid-hearing, I conducted an analysis under *Rogan Brothers Sanitation*, 362 NLRB 547 (2015). Pursuant to that, I determined that it would not be inappropriate to allow this amendment. I therefore granted the General Counsel's motion. (Tr. 210–215.)

[3] There are minor errors in the hearing transcript. One of which is that the undersigned is mistakenly referred to as "Judge Carlson" from pp. 52 through 88.

[4] To aid review, I have included certain citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive, as my findings and conclusions are based on my review and consideration of the entire record.

[5] See Auto-Chlor Services | Commercial Dishmachines & Service, last checked on May 6, 2025.

[6] Abbreviations used in this decision are as follows: "GC Exh." for General Counsel's exhibits; "R. Exh." for Respondent's exhibits; "Jt. Exh." for joint exhibits; "Tr." for citations to the hearing transcript; "GC Br." for General Counsel's brief; "R. Br." for Respondent's brief; and "R. Ans." for Respondent's answer. I refer to Counsel for the General Counsel as the "General Counsel."

Manager/Regional Vice President Barry Tischart, Regional Manager Scott Wagar, and Branch Manager Chris Gilchrist.

B. Facts

This case pertains to events which are alleged to have occurred at Respondent's facility in Kent, Washington (the facility). The facility opened in 2019. On February 22, 2022,[7] Gilchrist was promoted from sales and service representative to branch manager. At the time the alleged unfair labor practices occurred, Gilchrist was the highest-ranking individual at the facility and the only person stationed there alleged to be either a Section 2(11) supervisor or 2(13) agent. (Jt. Exh. 22, Tr. 169–170.)

Prior to October 2022, upper management visited the facility with varying frequency. Wagar directly oversaw the facility (as well as two others in Washington State) and visited it the most often: one to three times per week. Tischart was next up in the hierarchy; he visited the facility just twice in 2022. Vanderbilt, the highest-ranking of these managers, normally visited just once a quarter. But in 2022, he had to visit more frequently to help with Gilchrist's onboarding as branch manager and because Wagar was out on leave in April and May. (Jt. Exhs. 19, 20, and 22, R. Ans., Tr. 14, 79–81, 164–166, 216, 221, 228–229, 250–251.)

Employees at the facility included Route Supervisor Julian Murillo, Office Administrator Kelly VanHooser, two Rebuilders (whose duties included refurbishing the machines), Installers (who set up the machines for new customers), and approximately seven Service and Sales Representatives (SSRs). (Tr. 81–82, 164–166, 247.)

SSRs are dispatched daily to visit customer businesses, many of which are restaurants that use Auto Chlor machines and sanitizing products. SSR duties include interfacing with customers, selling chemical cleansers, servicing and repairing the machines, and processing renewals for the machines.[8] There were multiple components to their pay, including a base hourly rate, sales commissions, compensation based on the type of equipment used by the customers, and a profit-sharing program. There were approximately seven to nine SSRs working out of the facility. The current or former SSRs who testified at the hearing were Jayshayn Ware, Dametrius Ballard, and Kyle Taylor. (Tr. 38, 73–76, 81–82, 121–122, 164–166, 171, 196–198.)

While Respondent often granted raises to employees every January, that was not always the case. In 2021, for example, Respondent made changes its compensation formula in July.[9] In 2022, Respondent granted pay raises in March instead of January. Pay increases were so irregular that SSR Taylor testified that, from his perspective, the company had no system for annual raises. In addition to timing, the amount of raises was variable, since they were based on factors that

[7] All dates are for the year 2022, unless specified otherwise.
[8] It was unclear whether customers purchase or lease dishwashers and other machines from Respondent.
[9] Due to the COVID-19 pandemic, SSR commissions had dropped because of the downturn in the restaurant industry. To account for that, Respondent restructured its system to de-emphasize commissions and instead boost hourly pay.

changed every year, such as cost of living/inflation data and the wages that competitors were paying. (Tr. 190, 267–270.)

Most mornings, Gilchrist led daily meetings, called "huddles," to brief the staff on what was happening at the facility, provide sales tips and training, and update everyone on trends in the field. The huddles normally took place in the open area of the office from 7 to 7:30 a.m. SSRs, the office administrator, rebuild staff, and installers attended; they were expected to be there and would be spoken to by a manager if they were late or missed the huddle. Regional Manager Wagar joined these huddles about once a month. Prior to the union organizing drive, Vanderbilt and Tischart rarely attended huddles. (Jt. Exh. 18, Tr. 39–40, 82–83, 109–110, 121–123, 131, 166–167.)

Respondent maintains an employee handbook titled, "Auto-Chlor System Employee Handbook 2017."[10] The handbook discusses various employee benefits, including a profit sharing plan. On page 34, the handbook states that union-represented employees are not eligible to participate in the profit sharing program: "The Plan does *not* allow participation by employees who are: Covered by a collective bargaining agreement."[11] While Vanderbilt explained that this provision was based on language contained in a summary plan description created by outside company Silicon Valley Retirement Services, the handbook itself makes no reference to that origin. (Jt. Exhs. 17, 22.)

In February, Office Administrator Kelly Vanhooser first looked into union representation at the facility by reaching out to Union Representative Tony Ruiz. Vanhooser testified that the issues motivating organizing were wages, training, and work schedules. Vanhooser and Gilchrist—who was still an SSR at that time—led the campaign by speaking with coworkers, starting a group text, asking coworkers to sign authorization cards, and arranging Zoom and in-person meetings with the Union. In addition to those two, SSRs Murrillo, Ware, and Ballard attended meetings. Gilchrist dropped out of the organizing group once he became the branch manager. (Jt. Exh. 18, Tr. 41–44, 46–47, 169–170, 181–186, 229.)

Sometime prior to the filing of the representation petition, Wagar mentioned during a morning huddle that the company would be giving raises at the start of 2023. "[S]ome of us asked Scott [Wagar] if there was any future for more earnings," testified Jayshayn Ware. "And his answer was yes, there is a system that we are working on and that is in place but I can't give you too much details on it." Ballard recalled the same thing: "There was a morning meeting and Scott Wagar had told us in one of those meetings [while] we were doing our stretches, and he had made it aware that, hey, at the beginning of the year we plan on giving raises." (Tr. 95–96, 128–129, 171.) In a casual conversation with employees around that time, Gilchrist said the same

[10] The parties stipulated that Respondent has maintained the policies in the handbook since "at least October 14, 2022." (Jt. Exh. 22.)

[11] Pages 32–36 of the handbook reference the "Profit Sharing and 401(k) Plan" and it appears that the plan provides for both benefits. The 401(k) plan also expressly excludes union-represented employees from participation: "The Plan does *not* allow participation by employees who are: Covered by a collective bargaining agreement." (Emphasis original.) But the complaint does not alleged the 401(k) language to be unlawful—the complaint references only the profit sharing plan language.

thing to a small group of employees. "I just remember us talking about pay," recalled Taylor. "And he was like, hey, there's been a lot of talk about there being a raise starting in January of 2023 like a—a yearly raise compensation." (Tr. 189.)

On October 17, Respondent received the Union's demand for voluntary recognition based on a "substantial majority of employees" at the facility having signed authorization cards. (Jt. Exhs. 1, 22.)

That same day, at around 11:30 a.m., Wagar approached Vanhooser and asked her to walk with him around the perimeter of the building. He did this periodically to ask her confidentially about things going on at the office. On this day, Wagar asked her about the organizing drive. "He asked me about the Union," Vanhooser testified. Wagar said that, "he hears things and that he knew I would come clean about the Union effort. He told me that he was hurt that I didn't come to him about that—our desire to join the Union. He asked me why we would want to join a union…. He asked me who was behind the union effort." Wagar told her that management opposed a union, saying, "Chris Gilchrist isn't on board with it." I'm not on board with it." When Vanhooser said that Gilchrist had supported the Union when he was an SSR, Wagar replied that, "he wasn't on board now." Wagar said he thought that a former employee had been leading the organizing drive: "'I thought James Hardy was behind it.' But [Hardy] had left, so he was kind of surprised that it was still continuing." When Wagar asked why the employees wanted a union, Vanhooser answered. "I told him that we really wanted more of a say in our day-to-day working lives regarding training, wages, on-call schedule," Vanhooser explained. "We wanted real solutions instead of these little things that were—felt like it wasn't—it was promises. It wasn't a real solution." As to wages, Wagar asked what Vanhooser considered fair.[12] "[H]e specifically asked me what I thought was a fair wage. And I gave him that number, and he said that's exactly what these guys make with their commissions." Upon returning from their walk, Wagar was visibly upset. "And he was very tense and short with me," said Vanhooser. "[He] was like, very short and, you know, said, I don't agree with you at all. And—and left." (Tr. 45–48, 56.)

On October 18, the Union filed its representation petition with NLRB Region 19 in Case 19–RC–305488[13] seeking to represent a bargaining unit comprised of SSRs, route supervisors, and administrative administrators at the facility. An in-person election took place on November 30. (Jt. Exh. 22.)

In response to the organizing drive, Respondent engaged in a campaign to present the company's point of view and to provide information about the NLRB election process. This campaign took the form of meetings with individual employees, group meetings following the morning huddles, and the distribution of written materials.

On their end, several employees—including Vanhooser and SSRs Julian Murillo, Dametrius Ballard, and Jayshayn Ware—openly showed their support for the Union. Vanhooser

[12] At hearing, no evidence was presented to show that Respondent had a history or practice of soliciting grievances from employees.

[13] I have taken administrative notice of that case file.

wore a union pin, stickers, and T-shirt. Ware and Ballard put union stickers on their personal water bottles and on their company clipboards. (Jt. Exh. 18, Tr. 41–44, 65, 169–170.)

On the afternoon of October 19, managers met with individual SSRs upon their return to the facility following their routes. As SSRs walked into the main office area, managers Vanderbilt, Tischart, Wagar, and Gilchrist asked them to step into the conference room next to the employees' desks. They handed the SSRs a flyer discussing the Union's representation petition, the upcoming NLRB election, and various points that the company wanted to make. Those points included assertions that Auto-Chlor "believes in its employees," is "not anti-union," "will respect and follow the law," and "will respect employee choice" in the election.[14] In total, the managers met with about four or five of the 16 SSRs that afternoon. Wagar did most of the talking for management. He started by asking employees if they had ever been in a union. He then shared his experience with the Teamsters union many years before when he worked for United Parcel Service (UPS). Wagar also explained that, if the Union were voted in, various terms and conditions of employment, such as seniority, pay, benefits, and profit-sharing, could be frozen if subject to the bargaining process. (Jt. Exh. 13, Tr. 133–135, 150–154, 217–221, 255–259.)

Afterwards, both Vanhooser and Ware told management that such meetings between multiple managers and individual employees were problematic and asked Respondent to stop using that format. Management agreed to do so. (Tr. 154–155, 261–262.)

Respondent also communicated its antiunion messages to employees through a series of written handouts. The handouts were on various topics related to the organizing drive, the NLRB election process, the give-and-take nature of collective bargaining, dues, decertification, strikes, and total compensation paid by Respondent. While the handouts were drafted by an outside entity, they were mostly attributed to Vanderbilt. Between October 18 and November 30, they were handed to employees, mailed to their homes, or distributed at the workplace. (Jt. Exhs. 2–15, Tr. 20, 259–260, 266–267.) Many of the handouts made the point that collective bargaining involves give and take, could take a long time, and that no party was guaranteed to achieve or even maintain certain wages or benefits. Respondent's handouts had representations such as, "Nothing you have is guaranteed to be retained after bargaining," "A yes vote does not guarantee more money." But other handouts mentioned that Auto-Chlor had the duty to bargain in good faith and that the Union could obtain wages and benefits that were better, worse, or the same. (Jt. Exhs. 4, 8, and 10.) Two of the handouts quoted language from a Board decision that made it appear that the Board itself was saying that, if a union said it could guarantee certain terms and conditions, then it would be lying. The flyer was titled, "KNOW THE FACTS!" and said that,

[14] General Counsel witnesses Taylor and Ware testified that they each individually attended this meeting with the managers. Taylor said that Vanderbilt asked him whether he supported the Union and that Wagar asked him why he did not come to management before going to the Union. (Tr. 172–175.) Ware testified that Vanderbilt asked him if there were any improvements at the branch that should be made, if he was aware of the Union organizing drive, and whether he was going to vote for the Union in the Board election. He also reported that Tischart said, "if I was you, I would vote no because the Union will interfere with the job you're doing…" (Tr. 89–91.) For the reasons detailed in the credibility section below, I do not credit their testimonies. I have instead credited the testimonies of Respondent's witnesses and parts of Dametrius Ballard's testimony. Based on the credible testimony, neither Taylor nor Ware even met with the managers that afternoon, let alone were subject to coercive questions and statements.

with regard to bargaining, "here is what the **National Labor Relations Board** (NLRB) says:" "**'if the union tells you that what you have now is guaranteed, it is not telling you the truth! … *The truth is you can lose wages and benefits in collective bargaining***.'" *Ludwig Motor Corp*., 222 NLRB 635. (Emphasis and bold in the original.) (Jt. Exhs. 11 and 14.)

Respondent also conducted four to six group meetings at which Vanderbilt discussed the Union and the NLRB election process. Most of these meetings were held in the open office area where employees have their desks and followed the morning huddle. After management discussed the day's operational matters at the huddle, Vanderbilt would tell employees that his discussion was optional and that they were free to leave, although it appeared that nobody did.[15] Each of these presentations was based on one of Respondent's flyers, meaning they focused on individual subjects such as collective bargaining, union dues, strikes, benefits, and wages. (Jt. Exhs. 2–15, Tr. 233–235, 262–266.) The witness testimony presented at hearing was vague as to the dates and specific topics discussed at most of these meetings. But witnesses were able to recall two of the meetings with sufficient detail—one in the shop area on the subject of wages and a second meeting in the open area of the office on the subject of collection bargaining.

The meeting in the shop area occurred in early November. Present for management were Vanderbilt, Wagar, and Gilchrist. The employees in attendance included the SSRs, the route supervisor, and rebuild. Vanderbilt gave the presentation on behalf of management. Using a whiteboard, he spelled out how SSR compensation was calculated, including the hourly rate, commission, profit sharing, and compensation for getting customers to buy or lease equipment. Neither Vanderbilt nor any other manager discussed the Union during this meeting.[16] (Tr. 99–102, 174, 270–272.)

The meeting where the collective-bargaining process was discussed occurred in or around the week of November 21 in the open area of the office. Present for management were Vanderbilt, Wagar, and Gilchrist. Employees included the SSRs, Vanhooser, and install. Vanderbilt led the meeting and discussed the nature of collective bargaining. "He said that nothing was guaranteed," testified Taylor. "That essentially, through collective bargaining, the Union was going to be bargaining with Auto-Chlor. And it didn't mean that anything was going to be better or worse."[17] Taylor made clear on cross-examination that Vanderbilt said that, if the Union were voted in, he could not confirm that the 2023 wage increases would happen since those would be subject to the bargaining process: "His exact words [were] that he can't guarantee that it will happen." Ballard confirmed that, in discussing collective bargaining, Vanderbilt said

[15] It is noted that leaving the meeting at that moment could signal an employee's prounion stance.

[16] While Ware testified that Vanderbilt, during this meeting in the shop area, spoke about the Union and its impact on wages if elected, I do not credit that testimony. Ballard did not testify about the meeting in the shop; the testimony cited in the General Counsel's brief pertained to supposed comments by Wagar during the October 19 conference room meeting between managers and individual employees, not alleged comments by Vanderbilt in the shop area. (Tr. 143.)

[17] On direct examination, Taylor testified that Vanderbilt ended with the sentence: "That our pay increase would *probably* go away." (Emphasis added.) However, when asked on cross-examination what Vanderbilt's "exact words" were, Taylor conceded, "His exact words [were] that he can't guarantee" that the 2023 pay raise would happen, due to the give and take nature of collective bargaining. (Tr. 200–201.)

that terms and conditions had to be bargained over and that nothing could be guaranteed. "So the way he had said it was that…when it comes to negotiating with the Union, that Auto-Chlor could just say no….that there was no guarantee with a union being there that we would get anything that we would want," Ballard recalled on direct examination. During his examination by the Union, Ballard added, "And then if we were to unionize, that it puts all of that into a whole [']nother category because now things are being bargained for." Vanhooser testified that Vanderbilt said that their terms and conditions would be subject to bargaining: "He touched on a lot of things in the—one of the flyers. He said that absolutely everything was on the table and up for negotiations: our pay, our healthcare benefits, the profit-sharing, commissions, uniforms, everything was up for negotiation, and we could lose all those benefits." On cross-examination, she clarified that Vanderbilt said that any loss of benefits was simply a "possibility." Vanderbilt also said that, if the Union were voted in, managers could no longer help the SSRs with their work. "[M]ostly we talked about the fact that the managers wouldn't be able to…help out…the drivers doing their jobs if they were ever sick or needed anyone to step in for them," Vanhooser testified.[18] (Tr. 51–53, 69–70, 137–143, 180–181, 201.)

At one of the morning huddles in or around mid-November, Ware asked Vanderbilt if the employees were still going to get pay raises at the start of 2023. Vanderbilt replied that Respondent had never promised any wage increases and that there was no guarantee of wage increases. (Tr. 130.)

In early to mid-November Wagar had a one-on-one conversation with SSR Isaac Tyson about the Union at the truck loading area. After sharing his experience with the Teamsters when he was at UPS, Wagar said that election of the Union "could put us in a status quo event." He continued, "that it could go into collective bargaining and during that time, from my understanding learning about this, that we would be in a status quo state, and we would not be able to move forward with our raises that we annually give in January. ¶ So what I explained is that once it's in collective bargaining, we would—that it would get worked out by [the] parties, and we would not be able to do anything until that was worked out by them."[19] (Tr. 25–29.)

In the latter half of November, Ballard spoke one-on-one with Wagar to ask him about raises. Wagar responded that, while there would normally be raises at the start of the new year, those would be on hold due to uncertainties about the Union. Ballard testified, "And he told me that usually, [raises are] at the beginning of the year but he said if there was anything, like because of all the Union stuff happening, that essentially it would be put on hold because they can't guarantee anything if the Union vote is in the process or if there is a bargaining thing happening." (Tr. 131.)

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[18] The complaint did not allege this as a ULP and General Counsel did not seek at the hearing to allege this. Only in their posthearing brief did the General Counsel request that the ALJ consider this purported comment. For the reasons explained in the analysis section below, I conclude that it would be unfair and unjustified to consider this issue at this stage.

[19] This testimony, based on answers adduced by the Administrative Law Judge, is what prompted the General Counsel to amend the complaint to add an allegation that Respondent violated Section 8(a)(1) by Wagar threatening employees with the loss of previously promised wage increases if they selected the Union as their bargaining representative.

As open supporters of the Union, Ballard and Ware placed union stickers on their company-issued clipboards. SSRs typically carry business documents, such as service reports, on those clipboards, which they take while visiting customers. The stickers were round, multi-colored, and said "International Brotherhood of Electrical Workers." Ballard's sticker measured several inches in diameter and was placed on the top side of the clipboard. Respondent has no policy prohibiting stickers and it was not uncommon for SSRs to put stickers on their clipboards; these stickers could be from customers (e.g., restaurants and breweries that use Auto-Chlor's machines) or unrelated to work (e.g., anime, race cars, music bands, or energy drink stickers). Ballard's sticker remained on his clipboard through the election and for several months afterwards. (GC Exh. 2, Tr. 78–79, 107, 125–128, 144–147, 167–168.)

On November 30, the Regional Office conducted the Board election. The Union lost by a vote of 9 to 4 (with 3 challenged ballots). (Jt. Exh. 22.)

In April 2023, during a morning huddle, Wagar noticed Ballard's IBEW sticker on his clipboard and asked him what it was. Sometime later that month, Wagar removed the sticker from Ballard's clipboard because, in his opinion, "it did not represent who Auto-Clor is." (Tr. 23–24, 127.)

III. CREDIBILITY

A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has stated that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue on which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify); *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact). Adverse inferences may also be drawn based on a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030 fn. 13 (2014).

As to General Counsel witness Kelly Vanhooser, I found her to be a credible witness. Her testimony was detailed, specific, and given without hesitation on both direct and cross-

examination. On cross-examination, she freely admitted to facts that could be viewed as detrimental to her case.

I found Dametrius Ballard to be an earnest witness, but his testimony was often jumbled as to dates and events, he could not remember which supervisors made certain alleged statements, and his testimony was too often vague and overly general.[20] For these reasons, I found some of his testimony unreliable. Except where included in the facts above, I have not credited his testimony.

I found the testimony of Jayshayn Ware to be exaggerated at times. For example, while other witnesses credibly testified about a single meeting on October 19 between multiple managers and individual employees, Ware claimed there were multiple such meetings: "I remember at least three. But there could have been four or five." (Tr. 87.) Tellingly, he was able to provide a detailed account of just one of those meetings; his testimony turned vague when discussing the supposed other meetings, merely saying that the supervisors said the "[s]ame exact things as the previous meeting." (Tr. 93–94.) His testimony about the details of that meeting also struck me as untruthful. He claimed that "everyone was approached" to go into the conference room to speak to the managers and that he knew that because "this office had windows. You could actually see other guys being…asked to come and meet." Yet the credible testimony was that the managers met with only around four or five of the 16 SSRs that afternoon—and that Ware was not one of them. Additionally, the credible testimony as well as the diagram of the facility established that there is no window between the conference room and the open area of the office where the SSRs have their desks. (Tr. 91–92, 219, 287–288.) Except where included in the facts above, I have not credited his testimony.

I also found the testimony of Kyle Taylor to be unreliable in key places. With regard to the October 19 meeting in the conference room, he was able to remember, during direct examination, specifics about the managers' alleged coercive statements and questions; yet, on cross-examination, he was suddenly unable to remember basic facts, such as which managers were present (he recalled three when there were four), the name of the coworker who supposedly told him to go into the conference room (even though he said he remembered them saying that the managers were going to ask about the Union and the petition), and whom he told to go into the room after he was done. Taylor's inability to remember such basic facts is consistent with the credible testimony that he was not one of the four or five employees who spoke with the managers that afternoon. (Tr. 172–174, 201–204, 207–209, 219.) Except where included in the facts above, I have not credited his testimony.

In contrast, the three witnesses called by Respondent—Barry Tischart, Scott Wagar, and Aaron Vanderbilt—gave testimony that was consistent with each other and with the written documents. Their testimonies were also given without hesitation, were internally consistent, and held up on cross-examination. The only partial exception was Wagar; I found his testimony about his one-on-one conversations with Vanhooser, Ballard, and Tyson to be lacking in candor. Other than these instances, I have largely credited their testimonies.

[20] I made these deficiencies clear to the General Counsel. (Tr. 135–136, 139–140.)

IV. ANALYSIS

A. The Alleged Overbroad Handbook Provision

Complaint paragraph 5(a) alleges that Respondent violated Section 8(a)(1) by maintaining a discriminatory provision in its handbook.

The Auto-Chlor Employee Handbook provides that the profit-sharing program is open to all employees who are at least 20½ years of age and who have completed at least six months of service. But the program is not available to union-represented employees: "The Plan does *not* allow participation by employees who are: Covered by a collective bargaining agreement." This language is coercive because it sends the message that all employees will categorically forfeit the profit-sharing benefit if and when they elect a union. *Constellation Brands, U.S. Operations, Inc. d/b/a Woodbridge Winery*, 367 NLRB No. 79, slip op. at 10–11 (2019), and cases cited therein.

Respondent defends that the handbook should not be found unlawful because Auto Chlor simply took the language from the summary plan description produced by third-party plan administrators Silicon Valley Retirement Services, that it had no intent to discriminate based on representational status, that there was no evidence that any employee was aware of this provision, or that it influenced their support for the Union. These bases fail to negate the coercive nature of the provision. The origin of the language does not matter; it is undisputed that Respondent maintained that language in its handbook. The employer's intent in maintaining the language is immaterial; all that matters is whether employees would reasonably interpret the language to interfere with, restrain, or coerce them in the exercise of their Section 7 rights. This language could reasonably dampen employees' support for the Union because it forces them to choose between participating in a valuable job benefit and being represented by a union. Finally, whether any employee was actually impacted by the rule is irrelevant to the inquiry; it is sufficient that Respondent maintained this facially discriminatory rule in its employee handbook. See *Starbucks Corp.*, 374 NLRB No. 10 (2024), where it was explained that, when deciding if certain language violates Section 8(a)(1), the Board "does not consider the motivation or actual effect." Slip. op. at 94 (citing *Midwest Terminals of Toledo*, 365 NLRB 848, 860 (2014)).

Based on the foregoing, Respondent violated Section 8(a)(1), as alleged in complaint paragraph 5(a).

B. The Alleged Interrogation by Scott Wagar

Complaint paragraph 5(b) alleges that Respondent violated Section 8(a)(1) on or about October 16 when Scott Wagar interrogated employees about their union activities and support.

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, when viewed under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-*

Ad Services, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). A nonexhaustive list of factors to consider includes the background between the employer and union; the nature of the information sought; the identity of the questioner; the place and method of interrogation; the truthfulness of the employee's reply; and whether the employee was an open and active union supporter. *Westwood Health Care Center*, 330 NLRB 935, 939–940 (2000); *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). These factors are not to be applied mechanically but rather be viewed as possible areas of inquiry when evaluating the totality of the circumstances. *Rossmore House*, supra at 1178 fn. 20. The Board has found violations where the employer showed no legitimate purpose for its questions. *Benner Glass Co*., 209 NLRB 686, 688 (1974) (while the employee initiated the conversation about union activity, the supervisor's questions were coercive since there was no legitimate reason for the supervisor to ask who initiated the union activity); *Royal Manor Convalescent Hospital*, 322 NLRB 354, 362 (1996) (interrogation coercive where there was no purpose for the supervisor's questions other than to determine the employee's sentiments about the union).

On October 17, Wagar asked Vanhooser to step outside of the facility and take a walk with him. During their walk, Wagar asked about the employees' motivations for unionizing: "He asked me why we would want to join a union. He asked about the organizing team: "He asked me who was behind the union effort." He asked Vanhooser about her compensation target: "[H]e specifically asked me what I thought was a fair wage." Wagar said that "he knew I would come clean about the Union effort"—thereby acknowledging that his questioning went beyond the pale. He said that management disapproved of the employees' organizing and by the end of their conversation betrayed his anger over the organizing. Given the nature of Wagar's questions (seeking information unrelated to the operation of the business, such as who was leading the organizing drive), Wagar's status as a high-ranking manager (the Regional Manager who oversaw Kent and other facilities), his expressed opposition to the organizing campaign, his display of anger at the end of the conversation, the fact that Vanhooser had yet to reveal her support for the Union, and that the union campaign had yet to go public, I find that Wagar engaged in coercive interrogation about the organizing campaign.

In its defense, Respondent denied that Wagar asked these questions. I found Wagar's testimony that he merely used this opportunity to explain to Vanhooser how collective bargaining worked to be improbable. [21] I have not credited his testimony but rather have credited Vanhooser's.

Based on the foregoing, I find merit to the allegation in complaint paragraph 5(b), but clarify that the interrogation occurred on October 17.

C. Allegations that Vanderbilt Solicited Grievances and Threatened Employees

Complaint paragraphs 5(c)(i)-(iii) allege that Respondent, through Vanderbilt, violated Section 8(a)(1) by soliciting grievances, threatening employees with loss of a promised wage

[21] His testimony is on pp. 240–243.

increase, and threatening employees with reduction in pay and elimination of profit sharing if they selected the Union.

The Alleged Solicitation of Grievances. Employer solicitation of grievances during an organizing campaign, if accompanied by a promise, express or implied, to remedy those grievances, violates Section 8(a)(1). *Mek Arden, LLC d/b/a Arden Post Acute Rehab*, 365 NLRB 1065, 1066 (2017) (citing *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000), enfd. 755 Fed.Appx. 12 (D.C. Cir. 2018)). It is the promise to remedy the grievance rather than the solicitation that constitutes the violation. Id. However, solicitation of grievances in the midst of a union campaign creates a rebuttable presumption of an implied promise to remedy the grievances. Id. The employer may rebut this presumption by, for instance, establishing that it had a past practice of soliciting grievances "in a like manner" prior to the campaign, or by clearly establishing that the statements at issue were not promises. Id. (citing *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010)).

General Counsel's theory of a violation is based on the testimony of SSR Ware who asserted that, during the meeting in the conference room on October 19, Vanderbilt asked him "if there were any improvements on my end that I thought could be made within the branch." (Tr. 89–90.) I did not credit that testimony. No other witness reported that, during those meetings in the conference room, management asked them this or any other question approaching a solicitation of grievances. Instead, I found credible Vanderbilt's testimony that he and the other managers met only briefly with the SSRs that afternoon to hand out a flyer discussing the Union's representation petition and to provide some basic information about the election process. Therefore, I dismiss this allegation as being unsupported by credible evidence.

The Alleged Threat of Loss of a Previously Promised Wage Increase. If an employer, before it learns about the existence of a union organizing drive, promises increased wages or other benefits, then—once it does learn about the organizing—it must act as if the union were not on the scene and must make it clear that any adjustment will not depend on whether or not the employees select the union. See *Earthgrains Co*., 336 NLRB, 1119–1120 (2001)(citing *Atlantic Forest Products*, 282 NLRB 855, 858 (1987)).

In the instant case, General Counsel witnesses Ware, Ballard, and Taylor credibly testified that, prior to the filing of the representation petition on October 17, Supervisors Wagar and Gilchrist promised employee raises at the start of 2023.[22] However, between the filing of the petition and the election on November 30, Vanderbilt, at a morning huddle, denied that Respondent had ever promised raises and said that, if the parties went into collective bargaining, nothing could be guaranteed. This announcement threatened the loss of the promised wage increase. Based on the promises by Wagar and Gilchrist, employees could have reasonably believed that they were automatically going to get raises in early 2023. It was therefore incumbent on Respondent to continue with that plan regardless of the status of union organizing. But upon the filing of the petition, Respondent changed its position and declared

[22] While these promises were made before the petition was filed in October, Respondent knew about the organizing campaign by February, when former Union leader Gilchrist joined management.

that those raises would no longer be given automatically but that the Union would have to seek those raises in negotiations. In short, Respondent signaled that the Union would have to bargain simply to get the promised raises restored. *Earthgrains*, supra, at 1120 (citing *Taylor Dunn Mfg*., 252 NLRB 799, 800 (1989), enfd. 679 F.2d 900 (9th Cir. 1982)).[23] Vanderbilt's announcement was thus coercive.

The Alleged Threat to Reduce Wages or Eliminate Profit Sharing. The General Counsel argue that Respondent unlawfully threatened loss of pay or benefits, including profit sharing, if the employees selected the Union. For the reasons discussed in Section E below, I dismiss this allegation.

Based on the foregoing, I find merit to complaint paragraph 5(c)(ii) but dismiss paragraphs 5(c)(i) and (iii).[24]

D. Allegations that Wagar Solicited Grievances, Interrogated Employees, and Made Statements of Futility

Complaint paragraphs 5(d)(i)-(iii) allege that Respondent, through Scott Wagar, violated Section 8(a)(1) by soliciting grievances, interrogating employees, and making a statement of futility.

The Alleged Solicitation of Grievances. General Counsel allege that Wagar, during his October 17 walk around the building with Vanhooser, solicited employee grievances and impliedly or actually promised to promptly remedy those grievances. Crediting Vanhooser, I find that Respondent unlawfully solicited employee grievances and impliedly promised to remedy them based on Wagar asking Vanhooser what she thought was a fair wage.[25] Because he asked this during an organizing campaign, and after she expressly told him that higher wages was one of the reasons why the employees wanted a union, Wagar impliedly promised to remedy her request. Moreover, it was not shown that Respondent had previously solicited such grievances from employees. In its defense, Respondent asserted that Wagar never asked that question. I did not credit that denial by Wagar, but rather found Vanhooser's testimony more believable. I therefore find merit to this allegation. See *Garda CL Great Lakes, Inc*., 359 NLRB 1334, 1334 (2013) ("The solicitation of employee grievances during an organizing campaign 'raises an inference that the employer is promising to remedy the grievances,' and this inference is 'particularly compelling when, during a union organizational campaign, an employer that has not

[23] General Counsel's brief at p. 21 argues that Wagar threatened employees with the loss of a promised raise. I do not analyze that, as the complaint contains no such allegation.

[24] *The Unalleged Claim that Vanderbilt Interrogated an Employee About His Union Support.* In their brief, the General Counsel reference testimony by Taylor that, during the October 19 meeting in the conference room, "Vanderbilt immediately asked him whether he was for or against the Union." (Tr. 173.) The complaint contains no allegation that Vanderbilt interrogated any employees, and so I do not consider it. If I did, however, I would dismiss it, as I do not credit this testimony by Taylor. Instead, I credit the testimony of Respondent's managers that Taylor was not one of the four employees who spoke with management that afternoon. Additionally, I find Taylor's testimony improbable given the limited set of talking points the managers made during those meetings.

[25] No evidence supports finding that Respondent actually promised to remedy those grievances. Therefore, that portion of the allegation in complaint par. 6(d)(i) is dismissed.

previously had a practice of soliciting employee grievances institutes such a practice.' *Amptech, Inc*., 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006).")

The Alleged Interrogation. General Counsel allege that Wagar, during the October 19 meeting in the conference room, asked SSR Ware why he and the other employees did not come directly to him and instead went to the Union: "Scott Wagar asked why I wouldn't come to him. Why we wouldn't ask him or—or bring our concerns to him?" (Tr. 174.) I did not credit this testimony, as I concluded that Ware was not one of the four or five employees who met with management that afternoon. Additionally, I found Wagar's account improbable based on the limited set of talking points management made during those meetings. Accordingly, there is insufficient credible evidence supporting this allegation.

The Alleged Statement of Futility. A statement of futility is one where the employer, through coercive statements, communicates to employees that there would be no point in selecting a union. *Palby Lingerie, Inc*., 252 NLRB 176, 180 (1980). Employer statements to the effect that it would never bargain with the union, that it would adopt a regressive approach to frustrate the bargaining process and to retaliate against the union, and that the employees would have to wait years for an agreement and would receive no wage increases or improved benefits during that time are examples of statements of futility. See *Richardson Brothers South*, 312 NLRB 534, 540 (1993).

In the instant case, General Counsel argue that Wagar made a statement of futility by "telling Ballard that every planned benefit could be frozen if the Union is voted in." (GC Br. at 22.) General Counsel's claim is exaggerated and is unsupported by the testimony. During their conversation in his office, Wagar told Ballard that any raises in early 2023 would be on hold due to collective bargaining—he did not say that all planned benefits would or could be frozen. In the Facts section of their brief, General Counsel make that clear; they reference only a statement by Wagar about wages and nothing about "every planned benefit." While Wagar's comment might have violated Section 8(a)(1) as a threat to withhold promised raises if the employees elected the Union, it falls short of communicating the broader notion that the employees would not benefit by selecting the Union. See *DHL Express, Inc*., 355 NLRB 1399, 1407 (2010) (an employer violates Section 8(a)(1) by threatening employees that attempts to secure union representation would be futile because nothing could be gained from selecting the union).

Based on the foregoing, I find merit to complaint paragraph 5(d)(i) but dismiss paragraphs 5(d)(ii)-(iii).

E. The Flyers Allegedly Threatening Loss of Wages and Benefits

Complaint paragraph 5(e) alleges that Respondent violated Section 8(a)(1) by distributing at the facility unsigned documents threatening loss of wages and benefits if the employees unionized.

In their brief, General Counsel argue that statements contained in two of Respondent's campaign flyers—Joint Exhibit 11 (titled, "Know the Facts!") and Joint Exhibit 14 (titled, "Here are Some More Facts…And Some Common Claims")—violate the Act in three ways: by

threatening that employees could lose wages and benefits in bargaining, falsely attributing that claim to the Board, and suggesting that the Union lied to employees about the possibility of losses in bargaining. I find merit to General Counsel's first theory of a violation, but no merit to their second and third theories.

Respondent Unlawfully Threatened Employees with Loss of Wages. In the two flyers, Respondent communicated several points to employees, including that, while both sides have a duty to bargain in good faith, neither party needs to make concessions; the Union must obtain increased benefits through the bargaining process; employees could possibly wind up with reduced wages and benefits pursuant to collective bargaining; and that neither side could guarantee any specific results. In isolation, these flyers merely discussed the give-and-take nature of collective bargaining. But I find that, in the context of supervisors' promises of wage increases at the start of 2023, the flyers' statements that wages might go up or down were unlawful. As discussed above, the credited evidence showed that prior to the filing of the representation petition both Wagar and Gilchrist promised employees that there would be pay raises at the start of 2023. That planted in the minds of employees the expectation of higher wages. In contrast, these flyers say that, if the employees selected the Union, they would no longer be entitled to those pay raises but rather the Union would have to strive in bargaining to get those increased wages back. *Taylor-Dunn Mfg. Co*., 252 NLRB 799, 800 (1980). Therefore, these flyers would have the natural tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 right to support a union.

Respondent Did Not Violate the Act by Attributing Certain Language to the Board. In its flyer titled, "KNOW THE FACTS," Respondent represented that, with regard to bargaining, "here is what the **National Labor Relations Board** (NLRB) says:

> "**'if the union tells you that what you have now is guaranteed, it is not telling you the truth! … *The truth is you can lose wages and benefits in collective bargaining***.' *Ludwig Motor Corp*., 222 NLRB 635"

(Emphasis and bold in the original.) Jt. Exh. 11. Respondent included the same quote in its flyer titled, "Here are Some More Facts…And Some Common Claims." Jt. Exh. 14. This made it look as if the Board was giving that warning, when in fact the language came from employer campaign literature in that case. By the way it presented this quote, Respondent falsely attributed to the Board an employer's campaign propaganda threatening employees with potentially losing wages and benefits in collective bargaining and thus improperly placed the Board's imprimatur on that warning. The General Counsel contend that attributing this language to the Board was unlawful. While I agree that this portion of the flyers was both misleading and problematic, I cannot conclude that it constituted an unfair labor practice.

Section 8(c) of the Act provides that the "expressing of any views, argument, or opinion, or the dissemination thereof…shall not constitute or be evidence of any 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." As it applies to misleading tactics utilized in campaign flyers such as this one, the Board analyzes potential Section 8(a)(1) violations through the prism of Section 8(c). In

Patio Foods, Inc., 168 NLRB 305 (1967), for example, the employer in response to an organizing campaign mailed its employees a letter advising them not to sign union authorization cards because, if they did, they could lose their right to vote in any Board election. The ALJ found the employer's representation to be a "gross distortion of the law and serious deception practiced by an employer upon employees" and found a violation of Section 8(a)(1) based on interference with the employees' right to self-organization. Id. at 309. However, the Board reversed, reasoning that because the letter "contained no threat of reprisal," it "did not exceed the privileged area of free speech." Id. at 305. In *Patio Foods*, the Board relied on *Forenta, Inc*., 165 NLRB 641 (1967), where the ALJ found that the employer, in response to union campaign literature, unlawfully sent its employees a letter implying that the identities of employees who sign authorization cards was not a well-kept secret and that the employer knew that only a few employees had signed cards. The Board reversed because the letter contained no threat of harm to employees and no implied threat of reprisal. In dismissing the complaint, the Board wrote, "we are not prepared to find that the Respondent exceeded the privileged area of free speech by conveying to employees the information it did." Id.

Consistent with this precedent, I find no violation here. While the misrepresentation in Respondent's campaign literature wrongly sought to place the Board's imprimatur on threatening campaign literature, neither flyer contains any threat or implied threat of harm to employees. Based on the Board's tolerance of such misleading campaign literature, I find that Respondent did not violate Section 8(a)(1).[26]

Respondent Did Not Violate the Act by Suggesting that the Union Lied About the Possibility of Losses in Bargaining. Finally, as to this third argument by the General Counsel, I find that no language in either of these flyers suggested that the Union had lied. Accordingly, this argument was unsupported by the evidence.

Based on the foregoing, I find merit to the allegation in complaint paragraph 5(e) only by threatening employees with the loss of promised raises if they elected the Union.

F. The Alleged Statement of Futility

Complaint paragraph 5(f) alleges that Respondent violated Section 8(a)(1) by distributing a document signed by Vanderbilt telling employees that it would be futile to select the Union as their bargaining representative because bargaining can go for long periods of time, that there is no time limit by which bargaining must be completed, and that parties are not required to even reach agreement.

This allegation is based on a flyer that Respondent admitted to distributing to employees which provides, in pertinent part: "Collective bargaining can be a long and uncertain process. Bargaining with a union can go on for months to a year or longer, especially on a first contract. There is no law requiring a company and a union to reach an agreement within a certain period

[26] Given the language of Sec. 8(c), it makes sense to me that the only Board decisions which the General Counsel cited in their brief arose in the representation context, not the ULP context.

of time, or in fact, to ever reach an agreement." The flyer, titled "Collective Bargaining," references Respondent's duty to bargain in good faith and is otherwise free of any unlawful language. (Jt. Exh. 8, 22.) This language did not threaten that Respondent would unlawfully draw out the bargaining process. Rather, the flyer merely states that bargaining, especially over a first contract, "can" take months, a year, or even longer and not a threat that selection of the Union would be a futility. *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135, slip op. at 45 (2024) (citing *Hisacount Corp*., 278 NLRB 681, 689–690 (1986)).

In support of their position, the General Counsel cite to *Airtex*, 308 NLRB 1135 (1992). But the facts of that case make it distinguishable. In *Airtex*, the Board found that the company committed an unlawful statement of futility because the president's statement that negotiations could last a year "did not stand alone." Rather, it was accompanied by a threat of job loss and an offer of benefits if the employee stopped supporting the union. Those additional statements provided a context in which a mere statement of law was rendered a coercive threat that employee support for the union would be futile. Id. at fn. 2.

Based on the foregoing, I dismiss complaint paragraph 5(f).

G. The Alleged Impression of Surveillance

Complaint paragraph 5(g) alleges that Respondent violated Section 8(a)(1) by creating the impression of surveillance based on the increased presence of Vanderbilt and Wagar at the facility.

The test for determining whether an employer has created an impression of surveillance is '"whether, under all of the circumstances, the employer's statements or other conduct would lead reasonable employees to assume that the employer has placed their union activities under surveillance.'" *Stern Produce Co.*, 372 NLRB No. 74, slip op. at 2 (2023) (quoting *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 4 (2018), enfd. 939 F.3d 798 (9th Cir. 2019); and *Flexsteel Industries, Inc*., 311 NLRB 257, 257 (1993).

The facts here would not cause employees to reasonably assume that their union activities were under surveillance. As a threshold matter, the General Counsel failed to establish that upper management's presence at the facility between the filing of the petition and the election was unusual or a significant departure from past practice. While Vanderbilt visited only quarterly in the past, he had to visit the facility more often in 2022 to help with Gilchrist's transition into management and to cover for Wagar during his leave of absence in April and May. I credit the testimony that Tischart was at the facility just one day between October 18 and November 30. As for Wagar, he normally visited a few times per week as the manager directly overseeing the facility. Other factors cut against a finding of impression of surveillance, as well. There was no evidence of actual surveillance. Other than the open display of support in the form of Union stickers, pins, and T-shirts, there was no organizing activity conducted at the workplace to surveil. The union meetings occurred via Zoom or at offsite restaurants. There were no statements by Vanderbilt, Wagar, or any other supervisor suggesting that management was observing the employees' organizing activity.

I find General Counsel's citation to two cases unpersuasive. In *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007), the nursing administrator went to the facility on her day off, Saturday, for the sole purpose of watching the employees meet with the union organizer next to the parking lot. The administrator stood in the exit doorway at the facility and watched the meeting. The Board based its finding of a violation on the fact that the administrator's conduct was so out of the ordinary that it sent the message to employees that their protected activities were under surveillance. Id. at 1190–1191. In contrast, Respondent's managers here observed no protected activity at Kent and their presence was not shown to be out of the ordinary. Contrary to the General Counsel, I find that, in *NORC, LLC, d/b/a Northwest Center for Rehabilitation and Brain Injury*, 372 NLRB No. 35, slip op. at 4 (2022), the Board did not "explicitly reject the claim that an employer has an unlimited right to go into its workplace at any time." Rather, the Board stated that when an employer does something out of the ordinary—like having supervisors go to the workplace during their days off to observe and ask employees about union activity—that such conduct constitutes unlawful surveillance.

Based on the foregoing, I dismiss complaint paragraph 5(g).

H. The Alleged Unlawful Removal of a Union Sticker

Complaint paragraph 5(h) alleges that Respondent violated Section 8(a)(1) by removing an employee's union sticker from his clipboard.

An employer violates Section 8(a)(1) when it prohibits employees from wearing union insignia, absent special circumstances. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). This right to display union insignia has been extended to employees adorning objects, such as hard hats, with union stickers. *Zimmerman Plumbing & Heating*, 325 NLRB 106, 114 (1997) (the employer's prohibition against employees putting union stickers on their company-issued hard hats found unlawful). Special circumstances justify restriction of union insignia only "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees." *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003). It is the employer's burden to prove the existence of special circumstances justifying its restriction on union insignia. *AT&T*, 362 NLRB 885, 887 (2015). Moreover, the employer's restriction must be narrowly tailored to address the special circumstances justifying its maintenance. See *Boch Honda*, 362 NLRB 706, 707 (2015). The employer must show that its prohibition on displaying the union insignia was justified based on the facts of the case; it is not enough for the employer to articulate a legitimate basis for a prohibition generally. See *Constellation Brands U.S. Operations, Inc. v. NLRB*, 992 F.3d 642, 648 (7th Cir. 2021) (noting that "the company had the affirmative obligation of proving its position with facts and evidence" in rejecting employer argument that "Cellar Lives Matter" slogan could exacerbate employee dissention), enfg. 367 NLRB No. 79 (2019).

The facts here are undisputed. Ballard placed a union sticker on his company-issued clipboard sometime in October, and that sticker remained there until April 2023 when Wagar

noticed it. Wagar then removed it because he "did not feel that it accurately represented Auto-Chlor." (R. Br. p. 27.)

Because the parties agree that Wagar removed the sticker, to avoid a violation of the Act, Respondent must demonstrate special circumstances justifying its actions. I find that it failed to carry its burden. Respondent did not show that the sticker jeopardized employee safety in any way, damaged company property, exacerbated employee dissension, or unreasonably interfered with Respondent's public image. *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003). Respondent asserts that it lawfully removed the sticker because it was placed on company property, not clothing; neither Wagar nor any other supervisor told Ballard to remove it; and Ballard was not disciplined for displaying the sticker. These facts do not demonstrate special circumstances. Nor do they amount to legitimate business factors outweighing employees' protected right to show their union support. *Northeast Industrial Service Co.*, 320 NLRB 977, 979 (1996). Until the arrival of the Union, Respondent exhibited no concern about the placing of non-company stickers on company property—it had no prohibition in the employee handbook and permitted a host of other stickers, such as anime, race car, music band, and energy drink stickers to be displayed by employees. Wagar's removal of the sticker was conduct directed solely to rid the workplace of any lingering support for the Union.

Based on the foregoing, I find merit to complaint paragraph 5(h).

I. The Alleged Threat by Scott Wagar at the Loading Dock

At the hearing, the General Counsel amended their complaint to allege that Respondent violated Section 8(a)(1) through Scott Wagar, on a specific date between October 18 and November 30, 2022, at the loading dock of the facility by threatening its employees with the loss of previously promised wage increases if they selected the Union as their bargaining representative. This allegation is based on Wagar's testimony, adduced by the ALJ, that in mid-November he told employee Isaac Tyson that, if the employees elected the Union, the parties could commence collective bargaining, during which time the employees' terms and conditions "would be in a status quo state, and that we would not be able to move forward with our raises that we annually give in January." Prior to this, Supervisors Wagar and Gilchrist promised employees pay raises at the start of 2023. In light of these promises, it was unlawful for Wagar to tell Tyson that, if the employees selected the Union, they would no longer get a pay raise but rather the Union would have to obtain it through bargaining. Based on the foregoing, I find merit to the allegation that Respondent, through Wagar at the loading dock, violated Section 8(a)(1) threatening its employees with the loss of previously promised wage increases if they selected the Union.

J. The Unalleged Claim that Vanderbilt and Wagar Threatened Employees with Loss of Supervisor Assistance

On brief, General Counsel argue that Respondent should be found liable for a threat in violation Section 8(a)(1) when Vanderbilt purportedly said that, if the employees voted in the Union, managers could no longer help them with their work.

This claim is not alleged in the complaint, a fact that General Counsel concede in their brief. Nor did General Counsel move to amend it at the hearing, as it successfully did for the alleged threat by Wagar at the loading dock. Nonetheless, they argue that it "is appropriate for the ALJ to find this statement violated the Act" since it is closely related to other allegations in the complaint, was "fully litigated," and that "Respondent had the opportunity to respond at the hearing."

Based on the circumstances here, I deny this request because doing so would be unjustified and unfair to Respondent. The testimony about the supposed statement about loss of supervisory assistance by Vanderbilt came from employee Vanhooser, who testified on the morning of the first day of hearing. Even though the General Counsel knew about this testimony well before they rested their case in chief—and successfully moved to amend the complaint to add a different allegation—they did not move to add this before the close of the hearing. Nor did they move to amend the complaint after the record closed or offer any explanation why they waited until their post hearing brief to raise it. More importantly, for me to consider this claim at this late stage of the case, when Respondent has already submitted its brief, would be fundamentally unfair and, in my view, violate basic concepts of Due Process. See *Desert Aggregates*, 340 NLRB 289, 293 (2003) ("Because counsel for the General Counsel failed to place the lawfulness of the statement at issue during the hearing, the Respondent was deprived of the opportunity to adequately address the question."). Because the issue was not mentioned as a potential alleged ULP in the complaint, at the hearing, or in any posthearing motion to amend, Respondent received no notice about it. While General Counsel had the opportunity to present a factual discussion and legal analysis in their brief, Respondent lacked that opportunity. Absent a compelling justification, I cannot consider this matter.

Based on the foregoing, I decline to consider whether Respondent violated Section 8(a)(1) by allegedly threatening employees with loss of supervisory assistance if they selected the Union.

CONCLUSIONS OF LAW

1. Respondent Auto-Chlor System of Washington, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

2. International Brotherhood of Electrical Workers Local 46 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by its supervisors and/or agents, engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by the following conduct:

a. Since October 14, 2022, maintaining an overbroad handbook provision which states that employees "covered by a collective bargaining agreement" are not allowed to participate in Respondent's profit sharing plan.

b. On or about October 17, 2022, Respondent, by Regional Manager Scott Wagar, coercively interrogated employee Kelly Vanhooser about her and other employees' union activity and support.

c. Between October 18 and November 30, 2022, Respondent, by Regional Vice President Aaron Vanderbilt, threatened employees with loss of a previously promised wage increase if they selected the Union as their bargaining representative.

d. Between October 18 and November 30, 2022, Respondent, by Regional Manager Scott Wagar, solicited grievances and impliedly promised to grant benefits.

e. Between October 18 and November 30, 2022, Respondent distributed at the facility a document threatening its employees with loss of wages if they unionized.

f. Between October 18 and November 30, 2022, Respondent by Regional Manager Scott Wagar, threatened employees with loss of a previously promised wage increase if they selected the Union as their bargaining representative.

g. In April 2023, Respondent by Regional Manager Scott Wagar, discriminatorily removed employee Dametrius Ballard's union sticker from his clipboard, while permitting employees to have other noncompany stickers on their clipboards.

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

5. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I recommend that the Board order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(1) by maintaining the discriminatory policy specified above, I will recommend that Respondent be ordered to rescind or revise it to remove any language which reasonably may be read to prohibit conduct protected by Section 7 of the Act, advise its employees in writing of such recission or revision, and provide them with the revised handbook.

I deny the General Counsel's request for a notice reading. The remedies discussed above will effectively address the unfair labor practices found, making a notice reading unnecessary.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Auto-Chlor System of Washington, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an unlawful "Profit Sharing and 401(k) Plan" provision in its employee handbook that infringes on employees' exercise of their Section 7 rights under the Act.

(b) Coercively interrogating employees about their union support and activities.

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

(c) Threatening employees with the loss of promised raises if the employees selected the Union as their collective-bargaining representative.

(d) Soliciting grievances and impliedly promising to grant benefits to discourage employee support for the Union.

(e) Distributing to employees a document threatening them with loss of wages and benefits if they unionized.

(f) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act by removing their union stickers from their clipboards.

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

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

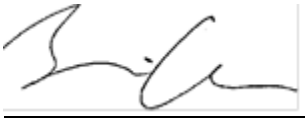
(a) Rescind the "Profit Sharing and 401(k) Plan" provision in the handbook or revise it to remove any language which prohibits or reasonably may be read to prohibit conduct protected by Section 7 of the Act.

(b) Post at its Kent, Washington, facility copies of the attached notice marked "Appendix" in English and any other language deemed appropriate by the Regional Director.[28] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to 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.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 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.

[28] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

Dated, Washington, D.C. May 15, 2025.



Brian D. Gee
Administrative Law Judge

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 maintain employee handbook policies that infringe on your exercise of the rights listed above.

WE WILL NOT coercively question you about your support for or activities on behalf of the International Brotherhood of Electrical Workers Local 46 (the Union) or any other labor organization.

WE WILL NOT threaten you with the loss of promised wage increases if you select the Union as your collective-bargaining representative.

WE WILL NOT solicit grievances and impliedly promise to grant benefits to dissuade you from supporting the Union or any other labor organization.

WE WILL NOT distribute documents threatening you with loss of wages if you unionize.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the Act by removing union stickers from your clipboards.

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

WE WILL rescind or revise the "Profit Sharing and 401(k) Plan" provision in the employee handbook to remove any language which prohibits, or may reasonably be read to prohibit, your exercise of any of the rights listed above.

WE WILL notify you in writing that we have rescinded or revised this "Profit Sharing and 401(k) Plan" provision, and WE WILL provide you with our revised handbook.

WE WILL post this notice at our facility in Kent, Washington, for a period of 60 days. In addition, WE WILL distribute the notice electronically, including by email, and by any such means as we generally use to communicate with you.

AUTO-CHLOR SYSTEM OF WASHINGTON, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also may also obtain information from the Board's website: www.nlrb.gov.

Henry M. Jackson Federal Building

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078

(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/ 19-CA-313715 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.