

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

KROGER FULFILLMENT NETWORK, LLC,

Respondent

and

Case No. 07-CA-344196

TIMOTHY DAVID CERESA, an Individual

Charging Party

*Kelly Temple and Micah Wright, Esqs.,
for the General Counsel.*

*David Barron and Nandini K. Sane, Esqs.,
for the Respondent.*

DECISION¹

STATEMENT OF THE CASE

RENÉE D. MCKINNEY, Administrative Law Judge. This case was tried² in Detroit, Michigan, on March 17, 2025. Timothy David Ceresa, an individual, filed the charge in Case No. 07-CA-344196 on June 11, 2014.³ The General Counsel⁴ issued a complaint and notice of

¹ I use the following abbreviations in this decision: “Tr.” for transcript; “GCX” for General Counsel exhibit; “RX” for Respondent exhibit; “JX” for joint exhibits; “GC Br.” for the General Counsel’s brief; and “R. Br.” for Respondent’s brief. Although I have included citations to the record to highlight particular testimony or evidence, my findings and conclusions are based not solely on the evidence specifically cited but rather are based on my review and consideration of the entire record, which may include the demeanor of the witnesses. I have also considered the relevant factors in making my credibility findings which includes: “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.’” *Daikichi Corp.*, 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003)).

² During my review of the record, I identified the following transcript corrections that are warranted: p. 81, line 14: replace “it” with “not”; p. 124, line 9: replace “responding” with “Respondent”; p. 130, line 4: replace “assigned” with “assign”; p. 130, line 19: replace “it fits” with “if it’s”.

³ All dates herein 2024 unless otherwise indicated.

⁴ On February 3, 2025, President Donald J. Trump appointed William B. Cowen Acting General Counsel, replacing former General Counsel Jennifer Abruzzo. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsel for the General Counsel collectively as the General Counsel.

hearing on November 12. Respondent Kroger Fulfillment Network, LLC filed a timely answer and Affirmative Defenses⁵ to the complaint on November 25.

The complaint alleges that about June 7, Respondent violated Section 8(a)(1) of the Act by transportation supervisor James Banks (“Banks”),⁶ who orally issued an overly broad directive to employees prohibiting discussion of union matters during work time while permitting discussion of non-union matters during work time. Respondent denies that Banks forbade employees from discussing union matters but rather maintains that he lawfully directed employees to return to work regardless of the topic of discussion. All parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. After the conclusion of the trial, Respondent and the General Counsel filed briefs, which I have carefully considered.

Thus, based on the entire record, including my credibility determinations, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company with an office and place of business located in Romulus, Michigan. Respondent provides grocery delivery services. In conducting its operations during the calendar year ending December 31, 2023, Respondent derived gross revenues in excess of \$500,000 and purchased and received at its Romulus facility goods valued in excess of \$5,000 directly from points outside the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

⁵ Respondent contends that the complaint should be dismissed because administrative law judges are unconstitutionally insulated from removal. However, the Board has rejected this defense. *Seaport Hotel Boston*, 373 NLRB No. 142, slip op. at 1 fn. 1 (2024). Therefore, I do the same. Further, Respondent did not adduce testimony or brief either this constitutional affirmative defense, or its boilerplate defenses asserting that the complaint is untimely under Section 10(b) of the Act; that Respondent is not liable for any acts by non-supervisors or non-agents; and that the complaint is barred by the doctrines of waiver, laches, and/or estoppel. Accordingly, I deem them all waived. See *Yorkaire, Inc.*, 297 NLRB 401 (1989), *enfd.* 922 F.2d 832 (3d Cir. 1990).

For purposes of the instant case only, based on the General Counsel’s theory of the case, Respondent did not press its affirmative defense that Charging Party Ceresa is a 2(11) supervisor. (R. Br. 1 fn. 1.) Therefore, this decision does not address that argument.

Respondent’s remaining affirmative defenses, relating to merits or appropriate remedies for any violation found, will be addressed below through my legal conclusions and remedy.

⁶ Banks is an admitted 2(11) supervisor and 2(13) agent. (GCX 1(d).)

On June 3, the Regional Director for Region 7 of the National Labor Relations Board, issued a certification of representative certifying Local 337, International Brotherhood of Teamsters (IBT) ("Union"), as the collective-bargaining representative of the employees in the following appropriate unit:⁷

All full-time and regular part-time Customer Service Delivery Drivers employed by the Employer at its facility at 15675 Wahrman Rd[.], Romulus, MI 48174; but excluding all other employees, professional[s], guards, clericals, confidential employees, managers[,], and supervisors as defined by the Act.

(GCX 2.)

B. Working Conditions on June 7

Ceresa's job duties include printing out dispatch routes for the delivery drivers. (Tr. 17.) The routes are generated from a program known as OSP,⁸ which displays the routes once they are ready to issue; this is known as the "Puzzle." (Tr. 18.) The OSP program produces information that creates the routes and delivery times. Afterwards, from his desk in the transportation area, Ceresa assigns drivers to each route. Dispatching begins early in the morning, so, when Ceresa begins his shift around 12:30 p.m., most of the drivers have already been dispatched but there are three afternoon dispatch times: 1:00 p.m., 1:30 p.m., and 2:30 p.m. (Tr. 20, 41.) If there is a power outage, bad weather, or if the grocery packers are behind, the OSP shuts down. (Tr. 19, 104.) In the event of a system outage, the drivers are unable to receive route assignments and wait for their routes to be distributed, unless they are instructed to complete online compliance training, to assist with marshalling⁹ in the yard, or to clean vans. (Tr. 19, 104, 113, 114, 139.)

On June 7, when Ceresa reported to work, there was a power outage. (Tr. 19.) Respondent's facility was operating on backup generator power. (Tr. 19.) The 1:30 p.m. and 2:30 p.m. routes were canceled, and those drivers were sent home. (Tr. 19.) Approximately seven of the drivers, scheduled for 1:00 p.m. dispatch, remained at the facility on standby, waiting for their assigned routes. (Tr. 54, 20, 106.) Ceresa was in the transportation office, waiting for the routes to generate so he could distribute them to the drivers. (Tr. 20.) The drivers remained at Respondent's facility in the transportation office on standby. (Tr. 54, 106.) Neither Banks nor the transportation supervisor for Ceresa's shift, Valerie Freeman, provided a time estimate of when the routes would be available. (Tr. 28.) The drivers were instructed upon arrival to do their training on the computer if they had any to do but, if not, it was fine to just sit there. (Tr. 109.)

C. Ceresa's June 7 Discussion with Bargaining Unit Employees and Banks' Response

After waiting an hour, in order to update them that there was no new information, Ceresa walked from his desk to the sitting area where the seven drivers were waiting. (Tr. 28.) After

⁷ Pursuant to the parties' stipulation, Customer Service Delivery Driver Team Leads, which is Charging Party Ceresa's job classification, were neither included nor excluded from the covered bargaining unit. (Tr. 16; GCX 2.) I take administrative notice that the status of this job classification is at issue in a pending unit clarification petition, Case Number 07-UC-355195.

⁸ The meaning of "OSP" was not provided at hearing.

⁹ No explanation of the marshalling process was provided at hearing.

Ceresa gave the drivers the update, the drivers began to ask Ceresa questions about the Union. (Tr. 28.) Ceresa had been acting as de facto steward and, apparently, held a high profile during the campaign. (Tr. 18, 65.) His likeness was featured on a banner that the Union had posted in a vacant lot across from Respondent's facility. (Tr. 89.) Although no election was yet scheduled,
 5 Ceresa desired to be elected steward. (Tr. 65.)

For five to ten minutes, Ceresa addressed his coworkers' questions about the timing of post-certification union steward elections, the scheduling of meetings regarding contract proposals, and the appointment of alternate stewards for about 4 to 10 minutes. (Tr. 29, 58, 109-
 10 110.) Then, transportation supervisor Banks approached the group because Ceresa was not at his desk as Banks expected; he could not hear what the group was discussing from his desk. (Tr. 133, 134.) Banks approached the group looking to speak to Ceresa either because there was an influx of telephone calls (which it was Ceresa's responsibility to answer) or because he recognized that, given the delay, the team leadership needed to figure out a plan; Banks could not
 15 recall at hearing which was his motivation. (Tr. 134.)

According to Ceresa and driver Jalen Woods, Banks walked over and told Ceresa and the assembled drivers that they could not talk about the Union while on the clock. (Tr. 30, 33, 60, 61, 69, 72, 75, 108.) Banks testified that he did not recall his exact words¹⁰ but as he walked up, he
 20 told the assembled that they had things to do and asked Ceresa to come back to the office. (Tr. 134, 137, 146.) Banks next said that they could be doing other things, like the online trainings. (Tr. 30.) In response, Ceresa told Banks that he was wrong: the group was not causing a work stoppage; the employees were the Union and could talk about the Union. (Tr. 62, 70, 72.) Banks replied that he could find work for them to do. (Tr. 108.) Banks proposed that the drivers could
 25 log into compliance training, help with the marshallers, or wash the vans. (Tr. 134.)

Banks asked Ceresa to speak to him privately. (Tr. 30.) Ceresa responded that after he was done with the drivers' questions, he would come over and talk to Banks. (Tr. 71.) Banks replied that he was a supervisor and Ceresa a team lead—Ceresa had to listen to him. (Tr. 30,
 30 75.) With no more questions being asked by the drivers, Ceresa returned to his desk. (Tr. 30, 75.)

At Ceresa's desk, according to Ceresa, Banks reiterated to him that he could not talk about the Union; that he was a supervisor and Ceresa a team lead; and that Ceresa had to listen to him. (Tr. 31, 75.) Ceresa told Banks to stop talking to him. (Tr. 31, 75.) Banks refused. (Tr. 31,
 35 75.) Ceresa replied that Banks was harassing him and he was going to HR. (Tr. 31, 75.)

According to Banks, as he approached, Ceresa had announced to him that the group was discussing the Union—in particular, the right of represented employees to request a union representative. (Tr. 134, 137.) After he asked Ceresa to speak with him privately and Ceresa
 40 refused, Banks elaborated that “you can't step away from work to talk about anything, you know, union, sports, what we're eating today...we have work we can be doing....” (Tr. 137.) Ceresa responded with “what he wasn't going to do or what he didn't have to do, and he also asked

¹⁰ At hearing, Cortlandt McCall, HR Manager, opined that Banks would not give a directive to not talk about the Union on the clock because Banks had been trained in what he could say in a union-represented environment and had worked in a unionized facility previously. (Tr. 161-162.) I give no weight to McCall's opinion. She was not present for the confrontation. Nor does Banks' training or prior work experience in a union-represented facility establish that he did not tell Ceresa and Respondent's drivers that they could not talk about the Union on June 7.

for...his junior rep, I believe.” (Tr. 137.) Banks replied that he was not interrogating Ceresa or asking him anything but telling him to do his job. (Tr. 137-138.) Banks testified he told Ceresa that if he did not know what he could be doing at that time, Banks could show him. (Tr. 138.) Ceresa said he wanted to go up to HR and left. (Tr. 138.)

5

D. Ceresa’s June 7 Meetings with Human Resources and Plant Management

On his way to HR, Ceresa encountered driver Tobias Knight; he asked Knight to serve as his witness with HR. (Tr. 32.) Ceresa and Knight met with HR Manager Cortland McCall, in her office. (Tr. 33.) During the meeting, Ceresa stated that he and a group of drivers were discussing Union matters when Banks approached, interrupted their discussion and told the group that they could not talk about the Union. (Tr. 33, 69, 155-156.) McCall asked whether all members of the group were on the clock at the time; Ceresa confirmed that they were. (Tr. 33.) Driver Knight pointed out that employees were allowed to engage in other non-work-related conversations on company time and asked why discussion about the Union was different. (Tr. 34.)

Ceresa testified that during working hours, he engaged in non-work related conversations with other employees. These discussions ranged widely, from everyday life to health, family and sports, including about golf with Banks. (Tr. 36.) Ceresa also had non-work-related conversations with transportation supervisor Freeman about her pet during working time. (Tr. 37.) During these conversations, Ceresa was on the clock but was not always performing his duties. Driver Woods also participated in non-work-related conversations on the clock, both while waiting for routes in the transportation office and otherwise while working. (Tr. 111-112.) Respondent had also permitted employees to visit the associate pantry¹¹ while on the clock until recently. (Tr. 36, 37.)

McCall said that she would need to discuss the incident with Banks with the legal department since the conversations occurred on the clock. (Tr. 33.)

After Ceresa’s initial meeting with McCall, he attended another meeting 10-15 minutes later with McCall and Plant Manager John Kossick, and was accompanied by his supervisor, Freeman, who he selected as his witness. (Tr. 34-35, 156.) During the meeting, McCall and Ceresa told Kossick about Banks’ directive to employees not to talk about the Union. Kossick stated that the drivers should have been in the yard cleaning the trucks or cleaning inside the truck cabs. (Tr. 158.)

DECISION AND ANALYSIS

Based on my review of the witnesses’ testimony as a whole, I conclude that Banks told Ceresa and the delivery drivers present that they were not to talk about the Union on June 7. Both Ceresa and Woods testified in a straightforward manner that Banks simply approached them and forbade employees from discussing the Union. On the other hand, Banks admitted that he could not recall his exact words at that initial approach.

¹¹ The associate pantry is a benefit for employees. It contains items returned by customers that Respondent cannot sell to the public.

Further, while Ceresa's status as a statutory employee remains in dispute, Woods' status is not in dispute. As a current employee who testified against his employer's interest, the Board finds such testimony such as Woods' particularly persuasive. See *Flexsteel Industries*, 316 NLRB 745, 745 (1995) ("[T]he testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest."), enfd. mem. 83 F.3d 419 (5th Cir. 1996); *Avenue Care & Rehabilitation Ctr.*, 360 NLRB 152, 152 fn. 2 (2014) (current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues).

C. Factotum, Inc., 334 NLRB 189 (2001), which Respondent argues demonstrates that "employers have a right under the Act to restrict talk while working, even if the discussion involves the Union, and an employer's efforts to maintain productivity does not violate Section 8(a)(1) of the Act" is inapposite to the instant case. *C. Factotum* involved a blanket no-talking rule imposed because employees stopped working for periods of time of 10-15 minutes to discuss the union. Here, the employees were idle due to a shutdown of Respondent's systems for at least an hour before. Simply seeking to provide a status update, Ceresa met with the drivers. At that point, the drivers asked Ceresa questions about the Union and steward elections. This discussion lasted 4 to 10 minutes, during which time the dispatch system remained down and no supervisor instructed the drivers to perform specific work.

Further, in *C. Factotum*, the Board adopted the judge's findings that there was no evidence that the no-talking rule had been imposed specifically to restrict discussion about the union and also adopted his finding that there was no credible evidence that employees were permitted to discuss other subjects during working time. *Id.* at 189, 193. Here, the opposite is true: I have found that the no-talking directive imposed by Banks specifically addressed discussion of the Union and I have credited testimony that employees were permitted to discuss subjects other than the Union during working time.

The credited record evidence establishes that, through Banks on June 7, Respondent restricted conversations about the Union while still permitting general conversations.¹² Accordingly, I find, as alleged in paragraphs 6 and 7 of the complaint, that Respondent, by Banks' June 7 directive to employees prohibiting them from discussing the Union during working time, while permitting discussion of other non-work matters, has violated Section 8(a)(1) of the Act. *Emergency One, Inc.*, 306 NLRB 800 (1992); see *Magnolia Manor Nursing Home*, 284 NLRB 825, 829 (1987); *F. Mullins Construction*, 273 NLRB 1016, 1022-1023 (1984).

CONCLUSIONS OF LAW

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

¹² I note Respondent's argument that Banks simply sought to have Ceresa return to his job duties, which Ceresa refused to immediately do. Although I agree this goal was consistent with Banks' authority and duty as a supervisor, his method was unlawful. Likewise, Respondent's focus on Ceresa's asserted failures in initiative as a team lead on June 7 is misplaced in this case.

2. Respondent has violated Section 8(a)(1) of the Act by prohibiting employees from engaging in conversations about union matters during working time, while permitting conversations during working time about other nonwork related matters.
3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

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

Respondent shall rescind its unlawful directive prohibiting employees from discussing the Union during working time and inform employees in writing that this has been done.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facility in Romulus, Michigan wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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 Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 7, 2024. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 7 for the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

Respondent, Kroger Fulfillment, LLC, Romulus, Michigan, and, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹³ 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.

(a) Prohibiting employees from engaging in conversations about union matters during working time, while permitting conversations during working time about other nonwork related matters.

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

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

10 (a) Post at its Romulus, Michigan facility and electronically copies of the attached notice marked "Appendix" on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily
15 posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by any other material.

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

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

25

Dated at Washington, D.C., July 25, 2025.



30

Renée D. McKinney
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.

YOU HAVE THE RIGHT to freely discuss union matters on working time and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT prohibit you from discussing Local 337, International Brotherhood of Teamsters (IBT), or any other labor organization, on working time, while permitting you to discuss nonunion topics on working time and we hereby rescind any directive issued on that subject.

Kroger Fulfillment, 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 obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, 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/07-CA-344196> 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 (616) 930-9165.