

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

BAPTISTA'S BAKERY, INC.¹

and

Cases 30-CA-17104
30-CA-17268
30-RC-6604

TEAMSTERS LOCAL UNION NO. 344
SALES AND SERVICE INDUSTRY,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS²

Angela B. Jaenke, Esq., and Paul Bosanac, *Esq.*,
for the General Counsel.

John E. Murray, Esq., of Milwaukee, Wisconsin,
for the Respondent.

Timothy C. Hall, Esq., of Milwaukee, Wisconsin,
for the Charging Party/Union

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Milwaukee, Wisconsin, on various dates in February, April, and May 2006, based on charges filed in 2005 by the Union on February 11 and August 15, and a representation petition filed by the Union on February 8, 2005. Both charges were amended on various dates.

The Acting Regional Director's amended consolidated complaint dated February 22, 2006, alleges that the Respondent violated Section 8(a)(3) of the Act by permanently laying off six employees,³ discharging employee Kathy Mankin, and disciplining employee Donna McCall. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act by the following actions related to the union organizing activities of its employees: restatement or promulgation of its no-solicitation rule, solicitation of, and positive response to, grievances and promise of benefits, threats of loss of benefits, informing employees that everything would "start from zero," that the Employer could not grow if the Union were successful, and that the organizing campaign was preventing an employee from receiving increased pay, threats of plant closure, informing employees that it wanted employees with "good attitudes" and employees who "don't cause trouble or open their mouths" to move forward with, informing employees that the Respondent was finally making money and that this would be ruined "by bringing in a third party," offering to disclose and disclosing confidential information about employees, implying

¹ Respondent or Employer.

² Charging Party or Union.

³ Dennis Sobiech, John Crowley, George Ann Bohem, Lynda Starrett, Judy Zullner, and Kathi Szuszka.

surveillance of union activity, comparing the Union to a “crack addict,” and granting benefits including a Major League Baseball outing, free jackets, an employee-of-the-year award, and complimentary dinners at area restaurants.

5 The Respondent maintains variously, that certain of the alleged actions are precluded by
 Section 10(b), that others were permissible under the Act, and that others did not occur or were,
 essentially, taken out of context. The Respondent further contends that the alleged layoffs were
 unrelated to union organizing activities, and were, instead, generated by a slowdown of the
 Respondent’s business, and that the discharge of Kathy Mankin and discipline of Donna McCall
 10 were not violative of Section 8(a)(3).

 The parties also litigated election objections filed by the Union and challenges filed by
 the Respondent, which are essentially parallel to the unfair labor practice allegations. The
 Respondent challenged the ballots of George Ann Bohlen, Judy Zullner, and Kathleen Szuska,
 15 all of whom were alleged in the complaint to be permanently laid off in violation of Section
 8(a)(3). In its brief, the Union maintains that the Respondent’s challenges should be overruled
 and the votes counted, that if the Union then prevails it should be certified, and that if it does not
 or if the challenges are upheld, a rerun election should be ordered pursuant to its objections.

20 At the trial, the parties were afforded a full opportunity to examine and to cross-examine
 witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally,
 and to file post-trial briefs. Base on the entire record, including my observation of the witnesses
 and their demeanor, and after considering the oral argument and brief of the Respondent, and
 the briefs of the counsel for the General Counsel and the Union, I make the following

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FINDINGS OF FACT

I. Jurisdiction

30 The Respondent, a corporation, maintains an office and place of business in Franklin,
 Wisconsin,⁴ where it has been engaged in the snack food manufacturing business. During the
 calendar year 2005, in conducting said business, the Respondent purchased and received
 goods and materials valued in excess of \$50,000 directly from suppliers located outside the
 State of Wisconsin. It is admitted, and I find, that the Respondent is now, and has been at all
 35 times material herein, an employer engaged in commerce within the meaning of Section 2(2),
 (6), and (7) of the Act.

II. Labor Organization

40 I find, and it is admitted, that the Union is, and has been at all times material herein, a
 labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

45 Overview

 The Respondent operates a bakery/factory in the Milwaukee, Wisconsin metropolitan
 area at which it manufactures baked snack foods. Sometime in January 2005,⁵ an employee

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⁴ The only facility involved here.

⁵ All dates refer to 2005, unless otherwise indicated.

contacted the Union, and an organization drive was put into motion. On February 2, the Respondent permanently laid off six unit employees. The General Counsel maintains, and the Respondent denies, that the Respondent had learned of the union activity prior to the layoff decision. The Union filed a representation petition with the Board on February 8, and both the

5 Respondent and the Union engaged in an election campaign that culminated in a Board-conducted election on March 23. At the election, of 44 eligible voters, 21 cast ballots for the Union, 22 against, and the Respondent challenged three voters, sufficient to affect the results of the election. The Union filed objections to the conduct of the election on March 29. The alleged unfair labor practices took place both before and subsequent to the election.

10 The Respondent

The Respondent's predecessor company, Gardetto's, along with one of its two bakery manufacturing facilities, was sold to General Mills in 1999. Nan Gardetto, Respondent's CEO, and identified in the record as the Respondent's owner, then formed Baptista's in August 1999, and located its operations at the Franklin facility involved herein, the Gardetto's facility that was not included in the General Mills transaction. Gardetto's produced snack mixes at its two plants, with the Franklin plant producing bread stick pieces that were part of the snack mixes. After the Respondent began operations, the Franklin plant utilized two ovens to produce breadstick

15 pieces for the General Mills snack mix, which were packaged in large cardboard totes that held up to 700 pounds, and also produced breadsticks and toasts which were packaged in trays. Respondent is managed by its president, Tom Howe, and CFO Jon Becker. Reporting to Howe, among other managers, are Vice President, Human Resources and Operating Services Thomas Mayer, and Manager of Quality Assurance and Sanitation, Marlenea Jackson. At the time the

20 events discussed herein occurred, Brent Lepak was the vice-president, manufacturing.

Howe was hired by the Respondent in mid-2003. In mid-2004, he decided to change the direction of the business by signing a 3-year contract to supply General Mills and by seeking new business involving baking product, including pretzels and other snack foods, for major customers including "Old Dutch" and "Weight Watchers," to be sold under the customer's labels. In order to facilitate this new business plan, the Respondent purchased new equipment including a large-scale oven,⁶ increasing its baking capacity by 50 percent, and new packaging machines. As a result, by July 2004, the Respondent's production volume increased approximately two-fold.

35 In July 2004, the Respondent implemented a new work schedule to accommodate the increased workload, which changed its operation from a 3-shift daily schedule, to 4 shifts, operating 24 hours a day, either 6 or 7 days a week. To man the new shift structure, the Respondent hired new employees in July through September 2004, many of the new hires coming from the newly defunct American Italian Pasta Company in nearby Kenosha, Wisconsin.⁷

Much of the testimony and evidence dealt with the issue of the state of the Respondent's business at the time it decided on and implemented the permanent layoffs in early 2005. The

45 ⁶ Added to the then current two ovens.

⁷ Various witnesses described tensions between the existing Baptista's employees, and the newly hired "pasta employees" or "pasta people," as they were frequently referred to in the record. From these accounts, I find that these tensions were at least partially caused by the

50 then current employees' resentment over the Respondent's decision to hire and/or promote some of these new employees to lead, supervisory, and managerial levels.

Respondent's evidence consisted mainly of testimony by its managers to the effect that the Respondent's business, and the snack food business in general, is seasonally cyclical and that, further, due to poor sales, the Old Dutch and Weight-Watchers' business had never reached expected goals, with the Respondent experiencing and expecting reductions in the amount of product that needed to be produced for these two customers. This issue is discussed, in detail, below.

The Layoffs, Union Organizational Activity, and Respondent's Knowledge

Paul Brzezinski, an employee of the Respondent, first contacted the Union on January 12, which resulted in a meeting on January 17 at the Union's offices in Milwaukee with Business Agent/Organizer James Dillon. Brzezinski and Dillon agreed to arrange two meetings for Respondent's employees and Dillon at the Union's offices on January 20 and 22. Brzezinski, who was on medical leave at the time,⁸ telephoned various employees to inform them of the union meetings. Dillon conducted these two meetings, and discussed with the employees present what was entailed in organizing a union, including the necessity of obtaining signed authorization cards and forming an organizing committee. At these meetings, Dillon told the employees that for the time being they should keep the fact of the organizing drive to themselves and to other employees they thought would be interested.

The Respondent announced the permanent layoffs of the alleged discriminatees, and the restructuring of its shift schedule on Wednesday, February 2. The February 2 memo from Respondent's president, Howe, to "all shop employees" began with the following two paragraphs:

As all of you have noticed from our work activity, we are experiencing the annual post-holiday lull in orders that always affects the snack industry, something I explained in my notice of July 9, 2004, when announcing our change to a 7/24 two-week rotation. This slowdown is common throughout the snack industry, and snack companies typically adjust their work schedules, reduce their work weeks, and schedule plant shutdowns.

As a result of this slowdown, it is necessary that we remain flexible and also make adjustments in our work schedule to reflect our current and near-term customer demands.

The memo from Howe also, in pertinent part, stated as follows:

The second step we've taken, and one we regret was necessary, is the layoff of some members of our workforce to reflect our current and near-term business level and added capacity going forward. These involved tough decisions, we provided those people some assistance to help during their transition to new opportunities, and our focus was on retaining people possessing the skills, knowledge, flexibility, reliability and attitude that provide the best foundation for building for the future. (emphasis contained in original)

⁸ He eventually returned to work 6 days before the representation election.

Finally, the memo stated as follows, in pertinent part:

5 Please do not read anything into these changes beyond it being a temporary seasonal adjustment. Our business is growing, we have made significant investment in baking and packaging equipment to foster that growth, and potential customers are excited about what Baptista's to (sic) offer.

10 During their shifts on February 2, the Respondent laid off five of the six employees who are alleged in the complaint as permanent layoffs in violation of Section 8(a)(3): Judy Zullner, Dennis Sobiech, John Crowley, Lynda Starrett, and George Ann Bohlen. They were informed of their layoffs, and escorted out of the plant. The sixth alleged discriminatee named in the complaint as being permanently laid off on February 2, Kathi Szuszka, was not, in fact, laid off
15 by the Respondent. Her situation is discussed below.

 Dillon held another organizational meeting for the Respondent's employees on February 5. At this meeting, Dillon discussed forming an organizing committee and opined that the easiest way to protect union supporters was to tell the Respondent their names. On February 7,
20 the Union mailed and faxed a letter to the Respondent's president, Howe, notifying the Respondent of the names of the employee members of the Union's organizing committee, including Bohlen, Zullner, and Szuszka.

 The Respondent's vice-president, Mayer, received the Union's fax the evening of
25 February 7. Mayer called Howe, Gardetto, and the Respondent's legal counsel, and notified them of the receipt of the Union fax. Mayer, Gardetto, and Howe met the following day to discuss the fax, and Mayer gave Gardetto and Howe copies. They agreed not to discuss the union organizing until they had spoken to legal counsel, but to meet the following day, February 9, with the management group including the shift managers and supervisors.

 On February 9, Mayer, Gardetto, Howe, Vice-President of Manufacturing Brent Lepak,
30 Director of Engineering Gary Olson, Maintenance Supervisor Jeff Sertich and manager Russell Sparks met to discuss the developments. Mayer told the group that he had received a fax two evenings earlier regarding an organizing committee for the Union. Gary Olson responded that
35 weeks before, he heard Brzezinski say that "we ought to get a union." Olson said he thought it had been a "passing remark." Sertich said that maintenance mechanic Terry Cantwell had made a comment about a union to him weeks earlier as well, and that Sertich had reported the remark to Lepak within a day or two of hearing the comment. At the meeting, Lepak
40 acknowledged that Sertich had so informed him a couple of weeks earlier.⁹

 Brzezinski's comment to Olson concerning "we ought to get a union" occurred at a gathering about January 26, or earlier in January,¹⁰ for an employee leaving the Respondent's

45 ⁹ My findings as to what occurred at this meeting are based on the credited testimony of Mayer, and the admissions in Respondent's position statement submitted to the Region during the investigation and introduced as an exhibit. As to the position statement, see *Dobbs International Services, Inc.*, 335 NLRB 972 (2001).

50 ¹⁰ I find that this conversation occurred about January 26 based on the testimony of Mayer to the effect that Olson admitted at the February 9 management meeting that the conversation had occurred weeks earlier, the admission of the Respondent in its counsel's position statement to the Region that the Olson conversation with Brzezinski had occurred "two weeks earlier," and

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employ (unrelated to the issues in this case), at a Franklin, Wisconsin bar. Brzezinski began talking about a union with those present, including Olson. At some point Olson and Brzezinski had a conversation while playing pool. Olson commented that he thought, "it's a good thing that—what you are doing." Brzezinski responded that he also thought it was good, that he
 5 "don't have nothing to lose anyways."

Kathi Szuszka

10 Szuszka was employed as one of four QA Techs,¹¹ each one assigned to one of the then four shifts. Szuszka worked on the third shift. Quality Assurance Manager Marlenea Jackson and Vice President Lepak met with Szuszka the evening of February 2. Jackson told Szuszka that she was a good worker and the Respondent was not going to let her go, but a shift was being eliminated so Jackson wanted her to work on the first shift as a sanitation specialist. Szuszka responded that she preferred to work on the third shift. Jackson said that if the
 15 Respondent returned to a four shift schedule, Szuszka would be the mostly likely candidate to move into that position, but that she was being assigned to the first shift to receive more training so as to be better prepared to return to a QA Tech position in the future.¹² Jackson told Szuszka that she hoped that being assigned to the first shift wouldn't interfere "with her part time job," apparently a reference to Jackson's belief that Szuszka had a part-time job
 20 elsewhere. Szuszka said it would be no problem, but did not directly respond to Jackson's comment that she had a part-time job elsewhere. Szuszka testified that she, in fact, had no part-time job elsewhere. Lepak suggested that it was possible that maybe the Respondent could move her to second shift packaging if there was an opening there. The meeting ended with Lepak saying that he would see if "someone had dropped out or something else that was
 25 available."¹³

the testimony of Brzezinski that the conversation probably occurred in January, but he did not know the exact date other than it was after January 17. Respondent called Olson as a witness, but Olson did not testify as to the Brzezinski-Olson bar conversation, notwithstanding a claim to
 30 the contrary in the Respondent's brief. Olson's testimony that at the time of the meeting, he believed he was unaware that the "Teamsters were interested in an organizing campaign at Baptista's," may simply reflect that Brzezinski mentioned a union to Olson, but nothing about the Teamsters specifically. My finding of fact as to the contents of the conversation reflects Brzezinski's credible and unchallenged testimony.

35 ¹¹ Szuszka, Leslie Fintak, Sharon Cassel, and Judy Rautio.

¹² Jackson credibly testified that in the past she had perceived that Szuszka had some performance related problems related to the QA Tech position, and that additional training would be necessary.

40 ¹³ My findings here are based on the testimony of both Jackson and Szuzska. Lepak did not testify as to this conversation. As noted elsewhere here, both Jackson and Szuzska demonstrated by their demeanor an intent to truthfully answer questions of counsel for both sides. On the other hand, this single conversation took place some time before the trial, and recollections are affected by the passing of time. Jackson testified that, in effect, Szuzska admitted that a second job would cause her problems moving to the first shift. Szuzska testified
 45 that she did not have a second job, that she didn't tell Jackson she had a second job, and it was Jackson who brought up the subject. On the other hand, Szuzska admits that when Jackson brought up the subject, she didn't affirmatively tell her that she had no second job. I find that while Szuzska did not affirmatively tell Jackson she did not have a second job, she left Jackson with that impression by not denying such. I further find, that no matter the exact words used by
 50 each, the meeting ended with Jackson under the impression that Szuzska would not accept a transfer to first shift and that Lepak would see if there was an opening on another shift more

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When Szuszka reported to work on February 3, she learned she was not on the schedule for the following week. She went to Mayer's office and the two spoke. Szuszka told Mayer that she was not on the schedule for the following week. Mayer responded that she had refused a job. Szuszka said that Lepak was going to get back to her. Mayer again responded that she had refused a job. There was additional discussion, and then Mayer asked her if she was going to finish her shift. Szuszka said, "No." Mayer asked for her employee badge and then escorted her out of the plant.

10 The Election Campaign: Captive Audience Speeches/Meetings¹⁴

The Nan Gardetto Speech

15 The Union filed its representation petition with the Board on February 8. On February 18, Nan Gardetto spoke to all unit employees at a captive audience meeting held on the Respondent's premises. Gardetto used a prepared outline of points she wanted to communicate to the employees, but departed from the outline occasionally.¹⁵ Gardetto told the assembled employees that she felt embarrassed; that she felt shame that she had let the employees down, and that she hadn't done a good enough job communicating with them. She said she cared a lot for her employees, ". . . and because of my situation at home¹⁶—I really was feeling like I wasn't enough." She told the employees that she "felt very hurt and abandoned when she received the letter" from the Union, and expressed to the employees her thought that "that's exactly how my employees must have felt" about her lack of communication with them. Gardetto told the employees that her accessibility and communication with them would be getting better and that her door was always open if they had any questions or concerns.

30 Gardetto further told employees at the meeting that she wanted to correct any behavior that may have caused the employees to feel unappreciated, and to correct any feelings of fear, to speak out by creating a new culture based on open communication, problem solving, and effective teamwork and trust. She said that the union organizing attempt was a "wake-up call," that she hoped she could discover "where the disconnect and hurts occurred" and to make changes needed to continue a strong family business, and that Baptista's "was not taking the time to say thank you enough." She informed the employees that she hoped she would be able to continue going through the year addressing all their needs, the needs of customers, and the need for profitability without the involvement of a third party, that she was committed to having

40 acceptable to Szuzska, but that if there was no such opening there would be nothing for Szuzska. Szuzska left the meeting under the impression that she had expressed opposition to the first shift, but had closed no doors.

45 ¹⁴ Both the counsels for the General Counsel and the counsel for the Respondent used the term "captive audience speech" in their briefs to describe speeches given by various management representatives to assembled groups of employees during the course of the union campaign. The dates of some of these captive audience speeches and the order in which they occurred is not clear from the record, except that they all occurred during the period beginning with the Gardetto February 18 speech through about March 23.

50 ¹⁵ Much of my findings as to what Gardetto said at the meeting are based on Gardetto's own testimony. Gardetto said she could not remember what she said "verbatim," but could remember the "gist." I took Gardetto's "gist" comment to apply not just to the specific questions of counsel, but to her testimony as to her speech in general, unless she testified to the contrary.

¹⁶ Gardetto testified that her time had been occupied dealing with her husband's illness.

Tom Mayer focus on attending to employees' needs again, and committed to creating opportunities for "collaboration and communication on goals," and celebrating employee successes. She also told employees that she was human and had made mistakes but wanted employees to come to her so she could fix them, that she was not too proud to hear what they
 5 needed and to make the changes that they needed, that she was going to be more available in the plant and more conscious and aware of what was going on, and would actively participate in ensuring that the changes needed would happen.¹⁷

The Brett Lepak Speech

10 Brett Lepak, the Respondent's vice-president of operations during material times,¹⁸ gave a captive audience speech to employees during the course of the union election campaign. Despite the testimony of five witnesses, including Lepak, the record does not establish the exact date of the speech. Further, neither Lepak nor the other witnesses could definitively establish
 15 whether Lepak gave one speech to assembled employees or similar speeches to assembled groups on each shift, although Lepak testified, "I believe it was shift by shift." I, thus, make no finding as to the exact date of the speech, other than it was during the course of the union election campaign, nor as to whether it was one speech or similar speeches to each shift.

20 In his captive audience speech(es), Lepak told the assembled employees that Baptista's had made mistakes but wanted to do better,¹⁹ that the company was doing well and they were not headed towards more layoffs, that he didn't care whether the employees had a union or not but that the company couldn't grow with a union, that Baptista's wanted to move ahead people with good attitudes, that employees shouldn't forget to vote, and that whether an employee
 25 voted "yes" or "no" it wouldn't be held against him/her. Employee Sharon Cassel asked Lepak about why employee Joe Carvalho had his lead position and pay taken away. There is no evidence as to Lepak's answer, if any. Employee Leslie Fintak asked Lepak about employee Dennis Sobiech's layoff. Lepak responded that a mistake made by Sobiech had cost the company \$20,000. Lepak also said that the company wanted to have mid-year reviews for all
 30 employees and to have raises in June.²⁰

35 ¹⁷ One employee present for Gardetto's speech, Joe Carvalho, testified that Gardetto said that people who were not happy should leave the company. No other witness for the General Counsel so testified and, indeed employee Leslie Fintak testified that Gardetto did not make the comments testified to by Carvalho and that, further, such comments would be out of character for her. In their brief, counsels for the General Counsel do not mention or rely on Carvalho's testimony as to the alleged comment by Gardetto. On balance, I do not credit Carvalho's recollection of this alleged comment by Gardetto.

¹⁸ Lepak voluntarily left the Respondent's employ for another job in February 2006.

40 ¹⁹ In their brief, counsels for the General Counsel assert that this statement constitutes solicitation of grievances and promise of a benefit, but concede that the statement was not alleged as a violation in the amended consolidated complaint introduced during the hearing. Inasmuch as the statement is not alleged as a violation, nor was there an attempt to amend the complaint to add the allegation, and in view of my findings herein which make any findings as to
 45 the statement redundant, I have not made any findings herein as to whether, in fact, Lepak's statement was a solicitation of grievances or promise of benefits.

50 ²⁰ In finding that this is what Lepak said, I generally credit the testimony, except as set forth to the contrary, of all five witnesses who testified as to the captive audience meeting(s), each of whom answered questions forthrightly and, generally, without hesitation on direct and cross-examination, and demonstrating an intent to honestly answer, rather than avoid, questions: Manager Lepak, and employees Mankin, Karboski, Fintak, and Mang. Of course, the event

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The Tom Howe Speech

Respondent's president, Tom Howe, conducted 30-minute captive audience speeches with each of three shifts on March 17.²¹ Howe talked to the assembled employees about the state of the Respondent's business including: that at one point the Respondent had been ready to close the doors; that the Respondent's Weight Watchers business had not done well in the marketplace; that the company had made a substantial capital investment in pretzel baking and packaging equipment; that sales had now grown from 5 million to 9-10 million; that the Respondent was committed to find new products and customers to grow the business; that the Respondent was committed to make the business work by better training for and communication with its employees including using quarterly team meetings to share the state of the business; that he didn't want the union to come in and that he and Nan (Gardetto) were working hard on changing things; that he was asking the employees to support the direction the Respondent was going in; that they did not need union representation in order to move forward and that union representation could become a "hurdle" in that the Respondent's flexibility would²² be restricted by the rules of a union contract; and that bringing in a third party or union would ruin or wreck the progress the Respondent was making.²³

testified to occurred over a year prior to the testimony and not all of the recollections were equally strong. Lepak, for one, said, in effect, he was more comfortable testifying as to the "gist" of conversations, and his memory appeared somewhat hazy as to certain questions. For example, Respondent's counsel asked whether he made any comments that "specifically referenced the union or organizing campaign?" Lepak began his answer, "Nothing that I can think of specifically . . ." The Respondent's counsel asked Lepak whether he recalled telling employees that if the Union won the election, the company could not grow. Lepak answered, "No," and thus not denying that he said it, but testifying that he could not recall saying it. I, thus, chose to credit the specific testimony of Mankin and Mang to the effect that Lepak said the company couldn't grow with a union. And while there was no other supporting testimony, I chose to credit Mankin's specific testimony that Lepak said words to the effect that the company wanted to have reviews in mid-year for all employees to have raises in June. Lepak was not asked about this alleged statement and, thus, did not deny it. However, the General Counsel has not alleged this as a violation. Thus, and because a finding of a violation would be redundant in view of my other conclusions herein, I do not conclude that Lepak's comment as to mid-year reviews and raises violated the Act.

²¹ An exhibit, a memo from Tom Mayer to "All Shop Employees," established the date of the speeches. In addition to Howe, General Counsel witnesses Sharon Karboski, Sharon Cassel, and Rex Mang testified as to the content of Howe's captive audience speeches. Inasmuch as the testimony of the witnesses does not differentiate between the speeches given to each shift and in considering the overall sense of Howe's testimony, I find that essentially the same words were used during each speech. Both Cassel and Mang attended the meeting for first shift employees.

²² Howe's actual testimony is, "That we would be -in a union situation, we would be - - could be restricted insofar as needing to follow the rules of the union contract." Then, in answer to a question of the Respondent's counsel, Howe testified that he didn't recall whether he used the word "would" or "could." There was no other evidence as to which word Howe used. Because Howe first used the word "would" in his testimony before appearing to catch himself and say "could," I conclude that the initial words of his testimony are the reliable ones in respect to this issue, and that, in fact, Howe used the word "would."

²³ Employees Rex Mang and Sharon Cassel, both witnesses for the General Counsel, testified that Howe, in talking about the Respondent's upbeat plans for the future, said words to

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Gary Olson/Mario Blanquel Speeches/Meetings

5 Olson gave two captive audience speeches to employees during the election campaign, each time giving a similar speech to each of all three shifts.²⁴ At the first speech, the supervisor of the shift on which the speech was given was present. During the second speech, shift supervisor Mario Blanquel was present at least for the meeting on the first shift.²⁵ At the two captive speeches he gave, Olson told employees that he was there to talk about the Union, that he was against the Union, that choosing a union is overdoing it just like putting a tourniquet rather than a “Band-Aid” on a cut finger is overdoing it, and that the Respondent had made mistakes but that he, Blanquel, and Lepak were trying to change things and make them better and treat them fairly by giving them, for example, enough advance warnings of shift changes. Olson told the employees, as to notice of shift changes, that Tom Howe had stated that he “would make sure that we would give them ample notice from that point on,” and that Howe had also stated that “we were not going to work Sundays.”²⁶

20 the effect of asking employees why they would want to “wreck” everything by bringing in a union. Mang testified that Howe said, “. . . why ruin this by bringing in another party.” Cassel testified that Howe said that “Bringing in a union . . . would wreck everything.” Howe, when asked by the Respondent’s counsel whether he had made any comment to the effect that if the employees voted for a union, it would ruin the company or ruin the company’s progress, answered “No.” While Mang and Cassel did not use identical words, the import of the words of their testimony is the same: that is, that Howe told the assembled employees that choosing the Union would ruin the Respondent’s otherwise upbeat progress. The fact that they did not use identical words does not detract from the credibility of either witness. Based on my observations of their demeanor as witnesses, including their generally unhesitating and forthright answers to the questions of all counsel, I credit their testimony rather than the denial of Howe. Howe’s credibility is discussed in more detail, *infra*.

30 ²⁴ The record does not definitively establish the dates of the speeches except that they occurred during the union election campaign after the Gardetto speech and before the election.

35 ²⁵ I found, and Olson so testified, that he attended and spoke at two series of meetings, each series consisting of a similar speech to each shift. I also find that Blanquel at least attended and spoke at the first shift meeting for the second speech, which Olson also attended. Olson testified that the first shift supervisor (Blanquel) attended the first shift meeting for the first speech, and that Blanquel attended all three shift meetings for the second speech. Blanquel testified that he only attended the first shift meeting for the second speech. The four General Counsel witnesses, all employees, had differing recollections: Sharon Karboski testified to remembering only one meeting with Olson. Rex Mang remembered two meetings with Blanquel and Olson, the first of which Mayer also attended. Kathy Mankin remembered one meeting with Blanquel and Olson. Sharon Cassel remembered one meeting with Olson and Blanquel on the first shift. Because of this widely divergent testimony, some of which may or may not have been caused by some of the employee-witnesses not attending all the meetings, I cannot reach a definitive finding as to how many of these meetings Blanquel attended, other than he attended at least the second speech for the first shift, but may also have attended all three shift meetings for the second speech, and either one or all three shift meetings for the first speech. Nevertheless, my factual findings as to what Blanquel and Olson said at these meetings are based on my credibility assessments of all of these named witnesses, no matter at which meeting(s) the comments may have been made.

50 ²⁶ Much of my findings as to what Olson said at the meetings come from his testimony, which I have credited as to these meetings. However, Olson did not appear to have a complete memory of these meetings, including comments such as “I don’t remember exactly,” in his

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At the meeting or meetings he attended, Mario Blanquel told the employees he had worked for union employers, and unions promise a lot of things, but “why would you want to pay union dues,” and that he would treat the employees fairly. At one of the meetings, employee Joe Carvalho asked why he hadn’t been paid as a lead person. Blanquel responded that if the Respondent ever went back to three shifts Blanquel would consider him the lead, and would do his best to get Carvalho what he deserved.

At one or both of the Olson meetings, the subject of the permanent layoff of alleged discriminatee Dennis Sobiech came up.²⁷ At the first captive audience meeting, one or more of the employees present brought up the subject of the permanent layoff of Dennis Sobiech, and questioned why he wasn’t offered another position with the Respondent.²⁸ One of the employees asked why Sobiech wasn’t offered another job if he couldn’t handle the baking process operator job. Olson said he would check into it. After the meeting, Olson met with Mayer, and mentioned the question raised at the meeting.²⁹ Mayer told Olson that one of the disciplinary write-ups in Sobiech’s personnel file contained a notation to the effect that Sobiech should consider relocating to a different position. At Olson’s request, Mayer gave Olson a copy of the write-up.

Olson took Sobiech’s write-up with him to his second captive audience meeting. At the second meeting, Olson, with Blanquel, told the assembled employees that, in fact, Sobiech had been offered another position and that he had it in writing, “right here.” None of the employees asked to look at the write-up, and Olson did not actually show the write-up to any of the employees at the meeting.

testimony. I have, thus, also credited the General Counsel’s witnesses who added to Olson’s testimony and whose testimony Olson did not deny. I have credited Rex Mang and Kathy Mankin that Olson said that the Respondent had made mistakes, that it wanted to do better, and employees should give Respondent a chance, and credited Sharon Cassel that Olson said he was at the meeting to talk about the Union and that he was against it.

²⁷ General Counsel witnesses Karboski, Mang, Mankin, and Cassel testified as to the subject of the layoff of Sobiech being discussed at one or both meetings, as did Respondent witnesses Olson and Blanquel. The version of each witness is slightly different, but not necessarily inconsistent, except that both Olson and Blanquel took credit for addressing the Sobiech issue at the second meeting. All of the witnesses impressed me both by their demeanor and answers, as making significant efforts to recall an event that occurred some time ago and testifying truthfully as to it. Thus, I credit Olson as to the Sobiech discussions at the meetings, and supplement that finding with the not inconsistent testimony of both the General Counsel’s and the Respondent’s witnesses.

²⁸ I credit both Olson and Cassel who testified that employees had questions as to the Sobiech layoff.

²⁹ In their brief, counsels for the General Counsel state that Olson testified that Mayer was present at the first meeting, so it isn’t logical that Olson would report to Mayer what happened at the meeting, if Mayer had attended the meeting. But I do not view Olson’s actual record testimony as necessarily meaning that Mayer attended the first meeting. (“ Q. Who else from management was there? A. In the first round of meetings the supervisor of the particular shift was there. Q. Okay. A. And then Tom Mayer.”) Further, even if Mayer had attended the meeting, that doesn’t preclude Olson and Mayer from later discussing what happened at the meeting.

After the meeting, Olson, Blanquel, Cassel, and Mankin had a side conversation. Mankin and Cassel asked questions about why Sobiech was laid off. Olson and Blanquel offered to show them Sobiech's personnel file. Cassel asked why the "pasta people" (the employees who had come over from AIPC) were being hired at higher wages than the
 5 Baptista's employees had been earning. Blanquel answered that it was because of "what they brought to the table." Both Blanquel and Olson asked if Cassel and Mankin had any ideas on "how to improve," and said that they wanted to make things better. Blanquel said that if any of the employees wanted to meet them outside of work, at any time, they would be willing to answer questions and "try to convince us that Baptista's was going to be a better place for us
 10 and things were changing and they were striving to work towards that." At that point Cassel and Olson left the conversation.³⁰

After Olson and Cassel left, Blanquel and Mankin continued to talk. Blanquel again asked Mankin if she had any ideas on how the Respondent could improve. Mankin responded
 15 that she would have to think about it. Blanquel said that he would take Mankin out to dinner and would pay for it so they could discuss her ideas. Mankin responded that she wouldn't do that by herself. Blanquel said that she could take anyone and he would pay for it out of his own pocket. Mankin responded that she would think about it.³¹

20 I credit Blanquel's testimony that during the course of his employment by the Respondent as a supervisor, he had previously solicited suggestions from a number of employees. The essence of Blanquel's testimony was that from the time he started work as a supervisor, he solicited suggestions from employees under his supervision as to how their work could be performed better, easier, and faster. Blanquel testified that he asked for such
 25 suggestions "because they do the job so they should know what can we do for them to get the job easy. A lot of times we in management we overlook things and when we ask them they come up with good ideas." Blanquel also testified, "A lot of times the employees they bring it up before me to a manager and it was not accomplished and it's something we can do that is not costly, they can get things done faster and better."

30 The Election Campaign: Supervisor/Employee Conversations

Blanquel Conversation with Karboski

35 About 3 weeks before the election, Karboski was told by her leadperson to report to Blanquel's office, where Blanquel and Karboski spoke. Blanquel told Karboski that he wanted to give her his take on the Union; that he didn't believe in unions, and that it's not always the way they say it's going to be. Karboski said she wanted the Union in. Blanquel said that in the bargaining, the parties could start from zero and employees could lose their vacation.³²

40 _____
³⁰ My finding as to what was said during this conversation is based on the credited and uncontradicted testimony of Cassel and Mankin. As to this conversation, both witnesses demonstrated excellent recall and answered questions without hesitation.

45 ³¹ My finding as to what was said between Mankin and Blanquel is based on the credited and uncontradicted testimony of Mankin.

50 ³² My finding as to what was said between Blanquel and Karboski is based on Karboski's testimony and Respondent's admissions in its answer, Paragraph 9(a)(ii). Karboski was taken through the conversation a number of times by counsel for the General Counsel, counsel for the Respondent, and the undersigned. She impressed me as trying her best to honestly and accurately answer all of the questions of counsel. Her answer to the last question from Respondent's counsel, as clarified by the undersigned, is consistent with the rest of her

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Blanquel Conversations with Carvalho

Supervisor Blanquel and employee Carvalho had five conversations during the election campaign period in February and March. In mid-February, Carvalho was told to report to Blanquel's office. Blanquel told Carvalho that he might get paid the following week as a lead BPO, rather than just as a BPO.³³ Blanquel then asked Carvalho if he knew anything about the Union, Carvalho said he didn't. Blanquel told Carvalho that Carvalho would lose his vacation and seniority and that everything would start from zero if a union came in, and that the owner would close down the plant. Blanquel said that he had worked for a union shop for 9 years and knew the union is a bad thing.³⁴

About a week to 10 days after the first conversation, Blanquel and Carvalho spoke in the hallway outside the supervisor's office. Carvalho asked why he wasn't receiving the pay for a lead BPO. Blanquel said because "we were in the process of union (sic) campaign." Carvalho asked why he hadn't been paid as a lead since he had been performing the work for 8 months. Blanquel said, "It's up to people upstairs."

At the end of February, Carvalho complained to Blanquel about receiving remuneration for 2 days in his paychecks in lieu of 2 vacation days, when he did not request such in lieu pay. Carvalho had, in previous years, accumulated all of his vacation days to use in one long annual vacation and did not want pay in lieu of vacation days because he wanted to continue his vacation practice.³⁵ Blanquel told Carvalho that "it's the way it's supposed to be, is new

testimony and is credible. She testified, "My basic recollection is he said we could start out from zero and could lose our vacation." In its answer, the Respondent admitted words similar to those testified to by Karboski, but denied she was told vacation would be lost. The Respondent counsel's position statement, admitted in the record, was consistent with the Respondent's answer. Blanquel testified as to employees he had one on one conversations with, but did not mention Karboski. He also testified that he didn't remember speaking to any employee about how contract bargaining worked or recall telling any employee that if a union came in, everything started from zero. Again, based on Karboski's credited testimony and Respondent's answer, I find that either Blanquel's memory is faulty or his testimony as to this issue is not credible.

³³ Carvalho had been acting as a lead person from June 2004 until February 2005, but was not receiving pay commensurate with the lead position. At the time of this conversation Carvalho was acting as a lead.

³⁴ In my observations, Carvalho, while experiencing some English language difficulties, demonstrated the demeanor of a witness earnestly attempting to truthfully answer the questions of counsel, both on direct and cross-examination. He demonstrated good recall and was generally consistent in his testimony. I find Carvalho to be a credible witness. While his testimony as to the conversations with Blanquel was generally uncontradicted, Blanquel did answer "No," when asked by Respondent's counsel, "Did you ever tell any employees that the plant would be closed?" Blanquel was not asked specifically whether he said that or similar words to Carvalho. I also note that when Blanquel was asked to name the employees he recalled individual conversations with, he named five employees, but not Carvalho. Based on my observations of the demeanor of the two witnesses, and the impressiveness with which Carvalho testified, I credit his testimony as to all of his conversations with Blanquel. Given the level of detail Carvalho credibly testified to as to his conversations with Blanquel, Blanquel's testimony that, in effect, he didn't talk about the Union to Carvalho, is not credible.

³⁵ In 2004, the Respondent had announced a policy allowing employees the option of either

Continued

administration, new management.” In mid-March, Blanquel walked up to Carvalho in the lunchroom and told Blanquel, “Joe, you were right. You don’t have to take vacation days paid if you want.”³⁶ Carvalho then signed a form proffered by Blanquel, agreeing to pay back the Respondent.

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I also find, as to pay in lieu of vacation, that in July 2004 the Respondent had introduced a new policy as to combining vacation pay and holiday pay into a single bank of paid time off, and allowing employees the option of taking paid time off or receiving remuneration in lieu of the time off.

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Also towards the end of February, Blanquel spoke to Carvalho in the plant mixing room. Blanquel told Carvalho, “So I want to show you that it’s true that Dennis Sobiech got a write-up and this is his signature.” Blanquel showed Carvalho a paper which purported to be the Sobiech write-up. Carvalho looked at the paper, but didn’t reply.

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Mayer Conversation with Karboski

The Respondent’s vice-president for human resources and operating services, Mayer, and employee Karboski spoke in the packaging room the day before the election.³⁷ Mayer said “Good morning,” and told Karboski that he had heard that she was going to be the Union’s observer for the election. Karboski said “Yeah.” Mayer said that he was surprised that the observer wasn’t Paul (Brzezinski). Karboski said that she had picked her side early on and that she was going to stick with it. Mayer replied, “I hope you know what you’re doing.” Karboski said, “Well, if it didn’t work out we could vote the union out in a year.” Mayer replied, “That’s what crack addicts think too, that they can get off of it.”³⁸

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Lepak Conversation with Mang

In mid-February, Brett Lepak, the Respondent’s vice-president of operations, and employee Rex Mang spoke in the mixing room. Lepak walked up to Mang in the mixing room and told him that, “We have good work force, they’re good workers, and you don’t complain too much.” Lepak also told Mang that “Things were looking good.”³⁹

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taking paid time off or receiving money in lieu of the time off. There is no evidence that Carvalho had made such a request. In fact, the evidence demonstrates that Carvalho wanted his vacation days, not the pay in lieu.

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³⁶ Subsequent to this conversation with Blanquel, and prior to the election, Tom Mayer also had a conversation with Carvalho in which the subject of Carvalho’s vacation preferences came up. Mayer told Carvalho that the Respondent had just reinstated two employees who had missed work because they were in jail, that the same flexibility which allowed the Respondent to reinstate the workers, allowed the Respondent to grant Carvalho the 3 consecutive weeks of vacation each year, and that Carvalho should think about it because if a union came in it would be different. I credit Carvalho’s testimony on direct examination as to this, rather than the similar answers he gave to summary questions on cross-examination.

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³⁷ Based on the record, it is impossible to determine who initiated the conversation.

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³⁸ My finding as to this conversation is based on the uncontradicted testimony of Karboski, who testified with impressive demeanor and is a reliable witness. In his brief, the Respondent’s counsel does not dispute Karboski’s version of the conversation.

³⁹ I credit Mang’s uncontroverted testimony as to this conversation.

Gardetto Conversation with Mang

5 About 2 weeks before the election, Mang and the Respondent's founder and CEO Nan Gardetto spoke in the mixing room.⁴⁰ Gardetto walked up to Mang, mentioned that they go back a long time and that he knew her whole family. Gardetto asked Mang about an old friend they both knew. She told Mang that "things will be getting better" at the facility. Gardetto told Mang that Respondent maybe was going to go back to offering anniversary awards to employees. A previous program, which had been discontinued, provided that on certain anniversaries of employment an employee could pick a prize from a catalog.⁴¹

10 Mayer Conversation with Mang

15 A week or two before the election Mang was told that Meyer wanted to see him. Mang went to Mayer's office. Meyer told Mang he knew the employees were kind of upset that the Respondent had let Dennis (Sobiech) go, but that Dennis had been making mistakes and Meyer was going to show Mang Sobiech's personal [personnel] file showing that Sobiech had made mistakes in the past. Meyer showed Mang a file which contained something about what another supervisor had written about Sobiech.

20 Blanquel and Sparks Conversation with Mang

25 About 2 or 3 weeks before the election, Mang met for about 10 minutes in a supervisor's office with Blanquel and supervisor Russ Sparks. Blanquel said that he had worked for a company that had a union and "they didn't do nothing for him," and asked Mang why he would want to "pay so much money for union dues." Sparks said he worked for a company that had a union and he agreed with Blanquel that "they promise you this and promise you that . . . the union is not all that it cracked (sic) to be." Sparks gave his opinion that a union destroyed hockey and that the NHL lost a year of play. Sparks showed Mang a list of employees' names and how much it would cost him each month for union dues. Blanquel asked Mang for suggestions to "make the company better." Mang suggested that there should be job postings with a sign-up sheet.⁴² At some point after the conversation, Mang saw job postings in the lunchroom.

35 ⁴⁰ I credit Mang's uncontroverted testimony as to this conversation.

⁴¹ The previous program had been discontinued in about 1996 and, thus, may have been in effect at Gardetto's rather than Baptista's.

40 ⁴² Blanquel denied that he ever spoke to Mang about the subject of a union during the time of the organizing campaign. Blanquel admitted that he had a conversation with Mang during that time period, but testified "I don't remember exactly the conversation." Sparks did not testify. As noted, I did not find Mang to be an infallible witness but was generally impressed with his testimonial demeanor and his earnest attempts to truthfully answer questions to the best of his ability, rather than just to give answers which were helpful to the General Counsel's case. Here, Mang demonstrated a good recollection for detail as to this conversation, and on balance I credit his testimony over Blanquel's denial that he spoke to Mang about the Union during the campaign.

45 I note that Blanquel testified that he didn't remember if it was during the union campaign, but that "When I asked my employees, the people that work for me, I tell them, you know, things are going to get better for them to make their job easy. One of the things that he brought up was why can't they post a job." Blanquel testified that the conversation occurred as Blanquel was talking to Mang about the Respondent bringing in new stronger hoses for cleaning.

50 Because I found Mang to be a generally reliable witness, and because I found Blanquel less so,

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Respondent, in fact, posted an available job and sign-up sheet on the lunchroom bulletin board from March 2 through March 5. Respondent had posted such job openings and sign-up sheets in the past, but not during 2005. Respondent had posted jobs in 2000 and 2002, and
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sometime in 2004.

Blanquel had, on previous occasions, talked to Mang about improving production processes. In 2004, when Blanquel first was employed by the Respondent, as a supervisor, he asked Mang, the BPO with the greatest seniority at that time, and other employees, questions
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about how they did their jobs, and how the jobs could be done better. Blanquel continued to ask for suggestions, focused on the production of the Respondent's products and how the production processes worked. Blanquel also asked other employees for suggestions beginning upon the inception of his employment with the Respondent. These suggestions involved improvements in the production processes. For example, Carvalho suggested placing air hoses
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closer to the production line for cleaning the ovens. Other employees suggested to Blanquel placing hot water hoses next to a production line, more automatic systems, and putting alarms into oven systems that did not have alarms. Blanquel sought these suggestions from the employees he supervised in the mixing room and the packaging area in order to improve the production processes, and he testified, "It's something we can do that is not costly, they can get
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things done faster and better."⁴³

In addition to asking Mang for suggestions, prior to September 2004 supervisors regularly asked Karboski for her opinions as to how the Respondent was doing. After September or October 2004, when Lepak was hired by the Respondent, he met with all
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employees and asked for suggestions as to how things could operate better.⁴⁴ There is no evidence as to the number of such meetings or the dates on which they occurred.

Postelection

30 Election Day Memo Posting

On the day of the NLRB election, after the election, the Respondent posted a memo from Gardetto and Howe to all employees. The memo, in pertinent parts, stated as follows:

35 Folks, the NLRB has informed us that all of you voted today to continue to operate without a union...

40 The vote was 22 to 21, and we sincerely thank everyone for your show of support for keeping Baptista's as one team, and for

particularly here, where his recollections were not strong and changed during the course of his testimony, I credit Mang's testimony that this conversation occurred during the course of the union campaign, and during a conversation in which Blanquel and Sparks were presenting
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reasons to Mang why he should oppose the Union.

⁴³ I largely credit Blanquel as to his seeking suggestions from employees under his supervision, and that his questions and the suggestions principally dealt with production processes. This testimony is consistent with Mang's testimony.

⁴⁴ Karboski credibly testified that she attended meetings where Brett Lepak asked all
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employees for suggestions about how things could operate better. No dates were established for these meetings, except that it/they occurred after September 2004.

believing that your futures are brighter by working together to become a unified team...

5 We also appreciate the “wake-up call” presented by this union organizing drive and this close election result. We know that much work remains to bring everyone together under one banner...

10 Because of “challenged ballots,” the election is not yet final...

15 We acknowledge that we should have done a better job of communicating the need for changes that took place, as well as providing opportunities for employees to actively participate in effecting those changes. We realize that the greatest success comes when there is effective, continuous communication, sharing of information, and employee participation. You’ve all helped us start on this path and we commit that this will be our environment going forward.

20 Consultant Susan Wehrley

25 Susan Wehrley is a self-employed organizational and employee development consultant. Following a discussion between Mayer and Gardetto in January, the Respondent retained Wehrley. The record does not delineate the exact date Wehrley was retained by the Respondent. The Respondent had previously utilized Wehrley’s services in 2000 and 2001 to work with the Respondent’s management in improving communication skills and blending management styles and managers’ personalities. This work principally involved the top managers of the Respondent, including Gardetto and vice-presidents. On February 10, Wehrley sent an e-mail to Howe, with copies to Gardetto and Mayer, confirming a meeting on 30 Saturday, February 12 and stating, “Also, if there is a decision made ahead of time on which way you are choosing to go with the union, be sure to let me know ASAP, as that will change what I focus on in my session.”

35 Wehrley met on February 12 with the Respondent’s managers, including Gardetto, Mayer, Howe, Olson, Lepak, Sertich, Bequest, Ken Thompson, Blanquel, Sparks, Jon Becker, Amy Roebuck, and Marlenea Jackson. Following the meeting, Mayer sent an e-mail message to all of the attendees, with a copy to Wehrley, which contained the following in pertinent part:

40 Folks, thanks for spending your Saturday morning in our meeting today...

45 As we go forward in this effort, the best thing you can do is to just be yourself, the person that people know. If you worry too much about the legal aspects, or try to express your feelings in the legal words and phrases used by our attorneys, it will be clear to the people on the shop floor you’re not being yourself and they will not accept you as sincere...

50 By being yourself, keeping it simple, and following the rules on the TIPS card you’ll satisfy the legal side of things while having great communications with your people offering facts and opinions that will help them realize how the Teamsters are not in their interest.

5 We'll all talk frequently as we go forward. I'll be glad to answer your questions, help you think-through how to handle situations you may encounter, and we'll overcome any minor mistakes we make which I'm sure will be few and far between...

10 Wehrley met three times in February with the Respondent's top management, including Gardetto, Howe, Mayer, and CFO Jon Becker. At these meeting Wehrley was informed of the existence of the Union's organizing drive, that management was concerned about the drive, that management wanted to know the cause of employees wanting a union, and management desired not to have a union. Wehrley testified, "...it was clear that they didn't want a union, and there was concern about why that there was an attempt, in the beginning, to even have a union, what was the cause of the employees wanting a union." In tailoring her work for the Respondent, discussed below, Wehrley designed her study, in part, to find out the root cause for disgruntled employees. Wehrley testified, "It wasn't necessarily tied exactly to the union, but there was a concern about why are people disgruntled."⁴⁵

20 Wehrley also conducted workshops with plant supervisors. During these workshops, she talked about communication, leadership, and teamwork, and "we talked about how might they do that while the union was going on...." The subject of the Union came up in more than one of these workshops.⁴⁶

25 Wehrley also met with plant employees on three occasions, the first being on May 10, almost 7 weeks after the election. Attendance at the meetings was mandatory for the plant employees. At the first meeting, Mayer introduced Wehrley to the assembled plant employees, and then left the meeting. Wehrley told the employees that Gardetto had asked her to help improve communications between Baptista's and its employees, and to help the long time Baptista's employees merge with the newer employees hired from AIPC (the "pasta people").⁴⁷

30 Wehrley distributed a 9-page questionnaire⁴⁸ to the employees, asked them to complete and return the questionnaires and promising them a \$10 gift certificate at a local restaurant in return, and assured them the questionnaires would be kept confidential.⁴⁹

35 ⁴⁵ My findings here are based on exhibits, and the testimony of Wehrley, which I have credited. Although displaying some of the normal problems associated with trying to recall events that occurred some time ago, Wehrley impressed me by her demeanor and answers as making every effort to honestly answer the questions asked of her on direct and cross-examination. While she maintained a longtime business relationship with the Respondent, she did not demonstrate any bias towards the Respondent's position in her testimony. On

40 occasions when her memory failed, she was able to recall events upon being shown exhibits which memorialized the events.

⁴⁶ Again, this finding based on the credited testimony of Wehrley.

⁴⁷ My findings as to the meeting are based on the credited, nonconflicting, testimony of Wehrley, Karboski, Mang, Brzezinski, and Meyer.

45 ⁴⁸ It appears from the record that completing the surveys was voluntary in that an incentive gift certificate was offered for doing so. Karboski testified on cross-examination as follows: "Q. She told you it would be strictly voluntary? A. I don't know if it was voluntary. Q. It was not voluntary to come to the meetings but it was voluntary to complete the assessment. Right? A. Yes."

50 ⁴⁹ Karboski, on two occasions, testified that Wehrley told the employees that the questionnaires would be kept confidential. She also testified that Wehrley said that the

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Wehrley again met with plant employees on May 18. Prior to this meeting, Mayer posted a memo to all employees announcing the May 18 meeting. The memo contained the following:
 5 “Please make sure your surveys are completed as best you can and sealed in the envelopes that Susan provided. If you’ve lost the envelope, please put your completed survey in another envelope so that it remains confidential. Thanks, Susan looks forward to meeting with everyone again, and she’ll have \$10 Culver’s Restaurant gift cards as a ‘thank you’ for everyone who returns a survey to her.” Wehrley conducted this second meeting, collected the completed questionnaires, and passed out the Culver gift cards. Wehrley conducted a third meeting in late
 10 May with the plant employees during which she explained her composite summary of the questionnaires.⁵⁰

The survey, attachment 4 to the complaint, covers a wide range of issues concerning employee attitudes about their jobs and employment with the Respondent, including some
 15 directly related to their terms and conditions of employment. Questions which arguably impacted on terms and conditions of employment included: How would you rate your overall satisfaction with the direction of the company? Name 1–3 changes you feel have been most negative (positive) in the last year and why? What do you need so that you can trust your manager more? What is Baptista’s greatest weakness (strength)? What is the greatest threat
 20 to Baptista’s? The survey also asks employees to rank the Respondent on a 1–5 scale in areas including: “There is recognition and incentives for a job well done.” “My pay is competitive with jobs at other companies that involve similar work.” “Vacation and holidays.” “Benefits.” The survey asks: “What suggestions do you have for recognition programs and incentive programs?” “List 3 instances in the past 6 months where [you] felt the Company went beyond
 25 your expectations. In other words, what did the Company do for the employees to go the extra mile?” “What would you like the Company to do to go the extra mile for you?”

After the meetings with the plant employees, Wehrley continued to meet and consult with the Respondent’s management from August through November in a “strategic planning
 30 process.” There were four or five of these meetings, and the Union continued to be a topic “on and off.” The main topic at these meetings was a strategic plan for the Respondent, which was broken up into “people,” “productivity,” and “profit.” During these discussions, while the Union was not the focus, Gardetto brought up the subject of the union organizational campaign, that it was a “symptom,” that it was something that can’t be ignored, and it was “something going on
 35 that we have to address.”⁵¹

Providing Benefits

Employee-of-the-Year Award and Prize

40 On March 28, 5 days after the election, the Respondent awarded an “employee-of-the-year” prize, consisting of a \$500 gift Sears gift certificate and a plaque, to plant employee John Rautio. The Respondent had never previously awarded an employee-of-the-year prize, although both in 2005, and in past years it has awarded perfect attendance prizes both for the
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“assessment” would be shown to management. The assessment is the document Wehrley prepared from the information garnered from the questionnaires.

⁵⁰ The record does not contain much detail as to this meeting. Only Wehrley testified as to this third meeting, some of the other witnesses only remembering two meetings. Wehrley, as
 50 discussed earlier, is a reliable witness, and I credit her recollection of a third meeting.

⁵¹ From Wehrley’s credited testimony.

current year and consecutive years. The single year perfect attendance award has been a \$75 restaurant certificate and a plaque, each year since 2001. The consecutive year's perfect attendance award has been a \$100 savings bond for each year over one, and a plaque, each year since 2001. Mayer testified that the Respondent created the employee-of-the-year award because "2004 was a year of significant change and we had an employee who really distinguished himself for all the different things he did."

Baseball Game Outing and Jacket

In late April, the Respondent provided its plant employees with free jackets with Baptista's logo, in conjunction with a complimentary catered outing to a Milwaukee Brewers baseball game. Respondent gave plant employees their choice of jacket style, including zip-up windbreakers and pullover fleece, and color. The jackets were accompanied with a memo from Gardetto and Howe which stated, "As we move Baptista's forward it is important that we do so as one unified team." Respondent requested employees to wear their new jackets to the Brewers outing. Respondent purchased the jackets at a cost of \$2,445.38.

The Respondent, in early April,⁵² invited its plant employees, their children, and a guest, to be its guests at a Milwaukee Brewers baseball game on May 1. The invitational memo stated, "We have a block of tickets reserved for Baptista's team members . . . spouses or significant-others, and kids. Baptista's is providing the food and game tickets, your only cost will be for parking."

The baseball outing included tickets to the game, and a buffet meal in the stadium's "Dew Deck," a private section. The buffet included various main dishes, salads, cakes, soft drinks, and two alcoholic beverages per ticket. Gardetto's, the Respondent's de facto predecessor, had sponsored numerous events at the Brewers' ballpark, but the 2005 event was the first one sponsored by the Respondent. Gardetto testified that the Respondent had not previously sponsored a Brewers' event because, ". . . we weren't making money." Gardetto also testified that such an outing is "a very expensive event to hold and we didn't have the money." At the time of the organizational campaign, the Respondent was not making a profit and was not consistently profitable until the first part of 2006.⁵³

In the past, prior to 2005, the Respondent has sponsored other social events for employees and given free clothing to employees. In October 1999, the Respondent sponsored a barbeque to celebrate the new business and the fact that there was no lost time due to employee injuries for a year. Mayer cooked steaks and baked potatoes for all the employees. In December 1999, the Respondent sponsored an all-employee meeting and dinner, to "talk about what was going on in the business," and conducted a drawing for six tickets to a Green Bay Packers football game.

In March 2000, the Respondent sponsored a "chili cook-off," in which Mayer prepared his chili for the employees, and employees were requested to bring in to work their own chili or side dishes. There were no prizes for the chili event. In January 2000, the Respondent sponsored a "baby guessing contest" in which employees tried to match baby photos to the adult, with a restaurant certificate prize. In April 2000, the Respondent sponsored an all-employee meeting with barbeque, at which the Respondent provided "brats and buns," and employees were requested to bring in other dishes and desserts. On October 29, 2000, the

⁵² The memo announcing the outing requested that employees sign up no later than April 7.

⁵³ Howe's credited and uncontradicted testimony.

Respondent sponsored a "First Anniversary Party and Packer's Blast" held in a park, at which employees were invited to bring side dishes and watch a Packers game on television while the Respondent provided a pig roast and soft drinks. Also, apparently in 2000, the Respondent sponsored a restaurant-catered lunch at the plant to thank employees for shifting their work schedule prior to the Thanksgiving holiday.

Most years the Respondent has provided turkeys to its employees, at a cost to the Respondent of about \$10 to \$15 per turkey, in conjunction with its annual holiday luncheon for employees and has also provided "Fiesta Italiana" tickets to employees during the summer, which tickets the Respondent obtained at no cost to itself, but would have cost \$10 to purchase. On June 27, 2002, the Respondent sponsored an all-employee meeting and barbeque at which the Respondent provided most of the food.⁵⁴ On August 12, 2002, the Respondent sponsored a third anniversary cookout, at which the Respondent provided picnic fare, and invited employees to bring food to share.

The Respondent has also previously purchased logo clothing for its employees. In 2000, the Respondent provided Baptista's logo button-down khaki shirt with "Founding Team Member" printed on the cuff to employees employed at the inception of the Respondent, and green logo sweatshirts to employees in August 2002. Respondent purchased the "Founding Team Member" shirts at a cost of \$1,377.40.

Two Dinners for Sanitation and Quality Control Employees

I find, and the parties stipulated, that in June 2005, Marlenea Jackson, the Respondent's manager of quality assurance and sanitation, invited all of the employees of those departments, along with a guest, to a complimentary dinner at Famous Dave's restaurant for the stated purpose of thanking employees for a successful sanitation audit by the AIB (American Institute of Baking). I further find, and the parties stipulated, that 2 or 3 weeks later,⁵⁵ Howe and Gardetto took the entire same group, and Jackson, to Ingrilli's restaurant for another complimentary dinner, for the stated purpose of thanking employees for a successful audit by the AIB. The price range for dinners at Famous Dave's is \$10 to \$20. At Ingrilli's, the price range is \$15 to \$25, and higher.⁵⁶ The Ingrilli's dinner included alcoholic drinks, the Famous Dave's dinner did not. Jackson testified that she took out the entire quality assurance and sanitation department for dinner because she was pleased with the relatively high score the Respondent received from the AIB audit and to reward the employees of those departments for their hard work which she believed led to the audit score.

I credit Marlenea Jackson's uncontradicted testimony as to the background of the AIB inspection as follows: the Respondent hired Jackson as quality assurance and safety manager in late October 2004. Upon employment, Jackson determined that the facility had not been properly maintained and that much work needed to be performed so that the Respondent's facility could pass the AIB audit. The AIB auditor inspects for cleanliness, equipment maintenance, cleaning cycles, and employee sanitation, among other items. Preparation for the audit began in December 2004 and continued up until the actual audit the last week of May, and included the usage of eight or nine temporary employees the weekend prior to the audit. The Respondent scored 870 out of 1,000 on the audit, an "excellent" rating with "superior" being the

⁵⁴ Mayer testified that two to four times a year the Respondent has some type of barbeque or employee meal.

⁵⁵ Jackson testified that the second dinner was two or three weeks after the first dinner.

⁵⁶ Uncontradicted and credited testimony of Kathy Mankin.

highest, and a score that Jackson characterized as a “B”. There is no evidence as to when the Respondent received the AIB inspection score.

No-Solicitation/No-Distribution Rule Posting

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There is little factual dispute between the parties as to the Respondent’s posting of its no-solicitation/no-distribution rule. On February 21, the Respondent posted the rule on a glass-enclosed bulletin board in the employee lunch room. No rule had been previously posted in the plant, and the Respondent posted the rule solely in response to the Union’s organizing campaign.⁵⁷ Respondent had an existing rule published in its employee handbook, but not posted, which prohibited solicitations during working time, not including breaks, lunch, and before or after scheduled work, and prohibited the distribution of literature in working areas, which did not include the lunchroom or parking lot.

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The rule posted by the Respondent on February 21 restated the existing rule and added the following: “Please be advised that employees who violate this policy will be subject to disciplinary action, up to and including discharge from employment.” The posting also directed employees to bring any questions concerning the policy to management or to Mayer. The no-solicitation rule contained in the handbook did not include the disciplinary language posted in the notice. Little evidence was presented as to the enforcement or nonenforcement of the February 21 posting.

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In a section of the employee handbook separate from the no-solicitation rule, the Respondent sets forth a description of its disciplinary procedures and penalties which, in general, sets forth a five-step system of progressive discipline including discharge for violations of the handbook’s guidelines, but also states that, “There may also be instances where disciplinary action will not be progressive, depending on the severity and circumstances of the situation.” The disciplinary section of the handbook also states as follows: “Baptista’s will attempt to administer discipline fairly based on the circumstances. Because it is impossible to list every conceivable infraction, these guidelines may not be all-encompassing and can be amended by Management within its sole discretion.” The exact language of the addition to the no-solicitation rule does not appear in the handbook.

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Although the complaint does not allege disparate enforcement, and counsels for the General Counsel acknowledge that the posted and preexisting rule is not facially invalid, the rule appears not to have been particularly enforced either before or after its posting in the lunchroom, either prior to or during the organizational campaign. Thus, sometime after the Union’s organizing drive began, supervisor Jackson solicited employee Cassel for a fund raiser for her daughter, and handed her a brochure in the lab area. Jackson handed Cassel a brochure, pointed out an item to Cassel that she might like, told her to show the brochure to other lab techs, and if they wanted to buy something to give her the money. Cassel purchased two items.⁵⁸ This solicitation occurred during work time. Jackson also engaged in a similar solicitation of employee Mankin in the lab on work time, before the organizing drive.⁵⁹ On a number of occasions, prior to the Union’s organizing drive, Karboski observed solicitation for the sales of various products including home interior products and Avon products through the usage of catalogs left in the lunchroom. Additionally, about 3 or 4 years prior to the posting, Karboski

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⁵⁷ Mayer so testified as to the reason for the posting.

⁵⁸ Uncontradicted and credited testimony of Cassel.

⁵⁹ Uncontradicted and credited testimony of Mankin.

5 sold raffle tickets in the lunchroom to other employees and to at least one supervisor.⁶⁰ Further, the parties stipulated that prior to the date the no-solicitation rule was posted in the lunchroom, “on various occasions employees engaged in the sale of commercial items, including for example for civic and charitable groups, in various non-production areas of the plant including the office area, without objection by the Respondent.”

Discharge of Kathy Mankin

10 QA tech (quality assurance technician) Kathy Mankin was initially hired by the Respondent in about 1999. Prior to the permanent layoffs of February 2, she had worked as a packager (packaging department employee), but had also filled in as a BPO, and as QA tech “once in a while.” Mankin was permanently laid off along with a number of other employees on February 2. When she was laid off, Mayer told her (and two other employees who were with her at the time) that “it wasn’t a reflection on our work, that the company just needed to cut back.”⁶¹
 15 The day after she was laid off, Mayer called Mankin and offered her a position as a QA tech. Mankin began work as a QA tech for the Respondent a few days later.

20 The Respondent discharged Mankin on August 7. During the months prior to the discharge, the Respondent employed three QA techs, Mankin, Sharon Cassel, and Judy Rautio, in its quality assurance department, all of whom reported to department supervisor Marlenea Jackson. Mankin was an avid supporter of the Union, and Respondent was admittedly aware of such support. The Union’s letters of February 7 and 25 to the Respondent named Mankin as a member of the Union’s organizing committee. Mayer received a copy of the Union’s March 23 “Vote Yes” campaign letter containing the signatures of 14 employees, including Mankin.
 25 Jackson testified that she observed Mankin wearing a union button on her coat “every day, so I naturally assumed that she was for the Union.”

30 The Respondent concedes in its brief, that “Mankin was the only QA tech whom Ms. Jackson believed to be a Union supporter.” Indeed, fellow QA tech Cassel told Jackson that Cassel was not for the Union, “she did not want the Union at Baptista’s.”⁶² There is no record evidence as to the union leanings of the third QA tech, Rautio, or the Respondent’s perceptions of her leanings, except that she is not named as a member of the Union’s organizing committee in the Union’s letters to the Respondent.

35 Beginning in June, Mankin, Cassel, and Rautio experienced a number of performance related problems.⁶³ About June 22, a customer of the Respondent rejected a shipment of 2,710 cases of butter flavored pretzel spindles that had been produced on June 20 and 21, because of what the customer deemed unacceptable flavor. The rejection cost the Respondent over \$12,000 in lost revenue. Jackson investigated and discovered that none of the three QA techs
 40 had documented sensory tests which they were required to perform every 4 hours. Jackson disciplined all three QA techs, handing Mankin and Rautio, both of whom had no prior discipline, a first written warning, and giving Cassel, who had received a written warning a few months earlier, a second written warning. In her testimony, Mankin claimed she actually had performed the tests, but had failed to document them.
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⁶⁰ Uncontradicted and credited testimony of Karboski.

⁶¹ Uncontradicted and credited testimony of Mankin.

⁶² Uncontradicted and credited testimony of Jackson.

⁶³ Conceded by counsels for the General Counsel in their brief.

On July 26, Mankin received a performance counseling from Jackson and Mayer. During the counseling, Jackson reviewed perceived shortcomings in Mankin's job performance, including that she was spending too much time in the lab and needed to spend more time on the production floor. During the meeting, Mayer told Mankin that he had known her for many years and had always thought of her as an intelligent person who cares about job performance. Both Mayer and Jackson asked if there was something they could to help her do her job better. Mankin responded that she didn't know, and she apologized for letting other people down and for not doing her job faster.⁶⁴

Three days later, on July 29, Mankin received a second written warning for "unacceptable performance." This discipline resulted from Mankin's admitted failure to perform sensory tests as per a schedule that Jackson had imposed on the QA department. In her testimony, Mankin conceded that she had not performed the tests, and that coworker Judy Rautio had advised her to perform the tests, but placed the blame as follows: on a coworker who allegedly told Mankin that if Mankin didn't finish the tests, the coworker would; on coworkers who worked other shifts and could have performed the tests but didn't; on Jackson who allegedly did not give her a schedule of "things to do that evening;" and that it wasn't really necessary to perform the sensory tests according to the schedule because "the sensories had been collected over a period of days, they hadn't been done every day." Mankin also testified that even though she did not perform the tests on Thursday as per the schedule, she performed them her next day of work, Monday, and there was no production in the plant between Thursday and Monday.

On August 4,⁶⁵ Mankin received a final written warning for "unacceptable performance," involving the failure of all three QA techs, Mankin, Rautio, and Cassel, to correctly weigh samples of a product in a production run. On August 5, Mankin signed the warning, which contained the following: "I, Kathy S. Mankin, have received this Final Warning for Unacceptable Performance. I understand that my job is in jeopardy. I understand that any future instance of Unacceptable Performance of any sort will result in my discharge from employment with Baptista's Bakery, Inc. (capitalization in original). When Jackson handed the written warning to Mankin, she told her "that this was a final written warning and that the next step for her would be out the door . . ."⁶⁶

The incident resulting in Mankin's final warning began on the August 4 shift. As part of their job duties, QA techs were supposed to weigh sample bags of "Houdini Smoky Mozzarella" during their production run, to ensure that the bags were between 3 and 3.125 ounces. Mankin, admittedly, simply compared the weight of the sample bag to the range of bags weighed during the prior shift, rather than to the guidelines for the weight. Inasmuch as the prior shift's bags were underweight, so were the bags on Mankin's shift, which resulted in the production of 55,000 bags of the product which were underweight and had to be repackaged. Thus, all three QA techs had documented the wrong weights, and all three were disciplined. Cassel, further along in the Respondent's progressive discipline system, was discharged. Rautio received a second written warning. In her testimony, Mankin blamed the weighing problem on her difficulty

⁶⁴ My findings as to this counseling are based on a record exhibit, and the noncontradictory testimony of Mankin, Jackson, and Mayer.

⁶⁵ The shift overlapped from August 4 to August 5. So, while the shift began on August 4, it ended on August 5.

⁶⁶ Based on Jackson's credited testimony. During her own testimony, Mankin did not mention this part of the discussion, but said nothing to contradict it. Mankin also testified that Meyer was present when Jackson presented the final written warning to her.

converting grams to ounces. Thus, instead of doing the conversion, she simply checked to see whether the weight range during her shift was the same as the range during the prior shift. It turned out both shifts were wrong.

5 Earlier on the same shift beginning on August 4, Jackson had instructed Mankin explicitly that she was to perform certain tasks before the end of her shift. Mankin testified, without contradiction, that Jackson told her to “take the two products that were on hold and take samples out of each box of the products and to look at them and put them on the side for her for the next day to look at.” Jackson told Mankin that “they felt that there was probably some
10 burned product in some of them and they may not be acceptable to send out.”⁶⁷ At Mankin’s request, Jackson wrote a note to Jackson detailing the tasks.

At the end of her shift, when she was called in to Mayer’s office to receive her final written warning, Mankin had started, but not completed, the tasks assigned to her earlier by
15 Jackson. As a result of receiving the final written warning, Mankin became upset and left the plant, leaving no notes to the effect that she had not finished the assigned tasks, or any explanation therefor. Further, Mankin did not tell Jackson or Meyer that the assigned tasks were not completed, when meeting with them to receive the final written warning, nor note the failure in the departmental logbook. Mankin testified, “I was very shaken, and I didn’t even think
20 to tell them that I hadn’t finished it.”

Later on August 5, after going home, Mankin’s husband took her to a hospital, as she was extremely upset from the occurrences earlier at work. Mankin’s husband called the Respondent and left messages for Jackson and Mayer to the effect that she would not be in to
25 work because she was very upset and being taken to the hospital. Mankin testified that at the hospital she was diagnosed as having an “anxiety attack.”

The Respondent discharged Mankin on August 7. The discharge memo referred to Mankin’s failure to perform the testing duties Jackson had assigned to her on August 4, and referred to the other written warnings received by Mankin, including the final written warning.
30 There is no evidence that Mankin’s failure to report to work on or after August 5 played any role in the discharge decision. The Respondent did not offer Mankin the alternative of a different job before it discharged her.

35 Sharon Cassel, a QA tech, was also discharged based on a series of performance-related disciplinary warnings. At the time of her final warning, before her discharge, Mayer discussed with Cassel whether she would like to work in sanitation, packaging, or as a fork truck driver. Cassel testified that Mayer asked “that maybe I would even like some office work.” A similar discussion occurred during a meeting which Jackson also attended. In his testimony,
40 Meyer denied that he ever offered Cassel a different position.

In her testimony on direct examination, Cassel was asked if she was offered different positions within the company. She answered, “Yes,” and testified that it occurred at the time of her final warning. Counsel for the General Counsel then asked her what positions she was
45 offered, and Cassel answered in conclusionary fashion as follows: “Sanitation, fork truck driver, packaging machine operator and then Mr. Mayer asked that maybe I would even like some office work.” Cassel was not asked what her response to Mayer was, and Cassel did not testify as to what Meyer’s words were in conveying the alleged offer of another job.

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⁶⁷ Uncontradicted and credited testimony of Mankin.

Based on Cassel's testimony, and the denial by Meyer that he offered another job to Cassel, I find that Meyer did not formally offer Cassel another job, but was simply gauging Cassel's reaction as to that possibility. As I have noted elsewhere, the testimonial demeanors of both Cassel and Meyer were impressive, and they are reliable witnesses. Thus, I credit
 5 Mayer's testimony that he did not offer Cassel another job, and I credit Cassel's general testimony about the conversations, but cannot conclude that an offer was, in fact, made. Cassel testified that she was offered different positions, but her testimony was just in summary, and did not contain either the words or the approximate words of the offer. In other words, both the
 10 counsel for the General Counsel, and Cassel, characterized whatever words Mayer used as an "offer." But the record does not contain whatever words Mayer used, other than as set forth above, or evidence other than Cassel's conclusionary testimony, from which I can find that, in fact, an "offer" was made or that Mayer wasn't being truthful in his testimony that he did not make such an offer.

15 Prior to the union activity involved herein, on June 26, 2004, Mayer met with Sobiech concerning alleged shortcomings with Sobiech's work performance. In Mayer's memo memorializing the meeting with Sobiech, Mayer states as follows: "I suggested to Sobiech that he consider a move to Packaging now, telling him that even though this would mean a wage
 20 reduction, he would at least be working in a job in which he might demonstrate better performance and not risk losing his job if his errors continue. Sobiech told me he was not interested in moving to Packaging." As with Cassel, I cannot conclude that Mayer's comment to Sobiech constituted an offer of a job in a different department.

25 Discipline of Donna McCall

Donna McCall was hired by the Respondent in 2002 and remained employed until September 18, 2005. She took an extended medical leave from January 23 to April 27. During her approximately first 2 years with the Respondent, McCall was employed as a sanitation
 30 worker. During the balance of her time with the Respondent, McCall was employed as a BPO. As is conceded by the Respondent in its brief, the Respondent learned McCall was active in the Union when it received the Union's February 7 letter naming her, and others, as members of the Union's organizing committee. McCall was also named as a member of the Union's organizing committee in the Union's second letter to the Respondent, and her signature appeared in the
 35 "Vote Yes" letter.

On July 27, the Respondent issued a final written warning to McCall. The warning memo was entitled "Final Warning—Unacceptable Conduct: Insubordination and Racially
 40 Offensive Remarks." What follows are my factual findings as to the incident that led to the discipline, based on the largely noncontradictory testimony as to the incident of McCall and Blanquel.

On July 18, Blanquel, the Respondent's shift manager, became aware that the Respondent was short-handed in the packaging room. Blanquel called Raul Lara, lead person
 45 in the mixing room, and asked Lara to send the "free person" to the packaging room.⁶⁸ Lara responded that McCall "was just cleaning the oil room." Blanquel instructed Lara to send McCall to the packaging room. Blanquel testified that boxes needed to be made in the packaging room because the production line couldn't be stopped, and if there were no boxes, product could be wasted or thrown away, and that it was, thus, an emergency.

50 ⁶⁸ Blanquel testified that there was usually one free person in the mixing room, apparently an employee without immediately pressing duties.

At the time Blanquel called Lara, McCall was cleaning a spill in the oil room. Lara went to the oil room and told McCall that she “had to go to packaging.” McCall responded, “You got to be kidding me.” Lara told her that he wasn’t kidding her. McCall said, “Let me finish what I started [cleaning the spill].” Lara told her she had to go right then. McCall responded that she thought “it was bullshit, that there were other BPO’s that he could have took and I feel like I’m being treated like a nigger⁶⁹ around here.” McCall eventually threw down the squeegee she had been using and walked towards packaging.

At this point, after waiting for about 15–20 minutes, when nobody from the mixing room appeared in the packaging department, Blanquel walked towards the mixing room to see what the problem was. Blanquel arrived in time to see Lara and McCall speaking, and McCall throw the squeegee. Lara told Blanquel what McCall had said to him. Blanquel and McCall then walked through the mixing room to get to the packaging room. McCall stopped along the way and spoke to another employee.⁷⁰ Blanquel told her, “I told you I wanted you to go to packaging.” McCall told Blanquel, “You always treat me like a [“N-word”].” Blanquel asked her, “Why did you even say that. If you didn’t want to go I can send somebody else or something. There is no reason for you to treat me this way.” McCall then walked to the packaging room and began performing the requested work.

A few hours later, McCall walked up to Blanquel and said, “I’m really—I was so hot. I was so angry about the situation. I apologize for what I say.” I didn’t mean the “N-word”⁷¹ like you think I meant the word.” Blanquel responded, “Well, it was offensive for me because I’m a minority too, you know. I’m Mexican.” McCall responded, “Well, I’m an Indian.”

Nine days later, on July 27, Blanquel, accompanied by supervisor Jerry Bequest, told Human Resources Vice-President Mayer of the incident involving McCall, Lara, and Blanquel. Blanquel told Mayer that McCall had made a racially offensive remark to him and Lara. Blanquel described the incident to Mayer.⁷² Mayer asked Blanquel questions about the incident.⁷³ Mayer told Blanquel and Bequest that he thought a disciplinary action was appropriate for something “so offensive.” Blanquel and Bequest agreed. Mayer asked why they waited 9 days to tell Mayer of the incident. Blanquel responded that he had to think about it because it was something that was upsetting, but he also wanted to make sure he wasn’t reacting because of that upset. Mayer told Blanquel that he should have told Mayer of the incident when it happened. Mayer, Blanquel, and Bequest agreed to a disciplinary final warning, but Mayer decided to also speak to Lara before imposing the discipline.

That same day, Mayer spoke to Lara about the incident. Lara told Mayer that Blanquel had asked him to send McCall from the mixing room down to the packaging room, and that

⁶⁹ In order to avoid burdening this decision with repeated use of the slur, I have chosen to use the euphemism “N-word” hereafter.

⁷⁰ McCall did not remember talking to an employee along the way. I credit Blanquel, who demonstrated good recall as to this incident, but there is no substantive significance to whether or not McCall paused to speak to an employee.

⁷¹ It’s not clear from the record if McCall here, used the actual slur “nigger,” or used the euphemism, “the N-word.” I had asked the witnesses not to burden the record by continuously using the slur after the first use, and it’s unclear whether Blanquel, in his testimony, was simply following my instructions or accurately quoting McCall.

⁷² The record does not contain the words Blanquel used to describe the incident.

⁷³ The record does not detail the questions Mayer asked.

when he told her to go to the packaging room she said, “Why do you always treat me like an ‘N-word?’” Lara also reported that McCall threw down the squeegee. Lara told Mayer that he was bothered by the incident, that he had never treated McCall with anything but respect, and that he couldn’t figure out why she would say something like that to him.

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After speaking to Lara, Mayer asked Blanquel and Bequest to bring McCall to his office. When they arrived at his office, Mayer told McCall what he had been told about the incident and what she was reported to have said. Mayer asked her if she, in fact, had said the words she was accused of. McCall admitted she said the words. Mayer told her it was inappropriate. McCall responded that she didn’t mean it like it sounded. McCall said she was being taken to a different area several times and felt like she was being treated like an [“N-word”]. Mayer told her that the words were inappropriate regardless of the intention, that when she utters a remark like that, the people she says the words to don’t know her intentions, that it was a violation of the Respondent’s rules, that there was never a circumstance that it would be tolerated, and that type of thing could be a dischargeable offense. Mayer told McCall that she was receiving a disciplinary warning, and McCall then apologized to everybody present. Mayer told her that if it ever happened again she would lose her employment. Finally, Mayer told her that her objection to going to another job was unacceptable and bordered on insubordination.⁷⁴

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While admitting that she used the “N-word” as described above, McCall testified that Blanquel had also used the “N-word” on at least two prior occasions in conversations with McCall at work. McCall testified, that a few years earlier, Blanquel used the “N-word” in referring to a supervisor that Respondent was about to hire. McCall also testified that Blanquel used the “N-word” in early July, in the presence of lead packaging machine operator Mike Stanford, and that she was “pretty sure Greg was there.” The reference to “Greg” is apparently a reference to Gregory Glyzewski, who was, at the time, employed by the Respondent as a BPO (baking process operator). According to McCall, “. . . he kept calling her the “N-word” over and over.” McCall testified that Blanquel’s alleged use of the slur was directed at Jackson, and that the conversation occurred by the picnic tables outside the plant. Stanford testified that he never heard Blanquel use the “N- word.” Blanquel testified that he never used the “N-word” at work, that he never used the “N- word” in reference to Jackson, that he never heard anybody else use the “N-word” in reference to Jackson, and that the only person he ever heard use the “N- word” at work was McCall.

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Gregory Glyzewski, who voluntarily left the Respondent’s employ in August, and who was employed as a BPO and was a member of the Union’s organizing committee during the organizational campaign, testified he was present during a conversation at the picnic table outside the plant with himself, Blanquel, and Stanford in July 2005. Glyzewski testified only that the three of them were present, and did not mention McCall. Glyzewski testified that during the conversation, Stanford said, “. . . um, something to the effect of, uh—that Marlenea is nothing but a big, fat ‘N-word.’” Glyzewski further testified that after Stanford spoke, Blanquel “. . . kinda chuckled.” Stanford, who denied that he ever heard Blanquel use the “N-word,” also denied that he ever used the word during his employment with the Respondent, denied that he ever used the word in Blanquel’s presence, and denied that he ever used the word to describe Jackson. There is no evidence that Blanquel or Stanford was ever disciplined in connection with using the “N-word.”

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⁷⁴ Most of my finding as to this discussion is based on the credited testimony of Mayer. McCall also testified as to this conversation, but her testimony was not as detailed as Mayer’s. Their testimony was not inconsistent on any significant detail of the conversation.

Based upon the above discussion, my assessments of the relevant witnesses, and the weight of the evidence, I cannot conclude that either Blanquel used the “N-word” at work or that Stanford used the word in Blanquel’s presence. All of the witnesses, to some extent, had a vested interest in their testimony, as Jackson and Stanford are current employees, Glyzewski was a former employee but an active supporter of the Union during his tenure, and McCall stands to have discipline removed from her record should the General Counsel be successful in this litigation.

Significantly,⁷⁵ Glyzewski’s testimony, similar in some respects, differed from McCall’s in two key aspects; that is, that McCall places herself at the Blanquel/Stanford conversation, while Glyzewski testified that only he, Blanquel, and Stanford were present, and Glyzewski testified that Stanford used the slur in Blanquel’s presence while McCall testified that Blanquel used the slur in Stanford’s presence. While there could have been two different conversations, certain details of their testimony, including the approximate date of the conversation and its location, make it appear that they were testifying as to the same conversation.⁷⁶ Thus, McCall testified that the conversation she heard occurred 2 or 3 weeks before her July 27 discipline. Glyzewski testified that the conversation he heard occurred in July. Both testified that the conversation they heard occurred at the picnic tables outside the plant. Both testified that Stanford was present. Both testified that Jackson was the subject of the slur.

Further, McCall admitted that in the investigatory affidavit she gave to the Board during the investigation, she never mentioned that she had heard Blanquel use the “N-word” in the past at work, and at no step of the disciplinary procedure did McCall defend herself by alleging that Blanquel had used the same slur. Based upon the similarities, I find that McCall and Glyzewski were testifying to the same conversation. Based on the significant inconsistencies in their testimony and McCall’s failure to mention in her affidavit that she had heard Blanquel use the slur at work, and because Blanquel’s demeanor was relatively more impressive, I find his testimony here more reliable than that of McCall or Glyzewski. McCall and Glyzewski were not unimpressive witnesses in demeanor, but the key inconsistencies in their testimony lends significant doubt to their credibility.

ANALYSIS AND CONCLUSIONS

Preelection Alleged 8(a)(1) Actions: Solicitation of Grievances and/or Promises of Benefits

Counsels for the General Counsel argue that Gardetto, in her speech of February 18, solicited grievances and promised benefits in violation of Section 8(a)(1). The General Counsel also maintains that further solicitation of grievances and/or promises of benefits occurred as follows: the captive audience speech held by Olson and Blanquel, Olson and Blanquel’s conversation with Mankin and Cassel, the conversation between Gardetto and Mang, the conversation between Blanquel and Carvalho, and the conversation between Mang, Sparks and Blanquel.⁷⁷

⁷⁵ Significant, because if McCall wasn’t present at this conversation, then her testimony as to this conversation is not credible, and resultant doubt is thrown on the rest of her testimony. McCall testified that she was “pretty sure Greg was there.” But the issue as to credibility is not whether Gregory Glyzewski was present, but whether McCall was present.

⁷⁶ While McCall, in answering the General Counsel’s questions, does not use Blanquel’s name in testifying as to who spoke the offending words, the context and sense of her testimony makes it clear she is speaking of Blanquel.

⁷⁷ In their brief, counsels for the General Counsel argue that Lepak’s statement in his

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The Board's test for interference, restraint, and coercion under Section 8(a)(1) is an objective one, and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways, Co.*, 124 NLRB 146, 147 (1959). The Board has long held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. *Blue Grass Industries, Inc.*, 287 NLRB 274, fn. 4 (1987).

This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB 1131, 1136 (2004). While an employer who has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994).

20 Gardetto Speech

The General Counsel, in paragraph 8(a) of the complaint, referring to her captive audience speech, alleged that Gardetto "solicited grievances and made promises of benefits." Gardetto's speech sent a strong, personal, and very emotional message to employees of her feelings against the Union. In their brief, counsels for the General Counsel concede that, ". . . not every word that Ms. Gardetto said was unlawful." The only two passages in her speech that arguably solicited grievances are as follows: 1. "that she was human and had made mistakes but wanted employees to come to her so she could fix them, that she was not too proud to hear what they needed and to make the changes that they needed, that she was going to be more available in the plant and more conscious and aware of what was going on, and would actively participate in ensuring that the changes needed would happen"; and 2. that her door was always open if employees had any questions or concerns.

In her speech, Gardetto made generalized comments about things improving, but also made specific promises that communication with employees would improve, and "that she was committed to having Tom Mayer focus on attending to employees' needs again, and committed to creating opportunities for collaboration and communication on goals, and celebrating employee successes." In his brief, the Respondent's counsel concedes Gardetto's comments about improving communications and her open door invitation to employees for questions and concerns, but argues that Gardetto did not link her efforts to improve communication to the outcome of the organizing campaign and that "she did not say that the results of the election would affect her efforts to improve communication with employees."

45 captive audience speech, to the effect that Respondent had made mistakes and wanted to do better, was a solicitation of grievances and promise of benefits, but acknowledge that there was no such allegation in the Amended Consolidated Complaint introduced at the hearing. Counsel's for the General Counsel take the same position as to the nonalleged statement of Mayer to Carvalho concerning his vacation days. Inasmuch as counsels for the General
50 Counsel did not move to amend the complaint to add these allegations, I will make no conclusions of law as to either conversation, but did include them in my factual findings.

Based upon the above, and my finding of facts, I conclude that in the context of an emotional personal speech about February 18 from the Respondent's highest official, geared to defeating the Union's organizational attempt, and without evidence that Gardetto's invitation and promises were merely a continuation of past policy, her linking of an invitation to employees to talk to her about any questions and concerns with promises to improve communications, to have Mayer focus on attending to employees' needs, and to celebrate employee successes,⁷⁸ constituted a solicitation of grievances and either a direct or implied promise of remedy, in violation of Section 8(a)(1). See, for example, *Center Service System Division*, 345 NLRB No. 45, slip op. at 1-2 (2005). I reject Respondent's characterization in its brief that Gardetto's "commitment to improve communication was nothing more than a commitment to return to the open communication the Company had enjoyed for most of its existence." In reality, the brief's characterization is a concession that Gardetto's comment was a promise to change from the then current policy, back to the policy that had allegedly existed at an earlier time. Further, while there is evidence that on occasion, lower level supervisors may have asked employees for suggestions in the past, this is a far different scenario than a speech from the Respondent's highest official.

Further, I disagree with the argument in the Respondent's brief that the Board's decision in *Curwood, Inc.*, 339 NLRB 1137, 1139-1140 (2003) stands for the proposition that "open invitations for employees to present questions or concern is not an unlawful solicitation of grievances." In *Curwood*, the Board weighed the meaning of the following communiqué (in pertinent part) from the employer to its employees: "If you have questions, I highly encourage you to write them down and return them in the envelope provided." As to the passage, the Board held, "The context of the letter as a whole reasonably suggests that the Respondent was soliciting questions about the mechanics of the election process and about its own views concerning unionization." Thus, rather than setting forth an all-encompassing general rule, the Board simply ruled that in the context of the entire letter, the quoted passage did not imply a promise to resolve their grievances. I concluded here to the opposite; that in the context of the entire speech, Gardetto's invitation conveyed an implication that grievances raised would be resolved.

Gardetto Conversation with Mang

The General Counsel alleged in paragraph 8(b) of the complaint that in March, Gardetto promised an employee "things would get better around the facility." As found, about 2 weeks before the election, Gardetto initiated a conversation with Mang in which she told Mang that "things will be getting better" at the facility and that Respondent "maybe" was going to go back to offering anniversary awards to employees. Respondent, in its brief, argues that ". . . Gardetto did not elaborate on what would get better, nor did she make any promises." I conclude that, in fact, Gardetto did elaborate on what would get better by implying that the Respondent would revert to a policy of providing employees with anniversary awards.

I agree with the Respondent's argument in its brief, citing the Board's decision in *MacDonald Machinery Co.*, 335 NLRB 319 (2001), that general, nonspecific, comments about an employer's desire to make things better, without more, do not constitute an unlawful promise in violation of Section 8(a)(1). See also *National Micronetics*, 277 NLRB 993 (1985), where the

⁷⁸ As to celebrating employee successes, see also my finding that the Respondent made good on this promise by its institution of an employee-of-the-year award with concomitant cash award.

Board found the statements at issue to be “too vague to rise to the level of illegal promises of benefits . . .,” and noted that “The statements do not promise that anything in particular will happen.” Here, however, Gardetto went beyond a general assertion that “things will be getting better” and coupled those words with a specific reference to reinstating anniversary awards. I
 5 conclude that such words implied a promise of benefits in violation of Section 8(a)(1). Further, as noted above, there is no evidence that Gardetto, the Respondent’s highest official, engaged in such solicitation of employee grievances prior to the organizational campaign. This is not a continuation of a past practice as, for example, found by the Board in *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB No. 33 (2006).

10 Olson and Blanquel Captive Audience Meeting

The General Counsel alleges, in paragraph 10 (a) of the complaint, that Olson and Blanquel solicited grievances at a meeting. In their brief, counsels for the General Counsel
 15 argue that the following, which they assert occurred at a captive audience meeting, constitutes a solicitation of a grievance and a promise of a benefit: “He [Olson] said that he and Blanquel were striving very hard with Lepak to change things around there and make them better.” In my findings of fact, I found that Olson also told the assembled employees that “the Respondent had made mistakes but that he, Blanquel, and Lepak were trying to change things and make them
 20 better and treat them fairly like by giving them enough advance warnings of shift changes.”

Based on my findings of fact, and the record as a whole, there is no evidence that Olson or Blanquel solicited grievances at this meeting, and I conclude that they did not. Olson did advocate against the Union at his captive audience meetings, and did tell the assembled
 25 employees that the Respondent had made mistakes but that “he, Blanquel, and Lepak were trying to change things and make them better and treat them fairly like by giving them enough advance warnings of shift changes.” But the General Counsel does not allege in the complaint introduced at trial that such constituted an illegal promise of benefit, and there was no motion to so amend the complaint. I, thus, decline to find such a promise of benefit, and because such
 30 findings would, in any case, be redundant in view of my other conclusions herein.

Olson and Blanquel Conversation with Mankin and Cassel

In paragraph 9(d) of the complaint, the General Counsel alleges that Blanquel solicited
 35 grievances and promised benefits after a meeting. In paragraph 10(b) of the complaint, the General Counsel alleges that after a meeting, Olson and Blanquel solicited employee grievances. As found, after a captive audience meeting at which they advocated against the Union, Olson and Blanquel spoke with employees Mankin and Cassel. Blanquel and Olson told Mankin and Cassel that they “wanted to make things better,” and asked them if they “had any
 40 ideas on how to improve.” After Olson and Cassel left, Blanquel again asked Mankin if she had any ideas on how the Respondent could improve and told Mankin that he would take her and a companion out to dinner and would pay for it so they could discuss any ideas she had. The General Counsel alleges in complaint paragraph 10(b) that these comments by Olson and Blanquel were illegal solicitation of employee grievances. The Respondent maintains that
 45 Blanquel was doing nothing different from what he has done over the course of his employment as a supervisor, that is, solicit suggestions from employees, and cites *Wal-Mart Stores, Inc.*, 339 NLRB 1187 (2003) for the proposition that an employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign.

50 I find that Blanquel’s and Olson’s comments to Mankin and Cassel constituted illegal solicitation of grievances in violation of Section 8(a)(1). The solicitation of grievances was

accompanied by statements that the Respondent wanted to make things better, and followed a captive audience meeting at which the employees were urged to oppose the Union. Additionally, Blanquel even offered to pay for dinner for Cassel and a companion as part of the solicitation. Respondent's argument is accurate in that Blanquel had previously solicited suggestions from employees, but those solicitations were clearly of a different character, in a different context, and did not involve dinner invitations. As noted, the Board has ruled that an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the campaign." *House of Raeford Farms*, supra. The solicitations here were clearly not geared to work processes, were accompanied by antiunion rhetoric, and included offers to pay for dinner. Under these circumstances they were not a continuation of past practice, and were illegal.

Blanquel and Sparks Conversation with Mang

The General Counsel alleges in paragraph 9(a)(v) of the complaint, that shortly before March 23, Blanquel "solicited grievances and thereafter made changes in response to those grievances." I found that about 2 or 3 weeks before the March 23 election, Mang met for about 10 minutes in a supervisor's office with supervisors Blanquel and Sparks. In the course of a conversation during which Blanquel and Mang engaged in antiunion rhetoric, Blanquel asked Mang for suggestions to "make the company better." Mang responded with a suggestion that there should be job postings with a sign-up sheet. Subsequent to this conversation, such a sign-up sheet was posted on the bulletin board in the lunchroom and stayed posted for a week or two. I also found that on previous occasions, prior to any union activity, Blanquel had solicited ideas from employees under his supervision, but those solicitations were geared to production processes. Finally, I found that the Respondent had posted job openings in the past in 2000, 2002, and sometime in 2004, but not in 2005.

I agree with the Respondent's argument that as to Blanquel's solicitation of Mang, there is insufficient evidence in the record from which I can conclude that Blanquel's solicitation was a deviation from past practice. I have found that in the past, before any union organizational activity, Blanquel solicited suggestions from employees, and put some of those suggestions into effect. As in the Board's *Wal-Mart*, supra, decision, the issue here is whether during the campaign the Respondent solicited grievances in a manner that was significantly altered from its past manner and methods. Here, the only difference in Blanquel's solicitation of grievances from Mang, from what Blanquel did in the past, was to accompany the solicitation with antiunion rhetoric, none of which is alleged to violate the Act. There is no evidence in the record as to whether the Respondent acted quicker to resolve Mang's grievance than it had in the past to resolve grievances presented to Blanquel. I, thus, conclude that Blanquel's solicitation of Mang was not a significant change from his practice prior to any union organizational activity, and did not violate the Act.

Other Preelection Alleged 8(a)(1) Violations

Blanquel Conversations with Carvalho and Karboski

The General Counsel alleges in the complaint that the following violations of Section 8(a)(1) were committed by the Respondent's supervisor Blanquel during the preelection campaign period, and at trial and in their brief counsels for the General Counsel maintained that the violations occurred during conversations supervisor Blanquel had with employee Carvalho as follows: 1) Complaint paragraph 9(a)(i) – shortly before March 23 told an employee that he would lose his seniority and vacation because if the Union came in, everything would start from zero; 2) Paragraph 9(a)(iii) –shortly before March 23 told an employee that the union

organizing campaign was preventing him from receiving increased pay; 3) Paragraph 9(a)(iv) – shortly before March 23 told an employee that he would receive a benefit by having his vacation restored; and 4) Paragraph 9(c) – on or about mid-February made threats of plant closure. Counsels for the General Counsel further maintain in their brief that Respondent violated
 5 Section 8(a)(1) as alleged in complaint paragraph 9(b) by Blanquel's comments in a conversation with Karboski.

I found that in mid-February Blanquel told Carvalho that he would lose his vacation and seniority because if the Union came in everything would start from zero, and the owner would
 10 close down the plant. I further found that about a week to 10 days after the mid-February conversation, Carvalho asked Blanquel why he wasn't receiving lead pay, and that Blanquel responded that "we were in the process of union campaign." I also found that near the end of February Carvalho complained to Blanquel that he had received remuneration for 2 days of pay
 15 in lieu of vacation when he had not requested such, that Blanquel had responded that it was supposed to be that way, "new administration, new management," that in mid-March Blanquel told Carvalho that Carvalho was right that he didn't have to take the vacation days, and that Blanquel had Carvalho sign a form to pay the vacation remuneration back to the Respondent and restore his vacation days.

I further found that about 3 weeks before the election, Blanquel told Karboski that he
 20 wanted to give her his take on the Union; that he didn't believe in unions, and that it's not always the way they say it's going to be. Blanquel said that in the bargaining, the parties could start from zero and employees could lose their vacation.

As to "start from zero," it is well settled that employer statements to employees during an
 25 organizing campaign that bargaining will start from "zero" or from "scratch" are "dangerous phrases" which carry within them "the seed of a threat that the employer will become punitively intransigent in the event the union wins the election." *Coach and Equipment Sales Corp.*, 228
 30 NLRB 440 (1977). "Although such statements are not per se unlawful, the Board will examine them, in context, to determine whether they 'effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the union can induce the employer to restore,' or
 conversely-whether they indicate that any 'reduction in wages or benefits will occur only as a
 35 result of the normal give and take of collective bargaining'." *Federated Logistics and Operations*, 340 NLRB 255 (2003), quoting *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).
 Blanquel's further threat during the same conversation that the owner would close the plant, adds further context to the "start from zero" comment, and also violates Section 8(a)(1).

I conclude that Respondent violated Section 8(a)(1), as alleged in complaint paragraph
 40 9(a)(i), when Blanquel told Carvalho in mid-February⁷⁹ that he would lose his vacation and seniority if the Union came in because everything would start from zero. Blanquel's comment is not simply an explanation as to how collective bargaining works, but a bald threat to Carvalho. I further conclude that Blanquel's comment, in the same conversation that the owner would close
 45 down the plant to be a threat in violation of Section 8(a)(1). *Evergreen America Corp.*, 348 NLRB No. 12 (2006). I find no separate violation as alleged in complaint paragraph 9(b).⁸⁰

⁷⁹ Carvalho credibly testified that this conversation occurred in mid-February rather than the March 23 date pleaded in the complaint. The issue was fully litigated and I perceive no
 50 prejudice to the Respondent.

⁸⁰ Complaint paragraph 9(a)(i) mentioned "seniority and vacation" being threatened. Complaint paragraph 9(b) mentions only vacation being threatened. I find no violation as

Continued

As to Blanquel's response to Carvalho's question about his pay raise, "it is well settled that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. "Thus, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. However, where employees are told expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference, the Board will not find a violation of the Act." *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980) (citations omitted). Here, Blanquel's response to Carvalho's question about his pay raise was not made in the context of an explanation that the pay raise was being withheld to avoid influencing the outcome of the election. As a result, Carvalho would have been left with the impression that but for the Union's campaign he would have received a pay raise. I, thus, conclude that the Respondent violated Section 8(a)(1) when Blanquel told Carvalho that, in effect, Carvalho was not receiving his pay raise because of the union campaign.

As to Blanquel's comments and Respondent's actions surrounding the remuneration to Carvalho in lieu of vacation days, even in the context of the other unfair labor practices found herein, I cannot conclude that such violated Section 8(a)(1) or was caused by anything more than an apparent mistake and then correction of the mistake, made by Respondent in respect to its vacation pay policy. Blanquel admitted the mistake in the application of the policy to Carvalho, and then corrected the mistake by allowing Carvalho to repay the Respondent, and regain his vacation days. In the absence of contrary evidence, the Respondent's explanation makes sense, and I will not find its actions motivated by the organizational campaign based only on the animus and other unfair labor practices found herein.

Lepak Captive Audience Meeting, and Conversation with Mang

The General Counsel's complaint alleges as violations of Section 8(a)(1) the following actions of then Vice-President of Manufacturing Brett Lepak: 1) In paragraph 11(a) that Lepak during a captive audience meeting in February, "said that the Respondent wanted employees with good attitudes and that they were trying to move forward"; 2) in paragraph 11(c) that "shortly before March 23," Lepak stated in a captive audience meeting that if "the Union won the election, the Employer could not grow"; and 3) in paragraph 11(b) that in about mid-February Lepak "told an employee that the Employer was looking for workers that don't cause trouble or open their mouths that much about stuff." In their brief, counsels for the General Counsel point to record evidence concerning a mid-February conversation between Lepak and employee Mang in support of the latter allegation.

I found that during the course of the organizational campaign, Lepak gave a speech or speeches as part of the Respondent's campaign against the Union, and that Lepak told the assembled employees that the company was doing well and not headed for more layoffs, that he didn't care whether the employees had a union or not but that the company couldn't grow with a union, and that the Respondent wanted to move ahead with people with good attitudes. I also found that Lepak told the assembled employees that they shouldn't forget to vote and that whether an employee voted "yes" or "no," it wouldn't be held against them.

Counsels for the General Counsel argue in their brief that Lepak's comment as to the Respondent not being able to grow with a union violated the Act, and that his coupling of his

alleged in complaint paragraph 9(a)(ii), a similar allegation, as there is no evidence to support said allegation.

comment about no more layoffs with his comment of moving ahead with people with good attitudes would cause employees to fear that to achieve no layoffs they would have to demonstrate good attitudes, meaning not supporting a union. Respondent's counsel, in his brief, concedes that Lepak told employees that "the Company wanted to move forward with workers who had a good attitude" but maintains, as to these alleged violations, that in the context of everything Lepak said to the assembled employees, including that he didn't care whether or not the employees had a union, and that the Respondent would not hold anything against an employee no matter how he/she voted, Lepak's words were not coercive.

I conclude that Lepak violated Section 8(a)(1), as alleged, when he told the assembled employees that the company could not grow with a union and that the company wanted to move ahead with people with good attitudes. The Board has viewed the usage of certain words in respect to union or protected concerted activity to be code words for that activity. See *Phillips Petroleum Co.*, 339 NLRB 916 (2003). "Attitude" is such a word. See, *Bronco Wine Co.*, 256 NLRB 53. 54 (1981). Here, Lepak's reference to moving ahead with people with "good attitudes" coupled with his references to the company not being able to grow with a union conveys a coercive message to the assembled employees that good attitude meant not favoring a union and that such attitude was the key to avoiding future layoffs. Lepak mentioned that the Respondent was not headed to more layoffs, but the assembled employees knew full well that the Respondent a month or so earlier had permanently laid off employees. Urging employees to vote, telling them that how an employee voted would not be held against him/her, and that Lepak did not care whether the employees had a union or not, did not and could not ameliorate the veiled and unveiled threats contained in the rest of his message.

I also find that Respondent violated Section 8(a)(1) when Lepak told employee Mang in mid-February that "We have a good work force, they're good workers and you don't complain much." Lepak's comment, which equates being a good worker with not complaining, is coercive in that it occurred in the context of an organizing drive and a vigorous Respondent counter-campaign, and followed on the heels of the Respondent's permanent layoff of other plant employees.

Mayer Conversation with Karboski

The General Counsel alleges in the complaint that the following actions of Vice-President of Human Resources and Operating Services Thomas Mayer on March 22 violated Section 8(a)(1): 1) Paragraph 15(a) – "expressed his opinion whom the Union's observer should be"; 2) paragraph 15(b) – "disparaged the Union by comparing it to a crack addict," and 3) paragraph 15(c) – "by the conduct described above in paragraph 15(a), impliedly engaging in surveillance." In their brief, counsels for the General Counsel rely on Mayer's conversation with employee Karboski to support these complaint allegations.

Karboski was the Union's observer at the election. I found that the day before the election, Mayer spoke to Karboski in the plant's mixing room. Mayer said he had heard that Karboski was going to be the Union's observer at the election. Karboski acknowledged she was the observer. Mayer said he was surprised the observer wasn't Brzezinski. Karboski responded that she had picked her side early on and she was going to stick with it. Mayer responded, "I hope you know what you're doing." Karboski said that if it didn't work out, the employees could vote the union out in a year. Mayer responded, "That's what crack addicts think too, that they can get off of it."

Counsels for the General Counsel, in their brief, argue that Mayer's comment about crack addicts was disparaging of the Union in violation of Section 8(a)(1), that Mayer's comment

about Brzezinski implied surveillance of union activity, and that Mayer's comment that he "hoped that Karboski knew what she was doing" (not alleged as a violation in the complaint) was not "harmless." The Respondent's counsel, in his brief, maintains that none of Mayer's comments violated the Act, that Mayer did not use the word "union" nor specifically mention the Union in his "crack addict" comment, and that Mayer's statement of his mistaken belief that Brzezinski would be the Union's observer, instead of evidencing surveillance, demonstrated the opposite.

Section 8(c) of the Act "implements the First Amendment" such that "an employer's free speech right to communicate his views to his employee is firmly established and cannot be infringed by a union or the Board." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). It gives employers the right to express their opinions about union matters, provided such expressions do not contain any "threat of reprisal or force or promise of benefit." *Progressive Electric, Inc.*, 344 NLRB No. 52, slip op. at 2 (2005). "Thus, an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB No. 3, slip op. at 2 (2006). "Denigration of the union is insufficient to support a finding that the Respondent has violated the Act unless it is such as to threaten reprisals or promise benefits." *Children's Center*, supra, quoting *Poly-America, Inc.*, 328 NLRB 667, 669 (1999).

Here, Mayer's "crack addict" comment was clearly not directed at the Union, but instead at Karboski's belief that employees could vote the Union out after a year if they were not happy. Inasmuch as it was not directed at the Union, it was not disparaging of the Union. Even if it were directed at the Union, Mayer was within his rights to express his nonthreatening, noncoercive, albeit strong, opinion.⁸¹

The Board's test for determining whether an employer has created an impression of surveillance is whether the employee would reasonable assume from the statement in question that his union activities had been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). "The Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance Further, the Board does not require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means." *Id.* at 151. "The idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Industries*, 311 NLRB 257 (1993).

I do not find that Mayer's comment as to who was the Union's observer implied surveillance of union activity. As argued by the Respondent's counsel in his brief, it was well-known that Brzezinski was a strong supporter of the Union. Brzezinski was designated as a member of the Union's organizing committee in the February 7 union letter to the Respondent. During Gardetto's captive audience speech, Brzezinski made comments to her supportive of the Union. Under these circumstances, with Brzezinski's support of the Union no secret, it hardly suggests surveillance for the Respondent to be aware of such support or to suggest to Karboski

⁸¹ While a strong antiunion atmosphere prevailed under the circumstances of this case, including other violations of the Act (see e.g., *Ryder Transportation Services*, 341 NLRB 761 (2004)), I cannot conclude that Mayer's crack addict comment was threatening.

that Mayer thought Brzezinski would be the Union's observer. Viewed objectively, Mayer's "observer" comment to Karboski would not reasonably have induced in her a fear that members of management were peering over her shoulders. At most, Mayer's comment was a sarcastic expression of his opinion. I, thus, conclude that Mayer's comments to Karboski did not violate the Act as alleged.

Howe Captive Audience Speech

The General Counsel alleges in complaint paragraph 12 that in about the second or third week in March, Tom Howe, Respondent's president, told employees during a meeting that "the Company was finally making money and asked why they would want to ruin it by bringing in a third party." Counsels for the General Counsel assert in their brief that Howe's comment was a "statement that selection of the Union was having adverse consequences." Respondent's counsel, in his brief, characterizes this complaint allegation as implicitly alleging a threat of plant closure, and argues either that Howe did not say what he was accused of and/or that what he did say was a lawful expression of the Respondent's opinion as to the Union, citing *Mt. Ida Footwear Co.*, 217 NLRB 1011 (1975).

I found that Howe told the assembled employees, in pertinent part, that the Respondent had made a substantial capital investment, that Respondent's sales had grown from 5 to 9–10 million dollars a year, that the Respondent was committed to finding new products and customers to grow the business, that the Respondent was committed to make the business work by better training and communication with its employees, that he was asking the employees to support the direction the Respondent was going in, that union representation could become a hurdle by the restrictive rules of a union contract, and that bringing in a third party would wreck⁸² the progress.

Howe's wrecking or ruining the Respondent's progress comment, is a clearly expressed prediction as to what would happen if the Union were to be successful. The standard for determining whether an employer's prediction is an impermissible threat was set forth in *NLRB v. Gissel Packing Co.*, supra at 618 (1969). The Board must focus on, "what did the speaker intend and the listener understand." *Id.* at 619. Any evaluation of the speaker's comments, therefore, "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed to the disinterested ear." *Id.* at 617. In further explication, the Court in *Gissel* held:

Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons

⁸² Or "ruin."

5 unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such is without the protection of the First Amendment. *Id.* at 618. (citations omitted).

10 Howe's words here do not constitute a carefully based prediction based on objective fact. In context, they are words calculated to make the assembled, listening employees fear that the Respondent's investment, efforts to find new business and products, and commitment to make the business work, would be torpedoed by an employee decision to choose union representation. Decisions to invest, try new products, and seek new business are within the control of the Respondent and are not demonstrably probable consequences beyond the Respondent's control. Howe's prediction that choosing a third party (e.g. union) would wreck or ruin the Respondent's progress is a coercive threat unsupported by any objective fact cited by Howe. I, thus, find that the Respondent violated Section 8(a)(1) by Howe's words to the
15 assembled employees.

Disclosure of Confidential Employee Information from the Respondent's Files

20 The General Counsel, in complaint paragraph 13, alleges that shortly before March 23, various supervisors, in captive audience meetings, offered to disclose confidential information to employees about an employee who had been permanently laid off. In paragraph 14(a) the General Counsel alleges that sometime in February, at a captive audience meeting, supervisor Blanquel disclosed confidential information to employees about an employee who had been
25 permanently laid off. In complaint paragraph 14(b), it is alleged that shortly before March 23, at a captive audience meeting, Vice-President Mayer disclosed confidential information about an employee who had been permanently laid off. At trial, the only evidence introduced by the General Counsel on this issue had to do with the Respondent showing or offering to show employees, during the election campaign, a disciplinary write-up from the file of laid off
30 employee Dennis Sobiech.

35 In their brief, counsels for the General Counsel rely on the late February conversation between Blanquel and Carvalho as evidence in support of complaint paragraph 14(a) although they concede that the evidence demonstrated that Blanquel's comments were made in a one-to-one conversation rather than, as alleged, at a captive audience meeting. Counsels for the General Counsel compare Respondent's actions in respect to the disclosure of the Sobiech disciplinary write-up to a campaign letter sent by the Respondent to its employees, apparently in respect to the *Excelsior* list requirement, in which Respondent said, "Baptista's has always respected the privacy of our employee's personal information, and we apologize that in this
40 instance we are required to release your personal information to the NLRB for the Teamsters without your permission." Finally, counsels for the General Counsel, in their brief, argue that, "By Respondent's actions and its earlier letter, employees would perceive that a union organizing campaign and subsequent union success could lead to the disclosure of confidential information by Respondent." Counsels for the General Counsel cited no case law in support of
45 this "chilling" argument.

50 Respondent, in its counsel's brief, concedes that it engaged in some disclosure to employees during the campaign, vis-à-vis Sobiech's personnel file, but that said disclosures are protected by Section 8(c) of the Act and Wisconsin state law. "Not only is Baptista's limited disclosure protected by Section 8(c) of the Act, but it is protected by Wisconsin law as well." The Respondent's brief characterizes the evidence as to the Sobiech disclosure as "largely undisputed," and concedes the following: that supervisor Olson told employees at a captive

audience meeting that he had a copy of Sobiech's write-up with him, that Blanquel "offered to show employees the disciplinary write-up in which Mr. Sobiech had been encouraged to consider another position," and that Blanquel offered to show employee Leslie Fintak a copy of Sobiech's disciplinary write-up.

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The Respondent, in its brief, argues that a number of employees had raised questions during the campaign as to the fairness of the Respondent having permanently laid off Sobiech without having offered Sobiech a different position, and that the Respondent was just trying to alleviate those concerns. As these questions were raised, Olson asked Mayer why Sobiech hadn't been offered a different position. Mayer told Olson that Sobiech had been offered the possibility of moving to a different position at one time, and that this was documented in a write-up in Sobiech's personnel file. At Olson's request, Mayer provided him with a copy, which apparently is the copy Olson and Blanquel offered to show employees.

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The version of the facts as to the Sobiech disclosure issue contained in Respondent's brief is largely consistent with my findings. I found that during an Olson captive audience meeting, one or more employees brought up the Sobiech subject and asked why he had not been offered another position prior to his layoff, that Olson inquired of Mayer as to Sobiech, who gave Olson a copy of the Sobiech write-up which mentioned the possibility of another job, and that both Olson and Blanquel offered to show this document to employees. I also found that towards the end of February, Blanquel told employee Carvalho that he wanted to show Carvalho the Sobiech write-up, and he showed it to him. Finally, I found that a week or two before the election, in Mayer's office, Mayer told employee Mang that Mayer knew the employees were kind of upset that the Respondent had let Sobiech go, but that he had been making mistakes and he (Mayer) was going to show Mang Sobiech's personnel file showing that Sobiech had made mistakes in the past. Mayer then showed Mang a file which contained something about what a supervisor had written about Sobiech. I also found that during the course of the election campaign, some of the Respondent's employees had asked supervisors why the Respondent had not offered Sobiech another job before laying him off.

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Under these circumstances, I do not conclude that the Respondent's offer to show or actually showing the Sobiech write-up containing language as to the possibility of another position, to other employees during the course of the organizational campaign, chilled union activity or violated Section 8(a)(1). The information disclosed was limited to a single write-up from Sobiech's personnel file and it was in legitimate response to employee questions to supervisors which arose during the course of the campaign. Based on this record, I cannot conclude that an employee would reasonably fear, based on Respondent's actions vis-à-vis the Sobiech write-up, that his/her confidential information would be released by the Respondent if he/she engaged in union activity, or if the union was chosen to represent them. Accordingly, I conclude that the Respondent did not violate the Act as alleged in complaint paragraphs 13, and 14(a) and (b).

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Posting of No-Solicitation Rule

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The General Counsel alleges in paragraph 7(c) of the complaint that the Respondent violated Section 8(a)(1) by restating and promulgating an addition to its no-solicitation, no-distribution rule, in response to the union organizing drive. Counsels for the General Counsel contend, in their brief, that while the rule itself is "facially valid," the Respondent did not just post the then-current rule but added language as to disciplinary consequences for violation of the rule. The Respondent maintains, in its counsel's brief, that the outstanding rule is facially valid, that the language as to discipline in the newly posted rule is merely an "abbreviated summary of the preexisting disciplinary policy in Baptista's handbook," and that in the absence of evidence

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that the rule was discriminatorily enforced, it was entitled to publish the rule. The Respondent asserts in its Counsel's brief that "When a company published a valid, preexisting solicitation/distribution policy, and there has been no disparate enforcement of that policy, there has been no violation of Section 8(a)(1)," but cites no case law in support.

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There is no allegation here that the rule as posted or as in the handbook is facially invalid. Unlike some cases, the Respondent does not assert that the posting of the existing, but largely dormant, rule was undertaken to preserve production and order and there is no evidence of such. Instead, as found, the evidence demonstrated that the rule was posted in the lunchroom solely in response to the union organizing campaign.

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While the Respondent's argument that the posted rule does not represent a change from the existing handbook rule is initially attractive and is accurate as far as it goes, it does not set forth the whole story. As found, the posted rule, unlike the handbook rule, includes explicit language as to violators being subject to discipline, up to and including discharge. Respondent's counsel refers to such language as "an abbreviated summary" of the existing handbook language as to discipline. But the handbook references discipline as progressive (acknowledging that "there may also be instances where disciplinary action will not be progressive, depending on the severity and circumstances of the situation"). The posted "abbreviated summary" makes no reference to progressive discipline. The Respondent, of course, could have included in the posting, language referencing readers to the current disciplinary policy included in the handbook, but chose to use the language it did, which made no reference to progressive discipline or to the current handbook policy. I have also found that Respondent did not enforce the no solicitation, no distribution policy either before or after the posting in the lunchroom.

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Inasmuch as the facial validity of the rule is not challenged here, the only issue is whether the Respondent's posting of the rule in the lunchroom, with the additional reference to discipline, during the course of the Union's campaign violated the Act. If the posted rule was just an amplification or clarification of the existing handbook rule, its posting may not have violated the Act. See *Adams Super Markets Corp.*, 274 NLRB 1334, 1335 (1985).

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Here, however, there is no evidence that the preexisting rule was ever enforced and much evidence that it was not enforced at all. Further, the posted rule emphasized the possibility of discharge and other discipline for violation, whereas the handbook rule is directly accompanied by no mention of discipline or discharge, and the handbook sets forth a policy of progressive discipline, a possibility not mentioned in the posted version. Finally, the Respondent presented no evidence that the posting was generated by the need to preserve order and production, but instead the evidence demonstrated that Respondent posted the rule solely as a response to union organizing. See, for example, *Harry M. Stevens, Inc.*, 277 NLRB 276 (1985). Under all these circumstances, I conclude that the posting in the lunchroom of a preexisting but unenforced rule, which emphasized discipline out of context, served to chill union activity in violation of Section 8(a)(1), and such chilling was clearly the purpose of the posting, no evidence to the contrary. See, *Dillon Companies, Inc.*, 340 NLRB 1260 (2003), where in the context of a case involving the timing of the promulgation of a no-solicitation rule, the Board held, "Where, as here, the rule has lain dormant for a substantial period of time, and is resurrected only in the context of a union campaign, there is a reasonable presumption or a nexus between those two events. In addition, if the timing can be explained by matters apart from the campaign, the Respondent, as the promulgator, is in the best position to adduce evidence of that explanation. Phrased differently, once it is shown that the rule was promulgated in the context of a union campaign, the burden of the explanation lies with the

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employer.” I, thus, conclude that the Respondent violated Section 8(a)(1) by its posting of the rule, as alleged in paragraph 7 of the complaint.

Postelection Allegations

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Respondent’s March 23 Letter to Employees

Complaint paragraph 18 alleges that the Respondent violated Section 8(a)(1) by soliciting grievances, in the letter to employees from Gardetto and Howe on March 23, just after the election. Counsels for the General Counsel, in their brief, point to the following sentence contained in the letter as evidence of solicitation of grievances: “We realize that the greatest success comes when there is effective, continuous communication sharing of information, and employee participation.” Respondent’s counsel, in his brief, citing *Curwood Inc.*, supra, maintains that “Nowhere in this memo do Ms. Gardetto or Mr. Howe solicit grievances from employees.”

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In agreement with the argument of the Respondent’s counsel, I find no words in the letter soliciting grievances or even impliedly soliciting grievances, and find that the Act was not violated in this regard. However the letter language cited by counsels for the General Counsel may be construed, there are no words from which I can conclude that grievances are being solicited, even in the context of the other solicitations I have found violative herein. Counsels for the General Counsel cite *Seville Flexpack Corp.*, 288 NLRB 518 (1988), for the proposition that an employer’s postelection solicitation of grievances and grant of benefits are unlawful, when “granted for union reason.”⁸³ *Seville*, however, is inapposite in that it involved a postelection grant of a benefit explicitly to thank employees for voting against the union, a “Freedom Day” holiday. It is not alleged, and I would not find, that the letter at issue here conveys a benefit upon employees. Further, I have found that there are no words in the Respondent’s letter which solicit grievances. Accordingly, I conclude that the Respondent did not violate Section 8(a)(1) as alleged in paragraph 18 of the complaint.

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Employee-of-the-Year Award

Complaint paragraph 17 alleges that on March 28, the Respondent granted a benefit in violation of Section 8(a)(1), by presenting an employee-of-the-year award, which included a \$500 gift certificate to Sears. In his brief, the Respondent’s counsel argues that 2004 was a trying year for the Respondent in that employees worked long hours, that the recipient of the award, employee John Rautio, distinguished himself in the newly created job title of packaging machine operator (PMO) by his “willingness to learn, his desire and the amount of hours he was willing to work,” that there was no evidence that the award was presented to Rautio for any reason other than his job performance or for discriminatory reasons, and that the Respondent has a history of giving attendance awards to employees each year. Finally, the Respondent argues that “A union organizing campaign should not prevent employers from recognizing outstanding performance by individual employees.” Counsels for the General Counsel, in their brief, simply argue that giving the award constituted the granting of a benefit.

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⁸³ “We find it unnecessary to rely on the implication in se. II,E,4, par. 3 of the judge’s decision that whether or not an election is pending, the grant of a benefit explicitly for rejecting a union is unlawful. We note that the benefit in this case was granted during the period when objections to the election could still be filed.” supra at fn. 2.

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I found that, in fact, the Respondent, on March 28, 5 days after the election, awarded an employee-of-the-year prize consisting of a \$500 gift certificate and a plaque to employee John Rautio, that the Respondent had never previously awarded an employee-of-the-year prize, and that in past years, and in 2005, it did award bonuses for perfect attendance.

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In the instant case, the entire postelection period, with objections to the election still pending, is a critical period for the consideration of Respondent's actions, such period characterized by the Board as a "preelection context." See, *Leland Stanford Jr. University*, 240 NLRB 1138, fn. 1 (1979). The Board, in *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280, (1979), enf. 620 F.2d 310 (1980). cert. den. 449 U.S. 1034 (1980), analyzed the law as to the granting of benefits during the critical period as follows:

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The validity of wage increases or other benefits during the pendency of representation petitions turns upon whether they are granted "for the purpose of inducing employees to vote against the union." And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increases to the organizational campaign. For as the Supreme Court observed in *NLRB. v. Exchange Parts Company* 405, 410 (1964), "the absence of conditions or threats pertaining to the particular benefits conferred" is not "of controlling significance." Under settled Board policy, a grant or promise of benefits during the critical preelection period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action (some citations omitted).

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Under the above discussed circumstances here, I conclude that the Respondent granted the employee-of-the-year benefit for the purpose of inducing employees not to support the union, and thereby violated Section 8(a)(1). These circumstances include the Respondent's aggressive campaign against the Union, the other unfair labor practices found herein, and the fact that the Respondent had never before provided such a cash prize for superlative employee performance. The Respondent argues that the award was granted after the election. But as Respondent acknowledged in its letter to employees posted the date of the election, just after the election, it was aware that the election was not final, and Board law holds that the preelection critical period extends to cover the disposition of challenges and objections. The attendance awards granted by the Respondent in the past are indeed benefits, but they are a different benefit than the cash award for employee-of-the-year, and are not a precedent for the granting of such new, different benefit. Finally, while Respondent argues that the employee-of-the-year benefit was granted for the legitimate business purpose of rewarding a deserving employee who went beyond the call of duty, it was created only after it was presented with the specter of union organization.

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In *American Sunroof Corp.*, 248 NLRB 748 (1980), the Board held that "the granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. And the Board has further held that an employer can meet this burden by showing that the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union." Here, based on my finding of facts, I conclude that the grant of the employee-of-the-year cash award was motivated by the Union's organizational campaign and not by factors other than the election. I reject the Respondent's implied argument to the effect that recipient Rautio's job performance in 2004 was so far superior to any employee's previous

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job performance under whatever circumstances that it called out for the Respondent to create this award.

Milwaukee Brewers Outing

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Complaint paragraph 16(a) alleges that the Respondent, in violation of Section 8(a)(1), “within a week or two after March 23,” granted employee benefits of free food and game tickets for the Milwaukee Brewers May 1 baseball game, and complaint paragraph 16(b) alleges that in conjunction with the baseball game, the Respondent provided free jackets to employees. The Respondent maintains, in its counsel’s brief, that giving the free jackets to employees was part of an already established company policy which the Respondent did not deviate from in that the Respondent had previously given items of clothing to its employees, and that the Brewers outing and jacket gift were for the Respondent’s business purpose of “team building” among its employees.

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I found that in early April the Respondent invited its plant employees and their guests to a Milwaukee Brewers baseball game, and included free tickets and food at the game. The outing took place on May 1, and “was a very expensive event.” In late April, the Respondent provided employees with their choice of a free jacket with Baptista’s logo and in a memo requested that the employees wear the jacket to the baseball game; “As we move Baptista’s forward it is important that we do so as one unified team.” The jackets cost the Respondent \$2,445.38.

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Again here, the issue is whether the outing and jacket benefits were granted for the purpose of inducing employees to vote against the union, and the granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. *Honolulu Sporting Goods, Co.*, supra. The Respondent has demonstrated, and I found, that on some previous occasions it has granted a free clothing benefit to employees, free festival tickets, and has provided free Christmas lunches/dinners and associated items such as holiday turkeys.

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But although the previous free clothing benefit is difficult to compare to the free jacket benefit, it is clear that none of the other events (which generally included employees contributing food or drink in a “pot-luck” type fashion) was of the magnitude of the very expensive baseball outing. The cost of the baseball outing and its timing becomes even more striking when compared with Gardetto’s testimony that the reason the Respondent had never before sponsored such an outing was because it was very expensive and the Respondent “wasn’t making money” and Mayer’s testimony that the Respondent was not making money during the time of the organizational campaign and was not consistently profitable until 2006.

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The Respondent, in its counsel’s brief, argues that when the Respondent sponsored the Brewers outing in 2005, it was motivated “by its desire to building a unified team out of its workforce, not a desire to interfere with employees’ exercise of their Section 7 rights.” This argument refers to my finding that the hiring of the “pasta people” in the summer of 2004 caused some hostility between that group and the preexisting Baptista’s employees and references the memo from the Respondent to its employees with the logo jacket which stated, “As we move Baptista’s forward it is important that we do so as one unified team.” But, in view of the Respondent’s extensive campaign against the Union, and a record here replete with evidence of the Respondent’s animus, including from its highest officials, I conclude that the mention in the Respondent’s memo as to “moving forward as one unified team” more likely was a reference to moving forward after the election without the Union.

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Under all these circumstances, I conclude that the expensive baseball outing, at a time the Respondent was no better able to afford it than it was in previous years when it sponsored no analogous event, was intended to further inhibit employee support for the Union, and that the Respondent has not established that said outing was governed by factors other than the pending election outcome. Accordingly, I conclude that the Respondent violated Section 8(a)(1) as alleged in complaint paragraph 16(a) by providing to its employees the Brewers outing benefit. I further conclude that providing the logo jackets did not violate the Act as alleged in complaint paragraph 16(b) as the Respondent has established a pattern of past benefits of a similar nature.

Two Dinners for Sanitation Department Employees

Complaint paragraphs 20(a) and (b) allege that the Respondent violated Section 8(a)(1) by granting benefits to employees when Jackson took several employees to dinner at Famous Dave's restaurant, and also violated Section 8(a)(1) when Gardetto took several employees to dinner at Ingrilli's restaurant. In his brief, the Respondent's counsel argues that the dinners took place in June, months after the election, that the invited employees were members of the departments which had performed extraordinary work in preparation for the AIB audit, that there was no evidence that any comment "was made about the representation election at these dinners" or that the invitations depended on whether employees supported or opposed the Union, and that, "Based on the evidence which was presented, Baptista's has proven that its motivation for these dinners was wholly independent of the Union's organizing campaign." The Respondent's counsel further argues that in the past the Respondent has provided complimentary meals to employees.

I found that in June, Jackson treated all of the sanitation and quality control department employees and their guests to a complimentary dinner at Famous Dave's restaurant for the stated purpose of thanking the employees for their work towards the AIB audit, and that about 2 or 3 weeks later, Howe and Gardetto took the same group to a complimentary dinner at Ingrilli's restaurant, that the price range for dinners at the two restaurants is \$10 to \$25 dollars and higher, and that only the Ingrilli's dinner included alcoholic drinks.

Again, the test here is whether the two free dinner benefits were granted for the purpose of inducing employee disaffection with the union, remembering that the granting of benefits during an election campaign is not per se unlawful where the employer can show that its actions were governed by factors other than the pending election. *Honolulu Sporting Goods, Co.*, supra.

Based on my finding of facts, and the above-discussed circumstances, I conclude that the Respondent's providing of two free restaurant dinners to the employees of the sanitation and quality control departments and their guests, violated Section 8(a)(1) in that it constituted the granting of benefits during the critical period for the purpose of influencing their union leanings. In reaching this conclusion, I do not ignore the Respondent's argument that the dinners were for the purpose of thanking the employees for their work in preparation for the audit and that the Respondent had previously provided free meals to employees in the past.

But what the Respondent did here was unprecedented in that there is no evidence that on any previous occasion the Respondent took employees and their guests to a restaurant for a free dinner or purchased alcoholic drinks at a restaurant for their employees, and this first and only occasion "happened" to fall during the critical period. In the further context, that these actions occurred in the midst of the Respondent's aggressive campaign against the Union, expressed animus, and other unfair labor practices, and the fact that the Respondent found it

necessary to treat the employees to a restaurant dinner not just once, but twice, I conclude that the restaurant dinners were provided for the purpose of influencing employees during the critical period, and that the Respondent thereby violated Section 8(a)(1) as alleged in complaint paragraphs 20(a) and (b).

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The Wehrley Survey

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Complaint paragraph 19(a) through (d) alleges that on April 22, the Respondent notified “all employees that they would be introduced to Team Building & Communications Consultant, Susan Wehrley,” that about May 10, Wehrley distributed surveys to employees, that as an inducement to return the completed surveys, employees were offered and given \$10 gift certificates, and that the surveys, in violation of Section 8(a)(1), solicited grievances with the implied promise that wages, hours, and working conditions would be improved. In its counsel’s brief, the Respondent argues that it had previously utilized Wehrley’s services long before any union activity and that the record demonstrates that the Respondent had a legitimate business reason for utilizing Wehrley’s services as follows: “Unquestionably, Ms. Wehrley’s assessments solicited employee feedback and complaints. However, Baptista’s has a legitimate business justification for doing so.”

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In support of its argument that an employer may rebut the preliminary finding of unlawful solicitation of grievances by showing a legitimate business reason for the challenged practice, the Respondent cites *Torbitt & Castelman, Inc v. NLRB.*, 123 F.3d 899 at 907 (1997). Respondent also cites *Leland Stanford Jr. University*, supra at fn. 1, as an analogous case in which the Board concluded that an opinion survey rendered by an employer to unrepresented employees and soliciting their grievances concerning working conditions, does not violate the Act even during the critical period, where “the opinion survey was conceived for legitimate business reasons and was not designed in response or opposition to the Union’s organizing effort.”

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I found that Respondent retained Wehrley in January, after previously utilizing her services in 2000 and 2001 to work with the Respondent’s management in improving communication skills and blending management styles and manager’s personalities. This previous consulting work did not involve plant employees subject to the current organizational effort. Wehrley met with the Respondent’s top managers, including Gardetto, on February 12 and Mayer’s e-mail following the meeting to all attendees, thanking them for attending the Saturday meeting, also addressed how supervisors should deal with employees during the course of the Union’s organizing drive. Wehrley met three times in February with the Respondent’s top management and was informed at these meetings of the existence of the organizing drive, that management was concerned about the drive, that management wanted to know the cause of employees wanting a union, and management desired to have a union. Wehrley, herself, testified as to designing the employee survey that, “It wasn’t necessarily tied exactly to the union, but there was a concern about why are people disgruntled.”

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As discussed above, Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities. *American Red Cross Missouri Illinois, et al.*, supra. “An employer who has a past policy and practice of soliciting employees’ grievances may continue such a practice during an organizational campaign,” Johnson *Technology, Inc.*, 345 NLRB No. 47 (2005), slip op. at 3 (2005) but an employer cannot rely on past practice to justify solicitation of grievances where the employer “significantly alters its past manner and methods of solicitation.” *Wal-Mart Stores*, supra (quoting *Carbonneau Industries*, 228 NLRB 597, 598 (1977)).

Here, the Respondent, prior to the Union's organizational campaign, occasionally solicited suggestions or grievances, and the Respondent has, in the past, used Wehrley's services. But the Respondent never before circulated surveys among its plant employees within the unit that is the subject of the organizational campaign and never before provided a benefit to employees for completing surveys. Under the circumstances here, I conclude that the Respondent's method of using surveys with incentives for completion is a significant departure from any past solicitation.

Inasmuch as the solicitation occurred in the critical period⁸⁴ and in the context of the unprecedented usage of a gift certificate for completion of the surveys, Respondent's aggressive campaign against the Union, and concomitant unfair labor practices, I conclude that the surveys constituted a solicitation of grievances with inference of a promise to remedy in violation of Section 8(a)(1) of the Act. See, for example, *American Red Cross Missouri-Illinois et. al.*, supra at 5-7, where the Board found the survey not to violate Section 8(a)(1), but in a context where the employer, before union organizational activity, had utilized surveys to solicit employee grievances: "Moreover, the Respondent's use of a survey is consistent with its history of soliciting employee feedback with surveys."

Moreover, in light of Wehrley's testimony to the effect that management wanted to know the cause of employees wanting a union and that she was looking to find out why employees were disgruntled, and the continuing pattern of unfair labor practices I have found herein, there is a clear nexus between the organization drive and the survey. See *Amptech Inc.*, 342 NLRB supra at 1137. Finally, while the Respondent advances its asserted need to build teams as a legitimate business reason for the surveys and argues that it deliberately waited until after the election to conduct the surveys, I note that the Respondent did not "discover" its need to build teams and implement the surveys until it faced the specter of the Union's organizing campaign, and that the survey was conducted during the critical period, at a time it was well aware of the non-finality of the election and the Union's continuing interest in organizing its employees. I, thus, conclude that the Respondent has failed to rebut the inference that the survey was designed to correct the discontent that led up to the organizing drive and to ensure that the pending organization effort failed.⁸⁵ Accordingly, I conclude that the Respondent violated Section 8(a)(1) as alleged in paragraphs 19(a)-(d) of the complaint.

Section 8(a)(3) Allegations

Kathy Mankin Discharge

The complaint alleges that the Respondent discharged Kathy Mankin in violation of Section 8(a)(3). The Respondent, in its counsel's brief, concedes that it was aware of her support for the Union, but argues that she was discharged for job performance and "the General Counsel has failed to prove any causal connection" to her support for the Union.

⁸⁴ Post election, but while objections and determinative challenges were pending.

⁸⁵ The instant situation is unlike that in *Leland Stanford Jr. University*, supra, where the Board found, "The record is clear that for a considerable period of time, both prior and subsequent to the distribution of the survey, there was no active campaigning on the part of either the Union or the Respondents. . ." Here, the survey was distributed less than 2 months after the unresolved election and the record does not suggest that there was no active campaigning on the part of the Union and the Respondent. In fact, I found that the Respondent's unfair labor practices continued after the election.

5 In deciding whether the Mankin discharge violated Section 8(a)(3), I apply the criteria laid down in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981). “To prove a violation under *Wright Line*, the General Counsel must first show that protected or union activity was a motivating factor in the respondent’s decision to take adverse action against the alleged discriminatee. The General Counsel can satisfy this initial burden by proving that the alleged discriminatee engaged in protected or union activity, that the respondent was aware of it, and that the respondent demonstrated some animus toward that activity. The burden then shifts to the employer to demonstrate that the same adverse action would have occurred even absent the protected activity.” *American Red Cross Missouri-Illinois Blood Services Region*, *supra*.

10 The General Counsel has satisfied its initial burden in respect to Mankin. Thus, I found Mankin participated in union activity including being a member of the Union’s organizing committee. I also found, and Respondent conceded, it was aware of Mankin’s activities and support for the Union. Finally, I found that the Respondent engaged in an aggressive campaign against the Union, committed other unfair labor practices and otherwise demonstrated animus. The burden, thus, shifts to the Respondent to demonstrate that it would engaged in the same adverse action even absent the union activity.

20 In their brief, counsels for the General Counsel essentially concede that Mankin experienced the work performance problems asserted by the Respondent, and that all three Q.A. techs, including Mankin, a Union supporter, and Cassel who opposed the Union, were repeatedly disciplined for their performance shortcomings. Counsels for the General Counsel instead argue that Mankin was treated differently because of her support for the Union, and was, unlike Cassel—a Union opponent—not offered a position in a different department.

25 As found, the Respondent followed its policy of progressive discipline in respect to all three Q.A. techs, concluding in the discharge of all three. While the Respondent did not offer Mankin the chance to transfer to a different job, I could not find that Q.A. tech Cassel was extended such an offer by the Respondent. Further, I found that Mayer told Sobiech, at a time prior to his permanent layoff, that he should consider a move to a different department, but Sobiech was laid off, not discharged, and while Mayer told Sobiech to consider a different job, he did not offer the job. The record demonstrates, and I found, that Mankin was repeatedly disciplined for job performance shortcomings, and that the Respondent followed its policy of progressive discipline in respect to Mankin. Under these circumstances, I conclude that the Respondent has satisfied its burden of demonstrating that it would have discharged Mankin even absent her union activity. I, thus, conclude that the Respondent did not violate Section 8(a)(3) by discharging Mankin.

40 Donna McCall Discipline

45 Complaint paragraph 21(a) alleges that the Respondent disciplined Donna McCall in violation of Section 8(a)(3). The Respondent, in its counsel’s brief, argues that McCall was disciplined for cause, that “there was no evidence of any relationship between her union activity and this discipline,” and that “there was no evidence that Ms. McCall was treated differently than any similarly-situated employee who opposed the Union.” Counsels for the General Counsel, in their brief, essentially concede, as they must, that McCall engaged in the egregious actions she is accused of, but maintain that she was disciplined disparately: “While the General Counsel readily admits that using the “N-word” is unacceptable, what needs to be considered is whether action taken against others who used that word was consistent with this situation, involving a union supporter.” In support of this disparate treatment argument, counsels for the General Counsel cite McCall’s testimony that she heard Blanquel use the “N-word” on two occasions,

and Glyzewski's testimony that he overheard lead packaging machine operator (PMO) Mike Stanford refer to manager Marlenea Jackson with the "N-word" in the presence of Blanquel.

5 I apply the *Wright Line* test to the McCall discipline,⁸⁶ as discussed above. Under that test, I conclude that the General Counsel has met his initial burden of showing that protected or union activity was a motivating factor in the Respondent's decision to take adverse action against McCall. Thus, the General Counsel has proved that McCall engaged in union activity, that the Respondent was aware of it, and that the respondent demonstrated some animus toward that activity. I also conclude that the Respondent has met its resultant burden by 10 demonstrating that it would have taken the same disciplinary action even absent the union activity, and thus did not violate Section 8(a)(3) of the Act by administering discipline to McCall, as is alleged in the complaint. McCall clearly committed the acts she was accused of and the Respondent did not act in a manner inconsistent with its own disciplinary policy in administering a final warning to McCall. Mayer imposed the discipline when he learned of the incident.

15 Finally, in my findings herein, I have not found that either Blanquel, or Stanford in Blanquel's presence, used the racial slur involved herein. Inasmuch as there is no other evidence involving an employee similarly situated to McCall, I reject the disparate treatment argument advanced by counsels for the General Counsel. Accordingly, having applied *Wright Line*, I conclude that the Respondent did not violate Section 8(a)(3) by administering a final 20 warning to McCall.

The Respondent's Section 10(b) Argument

25 The Respondent maintains that most of the allegations added by the General Counsel's amendment to the complaint of February 17, 2006 are untimely in that they were never alleged in any prior charge or complaint. These allegations appear in the amended consolidated complaint of February 22, 2006, the operating document of the litigation, as paragraphs 8(a)–(b), 9(c)–(d), 10(a)–(b), 11(a)–(b) and 20. The February 22 amended consolidated complaint 30 added no new allegations, and was introduced at the trial by the General Counsel, without objection, at the undersigned's request, so that the parties would have one operating document for reference during the litigation, rather than a series of documents. The Respondent raised the 10(b) issue as an affirmative defense in the answer it filed on February 22 to the amended consolidated complaint. Counsels for the General Counsel do not address this issue in their 35 brief.

40 The General Counsel previously issued a complaint in Case 30-CA-17104 on June 30, 2005, and issued a complaint in Case 30-CA-17268 on December 30, 2005. The original charge in Case 30-CA-17104 was filed on February 11, 2005, and amended charges were filed on April 29, 2005 and May 31, 2005. The original charge in Case 30-CA-17268 was filed on August 15, 2005, and amended charges were filed on September 15, 2005, October 31, 2005, and November 2, 2005. The specific allegations which the Respondent argues are precluded by Section 10(b) and which were added by the February 17 amendment to complaint are as follows: In the first or second week of February, Gardetto solicited grievances; In March, 45 Gardetto promised an employee things would get better; In mid-February, Blanquel made

50 ⁸⁶ I note that the discipline of a final warning was not inconsistent with the Respondent's then-existing disciplinary policy. While the policy provided for progressive discipline, the Respondent's disciplinary guidelines also provide as follows: "There may also be instances where disciplinary action will not be progressive, depending on the severity and circumstances of the situation."

threats of plant closure; In February or March, Blanquel solicited grievances and promised benefits after a meeting; In February or March, Blanquel and Olson solicited grievances during and after a meeting; In February, Lepak told employees that the Respondent wanted employees with good attitudes and that the Respondent was trying to move forward during a captive audience meeting; In mid-February, Lepak told an employee that the Respondent was looking for workers who “don’t cause trouble or open their mouths that much about stuff;” In June Jackson took employees to dinner at Famous Dave’s restaurant; and in June, Gardetto took employees to dinner at Ingrilli’s restaurant.

Traditionally, the Board and the courts have allowed the General Counsel to add complaint allegations outside the 6-month 10(b) period if they are closely related to the allegations of the timely filed charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1988). There is a three-factor test for determining whether a sufficient relationship exists between an otherwise untimely allegation and a timely filed charge. *Id.* at 1118. “First the Board assesses whether the otherwise untimely allegation involves the same legal theory as the allegation in the timely charge. Second, the Board examines whether the allegations arise from the same factual situation or sequence of events. Third, the Board may look to whether the Respondent would raise similar defenses to both allegations.” *Precision Concrete*, 337 NLRB 211 (2001). See also, *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB No. 106 (2006), slip op. at fn. 2.

The charges and amended charges filed by the Union here⁸⁷ contain allegations as follows: 1. Original charge in 30-CA-17104: alleges that the mass layoffs violated Section 8(a)(3); 2. First amended charge in 30-CA-17104 added the following relevant 8(a)(1) allegations: That shortly before March 23, threatened that if the Union won the election, employees would lose benefits, everything would start from zero, and leadman pay would not be awarded to an employee. This amended charge also added allegations of surveillance, promulgation of a no-solicitation rule, disparagement of the Union, granting of benefits including the Brewers outing, jackets, and employee-of-the-year award, and the solicitation of grievances, and an announcement that it was considering changing the time of year for employee evaluations; 3. The second amended charge in Case 30-CA-17104 added an allegation as to the Wehrley questionnaire.

The original charge in Case 30-CA-17268 added 8(a)(3) allegations of discipline. The first amended charge added further allegations of 8(a)(3) discipline. The second amended charge added the allegation of the alleged 8(a)(3) discipline of McCall. The third amended charge added more allegations of discipline in violation of Section 8(a)(3).

I conclude that all of the allegations disputed by the Respondent as being precluded by Section 10(b), meet the Board’s “closely related” test as being closely related to timely filed charges herein, and are not precluded from litigation by Section 10(b). Thus, all of the disputed 8(a)(1) allegations added by the General Counsel’s amendment to the complaint involve the same legal theory as the 8(a)(1) allegations in the original and amended charges in Case 30-CA-17104; that is, that the Respondent engaged in solicitation of grievances, granting of benefits, and threats, as part of its campaign against the Union. Second, the disputed allegations all arise from the same sequence of events alleged in the original charges and amended charges; that is, the Respondent’s campaign against the Union. Third, the defenses raised by the Respondent to the disputed allegations at trial are essentially similar to the

⁸⁷ The Respondent does not contest the timeliness of any of the charges or amended charges.

defenses it raised as to the undisputed (for purposes of Section 10(b)) complaint allegations; that is, credibility, continuation of a preexisting practice, business purpose, and Section 8(c). The disputed allegations add no new theory of law and do not depart from the factual scenario involving the organizing campaign which is the subject of all of the charges and complaints involved here.

Permanent Layoffs of February 2

Kathi Szuszka Layoff

The complaint alleges that Szuszka was laid off on February 2, along with the five other named alleged discriminatees. The evidence clearly demonstrates that the Respondent had no intention of laying off Szuszka, and did not lay her off on February 2. In answer to my question during the trial, counsel for the General Counsel argued that the Respondent's actions vis-à-vis Szuszka were akin to a constructive discharge, but did not amend or seek to amend the complaint to so allege and, hence, there is no allegation here that the Respondent offered a job it knew she would refuse.

There is no evidence that somehow the Respondent targeted Szuszka for special treatment by pretending to offer her another job, knowing she would not accept it. And there is no evidence that the Respondent specially targeted Szuszka as a union activist in that it wasn't until February 7 that the Respondent learned she was a member of the Union's organizing committee, upon receipt of a letter from the Union.

Neither the Charging Party nor the General Counsel argues that the Respondent did not offer Szuszka a job. And there is no evidence that the Respondent's offer to Szuszka was, in any sense, a sham. It defies logic to believe that the Respondent would have gone through the effort it made with Szuszka, to find another position for her and to offer the position to her, if it didn't intend to keep her. At worst, there was a failure of communication between Jackson and Szuszka in that Jackson understood that Szuszka would not work on the first shift, and would remain an employee only if Lepak could find another position for her on an acceptable shift. I, thus, do not conclude that Szuszka was laid off in violation of Section 8(a)(3), as alleged.

Rest of the Layoffs

Complaint paragraph 6 alleges, in pertinent part, that on February 2, the Respondent permanently laid off employees Sobiech, Crowley, Bohlen, Starrett, and Zullner because employees of the Respondent engaged in union activities. The Respondent's answer admits the layoffs, but denies that they were connected to union activity. Respondent asserts that it laid off the five alleged discriminatees for economic reasons. I apply the *Wright Line*, supra, test to analyze whether the layoffs violated the Act.

The General Counsel's *Wright Line* Burden

Under *Wright Line*, I conclude that the General Counsel has met its initial burden of demonstrating that union activity was a motivating factor in the layoffs. In reaching that conclusion, I find that various employees of the Respondent were involved in a union organizing drive prior to the layoffs or any decision to layoff, that the Respondent was aware of the activity, and that the Respondent has displayed animus toward the organizational campaign.

First, under Wright Line, there is no dispute that prior to the layoffs, some of the Respondent's employees were engaged in organizing activity on behalf of the Union. Thus, Brzezinski first contacted the Union on January 12, and three union meetings were held in January for and with employees interested in union representation. The General Counsel does not contend that the Respondent deliberately chose certain employees for layoff because of their union activity, and the Board has held that in the case of layoffs, antiunion motivation may be found even when some, or even most of the laid off employees were not known union supporters. See, e.g., *McGaw of Puerto Rico, Inc.*, 322 NLRB 438 (1996), *enfd.* 135 F.3d 1 (1st Cir. 1997). Accordingly, the General Counsel is not required to show a correlation between each employee's union activity and his or her layoff, because it is the mass layoff, not the selection of employees for layoff that is at issue. Instead, the General Counsel's burden is to establish that the mass layoff was ordered to discourage union activity or in retaliation for the protected activity of some. See, *Davis Supermarkets, Inc.*, 306 NLRB 426 (1992), quoting *ACTIV Industries, Inc.*, 277 NLRB 356, fn. 3 (1985).

As to animus, the record is replete with evidence of the Respondent's aggressive campaign against the Union, and I have found that the Respondent has engaged in actions during the campaign violative of Section 8(a)(1), including by some of the Respondent's highest officials. The effect of such unfair labor practices is magnified when the conduct is perpetrated by high ranking officials. See *Weldun International, Inc.*, 321 NLRB 733, 736 (1996).

I also conclude that the Respondent was aware of the organizing activity at the time it decided on and implemented the layoffs. I found that on February 7, the Respondent received formal notification from the Union as to its organizing drive when Mayer received and read the Union's notification sent by fax. I also found that about January 26, Brzezinski talked to Shift Manager Olson about "getting a union." I further found that a couple of weeks before February 9, maintenance mechanic Cantwell made a comment about a union, heard by Shift Manager Sertich, and that Sertich had so reported to Vice President Lepak within a day or two after hearing the comment.⁸⁸

Lepak, as the Respondent's vice president of manufacturing, was directly involved at meetings where the Respondent discussed determining the layoffs and new shift assignments. On direct examination, when asked by the Respondent's counsel if he was "aware the Teamsters were in the process of trying to organize Baptista's employees," at the time of his involvement in layoff decisions, Lepak answered, "No." Lepak was then asked by the Respondent's counsel, "At any time prior to the change in the production schedule...did you have any knowledge of that?" He again answered, "No." However, in reaching my conclusion that, in fact, Lepak was aware of some union activity, I note that the comment by employee Cantwell, heard by supervisor Sertich and passed on by Sertich to Lepak, did not contain a specific reference to the "Teamsters," but rather referred to a union, generically. Thus, while Lepak specifically denied knowledge of a Teamsters campaign at the time of his involvement in layoff decisions, he never denied what other evidence demonstrated, that is knowledge of some union activity.⁸⁹

⁸⁸ Mayer testified that Sertich said that he didn't take Cantwell's remark seriously. But, of course, he took it seriously enough to report the remark to Vice-president Lepak.

⁸⁹ On direct examination Lepak testified: Q. "During the time you personally were involved in the process of determining new shift assignments, determining layoffs, were you aware that the TEAMSTERS were in the process of trying to organize Baptista's employees?" (emphasis added.) A. "No."

As to shift manager Olson, I found that he also had knowledge that a union was being discussed by employees. Similarly to Lepak, on direct examination Olson, when asked if prior to when he learned (about 2 or 3 weeks before the layoffs) about the change in shift schedules, he had “any idea that the Teamsters were interested in an organizing campaign at Baptista’s,” answered “I don’t believe so, no.” Thus, Olson denied knowledge of the Teamsters, but did not deny knowledge of union activity. I found that Olson learned of union activity from his conversation with Brzezinski. Brzezinski testified as to talking about a “union” and did not testify that he specifically mentioned the Teamsters.

As noted, Vice-president Lepak was directly involved in the layoffs. Further, while the record does not establish that Shift Managers Olson and Sertich were similarly involved, “it is well-established that a supervisor’s knowledge of union activities is imputed to the employer.” *Dobbs International Services, Inc.*, 335 NLRB 972 (2001). I, thus, base my finding that the Respondent was aware of union activity prior to the February 2 layoffs, on the actual knowledge of Lepak, and the knowledge imputed to the Respondent through supervisors Olson and Sertich.⁹⁰

In his brief, the Respondent’s counsel poses the key issue as to knowledge, as being whether the General Counsel proved that the Respondent’s relevant decision makers knew of the organizing campaign before the decisions were made, but then argues that “Baptista’s decision makers did not know of the Teamster’s organizing campaign prior to the February 2 layoffs.” Phrasing the argument this way is significant because nowhere in the Respondent’s brief is there any explicit date mentioned or suggested for such a decision by the Respondent. Indeed, nowhere in the record does any witness of the Respondent directly testify to or establish any firm date when the Respondent reached a decision to permanently lay off employees, or a firm timeline for such decision.

Thus, Mayer testified that the Respondent’s managers, Mayer, Howe, Lepak, and Jackson, first held meetings with regard to possible layoffs in early January, and late December 2004. Upon being shown a document to refresh his recollection, Mayer changed his testimony as to these meetings and testified that they occurred some time during the week of January 24. Mayer also testified that the Respondent used no documents at these meetings to come to a decision.

Jackson first testified, in response to the General Counsel’s questions, that she was in a meeting at which there was a decision to cut back but couldn’t remember the date. Also in response to the General Counsel’s question, Jackson testified that as of January 29 she wasn’t intending to, and wasn’t directed to, lay people off. Counsel for the General Counsel then asked Jackson, “Okay, so it was after January 29th that you were first informed there was going to be cutbacks because of slow business, correct?” Jackson answered, “As far as I remember, yes.” But, after a 5-week recess in the trial, when questioned by the Respondent’s counsel, Jackson testified that her testimony to the General Counsel as to the January 29 was “obviously wrong” because she would have needed more than a few days to figure out who she would lay off. Jackson testified, “I was obviously wrong because it took longer to get to move through this and figure out who we would like to keep, who we wouldn’t, what we were going to actually do. Were we going to release people?⁹¹ Were we going to go to the five day work week. It takes

⁹⁰ I find any testimony to the contrary by Mayer, Howe, or other officials of the Respondent to be noncredible in view of this conclusion.

⁹¹ Thus, even Jackson’s second version, if credited, leaves open the question of whether the Respondent had initially decided on permanent layoffs.

longer than just a couple of days.” Because of the inconsistency of Jackson’s testimony and her initial testimony that she couldn’t remember the date of any meetings when a cutback decision was made, I find that I cannot rely on Jackson’s testimony to establish any date for the Respondent’s decision to permanently lay off employees, nor any timeline therefor.

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Lepak testified that he was present at a meeting or meetings where the Respondent’s officials discussed the changes implemented on February 2, but also testified that he couldn’t recall a specific date when any meetings were held. Lepak, in response to the Respondent’s counsel’s question testified, “Well, I don’t recall specifically, you know, the date that we talked about it” The Respondent’s counsel then asked Lepak if the decision was reached in a single meeting or a series of meetings. Lepak answered, “I don’t recall if it was one single meeting. I don’t believe it was. We talked about it obviously on several occasions.” Lepak, thus, does not establish a date for the Respondent’s decision to permanently lay off employees nor any timeline therefor.

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The Respondent’s counsel asked the Respondent’s president, Tom Howe, how long it took the Respondent to make the decision to change the shift structure, as follows: “Q. Now again, I understand that very few decisions are made overnight – the decision to go from four twelves to three eights, was that a decision made in a couple days or was it a longer process? A. It would have been a longer process.” Howe then testified that the time frame for said decision was “approximately a month.” Howe testified that he was not the person who decided layoffs would be necessary, that he was part of discussions with Mayer and Lepak as to the “implementation of the new production schedule,” and that these were multiple discussions over an approximate period of 3 weeks. Howe then gave the following answers to the questions of the Respondent’s counsel: “Q. Before we talk about specifics, to the best of your recollection, what topics were discussed at these meetings? A. The meetings that I was part of was what the shift structure would be, as it relates to the number of jobs one each of the shifts. Q. As part of the discussion of the number of jobs on each shift, to the best of your recollection, was there any discussion in any of those meetings about the need for any layoffs? A. Yes. Q. Now, to the best of your recollection, what specifically was said and by whom? A. That there would be less jobs. Less positions required, since we were contracting from these four shifts to three shifts.”

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As I found as to Lepak and Jackson, I find that Howe’s testimony establishes no firm date for the Respondent’s decision to permanently lay off employees, nor any specific timeline. Indeed, Howe, the president of the Respondent, did not establish who made the decision (except, that he didn’t), exactly when a decision was made, and the specifics of the decision. Finally, when asked by the Respondent’s own counsel, who said what at the meetings where layoffs were allegedly discussed, Howe responded with generalities and a failure to identify the speakers. Howe did testify, in response to the questions of the Respondent’s counsel as follows: “Q. Not only were they [the layoffs] a natural consequence, but they were an inevitable consequence of that [new] shift structure? A. That is correct.” But such testimony, which seems to suggest that no decision to lay off employees was necessary because it was a natural consequence of the new shift structure, is belied by what the Respondent has done before when faced with such downturns, and what options are available in general to employers facing such situations. I will not substitute my judgment for the Respondent’s in deciding what to do when faced with such a problem, but find that it is facile to suggest that there was no decision to be made as to various options including layoffs. It is certain that some official of the Respondent decided there would be permanent layoffs and there was a date definite on which that decision was reached. But this record does not provide a basis for making such findings.

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Thus, in a case where the date of the Respondent's decision to permanently lay off employees is crucial, the Respondent failed to establish a date when the decision was made, or a timeline for the decision, and leaves it largely to speculation as to who made the decision. Howe testified that he decided on the shift changes, but Lepak and Mayer decided there would be layoffs. Lepak testified that he attended management meetings where the subjects of the shift change and production were discussed, that he was involved in deciding which employees would be laid off, but did not testify that he made the decision that the Respondent would lay off employees. Mayer testified as follows in answer to counsel for the General Counsel's questions: "Q. Were you involved in the decision to lay off the employees? A. Yes. Q. Did you initiate the idea that the employees would be laid off? A. No. Q. Who did? A. I don't recall. Q. What was your role in the process? A. Making sure that severance was taken care of, understanding the reasoning behind the layoffs. I felt comfortable with it, or I should say with the individuals."

Based upon my earlier findings that the Respondent had learned of union activity by January 26, and the failure of the Respondent to establish any date or timeline for the decision, or even who made the decision, I conclude that the Respondent had knowledge of the union activity prior to the February 2 permanent layoffs, and before any decision to engage in layoffs. Thus, under *Wright Line*, the General Counsel has established that employees engaged in union activity, the Respondent was hostile to that activity, and had knowledge of the activity when it decided to permanently lay off employees.

The Respondent's *Wright Line* Burden

I further conclude that while the General Counsel has met its initial *Wright Line* burden, the Respondent has failed to meet its resulting burden that it would have engaged in the permanent layoffs even absent the union activity. The Respondent argues, essentially, that the permanent layoffs were caused by a "double-whammy" consisting of the normal downturn that occurs at the Respondent's business, and throughout the snack business, in the period following the "Super Bowl" each year, combined with disappointing sales and projected future sales of certain snack products, including the Weight-Watchers and Old Dutch products. But, I find that the Respondent has failed to establish that the layoffs were legitimately based on anything other than the seasonal downturn, and that in previous years, before union activity, the Respondent had dealt with such downturns by methods other than permanent layoffs. The testimony of the Respondent's top officials at the time does not establish to the contrary.

Lepak testified as follows in response to questions of the Respondent's counsel: "Q. Before we talk more about those layoffs I want to finish exploring the business conditions. What in particular was in a downturn? What products, what parts of the business were suffering? A. Well, basically – you know, again I don't recall specifically, you know, which of our, you know, products or customers were worse off than others but throughout the winter, you know, snack foods generally decline in sales so that was our primary – that is the company's primary business. Q. Were you part of any discussions about how much of this slowdown was simply due to the season and it would pick up in the summer? A. Again I don't recall specifically, you know, that was part of it."

The Respondent's president, Tom Howe, testified that he did not make the decision that the permanent layoffs were necessary, but did make the decision to change from four 12-hour shifts to three 8-hour shifts. Howe testified as follows as to the basis of his decision to change the shift structure: "There was a two-fold reason. One was the seasonal reduction in demand for snack food products, principally through our major snack customers. Secondly is both the Old Dutch and Weight Watchers sales volume, regardless of seasonality, had fallen off

substantially.” In answer to a later question, Howe testified, “The seasonal slow-down had very little to do with the permanent change in the production schedule.”

5 As to the Weight Watchers business, Howe testified as follows: “The Weight Watchers new products that we introduced in mid-2004 were anticipated achieving a certain sales volume level, on a sustained basis, even giving consideration for seasonality. They were not successful in the marketplace. Therefore, the sales had dropped substantially and ultimately were discontinued.” Howe testified that the Weight Watchers product was discontinued in the first quarter “thereabouts” of 2005. When asked if he had any discussions with Weight Watchers about the success and volume of the product, Howe testified, “Yes. I speak with their key people, Stacy Gordon and David Rosenfeld, at least weekly, and they provide us sales data.” When asked at what point those discussions involved any consideration of stopping the Weight Watchers products completely, Howe testified, “It would have been shortly after Christmas of ’04, when the targeted sales volume for the product at their locations was falling rapidly.” When 10 15 asked by the undersigned when the first such discussion occurred about the total discontinuation of the Weight Watchers product, Howe testified, “I don’t recall.”

As to the Old Dutch business, Howe testified that customer Old Dutch’s product volume was down 20 percent from the year before, a time at which the Respondent had not yet 20 acquired Old Dutch as a customer. Howe testified that he was provided the sales information by Matt Colford of Old Dutch, and that Old Dutch “at that time was about 35 percent of our total sales, and their sales were down about 20 percent from prior year, actual.” My attempts to elicit from Howe the dates of any conversations with Old Dutch officials as to their sales was as follows: “Q. Do you recall when this conversation was? A. It was in 2000 – late 2004 and 25 2005. Q, Can you be any more specific? A. I have conversations weekly with our customers.... Q. Okay, and those discussions would have occurred when? A. In late 2004, early 2005. Q. Do you remember when the first such discussion was? A. No.”

Howe testified that he was present at multiple conversations over 3 weeks with Mayer and Lepak at which the subject of the shift structure was discussed. Howe then testified as follows in response to the questions of the Respondent’s counsel: “Q. As part of the discussion of the number of jobs on each shift, to the best of your recollection, was there any discussion in any of those meetings about the need for any layoffs? A. Yes. Q. Now, to the best of your recollection, what specifically was said, and by whom? A. That there would be less jobs, less 30 35 positions required, since we were contracting from these four shifts to three shifts.” Howe’s failure to fully answer this question casts further doubt on his credibility, at least in respect to the quality of his recollections.

As discussed above, Mayer testified that he attended discussions with Howe, Lepak, 40 and Jackson during the week of January 24. Mayer testified that at these meetings, Howe said that the Respondent “needed to cut back.” Counsel for the general counsel asked Mayer whether Howe, at these meetings, gave any reasons why he expected a slowdown. In response, Mayer testified, “He talked about customers, what he had heard from them. Called it a cyclical drop late January after Super Bowl.” Mayer testified, as to these crucial meetings at 45 which layoffs were allegedly discussed, that there were no notes taken during the meetings, no agendas prepared for the meetings, no e-mail messages announcing the meetings or detailing what took place at the meetings, and no documents reflecting what took place at the meetings or when the meetings occurred. Finally, Mayer testified, in response to counsel for the General Counsel’s question, that he made a search of the Respondent’s records for documents 50 reflecting a drop in future orders, but couldn’t find any such documents.

Thus, while Howe testified that the downturn in sales of Weight Watchers and Old Dutch products were the main impetus for the layoff decision, Lepak, and Mayer, quoting Howe, placed the blame on the yearly cyclical downturn. I found Lepak and Mayer to be generally reliable witnesses. Howe was not as impressive a witness both in demeanor and in his lack of detailed recollections as to the dates when significant events occurred and of the details of significant meetings, as is demonstrated by some of his quoted testimony above. His answers were frequently not directly responsive to questions.⁹² Finally, the Respondent produced no documents detailing what took place at the meetings or when the meetings occurred.

In support of its economic defense to the layoff allegation, the Respondent produced very limited financial records or other documents at the hearing. The Respondent introduced a document (Respondent exhibit 146) consisting of three charts made by its customer Weight Watchers, showing sales and forecasted sales of its snack products baked by the Respondent. The third Weight Watchers chart shows that its sales of products produced by the Respondent were in the 75,000 to 125,000 pound range as the products were being rolled out in May through November, 2004, climbed to over 450,000 pounds upon full distribution in December, 2004, fell to about 350,000 pounds in February, 2005, fell again to about 250,000 pounds in March, 2005, rose to about 300,000 pounds in April, 2005, and were forecast for period May through September to be in the monthly range of 200,000 pounds.

Howe testified that he received the third chart from Weight Watchers in April, 2005, some 2 months after the permanent layoffs, and did not know when he received the other two charts. Howe did not unequivocally testify that he specifically relied on the Weight Watchers documents in reaching his decision to change the shift structure, but did testify that he would have relied on Weight Watchers provided documents, “. . . if Weight Watchers would have provided us, which they periodically (sic), depending upon which meeting you are referring to, information regarding how the volume is tracking versus their expectation.”

The Respondent also introduced a three page document (Respondent Exhibit 143), the first two pages of which were computer generated on March 3, 2006, and show for the months June through December 2004, both the monthly totals and the grand totals for the period of the Respondent's sales, by pound, to customer Old Dutch. Page three of the document, showing a computer generated date of January 29, 2004, consists of the Respondent's planned sales to Old Dutch, by weight, for the months of April through December 2004. This document shows that the Respondent's actual sales to Old Dutch, by weight, were below the planned sales for every month from June through December, except September, but does not show a particular crisis period at the end of 2004. Thus, relying on the Respondent's document, the actual sales by pound to Old Dutch was 18.8 percent below plan in October, 12.2 percent below plan in November, and 8.2 percent below plan in December. This document does not cover the January 2005 period leading up to the layoff, but the October through December results show that, instead of a crisis, the sales versus planned sales to Old Dutch were improving in the period immediately preceding the layoff.

The final document introduced by the Respondent (Exhibit 144) in support of its economic defense is a computer generated printout identified by Howe as a report of the Respondent's actual sales, both by weight and dollar, by product and customer, and cumulatively, versus planned sales, on a monthly, and year-to-date basis, beginning with the 4-week period ending January 28, 2005, and ending with the 4-week period ending May 27, 2005. Because this document does not contain any sales data for 2004 or prior years, it does not

⁹² Here, as elsewhere, for the discussed reasons, I do not credit Howe.

present a picture of the months leading up to the layoff or allow comparison to a comparable period in 2004 or earlier years. The document, thus, does not allow comparison to prior years when the Respondent did not permanently lay off employees and when the cyclical seasonal slowdowns also afflicted the Respondent.

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But the Respondent's exhibit 144, like exhibit 143, does not demonstrate an extraordinary crisis situation in respect to the Respondent's sales in January or February 2005. For January, the Respondent's sales to Old Dutch, the customer cited by Howe along with Weight Watchers, was actually 3.5 percent higher by weight than planned, and equal to the plan in dollar sales. Sales to Weight Watchers by revenue, the second customer cited by Howe, were down 26 percent from the plan. The Respondent's overall sales by revenue during January were 16 percent lower than planned sales. Then, in February, the month in which the layoffs occurred, overall sales by both revenue and weight were higher than planned sales, and sales to Weight Watchers by weight also exceeded the plan, while sales to Old Dutch by revenue and weight were substantially below the plan. In March, the Respondent's sales, by revenue, were 12.3 percent below the plan. In April, revenue sales were 46.8 percent below the plan, due substantially to a shortfall in Weight Watchers revenue. In May, revenue sales were 59 percent below the plan.

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Respondent's exhibit 144 also appears, to some extent, inconsistent with admissions contained in its counsel's position statement to the Board during the investigation of the charges. Thus, the exhibit shows that the Respondent's grand total of sales by weight for the 4 weeks ending January 28 as 1,034,000 pounds. The exhibit contains no breakdown by individual week. The position statement (General Counsel's Exhibit 103), states as follows on page 3: "In the week ending January 7, 2005, Baptista's produced 302,155 pounds of product. The following week it produced 369,798 pounds. The week ending January 21, the Company produced 364,875 pounds. The following week, a marked decline began. In the week ending January 28, 2005, Baptista's produced only 281,420 pounds of its product." Adding these 4 weeks as set forth in the position statement, totals 1,318,248 pounds of product, as opposed to the exhibit which shows a total of 1,034,000 pounds. The record contains no further explanation as to which figure is accurate, if either, and the brief of the Respondent's counsel does not address this inconsistency. Absent such an explanation, I decline to rely on either document.

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Thus, the record contains a paucity of contemporaneous documents in which the Respondent sets forth either a decision to lay off employees or the reasons for such layoffs, or financial documents which demonstrate some sort of sales or other financial crisis which would have reasonably incited the Respondent to engage in an extraordinary permanent layoff of employees. There is, however, a lone contemporaneous document in which the Respondent does, in fact, state its asserted reason for the layoffs, the February 2 memo from Howe to "All Shop Employees." The memo begins: "As all of you have noticed from our work activity, we are experiencing the annual post-holiday lull in orders that always affects the snack industry, something I explained in my notice of July 9, 2004, when announcing our change to a 7/24 two-week rotation. This slowdown is common throughout the snack industry, and snack companies typically adjust their work schedules, reduce their work weeks, and schedule plant shutdowns."

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The memo discusses the shift changes and the layoffs, in pertinent part as follows: "The second step we've taken, and one that we regret was necessary, is the layoff of some members of our workforce to reflect our current and near-term business level and added capacity going forward. These involved tough decisions, we provided those people some assistance to help during their transition to new opportunities, and our focus was on retaining people possessing the skills, knowledge, flexibility, reliability and attitude that provide the best foundation for building for the future." (emphasis in original). The memo continues, "**Please do not read**

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anything into these changes beyond it being a temporary seasonal adjustment.

(emphasis supplied). Our business is growing, we have made significant investment in baking and packaging equipment to foster that growth, and potential customers are excited about what Baptista's (sic) to offer." Thus, this memo, the only contemporaneous document from Respondent in the record, unequivocally points to the normal seasonal slowdown as the reason for the layoffs. It assures employees that the problem is only "current and near-term."

The Respondent, in its counsel's brief, argues that Howe principally relied on the alleged sales problems affecting its products produced for Weight Watchers and Old Dutch in reaching his decision to change the Respondent's shift structure. More specifically as to Weight Watchers, the Respondent's brief asserts that "Howe had weekly conversations with Weight Watchers' representatives who monitored the sales and quality of Baptista's products," and that "The products Baptista's made for Weight Watchers sold below expectation." The brief further asserts that "in December of 2004, Weight Watchers told Mr. Howe it was evaluating whether to discontinue those products altogether," and "In the first quarter of 2005, Weight Watchers did just that." More specifically as to Old Dutch, the brief asserts that Howe relied on his conversations with Old Dutch officials to reach a conclusion that its product requirements "would remain lower than the volume he had projected originally."

These arguments as to both the Weight Watchers and Old Dutch business are unpersuasive. First, as to Howe's conversations with Weight Watchers officials, Howe, himself, testified that he didn't recall when the first discussion with Weight Watchers as to discontinuing its products occurred. The brief asserts that the Weight Watchers products were totally discontinued in the first quarter of 2005, but the Respondent's exhibit 143 shows sales continuing to Watch Watchers through the end of the exhibit, the week ending May 27, 2005. As to his conversations with Old Dutch officials, Howe testified that he didn't recall when he had the first such conversation.

Based upon the above, I conclude that the few financial records introduced by the Respondent during the hearing do not support its implied argument that by late January or early February, the Respondent's sales and projected sales were in a crisis situation. Further, the lack of any records whatsoever as to who made the decision to permanently lay off employees and when such decision was made or a firm timeline for such decision, together with the conflicting and indefinite testimony of the Respondent's witnesses as to these issues, precludes me from reaching conclusions as to who made the decision to lay off employees, when the decision was made, or any firm timeline for the decision.

The Respondent also argues that its permanent layoff of employees in 2002, well before any union activity, set a precedent for the February layoffs at issue here. In fact, in November and December 2002, the Respondent permanently laid off about 11 employees who were assigned to work on the "Lunch Muncher" product, which the Respondent produced for a customer. When the customer completed discontinued this product line, the Respondent reacted by permanently laying off the employees engaged in producing the product. Other than the February layoffs at issue here, the 2002 layoffs are the only time that the Respondent has permanently laid off employees since Baptista's was founded in 1999.

The Respondent's argument, that its 2002 layoffs set a precedent for the layoffs at issue here, is not persuasive. The 2002 layoffs were a result of a customer totally discontinuing a product, and the Respondent reacted by laying off employees involved in producing that product. In the instant case, no product was discontinued at the time of the February layoffs,

and I found that the evidence demonstrated that at the time of the layoffs, the Respondent was simply experiencing its normal seasonal downturn.⁹³ Even if there was evidence that the Respondent relied on the documents introduced at the hearing in respect to customers Weight Watchers and Old Dutch, those documents do not demonstrate a crisis in January or February. Indeed, the only momentous event occurring at the time of the early February layoffs was the Union's organizational drive. Various witnesses testified, without contradiction, that in prior years when the seasonal slowdowns occurred, the Respondent avoided layoffs, by assigning employees to cleaning duties, and Mayer testified that the Respondent dealt with prior cyclical slowdowns by various methods, including stopping production for a period of time, temporarily laying off employees, and reducing the number of temporary workers.⁹⁴

Based upon the above discussion, and the record as a whole, the Respondent has not met its *Wright Line* burden of demonstrating that it would have engaged in the February 2 permanent layoffs, notwithstanding the union activities of some of its employees. Since I have already concluded that the General Counsel has met its initial *Wright Line* burden, I further conclude that the Respondent's February 2 permanent layoffs of employees Sobiech, Crowley, Bohlen, Starrett, and Zullner violated Section 8(a)(3) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By permanently laying off Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner, on February 2, 2005, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

⁹³ Howe testified that the Weight Watchers line was eventually discontinued, although the Respondent's own records produced at trial show continued sales to Weight Watchers through the middle of 2005. But even if said business was eventually discontinued, it had not been discontinued at the time of the layoffs nor immediately thereafter.

⁹⁴ The Respondent's continued use of temporary workers after the layoffs, casts additional doubt on the asserted economic basis for the layoffs. The General Counsel introduced business records from two staffing companies which provided temporary workers to the Respondent, both before and after the layoffs, which demonstrate that the Respondent's usage of temporary workers continued on nearly the same basis after the layoffs as it had before. Credited and uncontradicted testimony of witnesses for the General Counsel established that many of the temporary workers were performing the same work as had been performed by laid off workers. In its brief, the Respondent argues that "it is meaningless to compare Baptista's use of temporary employees in 2005 to any prior period" because some of the temporary employees were utilized short-term in 2005 to prepare for the AIB audit, and because since 2004 the Respondent's "customer base and product mix has continued to evolve" causing fluctuation in its need for temporary employees, and finally because the Respondent's need for temporary workers fluctuates "based on its customer mix and production capabilities." But the records introduced by the General Counsel show continued use of temporary employees after the layoffs on a basis akin to their usage earlier in 2005, prior to the layoffs.

4. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

5 All full-time and regular part-time baking process operators,
including lead baking process operators, material handlers,
maintenance mechanics, quality technicians, packaging machine
operators, including lead packaging machine operators, sanitation
specialists and sanitors, and shipping and receiving clerks
10 employed by the Respondent at its Franklin, Wisconsin facility;
excluding office clerical employees, guards and supervisors as
defined in the Act.

15 5. By the following actions, on about the dates⁹⁵ set forth herein, the Respondent has
interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in
Section 7 of the Act in violation of Section 8(a)(1) of the Act by the following actions in respect to
its employees:

20 (a) On February 18, and about March 1, 2005, solicited grievances and made
promises of benefits.

(b) About March 9, 2005, promised benefits.

25 (c) About February 15, 2005, made threats including loss of benefits and plant
closure.

(d) About February 15, 2005, told employees that if a union was chosen, bargaining
would start from "zero."

30 (e) About February 22, 2005, told an employee that he was not receiving a pay raise
because of the union organizational campaign.

35 (f) About February or March 2005, told assembled employees that the Respondent
could not grow with a union and wanted to move ahead with employees with good attitudes, and
in mid-February 2005, told an employee that the Respondent had good workers who didn't
complain.

40 ⁹⁵ Some of the dates of alleged illegal actions were not specifically pleaded in the complaint.
Some others that were specifically pleaded were supported by evidence that either
demonstrated they occurred on different dates or on indefinite dates. However, all of the
allegations were fully litigated and the Respondent fully cross-examined all of the witnesses of
the General Counsel, and engaged all of the allegations with a full defense. The Respondent
45 does not argue, nor do I perceive, any lack of due process because certain of the dates proved
were different than the dates pleaded, or that a date definite could not be established for certain
of the violations. In my findings and conclusions I have attempted to set the dates as best
established by the evidence, but because these events occurred some time before litigation and
the recollections by some witnesses were not precise as to date, I have not been able to
50 determine precise dates as to some of the violations found. Nevertheless, all of the violations
found occurred after the inception of the Union's organizational campaign and/or during the
Board's critical period after the petition was filed and before the election was final.

(g) On March 17, 2005, told assembled employees that sales had grown and bringing in a union would wreck the progress.

5 (h) On May 1, 2005, provided employees and their guests with the benefit of an outing to a Major League Baseball game, which included free tickets and food.

(i) On March 28, 2005, provided employees with the benefit of an "employee-of-the-year" award, which included a \$500 gift certificate.

10 (j) On February 21, 2005, posted, restated, and repromulgated its no-solicitation/no distribution rule in response to a union organizing drive.

(k) On a date in June 2005, provided employees the benefit of free dinners at restaurants to employees and their guests.

15 (l) On May 10, 2005, solicited grievances from its employees with implied promise of resolution, by distributing surveys to employees and providing a gift certificate for completion and return of the surveys.

20 6. The unfair labor practices set out in paragraphs 3 and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

25 7. The Respondent, in no manner other than that specifically found herein, including any other manner alleged in the complaint, has violated the Act or engaged in objectionable conduct.

30 8. By the unfair labor practices found above, relating to the objection filed by the Union, and the following lettered objections set forth in the Regional Director's Order Consolidating Cases and Notice of Hearing on Challenges and Objections to Conduct Affecting the Results of the Election: A, B, C, D, F, and H, the Respondent has engaged in objectionable conduct likely affecting the outcome of the election held March 23, 2005, and requiring that the results of the election be set aside and a rerun election directed, should the counting of certain challenged ballots, ordered herein, not result in a certification of the Union. The appropriate unit for the election is the same unit previously found appropriate in the representation case, as set forth above.

40 9. Employees George Ann Bohlen and Judy Zullner, whose ballots were challenged at the election herein, were eligible voters. Employee Kathi Szuska, whose ballot was challenged at the election herein, was not an eligible voter.

10. None of the allegations of the amended consolidated complaint are precluded by Section 10(b) of the Act.

THE REMEDY

45 Having found that the Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act, as is set forth above, it will be ordered to cease and desist therefrom and from any like or related conduct. Having found that the Respondent has unlawfully permanently laid off the five employees named in the conclusions of law, it will be
50 ordered to offer them immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent ones without prejudice to their seniority or any other rights or privileges they may have previously enjoyed and make

5 them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay will be computed in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent will be ordered to remove from its files any references to the unlawful permanent layoffs and notify said employees that it has done so and will not use their layoffs against them in any way.

10 In respect to the representation case, it will be ordered that the ballots of George Ann Bohlen and Judy Zullner be opened and counted, and a revised tally of ballots be prepared and served upon the parties. If the revised tally shows that the Union has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Union has not received a majority of the votes cast, the election shall be set aside and a rerun election shall be conducted. In conformance with this decision, the Respondent's challenge to the ballot of Kathi Szuszkas is sustained and the Respondent's challenges to the ballots of George Ann Bohlen and Judy Zullner are overruled. Should a rerun election be held, the election notice will include Lufkin⁹⁶ language.

15 On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁹⁷

20 ORDER

The Respondent, Baptista's Bakery, Inc., its officers, agents, successors, and assigns, shall

25 1. Cease and desist from

(a) Soliciting and offering to remedy employee grievances and promising improved benefits because of its employees' union activities.

30 (b) Telling employees that if they choose a union to represent them, bargaining would start from zero.

35 (c) Threatening employees that they would lose benefits or the plant would close if they choose a union to represent them.

(d) Telling employees that the reason they did not receive a pay raise was because of a Union's organizational campaign.

40 (e) Telling employees that the Respondent could not grow with a union.

(f) Telling employees that the Respondent wanted to move ahead with employees with good attitudes or that the Respondent had good workers who didn't complain.

45 (g) Telling employees that choosing a union would wreck the Respondent's progress.

⁹⁶ *The Lufkin Rule Co.*, 147 NLRB 341 (1964).

50 ⁹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

(h) Providing employees with benefits including, but not limited to, free baseball tickets, food, restaurant meals, or employee-of-the-year awards with prize, in order to discourage support of a union.

5

(i) Distributing surveys for employees to complete, which solicit grievances with an implied promise of resolution.

10

(j) Posting, restating, or repromulgating the Respondent's no-solicitation, no-distribution rule in response to a union organizational campaign.

(k) Permanently laying off employees because of the union activities of employees.

15

(l) 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 deemed necessary to effectuate the policies of the Act.

20

(a) Within 14 days from the date of this Order, offer full reinstatement to Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed.

25

(b) Make whole employees Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed as set forth in the remedy section.

30

(c) Within 14 days from the date of this Order, remove from its files any reference to the permanent layoffs of employees Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner, and notify each of them in writing within 3 days thereafter that this has been done and that evidence of the unlawful actions will not be used against them.

35

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

40

(e) Within 14 days after service by the Region, post at its Franklin, Wisconsin facility copies of the attached notice marked "Appendix."⁹⁸ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 45 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the

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⁹⁸ 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."

5 notices are not altered, defaced, or covered by any other materials. In the event that, during the pendency of the proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its expense, copies of the notice to all employees and former employees of the Respondent at any time since February 11, 2005.

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

15 3. It is further ordered in respect to the election held in Case 30-RC-6604 that the challenged ballots of George Ann Bohlen and Judy Zullner be opened and counted, and a revised tally of ballots be prepared and served upon the parties. If the revised tally shows that the Union has received a majority of the votes cast, the Regional Director shall issue a certification of representative. If the revised tally shows that the Union has not received a majority of the votes cast, the election shall be set aside and the case remanded to the Regional Director for Region 30 for the purpose of conducting a rerun election, as set forth below. If a rerun election is held, the election notice shall contain *Lufkin*⁹⁹ language. The challenges to the ballots of George Ann Bohlen and Judy Zullner are overruled. The challenge to the ballot of Kathi Szuszkas is sustained. Consistent with the findings herein, the objections lettered E, G, and I, are overruled, and the Union's objection and objections lettered A, B, C, D, F, and H are sustained.

25 4. It is further ordered that Case 30-RC-6604 be severed from the consolidated unfair labor practice cases, and be remanded to the Regional Director for Region 30 for handling consistent with this Order, including the conducting of a second election, if necessary, as set forth below.

30 DIRECTION OF SECOND ELECTION

35 A second election by secret ballot shall be held, if necessary under the terms of the Order, among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. [Jeld-Wen of Everett, Inc., 285 NLRB 118 \(1987\)](#). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 45 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Teamsters Local Union No. 344 Sales and Service Industry, affiliated with the International Brotherhood of Teamsters.

50 _____
⁹⁹ *The Lufkin Rule Co.*, supra.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 22, 2006

Mark D. Rubin
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 on your behalf.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these activities.

WE WILL NOT solicit your grievances and offer to remedy them, by survey or otherwise, in order to discourage your support of a union.

WE WILL NOT promise improved benefits in order to discourage your support of a union.

WE WILL NOT tell you that if you choose a union, bargaining will start at zero.

WE WILL NOT threaten that you will lose benefits or we will close the plant if you choose a union.

WE WILL NOT tell you that the reason you did not receive a pay raise is because of a union organizational campaign.

WE WILL NOT tell you, or imply, that the company cannot grow if you choose a union or that choosing a union would wreck the company's progress.

WE WILL NOT imply that by not supporting a union or not complaining about your terms and conditions of employment we will consider you a good employee, by telling you that we have good workers who don't complain, or that the company wants to move forward with employees with good attitudes.

WE WILL NOT provide you with benefits including, but not limited to, a free Major League Baseball outing including food, restaurant meals, or an employee-of-the-year award and prize, in order to discourage you from supporting a union.

WE WILL NOT post, restate, or repromulgate our no-solicitation, no-distribution rule in response to a union organizational campaign.

WE WILL NOT permanently lay off employees because of your activities in support of a union.

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

WE WILL, within 14 days from the date of the this order, offer full reinstatement to Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of this order, remove from our files any reference to the unlawful layoffs of Dennis Sobiech, John Crowley, George Ann Bohlen, Lynda Starrett, and Judy Zullner, and we will, within 3 days thereafter, notify each of them in writing that this has been done and the layoffs will not be used in any way against them.

BAPTISTA'S BAKERY, INC.

(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.nlr.gov.

310 W. Wisconsin Ave., Milwaukee, Wisconsin, Suite 700
(414) 297-3861
Hours: 8:00 a.m. to 4:30 p.m.

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 OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.