UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-75515

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 AND BARTENDERS UNION, LOCAL 165, AFL-CIO, A/W HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

ALADDIN GAMING, LLC

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, AFL-CIO, a/w Hotel Employees and Restaurant Employees International Union, AFL-CIO ("the Union") to review an August 27, 2005 Decision and Order of the National Labor Relations Board ("the Board") dismissing, in part, an unfair labor practice complaint against Aladdin Gaming, LLC, now known as Reorganized AG, LLC ("the Company"). The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Union's petition was filed on September 22, 2005 and is timely under the Act, which places no time limitations on such filings. The Company, which was the prevailing party before the Board on the dismissed allegations now before the Court, has intervened on the Board's behalf.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160 (f)), the alleged unfair labor practices having occurred in Las Vegas, Nevada, within this judicial circuit, where the Company operates a casino.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for dismissing complaint allegations that the Company engaged in unlawful surveillance of its employees' union activities when its managers twice interjected into employees' open pro union conversations their lawful views against unionization.

STATEMENT OF THE CASE

Acting on a charge and an amended charge filed by the Union, the Board's General Counsel issued a complaint, alleging, among other things, that the Company engaged in unlawful surveillance of its employees' union activities in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (ER 21; 66-69.)[1]

After a hearing, an administrative law judge issued a decision and recommended order on May 28, 2004, finding that the Company had engaged in certain unfair labor practices, including two occasions where managers engaged in unlawful surveillance of employee union activity. (ER 37-39, 62.) Specifically, the judge found that Vice President of Human Resources Tracy Sapien, on one occasion, and Human Resources Director Stacey Briand, on a second occasion, unlawfully surveilled employees' union activity when they approached employees

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[1] Record references are to the Excerpts of Record filed by the Union ("ER"), or to the Supplemental Excerpts of Record filed by the Board ("SER"). References

who were engaged in open union activity in the employee dining room and spoke to them about unionization. The judge dismissed the complaint allegation that Sapien's conduct also constituted an interrogation. (ER 37.)

The Company filed exceptions to the judge's finding that it had engaged in unlawful surveillance. The Company did not file exceptions to the judge's finding that it had engaged in other conduct that violated the Act. (ER 13.)

On August 27, 2005, the Board (Chairman Battista and Member Schaumber, Member Liebman, dissenting) found, in disagreement with the judge, that the Company did not engage in unlawful surveillance of its employees' union activities. (ER 13-19.)

The Union, the charging party before the Board, initiated these proceedings with a petition to review that portion of the Board's Order dismissing the surveillance allegation.[2]

The facts, which are largely undisputed, are summarized directly below; the Board's conclusions and order are described immediately thereafter.

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preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Company has complied with the Board's Order

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Union Begins an Organizing Campaign

The Company operates a hotel and casino in Las Vegas, Nevada. The Company has approximately 3000 employees, with almost half of those employees working in its housekeeping, food, and beverage departments. (ER 21; SER 11.) On May 30, 2003, the Union began an open campaign to organize the housekeeping, food, and beverage departments. That day, at the Union's direction, employees Sheri Lynn, Julie Wallack, and Azucena Felix, among others, began wearing buttons at work identifying them as union committee leaders. (ER 37; 91, 108, SER 1, 2-4, 6-10.)

B. On Two Occasions, Company Officials Observe Employees Engaged in Open Union Activity in the Employee Dining Room and Speak to Them About Unionization

The hotel contains an employee dining room ("EDR"), a single room that seats approximately 200 employees and is open to all company employees 24-hours a day. Managers, supervisors, and non-supervisory employees regularly eat in the EDR. (ER 37; 95, 115, 122, SER 5, 12.) Vice President of Human Resources Sapien frequents the EDR two or three times a day. (ER 122.)

On June 4, while Lynn and Wallack were having lunch together in the EDR, they began talking to four or five employees seated at the table next to them about

signing union authorization cards. (ER 37; 92-93, 96, 100.) Lynn placed union authorization cards on the table. (ER 97.) As the employees discussed the Union, Sapien walked past their table, saw the union cards in plain view, and saw that an employee was about to sign a card. (ER 97; 93, 101, 122-23, 125, 129.)

Sapien stood by the table for approximately 2 minutes, and then said, "[E]xcuse me. I would like to make sure you have all of the facts before you sign that card." (ER 13, 37; 101, 123.) Lynn replied, "[D]on't worry about it, I've given her all the information, I wouldn't lie to the team members, I've given her all the facts." (ER 37; 123.) Sapien then explained that before an employee signs a union card, she should "understand" that what she is signing is "legal and binding," and that if the Union ever becomes the collective-bargaining representative, then the "card authorizes union dues to start coming out of [the card signer's] pay check." (ER 37; 123.)

The employee responded that the "only reason" she was signing the card was because of her "concern[s]" with the Company's benefits plan. (ER 123-24.) Sapien replied, "[N]obody should be promising you that benefits are guaranteed." (ER 37; 124.) She explained the collective-bargaining process, noting that after an employer recognizes a union, the parties "sit around the table, and everyone proposes what they feel will work the best." (ER 37; 124.) As an example, Sapien noted that the Company's warehouse employees negotiated a contract that retained

the benefit package the Company had provided before those employees had a collective-bargaining representative. (ER 37; 102, 124.)

Sapien also mentioned that union dues were $32.50 a month and Lynn indicated that she had already told the employees about dues. (ER 37; 93, 123.) Sapien concluded the conversation by telling Lynn that it looked like she "had all [her] bases covered." (ER 37; 94, 97, 98, 103, 125.) Sapien then left the EDR. (ER 13; 124-25.) At no time during her observation of the employees' union activity or her 8-minute conversation with them was Sapien asked to leave. (A 125.)

On June 6, union committee leader Felix was in the EDR on a work break when coworker Adelia Bueno called her over so that Bueno could sign an authorization card. (ER 38; 108-09, 112, 116.) Felix went to Bueno's table where Bueno was sitting with three or four other employees. (ER 38; 112-13, 115-16.) As Bueno was signing the card, Director of Human Resources Briand came over to the table. Briand said Bueno "shouldn't be signing things that she wasn't sure about, because what she was signing was something like a contract, and that [Felix] was probably promising something that [Felix] wasn't going to be able to give her." (ER 38; 113, 116.) Because Bueno did not understand much English, Felix translated Briand's comments into Spanish. (ER 39; 113, 117.) Briand asked what Felix was saying, and Felix said she was translating for Bueno. (ER

39; 113-14, 117.) Briand then left the table. (ER 39; 114.) Felix talked to the employees for a "very brief time" until the end of the break. (ER 118.)

II. THE BOARD'S DECISION AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber, Member Liebman (dissenting)), in disagreement with the administrative law judge, found that Sapien's and Briand's observation of the employees' union activity and their other conduct did not constitute unlawful surveillance. The Board found that, in context, Sapien's and Briand's conduct was routine and not "out of the ordinary." Moreover, the Board found that both managers had a right under Section 8(c) of the Act (29 U.S.C. § 158(c)) to assert their views regarding unionization. Accordingly, the Board dismissed the complaint allegations that the Company had engaged in unlawful surveillance on those dates in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (ER 13-16.)

SUMMARY OF ARGUMENT

Under well-settled principles, an employer's routine observation of employees who are engaged in open union activity does not constitute unlawful surveillance. An employer's observation of such activity is coercive, however, and therefore unlawful surveillance when the employer does something "out of the ordinary" to observe the activity. Here, the Board rationally found that the

Company did not engage in unlawful surveillance when, in two isolated incidents, a company official came across open union activity in the company dining room, briefly observed the union activity, and then briefly spoke to the employees engaged in the activity about management's position on unionization.

Indeed, the Union concedes (Br 12) that Tracy Sapien and Stacey Briand did not engage in unlawful surveillance by entering a dining room used regularly by management and non-management employees, by briefly observing the union activity, or by having conversations with the employees during which they expressed views permitted by Section 8(c) of the Act and, there is no merit in the Union's claim that the interruptions themselves constituted conduct so out of the ordinary as to convert the managers' behavior into unlawful surveillance.

Thus, the managers' conduct, including the interruptions, stands in sharp contrast to the conduct in other cases where the Board found unlawful surveillance. Unlike those cases—distinguished by the Board here (see pp. 19-21 and n.5) where the employer engaged in an elaborate scheme to monitor or inhibit union activity, after Sapien and Briand came across the open union activity, they simply presented management's viewpoint regarding unionization and then went on their way.

The cases the Union relies on do not support its position that the Board acted contrary to precedent by failing to find that the interruption of the open

union activity itself constituted unlawful surveillance. In those cases, the employers engaged in schemes that were designed to inhibit union activity, not, as here, mere interruption of open union activity. Moreover, in none of the cases did the employer, like the Company here, interrupt simply to express a lawful viewpoint about unionization. Accordingly, the Board reasonably dismissed the surveillance allegation.

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR DISMISSING THE COMPLAINT ALLEGATIONS THAT THE COMPANY ENGAGED IN UNLAWFUL SURVEILLANCE OF ITS EMPLOYEES' UNION ACTIVITIES WHEN ITS MANAGERS TWICE INTERJECTED INTO EMPLOYEES' OPEN PRO UNION CONVERSATIONS THEIR LAWFUL VIEWS AGAINST UNIONIZATION

A. Introduction and Standard of Review

1. Principles relating to surveillance and employer speech

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act (29 U.S.C. § 157)]." Section 7 of the Act, in turn, guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

. . . ." Applying those sections of the Act, it is settled that an employer's surveillance of its employees' union activities violates Section 8(a)(1) of the Act. *See NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995).

Only when an employer does "'something out of the ordinary'" to keep its employees' union activity under watch, however, does the employer's conduct become coercive and constitute surveillance that violates Section 8(a)(1) of the Act. *See NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d 932, 938 (4th Cir. 1990) (*quoting Metal Ind.*, 251 NLRB 1523, 1523 (1980)). *Accord Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1238 (10th Cir. 1998); *Metal Ind.*, 251 NLRB at 1523 and cases cited. Otherwise, "[i]t is firmly established that 'management officials may observe public union activity, particularly where such activity occurs on company premises.'" *Southern Maryland Hosp. Ctr.*, 916 F.2d at 938 (*quoting Metal Ind.*, 251 NLRB at 1523)). *Accord Albertson's*, 161 F.3d at 1238; *Metal Ind.*, 251 NLRB at 1523 and cases cited.

"The test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is 'an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act.'" *Southern Maryland Hosp. Ctr.*, 916 F.2d at 938 (citation omitted). Factors the

Board uses to determine the coerciveness of the employer's conduct include the duration of the observation, location of the observation in relation to the employee activity, and the existence or absence of other coercive behavior during the observation. *See S.J.P.R., Inc.*, 306 NLRB 172, 189 (1992), *enforced mem.*, 993 F.2d 913 (D.C. Cir. 1993).

Finally, Section 8(c) of the Act (29 U.S.C. § 158(c)) affirms an employer's First Amendment right to express "'any views, argument, or opinion' without violating section 8(a)(1) as long as that expression 'contains no threat of reprisal or force or promise of benefit.'" *UAW v. NLRB*, 834 F.2d 816, 819 (9th Cir. 1987). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court affirmed an employer's right to freely "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.'" *Id. at* 618 (quoting 29 U.S.C. § 158(c)). As this Court has recognized, "speech is privileged if it contains no threats or promises." *NLRB v. Marine World USA*, 611 F.2d 1274, 1277 (9th Cir. 1980).

2. This Court's standard of review

Unless the Union can show that the Board had no rational basis for dismissing the complaint, the Court should deny its petition for review. *See Chamber of Commerce of U.S. v. NLRB*, 574 F.2d 457, 463-64 (9th Cir. 1978)

(Court will uphold the Board's decision that the General Counsel has failed to establish that conduct violated the Act unless the Board had "no rational basis for its decision")[3]. *Accord United Mine Workers of America, Dist. 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989); *Ona Corp. v. NLRB*, 729 F.2d 713, 725 (11th Cir. 1984).

The Court defers to the Board's underlying interpretation of the Act if it is "reasonably defensible" (*Retlaw Broadcasting Co., v. NLRB*, 172 F.3d 660, 669 (9th Cir. 1999)), and to the Board's underlying factual findings if they are supported by substantial evidence (Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 490 (1951)). The Court may not displace those factual findings on review even though it might justifiably have reached a different conclusion had the matter been before it *de novo*. *See Universal Camera*, 340 U.S. at 488; *Walnut Creek Honda Ass. 2, Inc. v. NLRB*, 89 F.3d 645, 648 (9th Cir. 1996).

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[3] In a subsequent case, the Court applied, without discussion, a substantial evidence standard of review for determining whether the Board acted properly when dismissing a complaint. *See Dash v. NLRB*, 793 F.2d 1062, 1065-66 (9th Cir. 1986). The Court, however, has never specifically overruled its earlier statement that it reviews cases involving dismissals of complaints under a rational basis standard.

The standard of review remains the same when the Board's decision is contrary to the administrative law judge's, as the Board's decision, not the judge's, is under review. *See Universal Camera*, 340 U.S. at 493-94. Although the Court will "more carefully scrutinize[]" the Board's decision when it reverses the administrative law judge's credibility resolutions, the Court gives no special weight to the judge's decision where, as here, the Board merely disagrees with the ultimate conclusions drawn by the judge from the underlying facts. *Kallmann v. NLRB*, 640 F.2d 1094, 1098 and n.7 (9th Cir. 1981) ("the Board is to be accorded special deference in drawing derivative inferences from the evidence"). *Accord NLRB v. Brooks Cameras, Inc*., 691 F.2d 912, 915 (9th Cir. 1982) (with respect to derivative inferences, the Court's "deference is to the Board," not the judge).

B. The Board Rationally Concluded that the Company Did Not Engage in Unlawful Surveillance of Its Employees Union Activities

The Board rationally concluded that "neither Sapien nor Briand unlawfully surveilled employees in the [EDR]" because, in context, their presence in the EDR was routine, their observations were not accompanied by any coercive conduct, and they expressed views protected by Section 8(c) of the Act. (ER 14.) Indeed, the Union (Br 12) concedes that Sapien and Briand did not engage in unlawful surveillance "by entering the [EDR] or by briefly watching employees while they signed union cards in the [EDR]." Moreover, the Union concedes (Br 12) that

"the ideas that Sapien and Briand expressed" did not "fall outside Section 8(c)'s protection." In these circumstances, the Board's dismissal of the surveillance allegation was reasonable.

The Union asserts, however, that Sapien's and Briand's conduct was coercive because it was "out of the ordinary" and they "literally engaged in surveillance" (Br 32-33) through the "act of interrupting" (Br 12) the employees' union activity. The fallacy of the Union's claim - - that the simple act of interrupting open union activity converts otherwise lawful conduct into unlawful surveillance -- is amply demonstrated by the relevant facts.

First, Sapien's presence in the EDR on June 4, and Briand's presence in the EDR on June 6, was routine. The EDR is open to all employees, including managers, and, as the Board found (ER 13), "both managers and unit employees regularly dined" in the EDR. Indeed, Sapien explained that she went to the EDR two or three times daily. (ER 122.) In these circumstances, the Board reasonably found (ER 14) that "[t]he presence of Briand and Sapien in the [EDR] was not unusual."

Second, Sapien and Briand both observed "union activity [that] was in the open." (ER 14.) Sapien saw several employees at a table where union cards were in plain view, and also saw an employee about to sign a card. Similarly, Briand observed an employee signing a union card at a table where several employees

were seated. Moreover, the open union activity was led by employees who wore buttons identifying themselves as union leaders.

Sapien's and Briand's observation of open union activity in an area regularly used by managers falls well within the type of conduct that the Board has found does not constitute unlawful surveillance. *See Metal Ind.*, 251 NLRB at 1523 (three management officials, who "regularly stationed" themselves in the employee parking lot at the end of the day, lawfully observed union handbilling); *G.C. Murphy Co.*, 216 NLRB 785, 785 n. 2, 786-87 (1975) (assistant store manager, who was "frequently" present at the store exit during closing time, lawfully observed distribution of union handbills); *Tarrant Mfg. Co.*, 196 NLRB 794, 799 (1972) (employer official who saw union handbilling occurring as the employees left the plant, took his car to the parking lot and lawfully observed the activity).

Third, Sapien's and Briand's observations of the employees were brief. Sapien observed the employees at the table for approximately 2 minutes before approaching the table. Briand's observation was even shorter, observing, as the Board noted (ER 14), several employees at a table "for no longer than a moment before approaching the[] table." After talking to the employees, both managers promptly left the EDR. As the Board found (ER 14), their "observation of employee open prounion activity was for an even shorter period of time than in

other cases where the Board has not found unlawful surveillance." *See*, *for*, *example, Wal-Mart Stores*, 2003 WL 22855568, 340 NLRB No. 144 (2003) *enforced mem.*, 136 Fed. Appx. 752 (6th Cir. 2005) (manager's 30-minute observation, while sitting on bench outside store, of union handbilling activity in employer's parking lot, unaccompanied by other coercive conduct, did not constitute unlawful surveillance); *Roadway Package System, Inc.*, 302 NLRB 961, 961 (1991) (no unlawful surveillance when manager stood for 30 minutes at guardhouse where, "visible to all employees arriving to and departing from the plant," "he observed the handbillers' effort to distribute prounion literature").

Fourth, as the Board reasonably found (ER 14), Sapien and Briand did not engage in any coercive conduct when they spoke to the employees about the Union. As shown in the principles, Section 8(c) of the Act gives the Company the right to express antiunion views, as long as those views are not accompanied by threats. Here, neither Sapien nor Briand "made any statements alleged to be coercive during these events." (ER 14.)

Thus, Sapien, believing that she had the right to talk to the employee (ER 37; 125), simply wanted to "make sure" that the employee had "all of the facts before" signing the union card (ER 37; 123). In particular, Sapien lawfully explained the implications of signing the card and the cost of union dues. After the employee noted that she was signing the card because of her "concern[s]" with

the Company's benefits plan (ER 123-24), Sapien explained the negotiation process. Sapien concluded the conversation by noting that union committee leader Lynn had all her "bases . . . covered," an express recognition that Lynn apparently had adequately explained issues relating to the Union. Similarly, Briand simply cautioned the employee signing the card that she should be sure about what she was signing because it was "something like a contract (ER 113)," and noted that committee leader Felix might be promising her something that she could not deliver.

As the Board explained (ER 14), "Of course, both persons had a[] [Section] 8(c) right to assert their views regarding unionization. That they did so during an employee conversation about the Union . . . does not establish that the supervisors' conduct was out of the ordinary, requiring a different result."

Neither Briand nor Sapien tried to prohibit the union activity, told the employees that they could not engage in such union activity, recorded names, or thereafter continued to observe them. Nor does the Union claim that Sapien's or Briand's comments to the employees constituted unlawful interrogations.[4]

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[4] The Board dismissed the complaint allegation that Sapien's conversation with the employees constituted an interrogation. That issue is not before the Court.

Indeed, as the Board reasonably found (ER 14), Sapien's and Briand's "observations were qualitatively different from those in other cases where the Board has found unlawful surveillance." Thus, the Board has found that an employer engaged in out of the ordinary activity that went beyond casual observation of open union activity when employer representatives conducted lengthy observations, took notes or pictures of the union activity, or attempted to stop the activity. Indeed, here, the Board (ER 15) expressly distinguished the instant case from those where an employer engaged in unlawful surveillance by specifically altering a practice in order to monitor or stop the union activity. *See, for example, Elano Corp.*, 216 NLRB 691, 691, 695 (1975) (employer ordered its foremen to eat lunch in the employer's lunchroom "to keep the [employees'] union activities under observation or to inhibit open discussion about the [u]nion"); *Hawthorn Co.*, 166 NLRB 251, 251, 255 (1967), *enforced in pertinent part*, 404 F.2d 1205, 1208 (8th Cir. 1969) (foreman's adopted practice of sitting at employee tables in the cafeteria, instead of the foremen's table, during coffee breaks, "motivated by a desire to inhibit the employees from using their coffee breaks for purposes of self organization"). Here, in contrast, there is no evidence that either Sapien or Briand entered the EDR with the intent of monitoring or precluding union activity. Indeed, Sapien did not even notice the union activity until she was just a few feet from the table (ER 122-23).

As the Board noted (ER 14-15), this case also stands in marked contrast to those cases where the Board found that an employer engaged in unlawful surveillance because employer representatives followed employees around, often by engaging in elaborate schemes, and/or confronted them.[5] Neither Sapien nor Briand was part of an overall plan to observe and disrupt union activity, nor did

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[5] *Compare*, *for example*, *Dayton Hudson Corp.*, 316 NLRB 477, 478, 486-89 (1995) (on multiple occasions that involved multiple employees, employer agents videotaped employees, intentionally followed them around the employer's premises, stared at them, made loud and intimidating noises, and interrupted and monitored their conversations and phone calls); *Teskid Aluminum Foundry*, *Inc.*, 311 NLRB 711, 713-14 (1993) (manager followed two employees wearing union insignia into locker room, and thereafter on multiple occasions followed one of those employees around on work breaks); *Tyson Foods, Inc.*, 311 NLRB 552, 552 (1993) (employer agent walked up to two employees who were discussing the union with a shop steward and stated that she "ha[d] to sit down to keep [the steward] from talking," which caused the steward and the employees to walk away); *S.J.P.R., Inc.,* 306 NLRB 172, 185-86, 188-89 (1992), *enforced mem.*, 993 F.2d 913 (D.C. Cir. 1993) (employer "posted two security guards in the kitchen for much of the evening" to observe employee union activity, and also posted security with binoculars to watch employees' union activities on nearby public property); *Oakwood Hosp.*, 305 NLRB 680, 687-89 (1991), *enforcement denied on other grounds*, 938 F.2d 698, 703 (6th Cir. 1993) (employer "sought to thwart organizational talk" by having employer agents repeatedly follow union representative while he was talking to employees in the employer's cafeteria, "conspicuously listening in on employees' conversations," and "openly taking down names of employees who met with [the union representative]"); *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991) (employer president ordered employees who were distributing union literature at the public bridge near the plant to leave, threatened to, and did, call the police, and as employees received leaflets "loudly accused individual employees accepting union literature of being union supporters").

they try to prevent the union activity from occurring. To the contrary, they simply presented a management viewpoint on unionization.

C. The Union's Contentions Are Without Merit

1. The Board did not act contrary to precedent

The Union's repeated claim (Br 12, 15-16, 18-19, 31-34) - - that the Board acted contrary to precedent when it found the act of interrupting open union activity was not "out of the ordinary" coercive conduct, and therefore not probative of unlawful surveillance - - is simply unsupported in the caselaw. Indeed, as fully demonstrated above at pp. 19-21, the Board expressly distinguished this case from the established precedent finding surveillance of employees' union activity in violation of Section 8(a)(1). Moreover, the employer's conduct in the cases on which the Union relies (Br 11, 15-16, 18-19, 31-34) bears little resemblance to the conduct here. Rather, in each of the cases, the employer engaged in deliberate attempts to inhibit or disrupt union activity.

First, there is no support for the Union's claim (Br 13-16, 23-24, 32-33) that the very act of interrupting Section 7 activity is a violation of Section 8(a)(1). The Board has not adopted such a *per se* rule. The Board can hardly be faulted for failing to create a *per se* rule that makes it impermissible for an employer to interrupt employees engaged in open union activity, particularly where the speech itself is permissible. Indeed, the Union's suggestion (Br 23, emphasis added) that

the two managers "would have interfered equally with employees' Section 7 rights if they had interrupted employees' Section 7-protected conversations *to discuss any subject*, even one unprotected by Section 8(c)," demonstrates the absurdity of their claim. Taking the Union's argument to its logical conclusion, a manager would be guilty of a violation of the Act if she were to interrupt employees discussing the Union in the EDR to inquire about the soup of the day.

Moreover, the cases cited by the Union (Br 15-16, 31, 33) do not support its claim that mere interruption of protected activity, without more, constitutes unlawful surveillance. Instead, in each of the cited cases, the managers did more than merely interrupt employees' discussion, they sought to inhibit or disrupt the activity. Thus, in *Cubitt (d/b/a Grass Valley Grocery Outlet)*, 338 NLRB 877, 880, 881 (2003), *enforced in relevant part*, 121 Fed. Appx. 720 (9th Cir. 2005), a store manager went to the store parking lot and approached a meeting between union representatives and employees "for the very purpose of disrupting the discussion." Despite being told that he was not invited or permitted to attend, the manager folded his arms, refused to leave, and stared at employees until they left. Likewise, in *Federal Prescription Service, Inc.*, 203 NLRB 975, 981, 983 (1973), *enforced in relevant part*, 496 F.2d 813 (8th Cir. 1974), the employer's president who twice learned about the Union activity surreptitiously, interfered with the employees' organizing activities, once by interrupting a discussion across the

street and once by attempting to gain access to a union meeting at a local community hall. His actions "had the effect of immediately breaking up the meeting." *Id.* at 983. The Board found that the employer "recognized that he could break up employee activity by his presence, and that he took this action deliberately for that purpose." *Id.*

Similarly, in *Orbit Lightspeed Courier Systems*, 323 NLRB 380, 387 (1997), owners and managers confronted union organizers and employees as they handed out literature on the street outside the employer's offices, which would often "end with name calling." The Board found no unlawful surveillance where the managers observed union activity while they smoked outside, as this was not out of the ordinary activity. However, the managers violated Section 8(a)(1) on numerous occasions when they intentionally got close enough to hear the conversations, and then interrupted or interjected themselves into the conversations, hindering or effectively ending the union activity, unlike here. *Id.*

Second, the Union's claim (Br 18-19) - - that the employees were engaged in a private, not an open conversation concerning union activity that was entitled to unique protection under the Act - - misstates both the facts and the relevant precedent. In each of the cases on which the Union relies, the employer engaged in deliberate conduct designed to intrude on and disrupt the conversation—a factor that was not present here. Thus, *Liberty House Nursing Homes*, 245 NLRB 1194,

1200 (1979) (Br 11, 18, 31), like *Elano and Hawthorn* (discussed above p. 19), involved an employer who intentionally changed its policy concerning where its supervisors ate so that they could observe the union activity. Specifically, the supervisors "departed from the practice" of taking breaks in a private area in order to "deliberately mingle[] with employees" in the cafeteria utilized by the employees during their breaks and lunch periods. *Id.* at 1200. Such conduct included following employees who from one table to another to avoid sitting next to the supervisors, and following employees who left the cafeteria "to seek privacy" elsewhere. *Id*. Here, in contrast, it is undisputed that managers regularly entered the EDR, and there is no claim or any record evidence that Sapien or Briand followed employees in order to inhibit union activity.

In *Unbelievable, Inc.*, 309 NLRB 761, 763, 765, 766 (1992), *enforced*, 71 F.3d 1434 (9th Cir. 1995) (Br 18), the employer surreptitiously eavesdropped on a union representative performing representational duties and then expelled the union representative based on what the employer had overheard. Here, in contrast, as the Board found (ER 14), Sapien and Briand did not "lurk[] in the background to surreptitiously hear the employee conversations," nor did they try to prohibit the activity.

Likewise, in *Southern Maryland Hosp.*, 293 NLRB 1209, 1213, 1217 (1989), *enforcement denied on other grounds*, 916 F.2d 932 (4th Cir. 1990) (Br

18-19), the employer engaged in surveillance, on 2 consecutive days, when managers sat down with the union representatives in the cafeteria, and monitored their activity for the duration of their stay. One of these officials, the security director, "had no legitimate reason for even going in the cafeteria, but was there for the sole purpose of closely observing and thereby intimidating employees . . . ." *Id.* at 1217. Thus, unlike the brief, chance encounters here, the employer's "carefully orchestrated actions were demonstrably designed to inhibit employee contact with the organizers." *Id.*

So, too, in *Cubitt (d/b/a Grass Valley Grocery Outlet)*, 338 NLRB 877, 881 (2003), *enforced in relevant part*, 121 Fed. Appx. 720 (9th Cir. 2005), the store manager observed union activity in the parking lot, stood close by as employees discussed the union, and despite being asked to leave, remained with arms crossed and staring at the employees until they left. Here, in contrast, Sapien and Briand came across the union activity, did not stay over any objection, and promptly continued on their way after concluding their brief lawful conversation.

Third, there is no merit to the Union's claim (Br 19) that Sapien's and Briand's conduct was "out of the ordinary" and thereby coercive because they did not normally eat with or speak to non-managerial employees in the EDR. It is undisputed that the EDR was open to both managers and employees and that both Sapien and Briand frequented the EDR often. Thus, their presence was not "out of

the ordinary." *See Orbit Lightspeed Courier Systems*, 323 NLRB 380, 387 (1997) (no unlawful surveillance where managers usually smoked outside with employees, and thus their observation of union activity was not "out of the ordinary"). Moreover, their act of briefly speaking to the employees when they came across open union activity did not constitute the type of "out of the ordinary" observation that leads to a finding of surveillance. Indeed, the Union can point to no cases to support this unique view.[6]

2. The Union's remaining contentions are without merit

Contrary to the Union's contention (Br 2, 12, 22-23), rejecting the claim that concededly protected employer speech loses the Act's protection simply because it is interjected in the midst of employees' union activity, irrespective of the context, the Board reasonably noted (ER 14) that "there is nothing in Section 8(c) that even remotely suggests such a limitation." As the Board further explained (ER 14), "in order to have a free exchange of views in 'a market place of ideas' that time would be a logical time for the employer representative to express his opinion."

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[6] Contrary to the Union's claim (Br 19 n.3), there was no need for the Company to file a specific exception to the judge's finding that its managers acted "out of the ordinary." When the Company filed exceptions to the judge's decision that it had engaged in surveillance (ER 140), it implicitly objected to the judge's finding that

While recognizing that the two managers' interrupted the employees' conversations, the Board noted (ER 14) that their conduct was, "[a]t worst . . . rude, but it is not unlawful." As the Board explained (ER 14), "employees may listen to the employer representative while he speaks, and, to this extent, stop their Section 7 conversation. But, this is the essence of the exchange of ideas. After the employer representative has spoken, the employees can respond, or ignore him and continue[] their conversation." Indeed, that is precisely what happened here. Both Sapien and Briand set forth their opinions about unionization and the impact of signing a card, and Sapien specifically responded to a concern raised by the employee signing the card. The union activity continued and there is no evidence that the managers' conduct had any coercive impact on present or future union activity.

Since Sapien's and Briand's interruptions of union activity did not transform their otherwise lawful conduct into unlawful surveillance, the Union's repeated claim (Br 20-26) that Section 8(c) does not protect conduct that violates Section 8(a)(1) has no bearing here. Sapien's and Briand's conduct simply did not constitute unlawful surveillance.

Sapien and Briand had acted "out of the ordinary" in a manner that violated Section 8(a)(1) of the Act.

The Union's claim (Br 34-35) that even if Sapien and Briand did not engage in surveillance, they engaged in an undisclosed violation of Section 8(a) (1), ignores that "surveillance is the allegation of the complaint." (ER 15.) The Board (ER 15) rightly "question[ed] the fairness of finding a violation on the basis of an allegation that was not made." In any event, as the Board found (ER 15), it was not aware of any case "which teaches that an employer manager violates Section 8(a)(1) by injecting himself into a conversation in order to express an 8(c) opinion." As shown above pp. 22-26, none of the cases cited by the Union stand for that proposition.

Finally, the Union's repeated suggestion (Br 16-18, 21, 26-31) that the Board's decision here will have a chilling impact on employees' ability to engage in open union activity misrepresents the Board's decision. Contrary to the Union's claims (Br 10, 21, 24), the Board's decision does not give an employer an "absolute right" to interrupt union activity simply because that activity occurs in an open place and the employer wishes to express an opinion protected by Section 8(c). Rather, the Board will continue to follow its established precedent and examine the employer's conduct to determine whether the employer's observation of Section 7 activity is "out of the ordinary" and therefore coercive. As shown above pp. 19-21, and as the Board's decision recognizes (ER 13-15), where the facts support such coercive conduct, the Board has found that an employer

engaged in unlawful surveillance of open union activity. The conduct here simply did not support the allegation of unlawful surveillance.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's petition for review.

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