Airport 2000 Concessions, LLC *and* UNITE HERE Local 7, Hotel and Restaurant Employees Union, CLC.[1] Cases 5–CA–32092 and 5–CA–32185

April 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 2, 2005, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

This proceeding involves alleged unfair labor practices during the Union's campaign to organize employees of the Respondent's concession operations at Baltimore/Washington International (BWI) Airport.[4] Prior to the Respondent's takeover of these operations, the Union represented the employees at the concessions, including many of the employees the Respondent subsequently hired. The complaint alleges, and the judge found, several violations of Section 8(a)(1) and (3). We have adopted some of these violation findings, supra fn. 3, and we will deal with the remaining allegations sequentially.

1. Events of June 16

The Respondent was awarded a contract to operate the concessions at BWI Airport in May 2004,[5] and began operations on June 2. The Respondent's principals and corporate managers oversaw operations throughout the airport. The employees at issue here worked on pier B of the airport, where the Respondent maintained a Charley's Steakery and a combined Caribou Coffee/Mamma Ilardo's Pizza restaurant. At the individual store level, the Respondent employed a managing partner, assistant managing partners, shift leaders, and team members.

On June 16, Valerie Trusty, the managing partner for Charley's Steakery and an admitted supervisor, noticed a union organizer speaking with a team member while the team member was working. Trusty interrupted the conversation. Later, she noticed the same team member speaking with the union organizer in the "unit," i.e., the dining area adjacent to the food service counters. After observing them for a short period, Trusty approached the team member and asked her if she was okay. The employee replied that she was fine and was on her break. Trusty responded that the team member could speak with the union organizer as long as she was not on the Respondent's time and then left the area.

Trusty returned to her work area and loudly announced that she did not want any employees talking to anyone from the Union. Team member Donnell Gould challenged Trusty's pronouncement. Trusty responded that she could tell him what to do if he was on her clock and in her unit. She elaborated that he could talk to the Union on his own time and outside of the unit.

The judge found that Trusty's initial intrusion into the team member's conversation with the union organizer in the unit constituted an unlawful interrogation, creation of the impression of surveillance of employees' union activities, and actual surveillance of employees' union activities. We find it unnecessary to pass, as cumulative, on the judge's findings that the intrusion constituted an unlawful interrogation and impression of surveillance in light of our finding that the Respondent committed similar violations in August. We disagree with the judge, however, that the intrusion constituted actual surveillance.

As we recently found in *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), a case with very similar facts, a supervisor's routine observation of employees engaged in open Section 7 activity does not violate Section 8(a)(1).

[1] We have amended the caption to reflect the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge made factual findings regarding confrontations between several of Respondent's managers and shift leader, Maria Holmes and employee Donnell Gould on August 18, 2004 about the upcoming union rally, scheduled for August 20, and Shift Leader Maria Holmes' discharge several days after the rally. Based on those factual findings, the judge concluded that Holmes was not a supervisor and therefore he rejected the Respondent's argument that she was not protected by the Act. He further found that the managers' August 18 confrontation with Holmes' constituted unlawful interrogations, the creation of the impression of surveillance, and threats to discharge employees because of their union activities. The judge also found that Manager Valerie Trusty's inquiry regarding Gould's participation in the rally was an unlawful interrogation. Finally, the judge found that Holmes' discharge violated Sec. 8(a)(3) and (1). We agree with the judge and adopt his findings for the reasons he articulated, although Member Schaumber would find it unnecessary to pass on the judge's finding regarding the Gould interrogation as cumulative.

[4] We note that since the events at issue here the name of the airport has been changed to Baltimore/Washington International Thurgood Marshall Airport.

[5] All dates herein are 2004.

In *Aladdin Gaming*, a supervisor observed an employee engaged in Section 7 activity in a dining area frequented by managers and employees, approached the employee, waited 2 minutes, and interrupted the employee to express the supervisor's views on unionization. There, we found no 8(a)(1) surveillance violation because the supervisor's presence in the dining area was not out of the ordinary and thereby not coercive. Similarly, here, there is no allegation that Trusty's presence in the dining area was out of the ordinary. Moreover, as in *Aladdin Gaming*, the supervisor's interruption was not itself coercive nor was it accompanied by coercive conduct, such as contemporaneous threats. Indeed, the employee, although interrupted by Trusty, continued her conversation with the union organizer after Trusty left until her break was over.

In sum, Trusty's conduct bears little resemblance to the "out-of-the-ordinary" type of conduct found unlawful in the cases distinguished in *Aladdin Gaming*.[6] The General Counsel has not shown that Trusty's presence in the working area, or in the dining area was extraordinary. Further, Trusty did not, for example, respond to the union activity taking place right in front of her by videotaping or taking pictures of what was occurring, writing down names or taking notes, or embarking on a new practice designed to "scare off" the union organizer. Nor did Trusty intimidate or threaten the employee. Accordingly, we reverse the judge and dismiss the allegation that Trusty unlawfully surveilled an employee on June 16.[7]

We agree with the judge, however, that Trusty's subsequent conduct (returning to her workstation and instructing employees not to speak with union organizers) violated Section 8(a)(1).[8] As noted above, the judge credited employee Gould's testimony that Trusty's statement established a prohibition on speaking to anyone from the Union either during working time or while in the unit. The Respondent does not dispute that employees spend their breaks in the unit area or that a prohibition on employees' engaging in union activity during their breaktime would be unlawful.[9] Instead, the Respondent disputes only that Trusty's articulation of the Respondent's no-solicitation rule extended to employees' breaktime. The Respondent, however, has not provided any compelling reason for us to reverse the judge's decision to credit employee Donnell's testimony regarding Trusty's articulation of the no-solicitation rule. Accordingly, we adopt the judge's finding that Trusty's articulation of the Respondent's no-solicitation rule on June 16 was overbroad and, therefore, violated Section 8(a)(1).

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[6] Thus, the facts here are distinguishable from those in *Taylor-Rose Mfg. Corp.*, 205 NLRB 262 (1973), enfd. mem. 493 F.2d 1398 (2d Cir. 1974), upon which our dissenting colleague relies. In *Taylor-Rose,* the Board found unlawful the employer's attempt to eavesdrop on an employee's union-related conversation. Here, by contrast, Trusty merely observed open conduct in a public area—without eavesdropping, or attempting to eavesdrop, on the encounter between the employee and the union organizer—and then approached them and asked the employee if she was "OK." In sum, *Aladdin Gaming* is directly on point and therefore controls. Our colleague relies upon her dissent in that case, but the case remains Board law.

[7] Contrary to the majority and consistent with her dissent in *Aladdin Gaming*, supra, Member Liebman would adopt the judge's finding that Trusty's interruption of a team member's break-time conversation with a union representative in the unit constituted unlawful surveillance. Here, moreover, Trusty immediately followed her intrusion into the team member's obviously union-related conversation with a general announcement of an overbroad no-solicitation rule that expressly (and unlawfully) prohibited the precise protected conduct that the team member was at that very moment engaged in. By her announcement of the rule, Trusty indicated her intent to continue watching team members—and, in particular, the team member whose protected conduct led to the announcement of the rule—to ensure that they did not engage in such protected conduct. Further, as the judge found, Trusty actually continued to watch the remainder of the employee's conversation with the union representative. Under these circumstances, Member Liebman finds, as the judge did, that Trusty engaged in unlawful surveillance of the team member's union activity. See, e.g., *Taylor-Rose Mfg. Corp.*, supra (finding unlawful surveillance where company official openly approached employees engaged in conversation with union organizer in parking lot, in order to eavesdrop). The fact that Trusty's surveillance was not surreptitious does not make it lawful. See *Teksid Aluminum Foundry*, 311 NLRB 711, 715 (1993) (finding an 8(a)(1) violation in managers' overt surveillance of employees in public areas, intended to prevent employees from engaging in lawful organizational activities).

[8] Thus, the Board is unanimous on this point. We part company with our dissenting colleague, however, over whether Trusty's subsequent unlawful announcement of an overbroad no-talking rule retroactively converted her preceding conduct into unlawful activity. Our dissenting colleague finds Trusty's earlier intrusion on the employee's conversation with the union agent unlawful because Trusty subsequently promulgated the unlawful no-solicitation rule. We disagree. We find that the lawfulness of Trusty's intrusion is to be assessed as of the time of the intrusion. As that intrusion was not unlawful when it occurred, we find that it was not transposed into a violation based on Trusty's subsequent unlawful conduct. Moreover, even if Trusty's announcement of an overly broad no-talking rule would reasonably be construed, as our colleague argues, as suggesting that Trusty would be "watching" for future violations of that rule, that would not establish that Trusty or any other agent of the Respondent was "watching" employees' conversations *before* the rule was announced, much less that it was surreptitiously spying on such conversations.

[9] Although the Respondent generally excepts to the judge's finding that the Respondent lacked a sufficient property interest in the unit area to enforce a no-solicitation rule, the Respondent makes no argument to support its exception and, instead, asserts that the judge's finding was "wholly irrelevant" to its defense. In sum, given its view that the issue was irrelevant, the Respondent adduced little or no support for it. In these circumstances, the Respondent has not shown a property interest in the unit area.

2. Events of August 24–25

a. Union buttons

The parties do not dispute that during a one-on-one meeting on August 24, Respondent's secretary/treasurer, Stephen Olsen, told employee Phyllis Reaves that she could not wear her union button during working time. Nor do the parties dispute that, the following day, Airport Director Rick Becherer told employee Eva Johns that she had to remove her identical button. The judge found that the Respondent's requirement that Reaves and Johns remove their buttons violated Section 8(a)(1).

We agree with the judge. It is well established that an employer may not prohibit the wearing of union insignia, absent special circumstances. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802–803 (1945). As the judge found, the Respondent here failed to provide any evidence of special circumstances to justify its prohibition. The Respondent did not demonstrate that the buttons interfered with its ability to maintain production or safety standards, prevent discord between competing groups of employees, or prevent the alienation of customers. See *Systems West LLC*, 342 NLRB 851, 855 (2004). Moreover, the record shows that the Respondent permitted employees to wear other kinds of pins and buttons, such as Winnie the Pooh or angel pins. Thus, the Respondent inconsistently applied its uniform policy and, therefore, cannot use that policy to establish special circumstances. See *Waterbury Hotel Management LLC*, 333 NLRB 482, 545–546 (2001), enfd. 314 F.3d 645 (D.C. Cir. 2003) (prohibition on union buttons unlawful for several reasons, including because uniform policy was discriminatorily enforced). In addition, as the judge found, the Respondent tolerated the wearing of union buttons prior to the August rally, but changed its policy in response to the Union's increase in organizing activity, marked by the rally. See *E & L Transport Co.*, 331 NLRB 640, 640 (2000).[10]

b. Solicitation of grievances

During his August 24 meeting with employee Johns, Secretary/Treasurer Olsen told Johns that he heard she had a problem with her pay. Johns then shared with Olsen her dissatisfaction with the Respondent's choice in health care benefits. Olsen told her that maybe the Respondent could provide better benefits later. In response to Olsen's further prompting, Johns also complained to Olsen about how Airport Director Becherer had treated her a few days earlier. Olsen responded that he did not want to lose Johns as an employee.

Reaves had a similar conversation with Olsen in her one-on-one meeting on the same day.[11] Olsen asked Reaves what she liked and disliked about the Company and what he could do to make it better. Reaves complained about the benefits package and questioned the holidays for which the Respondent gave time off. When Olsen told her he would look into the holiday issue, Reaves asked if the Respondent would give employees more holidays off. Olsen told her no.

The judge found that Olsen's inquiries and responses constituted an unlawful solicitation of grievances and an implied promise to remedy those grievances. The Respondent has excepted to that finding. The Respondent contends that Olsen made no promise to remedy any problems raised by Johns and Reaves and, in fact, did not remedy any of the problems they raised. We find merit to the Respondent's exception.

The essence of a solicitation of grievances/implied promise of benefit violation is the promise of remedying the grievances, not the mere solicitation. See *Ryder Transportation Services*, 341 NLRB 761, 769 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). Thus, although the record shows that Olsen solicited grievances from Johns and Reaves, it does not support finding a violation. Instead, the record dispels any inference that Olsen promised that he would remedy Johns' and Reaves' grievances.

Olsen did not expressly promise to remedy the employees' complaints, and the responses he gave to the two employees' grievances were sufficient, in our view, to rebut any implication of a promise. In response to Johns' concerns about her health insurance, Olsen first explained that the benefits were less than generous because the Respondent was a small company and then said that the Respondent was a new company and "maybe" it could (not would) provide better benefits at a later date.

[10] In an effort to distinguish this case from *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), the judge characterized the status of the Sixth Circuit's and the Board's precedent regarding consistently applied uniform rules. Because we adopt the judge's finding that the Respondent did not consistently apply its uniform policy, we find it unnecessary to pass on the judge's characterization of this precedent.

In finding the Respondent's prohibition against wearing union buttons unlawful, Member Schaumber relies on the Respondent's failure to establish special circumstances justifying the ban and its acting to prohibit union buttons in response to the Union's stepped up organizing activity.

[11] In finding Olsen's meetings with Johns and Reaves unlawful, our dissenting colleague finds that these meetings were atypical and attaches importance to that finding. At the time the meetings took place, however, the Respondent had been in operation at BWI Airport for less than 3 months—too brief a time to draw meaningful conclusions concerning typicality. In light of the Respondent's short tenure as Johns' and Reaves' employer, we attach less significance to the fact of the meetings than to their content. In any event, even if the solicitation was atypical, that would not contradict the fact that the solicitor was not making promises.

Such a conditional statement is not a promise. See *Curwood, Inc.*, 339 NLRB 1137 (2003), enfd. in relevant part 397 F.3d 548 (7th Cir. 2005). Olsen's response to Johns' complaint about her treatment by Becherer was even more equivocal. He told Johns only that he did not want to lose her. He did not offer any steps he would take to alter her situation with Becherer.

With regard to Reaves, Olsen's only promise was a promise *not* to remedy her grievance about holidays off. Olsen initially said only that he would look into Reaves' complaint about holidays. When Reaves pushed him further, however, Olsen told her flatly that the Respondent would not be adding a holiday to the schedule. These responses are clearly distinguishable from the manager's conduct in *Ryder Transportation Services*, supra, upon which the judge relied in finding a violation. There, the manager repeatedly assured employees that the employer would bring about a favorable outcome. Here, in contrast, no such assurances were made. Instead, as shown, Olsen obfuscated or disclaimed any favorable action.

Our dissenting colleague asserts that we have abandoned the principle that an implied promise to remedy grievances violates Section 8(a)(1). We have not. We agree that a solicitation of grievances raises a rebuttable presumption of an implied promise to remedy those grievances, and that the employer bears that rebuttal burden. We find, however, that the Respondent has sustained that burden here. This is not a case in which the employer solicited grievances and then made no response to an employee's airing of a grievance. Rather, after soliciting grievances, Olsen proceeded to equivocate, temporize, and ultimately outright deny that the grievance would be addressed. In light of Olsen's post-solicitation conduct, we find that employees would not reasonably believe that their airing of grievances would result in desired change. Thus, the difference between ourselves and the dissent is not a difference concerning the applicable law, but simply over whether the quantum and quality of the evidence was sufficient to meet the Respondent's rebuttal burden.[12] We acknowledge that Olsen's conversation with Johns presents a factually close issue in this regard. For the reasons set forth above, however, we find that the Respondent met its burden here.[13]

[12] Our colleague submits instead that the difference is whether we have "placed a burden on the Respondent at all." We reject this assertion. The foregoing analysis explicitly centers on the burden that was imposed on the Respondent to avoid a finding that it unlawfully promised to remedy grievances. In accord with that burden, the Respondent introduced evidence of Olsen's responses to the concerns of Johns and Reaves, showing that Olsen promised them nothing. Contrary to our colleague, therefore, the issue is not whether the Respondent was relieved of establishing a rebuttal defense but, rather, whether the evidence that it did present in this regard was sufficient to establish its defense. That is plainly the question that divides us.

Pursuant to that question, our colleague concedes that Olsen's responses to Johns and Reaves were, at best, "equivocal and ambiguous," but nevertheless sufficient to establish a violation because a "reasonable employee could certainly have understood these equivocal responses as implicit promises of future changes." We disagree with our colleague's view that the ambiguous or equivocal responses here were implied promises. Clearly, they were not.

As stated above, we find that Johns and Reaves would not reasonably conclude from Olsen's equivocal and ambiguous responses that their concerns would be favorably addressed.

[13] Member Liebman would adopt the judge's conclusion that the Respondent acted unlawfully in soliciting the grievances of employees Johns and Reaves. As the majority states, the essence of a solicitation-of-grievances violation is the expressed or implied promise to remedy the solicited grievances. The Board infers that an employer is promising to remedy the grievances it solicits, an inference that is "particularly compelling" when an employer first institutes a practice of soliciting employee grievances during a union organizational campaign. *Center Service System Division*, 345 NLRB729, 730 (2005). As the judge found, prior to August 24, Olsen had never met, one-on-one, with Johns or Reaves, and he was not the Respondent's contact person for employee benefits. These meetings, which occurred almost immediately after the union rally, were clearly atypical.

Moreover, under Board precedent, while the inference of an implied promise is rebuttable, the Respondent bears the burden of rebutting the inference. See, e.g., *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004). Contrary to the majority, Member Liebman finds that the Respondent did not meet its burden. Only in his response to Reaves' request for *additional* holidays did Olsen unequivocally state that the Respondent would not remedy the employee's concern. Olsen's responses to all of Johns' and Reaves' other concerns were equivocal and ambiguous: regarding Reaves' request for *different* holidays, Olsen said he would check into it; in response to Johns' complaint about Becherer's treatment of her, Olsen assured Johns that he did not want to lose her, because she was a very valuable employee; and in response to Johns' dissatisfaction with the Respondent's health benefits, Olsen said that "maybe later Respondent could get better benefits." A reasonable employee could certainly have understood these equivocal responses as implicit promises of future changes. (In this regard, Olsen's statement about the possibility of better health benefits later is clearly distinguishable in tone and implication from the employer's statement in *Curwood, Inc.*, 339 NLRB 1137, 1139 (2003), that "there were no plans to make any changes at that time.") Indeed, Reaves might reasonably have concluded that Olsen's unambiguous refusal of her request for additional holidays, while he remained equivocal about her other requests, indicated that he was considering granting the other requests; obviously, the employees understood that Olsen knew how to say "no" when that was what he meant.

The majority finds that the inference was rebutted simply because "Olsen did not expressly promise to remedy the employees' complaints," and because the implicit promises in this case were less definitive than those made in *Ryder Transportation Services*, supra. Under the circumstances here, however, a stronger showing by the Respondent should be required. In Member Liebman's view, by finding that Olsen's ambiguity supports the Respondent's position, the majority improperly relieves the Respondent of its rebuttal burden and effectively eliminates an implicit promise to remedy grievances as a violation of Sec. 8(a)(1). Her disagreement with the majority on this issue is not merely a difference of opinion regarding "the quantum and quality" of evidence required for the Respondent to meet its burden. Rather, in

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Airport 2000 Concessions, LLC, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they cannot talk to union representatives during nonworktime in nonwork areas.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Coercively interrogating employees about their union activities or the union activities of other employees.

(d) Threatening employees with discharge if they engage in a job action on behalf of the UNITE HERE Local 7, Hotel and Restaurant Employees Union, CLC, or any other labor organization.

(e) Instructing employees to remove their union buttons to discourage them from supporting the UNITE HERE Local 7, Hotel and Restaurant Employees Union, CLC, or any other labor organization.

(f) Discharging employees because they engage in union activities or to discourage employees from engaging in union activities.

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

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

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

(b) Make Maria Holmes whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision. Backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

her view, it is a question of whether the majority has actually placed a burden on the Respondent at all.

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

(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 to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in the BWI Thurgood Marshall Airport, Maryland, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 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 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its operations at BWI Thurgood Marshall Airport, the Respondent shall duplicate and mail, at is own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 2004.

(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.

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.

[14] 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."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform employees they cannot talk to union representatives during nonworktime in nonwork areas.

WE WILL NOT create the impression that employees' union activities are under surveillance.

WE WILL NOT coercively interrogate employees about their union activities or the union activities of other employees.

WE WILL NOT threaten employees with discharge if they engage in a job action on behalf of UNITE HERE Local 7, Hotel and Restaurant Employees Union, CLC, or any other labor organization.

WE WILL NOT instruct employees to remove their union buttons to discourage them from supporting the UNITE HERE Local 7, Hotel and Restaurant Employees Union, CLC, or any other labor organization.

WE WILL NOT discharge employees because they engage in union activities or to discourage employees from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

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

WE WILL make Maria Holmes whole for any loss of earnings and other benefits suffered as a result of her unlawful termination, with interest.

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

AIRPORT 2000 CONCESSIONS, LLC

Stephanie Cotilla, Esq. and *Elicia Marsh-Watts, Esq.,* for the General Counsel.

Daniel P. Murphy, Esq. and *Jena Tarabala, Esq.,* of Atlanta, Georgia, for the Respondent.

Roxie Herbekian, of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Baltimore, Maryland, on February 22, 23, and 24, 2005. The charges and amended charges were filed by Unite Here Local 7, Hotel and Restaurant Employees Union, AFL–CIO, CLC (the Union or Local 7) against Airport 2000 Concessions, LLC (Respondent).[1] The consolidated complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the Act by: telling employees they were not to talk to union representatives during nonworktime and in nonwork areas; interrogating employees about their union activities and the union activities of other employees; creating the impression of surveillance and engaging in surveillance of employees' union activities; threatening employees with discharge if they engaged in a job action on behalf of the Union; promising and impliedly promising benefits to employees to dissuade them from supporting the Union; soliciting grievances from employees; instructing employees to remove union buttons; and that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Maria Holmes on or about August 23, 2004, because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.[2] Respondent, in its answer, denies that it violated the Act as alleged, and contends that Holmes was a statutory supervisor.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[3]

I. JURISDICTION

Respondent, a corporation, with an office and place of business at the Baltimore Washington International Airport (BWI) in Maryland, has been engaged in the retail sale of food. Respondent will annually derive gross revenues in excess of $500,000, and will annually purchase goods and services valued in excess of $5000 from points located outside the State of

[1] Respondent was also referred to as A2K by some of the witnesses in this proceeding.

[2] All dates are in 2004, unless otherwise specified.

[3] In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.,* 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness's testimony are not mentioned it is because it was not credited, or cumulative of the credited testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth throughout this decision.

Maryland. Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In May, Respondent was granted its initial contract by BAA Maryland, Inc. (BAA) to operate food concessions at BWI. Prior to Respondent beginning operations at BWI, H.M.S. Host (Host) operated the airport food concessions. Local 7 represented Host's employees. However, Host lost the BWI concession contract prior to entering a collective-bargaining agreement with the Union.

Respondent commenced customer service at BWI on June 2. Respondent is owned by Erroll Brown, its president, Stephen Olsen, its secretary treasurer, and George Jones. Respondent operates nine restaurants at BWI, where it employs over 200 employees. Respondent operates Charley's Steakery, Mama Ilardo's Pizza, and Nature's Table Café at the main terminal; Charley's Steakery, Mama Ilardo's Pizza, and Caribou Coffee at pier B; and Nathan's, Mama Ilardo's Pizza, and Caribou Coffee at pier C. Brown oversees Respondent's BWI operations and maintains an office at the BWI main terminal. Olsen maintains an office in Atlanta, Georgia. Respondent's chief of operations, Stan Weiss, reports directly to the three owners. Respondent's airport director supervises the nine restaurants. Frederick Becherer, known as "Rick" was Respondent's airport director in the summer of 2004.[4]

Most of Respondent's restaurants are staffed by a managing partner (MP), an assistant manager (AM), shift leaders, and team members. The MP's and AM's are salaried positions. Respondent pays for the MP's health-care coverage, and contributes to the AM's health-care coverage. Shift leaders in the summer of 2004, were earning around $10.50 an hour and most team members were earning between $7 to $8.50 an hour. Respondent does not contribute to the shift leaders and team member's health-care costs. As stated in Respondent's "Employee & Management Handbook," the MP has the overall responsibility for directing the restaurant's daily operations. They are scheduled to work 50 hours a week, conduct a weekly inventory, and order all supplies from vendors. The MP is responsible for staffing the restaurant with trained employees. They are required to monitor sales to make sure the restaurant is consistently staffed during peak travel seasons. The MP is required to see that employees are trained through the use of training handbooks. The MP is responsible for providing corrective feedback and disciplinary action up to and including termination. The MP is responsible for scheduling employees. The MP determines tasks to be performed, and delegates the work. The AM is scheduled to work 50 to 55 hours a week and is required to assist the MP in the above-described tasks. The MP and AM are on call 24 hours a day, 7 days a week. Respondent has admitted, as alleged by the General Counsel, that MPs Oscar Pena, Valerie Trusty, Linda Powell, Samuel Velardo, and AM's Jenny Greer and Sharon Evans are or were at times relevant statutory supervisors and it agents within the meaning of the Act.[5]

A. The Supervisory Status of Shift Leader Maria Holmes[6]

Maria Holmes worked for Respondent from May 15, until her August 23 termination. Holmes previously worked for Host as a shift leader. Becherer hired Holmes as a shift leader at $10.50 an hour.[7] During the period of May 15 through June 2, Holmes assisted with Respondent's hiring process by remaining in an office and informing former Host employees where to find Respondent's job applications.[8] Holmes credibly testified she was never asked her opinion about any of the applicants.[9]

When Respondent took over the restaurant operations on June 2, Holmes began work at Sticky Buns on the main pier where Holmes was a shift leader with four team members. Holmes transferred to pier B at the end of June, beginning of July, where she worked at Mamma Ilardo's and Caribou Coffee as a shift leader until her August 23 termination. On pier B, Caribou Coffee and Mamma Ilardo's are adjacent operations, and at the time Holmes was there MP Sammy Velardo and AM Jennie Greer were in charge of both restaurants' day-to-day operations.[10] Velardo and Greer did not wear uniforms rather they wore dress clothes. Shift leaders Holmes and Vickie Burks' uniforms included a blue shirt, which was provided by Respondent. Holmes testified the Caribou Coffee and Mamma Ilardo's team members wore different uniforms than the shift leaders, as did the certified trainer. Holmes described the staff-

[4] Respondent admits that Brown, Olsen, and Becherer are, or were at times relevant, its statutory supervisors and agents. Respondent no longer employed Becherer at the time of the unfair labor practice trial.

[5] Respondent witness Vickie Burks testified Velardo left Respondent's employ in late September or early October and that Greer left around November.

[6] The parties stipulated, in order to limit the scope of the hearing and the General Counsel's subpoena, that only the supervisory status of shift leaders at pier B Caribou Coffee and Mama Ilardo's (store 50) was to be litigated during the course of this proceeding. Accordingly, I have not considered record evidence concerning the functions of shift leaders at Respondent's eight other restaurants in reaching the factual findings and conclusions of law herein.

[7] Respondent entered into evidence a document from Holmes' employment records R. Exh. 7 containing personal information relating to Holmes such as date of birth and emergency contact. Brown's testimony reveals that in the normal course of business Holmes or Becherer would have filled out the document. Holmes' position on the document is listed as "Supervisor" with a hire date of May 15. Based on a review of a document Holmes testified she signed, GC Exh. 10, as well as the nature of the information contained in R. Exh. 7, I have concluded that R. Exh. 7 is in Holmes' handwriting. Cf. *Parts Depot, Inc.,* 332 NLRB 670, 674 (2000); and *Traction Wholesale Center Co. v. NLRB,* 216 F.3d 92, 105 (D.C. Cir. 2000), enfg. 328 NLRB 1058, 1059 (1999).

[8] I do not credit Holmes' claim that she did not answer any of the applicants' questions or help them fill out their application. Considering her demeanor, I did not find Holmes to be quite as forthcoming as she might have been when it came to her job functions.

[9] Respondent stipulated that shift leaders did not hire or recommend hiring employees.

[10] There is also a Charley's Steakery on pier B in close proximity to Mamma Ilardo's and Caribou Coffee with all three restaurants using the same dining area. Charley's had two MPs at the time of Holmes' transfer and they were Oscar Pena and Valerie Trusty.

ing of the restaurants as four employees at Caribou in the front, and three employees at Mamma Ilardo's in the front. The employees in the front served as cashiers and made coffee. In the back of the restaurants, there was one employee making sticky buns and two employees making pizzas, and there were two employees in the dining area.

Holmes' work schedule at Mamma Ilardo's and Caribou Coffee was Sunday through Thursday. On Sunday and Tuesday beginning in August, Holmes worked the night shift and her hours were 2 to 11 p.m. or midnight. The only time Holmes was in charge of the shift was on Sunday and Tuesday nights after Velardo and Greer left, which was around 4 or 5 p.m. Holmes testified the only times she closed as shift leader were Sunday and Tuesday nights. Holmes testified about 10 employees worked days. Holmes testified that on Sunday and Tuesday nights she was the shift leader for six employees, two in the back making pizza, two at Caribou Coffee, and two others at Mamma Ilardo's. Holmes testified if someone called in sick she would perform their duties.

There is a small office at Caribou Coffee and Mamma Ilardo's containing two safes and a computer. Holmes knew the combination for one of the safes, which she used to provide change for Respondent's cashiers, but she only performed this function on Sunday and Tuesday nights. Holmes testified that at the end of the night on Sundays and Tuesdays, Holmes also counted the money in the cashiers' drawers and entered the amount into the computer. She then made out a deposit slip and took the money and deposited it in a safe at the main pier. When a cashier was short, Holmes told them and they replaced the funds out of their own pockets. Holmes testified Velardo, Greer, and Burks also performed these functions when Holmes was not in charge of the shift. Holmes testified she had one key to close the cashier drawers, and one key to lock the store using a gate that prevented people from entering the unit area. Holmes testified Velardo gave her the latter key when she started working nights in August.

Holmes testified she learned what her job duties as a shift leader were by reading Respondent's "Employee & Management Handbook." The handbook provides the shift leader "has overall responsibility in the absence of the Manager and Assistant Manager for directing the daily operations of a restaurant." It states the shift leader may not hire, fire, or discipline "except to require a team member to clock out if appropriate." The handbook states that the shift leader will arrange for a meeting with the manager, shift leader, and team member to resolve the dispute. The handbook states the shift leader, "ensures compliance with company standards in all areas of operations, including product preparation and delivery, customer relations, restaurant maintenance and repair, inventory, management and financial accountability on the shifts that they are in charge." The handbook states, the shift leader is responsible for verifying the cash counts of each register drawer for each cashier, prepares and makes deposits, receives and verifies product deliveries, ensures that product is rotated, dated, and properly stored, ensures that the unit is stocked with adequate inventory for the shifts, and participates in the training of team members using the appropriate training materials.

However, Holmes testified she did not perform all the functions set forth in the handbook. Holmes testified she did not receive and verify product deliveries, nor did she ensure that the product was rotated, dated, and properly stored, and she did not ensure that the unit was stocked with adequate inventory for the shift. Holmes testified Respondent hired another employee who performed these functions. Holmes also testified she did not participate in the training of team members. Holmes testified she received no customer complaints while she worked for Respondent. Holmes also testified she never instructed a team member to clock out because of a disciplinary problem. Holmes testified that no disciplinary matter ever occurred while she was in charge of the shift. Holmes testified she never recommended that an employee be disciplined to Velardo or Greer. Holmes testified it was her understanding that Velardo and Greer were responsible for issuing written and verbal warnings to employees.

Holmes testified that on August 8, Holmes placed a call to Velardo when Holmes was the shift leader on the night shift. A cashier was $10 short in her drawer. Velardo told Holmes to write the employee up, if the employee did not have the money to replace the missing funds. Holmes testified Velardo had also posted instructions at the restaurant in a couple of places stating that if anyone's drawer comes up short, they have to take the money out of their pocket. In this instance, the employee did not have sufficient funds to make up the shortage. However, Holmes loaned the money to the employee, and Holmes did not write her up. Holmes wrote a note to Greer stating Holmes replaced the money for the employee. Holmes testified the employee paid Holmes back the next day. Holmes testified no one changed Holmes's decision and the employee was not written up. Holmes testified money was always short, but this was the only time she called Velardo about it.

Holmes worked an 8-hour shift. She testified she spent about 15 to 30 minutes of the shift making coffee, and about 3 hours and 30 minutes during the shift relieving cashiers while they were on breaks. There were three cash registers staffed by three employees. Holmes testified that she had a 30-minute break, and that for the remaining 3 hours and 30 minutes, "I would just—just make sure everything in the store and everyone was still doing their job and everything." Holmes testified that she also made sticky buns, and pizza for people who were on breaks, or on an as needed basis. Holmes testified that when she worked on Sunday and Tuesday night, she mopped up and swept the floor.

Holmes testified she never told employees what work had to be done because Velardo made up a chart with their names and assignments that was posted on a wall and on the freezer. Holmes testified Velardo posted another schedule showing the days and hours each employee was supposed to work. Holmes testified no employees ever contacted her concerning their schedule, no one ever asked her for time off, she did not authorize anyone to go home early, and she could not authorize overtime.

Holmes was given a red badge by Host, which she retained while working for Respondent. The red badge gave her access to the airfield, and allowed her to unlock certain doors at the terminal. She testified she used the badge, while working for

Respondent, to walk on the airfield to get to the pier while avoiding security. Holmes testified she did not use the badge to obtain inventory for the restaurant, although that was what others who worked for Respondent used it for. Holmes testified that on Sunday and Tuesday nights, when Holmes was in charge of the shift, another employee went to get supplies. Holmes testified Velardo had assigned a French-speaking employee to perform this function. The employee had the red badge needed to enter the inventory area. Holmes testified it was not her job to ensure the store was adequately stocked with inventory because the team member would go down and get it. However, Holmes later admitted it was her responsibility to see that the stores were stocked when she had to close on Sunday and Tuesday nights.

1. Respondent's witnesses

Vickie Burks began working for Respondent on June 3, as a shift leader. Burks transferred to pier B, Caribou Coffee, and Mamma Ilardo's along with Holmes as a shift leader. Burks was promoted to AM around the end of September or October.

Burks testified to the following concerning her work at pier B, Caribou Coffee, and Mamma Ilardo's: A shift leader in charge on the morning shift was responsible for opening the restaurant. The shift leader was due in at 4 a.m. and the restaurant opened at 5 a.m. The shift leader was responsible for preparing the coffee, bringing out the milk products, getting breakfast sandwiches ready for Mamma Ilardo's, counting the safe, and preparing the cash drawers for the cashiers who ran three registers. A shift leader on the closing shift made sure the store was clean, the trash was taken out, products were stocked for the morning shift, reconciling the safe, and making the deposit for the restaurants. When Burks was the shift leader in charge of a shift she took money out of the cashiers' drawers during the course of the shift and dropped it in the safe. At the end of the shift, Burks counted the safe down to $2500 and ran a report off the register. Burks took the excess money and made a deposit for the shift. During the time between opening and closing, when Burks was a shift leader in charge of a shift, her responsibilities were to assign each cashier a drawer, give them change, and make sure they had the products they needed. Burks had keys to the facility and she locked up and opened up. Burks knew the combination to the safe. Burks, as part of her uniform, wore a badge stating her name, and identifying her as shift leader. Burks credibly testified she saw Holmes wearing a similar badge.[11]

The team members on Burks' shift included: the barista who works behind the counter making drinks for Caribou Coffee; cashier and the pizza cutter at Mamma Ilardo's; pizza makers; and dining room employees who wipe the customers' tables, sweep the floor, and pull the trash. All of the team members were required to clean their areas. Burks testified, whoever is running the shift, whether it was the MP, AM, or shift leader, it was their responsibility to make sure the cleaning was completed. Burks testified she ran a shift by herself around 60 percent of the time.

[11] I have credited Burks' over Holmes' claim that Holmes did not wear her nametag.

Burks testified she and Holmes worked together a couple of times during a shift overlap. Burks testified Burks relieved Holmes. Burks testified Holmes made sure Burks had product coming in and Holmes had the team members restock to make sure Burks' materials were there. Holmes reconciled the safe and made her deposit from her shift, filled out the log, and let Burks know if anything happened during the day. Holmes let Burks know if they were out of something, then Holmes would go make her drop into the safe. Burks testified Holmes had the same responsibilities as Burks as a shift leader.

Burks testified she did not do any of the stocking, but she instructed the employee with that assignment to make sure the stores were stocked with supplies. The employee had a red badge to allow him access to the supply area. Burks testified there were three employees who retrieved supplies. The dining room employee does the restocking of the store along with the team members who are working behind the counter. The dining room employee retrieves the product, and the counter employees put it away. The counter employees told Burks when they needed supplies and she informed the dining room person the amount to retrieve. Burks testified she made sure the shelf was stocked for the next shift. Burks testified if the supply person was not there then the shift leader gets the supplies. Burks was not aware of counter employees going directly to the dining room employees to tell them they needed supplies. Burks testified when the restaurant was busy, she would also ask the dining room employee to make pizzas.

Burks testified the shift leaders and the certified trainer trained employees in making coffee. She testified the shift leaders were certified trainers, and they trained employees when the certified trainer was not there. Burks trained new cashiers. Burks testified she also trained employees to make pizza based on posted guidelines. Burks testified shift leaders did not handle paycheck complaints. Rather, they make copies of disputed checks and leave them with the MP. Employees requesting time off filled out a form and presented it to the MP. Burks testified that, as shift leader, she handled around two customer complaints during the June to August timeframe.

Burks testified that Velardo, during a supervisor's meeting in August, attended by Greer, Burks, and Holmes gave specific instructions on how to run the store. Velardo said he had received some complaints from Southwest Airlines about conduct at the store in the evening. Velardo said if the attendees at the meeting could not conduct their shifts eliminating the foolishness he would let them go. Velardo gave them forms and instructed them to write employees up, if necessary, and leave the papers for Velardo or Greer and he would sign them. Velardo said they could also call him, and he would send an employee home. Burks testified she had to call Velardo before sending someone home. Burks testified she attended another management meeting, while Burks was a shift leader. Greer conducted the meeting, as Velardo was not in the store that day. Burks testified Holmes also attended the meeting. Greer reviewed the same information Velardo had discussed 2 weeks earlier. Greer said she wanted writeups as she wanted employees to do what they were supposed to do. Burks testified Greer used a different writeup form than the one suggested by Velardo. Burks

testified one of the meetings was the middle of July and one was August.[12]

Burks testified that, as shift leader, she wrote up between one and five employees. Burks later testified she wrote warnings for at least four employees as a shift leader before she was promoted to AM. She testified she wrote employees up for no-call/no-show, one employee for arguing with a customer, and two employees were written up for being late. Burks took the forms out of a file hanging on the wall that said writeups. Burks filled the form out in its entirety and gave it to Velardo for his signature. Shift leaders were not allowed to sign the form. Burks did not know whether Velardo signed the write-ups, and she did not know whether they were given to employees. Burks testified when Velardo left Respondent's employ, he took boxes of materials with him, and Burks thought her writeups were in those boxes. Respondent was unable to produce the Burks' shift leader writeups at the hearing. As AM, Burks has signed writeups and given a copy to employees.

Nishalet Short began working at pier B Caribou Coffee and Mamma Ilardo's while Holmes was a shift leader there. Short is a cashier at Mama Ilardo's and Short helps make the drinks at Caribou Coffee. On occasion, Holmes served as Short's shift leader in July and August. Holmes told Short to keep the store clean, and she was responsible for giving Short the cash drawer and getting cash for Short. Short worked the 3 to 11 p.m. shift, so at the end of the shift, Holmes counted Short's drawer and made the deposit. Holmes told Short to clean the floor, when the floor was dirty. If it was Holmes' shift, she would check Short's work. Short testified, in response to a leading question, that when Holmes was the shift leader on Short's shift, Holmes was Short's supervisor.

2. Analysis

The burden of proving that an individual is a statutory supervisor rests with the party asserting it. See *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 710 (2001). Section 2(11) of the Act defines "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *NLRB v. Kentucky River Community Care*, supra at 713, the Court stated Section 2(11) of the Act:

> . . . sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer." *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 574 [(1994)].

I find that the record evidence does not establish that Holmes is a supervisor within the meaning of Section 2(11) of the Act. Respondent contends Holmes is a statutory supervisor because she responsibly directs employees, assigns them, and effectively recommends discipline. However, the evidence reveals that Holmes' decisionmaking was routine and repetitive and did not require the use of independent judgment.

Holmes and Burks' testimony reveals Velardo made up the team members' assignments and work schedules. The employees' assignments included barista, cashier, making pizza, making sticky buns, dining room, retrieving supplies, and stocking. Each employee was required to clean a specific area based on the assignment Velardo had given them. The work was repetitive in nature. Holmes assigning a cashier a drawer, instructing an employee when to clean, and checking their work did not involve the requisite independent judgment involved in assessing job skills and matching the employees with their assignments typically required to establish someone is a statutory supervisor. See *Palagonia Bakery Co.,* 339 NLRB 515, 535 (2003); and *Bozeman Deaconess Foundation,* 322 NLRB 1107 (1997).

Respondent also failed to establish that Holmes exercised independent judgment in disciplining or effectively recommending discipline to employees. Burks credibly testified that she attended two meetings, along with Holmes, where they were instructed to write up employees. Burks testified she wrote up between one and five employees when she was a shift leader. However, Burks testified she was not authorized to sign the writeups. Rather, she was required to tender the write-ups to Velardo for his signature. Burks did not know whether Velardo ever gave the writeups to the employees. Moreover, the write-ups never made it to the employees' personnel files, as Respondent could not produce them at the hearing, asserting Velardo had taken them with him when he left Respondent's employ. Burks also testified she had to obtain Velardo's approval before she could send an employee home, and Respondent's employee handbook provided that after they were sent home for disciplinary reasons they would then meet with the MP and the shift leader. Thus, Respondent failed to establish through Burks' testimony that the shift leaders issued discipline or could effectively recommend disciplinary action. Holmes testified to one incident where she phoned Velardo because a cashier was short some money in her drawer, and Velardo had posted the requirement that the employee pay the money out of their own pocket or be written up. The employee in question did not have the funds, and Velardo instructed Holmes to write her up. Rather than write the employee up, Holmes loaned her the money. I find Holmes' action here to be isolated and akin to a loan between coworkers, which brought the offending employee in compliance with Respondent's work rule. I do not find this to be a situation in which Holmes exercised independent judgment as to whether to discipline the employee.

[12] Holmes testified she did not attend shift-leader meetings stating there were none. However, I have credited Burks over Holmes on this point, and have concluded that she and Holmes attended the two meetings as Burks described above. Burks' testimony concerning the meetings was specific and made in a credible manner. While, as set forth above, I did not find Holmes as candid about her job duties as she might have been.

I also do not find Respondent established Holmes used independent judgment to responsibly direct employees. Velardo gave the employees their assignments, as well as their working hours. Holmes was in charge of two late-night shifts with six employees per shift. The employees' work was repetitive and routine. Respondent had published procedures for making certain foods, and Holmes merely ensured the work was performed, and the area was kept clean. Holmes counted the cashiers drawers, and required them to pay for shortages under Respondent's published procedure. This task involved simple addition and did not involve the exercise of independent judgment. Velardo and Greer were on call 24 hours a day, and Holmes could not send an employee home without Velardo's approval. Holmes could not approve overtime, or leave requests.[13]

Holmes' attendance at two low-level management meetings, her slightly higher pay than team members, the use of the office safe and certain keys, and her referral to herself in one of the Respondent's documents and in reference to her prehearing affidavit as a supervisor constitutes secondary indicia, which standing alone are not sufficient to meet the burden of establishing she was a statutory supervisor in the absence of evidence that she possessed any of the enumerated categories of authority in Section 2(11) of the Act. See *Palagonia Bakery Co.,* supra at 535; *Hausner Hard-Chrome of KY, Inc.,* 326 NLRB 426, 427 (1998); and *J. C. Brock Corp.,* 314 NLRB 157, 159 (1994). Accordingly, I find that Respondent has failed to establish Holmes was a supervisor within the meaning of Section 2(11) of the Act.[14]

[13] See *Ironworkers Local 28,* 219 NLRB 957, 961 (1975), where a group of working foremen and a general foreman were found not to be statutory supervisors when they acted "within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor." Their authority was found to be routine not requiring the use of independent judgment. See also *Electrical Workers Local 3 (Cablevision),* 312 NLRB 487, 488–489 (1993) (Monopoli); *George C. Foss Co.,* 270 NLRB 232, 234–235 (1984) (Merrow), enfd. 752 F.2d 1407 (9th Cir. 1985); and *Ogden Allied Maintenance Corp.,* 306 NLRB 545, 546 (1992) (Michot), enfd. 998 F.2d 1004 (3d Cir. 1993).

[14] Cases cited by Respondent do not require a different result. In *NLRB v. Chicago Metallic Corp.,* 794 F.2d 527, 534–535 (9th Cir. 1986), an assistant lead man was found to be a supervisor for purposes of an employer's objections to an election because the employees believed he was a supervisor. However, the court, in an unfair labor practice context stated:

> Here, unlike the electioneering analysis, we look to Picazzo's actual duties. When considering Chicago Metallic's treatment of Picazzo, the perceptions of other employees are irrelevant. As we have noted, substantial evidence supports the Board's conclusion that Picazzo does not meet the statutory criteria of 29 U.S.C. Sec. 152(11) for supervisor status. Thus, we hold that he is not a supervisor for purposes of the Union's Section 8(a)(1) claim.

The court concluded that, since Picazzo was not a statutory supervisor, the respondent employer violated Sec. 8(a)(1) of the Act by its conduct directed towards him during a union campaign. In *American Commercial Barge Line Co.,* 337 NLRB 1070 (2002), tugboat pilots were found to be supervisors because they made "navigation decisions based on their evaluation of nonroutine factors," and did not check with others before ordering action to be taken. Unlike the pilot, I have concluded Holmes responsibilities concerning her shift were routine and repetitive, and the MP and AM were on call 24 hours a day for consultation concerning any unusual events. The shift leaders in *Liquid Transporters, Inc.,* 250 NLRB 1421, 1425 (1980), were found to be supervisors because they had the authority to transfer employees from one job to another, to send employees home early, to call employees in for overtime to replace employees who were absent, and to make recommendations about employees' work performance that were given weight. Respondent has failed to establish that Holmes regularly engaged in any similar activities. In particular, despite what was written in Respondent's handbook concerning shift leaders, Burks testified that they had to consult with Velardo before they could send an employee home.

B. Union Activity and Respondent's Alleged 8(a)(1) Conduct

David Snyder is employed as an organizer with the Union. Snyder started working to organize Host employees around July 2001, and the Union won an election in 2003, and began to negotiate. Snyder testified they were in the process of finalizing a collective-bargaining agreement with Host when Host lost the BWI concession contract. Snyder testified the Union became involved in an effort to ensure the former Host employees would keep their jobs with the new companies at BWI. Snyder met Brown and Becherer when Respondent had its job fair prior to Respondent's starting operations at BWI.

Snyder credibly testified to the following: The Union began talking to employees in an effort to organize Respondent around June 3 or 4. Snyder first met Maria Holmes around 2003, when she worked for Host. Holmes was involved with the Union then, and she was briefly on the leadership committee while she worked for Host. Holmes contacted Snyder and told him Respondent had hired her. Holmes had a lot of friends at BWI as she had worked on different piers. The Union's organizing activities at Respondent consisted of meetings with employees, handing out union buttons, holding a rally, and visiting people at home. The Union began handing out union buttons around early to mid-June 2004. They handed out about 50 to 60 buttons to Respondent's employees. Some of the workers wore the buttons and had them from when they were Host employees.

Holmes credibly testified she called Snyder and talked to him about getting a union at Respondent around June. Holmes also talked to employees about getting a union at Respondent. She testified there were around 20 conversations. Some were on the phone, and some were in person. Holmes credibly testified Greer was present for some of the conversations Holmes had with employees about the Union, and that during one of the conversations; Greer agreed with Holmes that the employees needed a union. Holmes testified Greer heard her tell employees they needed a union because they were being treated unfairly in terms of benefits and pay, and because their hours were being cut.[15]

[15] I do not credit Holmes' testimony at the hearing that in the beginning of June, she spoke to Brown about the Union. Holmes testified she and several female employees walked up to Brown, and asked him about forming a union and asked Brown why they did not have a union. Holmes testified she asked first about having the Union, and then the rest of them asked. Holmes testified Brown said Respondent only had a contract for 1 year. Brown said what was the use of having a Union; the employees would have to pay dues. Brown said if the employees

1. The June 16 incident

Donnell Gould worked for Respondent from June 3, to the beginning of October 2004, when he ended his employment there. Gould worked at Charley's Steakery at pier B. Gould was a snackbar attendant, and his duties included cashier, food preparation, and cleaning. Gould testified Valerie Trusty and Oscar Pena were MPs at Charley's.

Gould credibly testified to the following: On June 16, Gould was working at the grill. Trusty came in and stated in a loud voice, that she did not want any of her employees talking to anyone from the Union. Gould responded she could not tell him who to talk to. Trusty said if Gould was on her clock and in her unit, he could not. Gould said what if he was on break, and not on Trusty's clock. Trusty told Gould it was all right to speak to people from the Union on his own time and outside the unit. Trusty said she did not want employees to talk to anyone from the Union in the food court area known as the unit because the employees might come back from break late. There were about six other employees in the area, when Trusty made her comment about the Union, and Trusty was talking to the entire group. The unit is a public dining area where the customers and employees eat the food purchased at the restaurants. There are three restaurants that share the dining area, which contains about 20 or more tables. Gould normally took his 30-minute break in the unit where he ate, talked on his phone, and talked to other employees.

Gould credibly testified he wore a union button to work around his neck for a couple of weeks then he lost it. Gould could not recall when he wore the button. He testified that no manager or supervisor of Respondent said anything to him about the button.

a. Respondent's witness

Respondent has employed Cardelle Valerie Trusty since June 3, 2004. Trusty was promoted from an AM to a MP at Charley's Steakery, pier B, 2 weeks after she was hired. Trusty testified that around June 16, there was an incident when a union representative was at the line at the cash register at Caribou Coffee and was speaking with a cashier about the Union.[16] Trusty testified she asked the union representative not to speak with Caribou and Charley's employees on Respondent's time.

Trusty testified the same day the union representative also spoke to the same Caribou employee, but this time the Caribou employee was sitting with the union representative at one of the tables in the unit. The Caribou employee was eating. Trusty testified she approached the employee because the employee looked as if she was being talked to against her will. Trusty testified she went to the table and asked the employee, "are you sure you're okay, and she said, yeah, I'm just fine. I'm eating. I'm on my break." Trusty testified the union representative said the lady said she was on break, and that, "I can talk to her as long as she's on her break." Trusty responded she did not "mind you speaking to her as long as she's not on A2K's time." The union representative told Trusty she could not tell her who to talk to. Trusty replied as long as they are not on the clock at Respondent, then Trusty walked away. Trusty testified when the conversation between the employee and union representative was over, she thought the employee went to the restroom, then punched back in, and the union representative went in the opposite direction off the pier.

Trusty testified she then went in the back and instructed everyone in the unit, including Gould, that they could only talk to the union representatives off Respondent's time. Trusty testified she gave this instruction because Gould was wearing a union button. Trusty testified she did not say anything to Gould about wearing the union button because it was the only time she saw him wear it and it was at the end of their shift.[17]

Trusty testified there was a sign posted in the unit, which reads, "NOTICE TO THE PUBLIC Outside Solicitation, Selling and Distribution of Printed Material or Other Items is Not Permitted on this Property." Trusty testified this rule applied to the unit and the sign was already posted when she began working for Respondent. She testified she did not know if Respondent, or a prior company that occupied that space posted the notice. Trusty testified it was her understanding that it was against the law for union representatives to talk to employees in the unit who were on company time.[18]

Trusty testified Respondent held a meeting where she received the instruction that the employees could talk to the Union off of Respondent's time. Trusty testified that this information was given to her during one of Respondent's Tuesday MP's meetings, which Trusty thought took place before the incident with the union representative in the unit. She testified this was the first meeting where this was brought up.

b. Positions of the Parties

The consolidated complaint alleges that:

> 5. On or about June 16, 2004, Respondent, by a manager named Valerie, at its BWI Airport, Maryland location, told

had problems they should come to him, and that they do not need a union. Brown said we will see about getting a union when we renew our contract. Holmes appears to describe this same conversation at p. 4 of her August 31 affidavit. However, contrary to her testimony at the hearing, she stated in the affidavit, "I was standing there listening but did not say anything and nobody spoke to me."

[16] Trusty testified she did not remember what date the union representative spoke to the employee on the line at Caribou Coffee, nor could she recall the name of the employee the union representative was talking to.

[17] I do not credit Trusty's testimony that this was the only time she saw Gould wearing a union button, as he credibly testified that he wore it to work for a 2-week period. Moreover, Trusty testified she did not receive any instructions that employees could not wear union buttons until an MP's meeting that took place after she saw Gould wearing the union button, so Trusty would have had no reason to say anything to Gould about it on June 16. Trusty testified there was no mention of any policy about wearing union buttons when Trusty first began working for Respondent.

[18] I have credited Gould over Trusty concerning his version of their conversation on June 16. I find that Trusty told Gould and the employees that she did not want union representatives talking to employees in the unit, although Trusty omitted this portion of the conversation from her testimony. I found Gould to be a reliable witness who testified with specificity as to his conversation with Trusty. Trusty also admitted that it was her understanding that employees could not talk to union representatives in the unit as set forth above.

> employees they were not to talk to representatives of the Union during non-work time and in non-work areas.

Counsel for the General Counsel amended the complaint just prior to the close of the hearing to allege that on or about June 16, Trusty, created the impression of surveillance and engaged in surveillance of its employees' union activity during nonworktime in a nonwork area and interrogated employees while they were speaking with representatives of the Union during nonworktime in a nonwork area.[19]

Respondent argues Trusty merely told employees not to speak to union representatives on company time, and that it was acceptable to speak to them on their own time, and Trusty did so after attending a management meeting, where Trusty was given these instructions. It is asserted Trusty's conduct was lawful. It is argued that Trusty did not engage in surveillance of the employee, who was speaking with a union representative in the unit. From Trusty's observation, which lasted only a few seconds, the employee looked as though she did not want to speak to the union official. Trusty just approached the employee to ensure that she was all right.

c. Analysis

In *Wild Oats Community Markets,* 336 NLRB 179, 180 (2001), the Board set forth the following principles:

> It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. This precedent, however, presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. In determining the character of an employer's property interest, the Board examines relevant record evidence—including the language of a lease or other pertinent agreement—in conjunction with the law of the state in which the property is located. See *Indio Grocery Outlet,* 323 NLRB 1138, 1141–1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Food For Less,* supra at 649–650; *Bristol Farms, Inc.,* 311 NLRB 437, 438–439 (1993).

In *Traction Wholesale Center Co.,* 328 NLRB 1058, 1069 (1999), enfd. 216 F.3d 92 (D.C. Cir. 2000), the following principles were set forth concerning interrogation of employees:

> Regarding the questioning of employees, the Board has held that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In making that determination, the Board considers such factors as the "background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation" as relevant, as well as whether or not the employee being questioned is an open and active union supporter. *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985); also, *Eaton Technologies,* 322 NLRB 848, 850 (1997), *Tony Silva Painting Co.,* 322 NLRB 989 (1997).

In the instant case, Respondent did not maintain any no-solicitation or no-distribution rule in the handbook it tendered to employees at the outset of their employment. While Respondent introduced as an exhibit a copy of a posting stating, "NOTICE TO THE PUBLIC Outside Solicitation, Selling and Distribution of Printed Material or Other Items is Not Permitted on this Property," Trusty testified that she did not know whether this notice was posted by Respondent or a predecessor company operating the restaurant. While Brown testified, he made no claim that Respondent posted the notice. Moreover, Respondent was on BWI property as a contractor, and Respondent presented no evidence it has a sufficient property interest in the unit area which is open to the general public to enforce a no-solicitation/no-distribution rule there, even assuming Respondent had a rule in effect prior to the June 16 incident. Finally, Trusty testified that during an MP's meeting an announcement was made that employees could talk to the Union off of Respondent's time. Trusty failed to testify that she was told that the employee discussions with the Union could not take place in the unit area.

I have concluded Respondent has failed to establish that it had a sufficient property interest to prohibit employees, who were on break, from talking to union officials in the unit area which was a restaurant open to the general public; or that it had a valid no-solicitation rule in effect prohibiting employees from talking to union officials while the employees were on break in the unit area at the time Trusty spoke to Gould and his coworkers.[20] I therefore find based on Gould's credited testimony that Trusty violated Section 8(a)(1) of the Act when she told employees that they could not talk to union representatives

[19] Respondent objected to the amendment of the complaint, which took place after Respondent rested. I granted the motion to amend the complaint at the hearing, while giving the parties the opportunity to brief my ruling. I adhere to my ruling to allow the amendment. The evidence supporting the amendment's allegations was drawn from Trusty, who was Respondent's witness, without objection from Respondent's counsel. The evidence was closely related to outstanding complaint allegations. Respondent had the opportunity to further examine Trusty concerning her testimony relating to these issues, and in fact took that opportunity. I find the amended allegations were fully litigated and Respondent has suffered no prejudice as a result of the amendment to the complaint. See *Pincus Elevator & Electric Co.,* 308 NLRB 684, 684–685 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993).

[20] See *Wild Oats Community Markets*, supra at 180.

while the employees were on break, unless the employees left the unit.

I also find Trusty engaged in surveillance, created the impression of surveillance and unlawfully interrogated an employee in violation of Section 8(a)(1) of the Act, when Trusty approached the employee who was on break and sitting and eating in the unit while talking to a union representative. Trusty interrupted the conversation and asked the employee, "[A]re you sure you're okay?" I do not credit Trusty's testimony that she approached the employee out of a concern for the employee's well being, as during this same day she told Gould that she did not want employees talking to union representatives while they were on break, but in the unit. While the Board has held that observation alone of open union activity does not violate the Act,[21] here Trusty approached the employee and union official and interrupted the conversation in such a manner to evoke a hostile response from the union representative.[22] Trusty's actions were coercive, and designed to impede the union activity of the employee she questioned and to send a clear signal to that employee that she was being watched.[23] Thereafter, although Trusty walked away, she continued to watch the conversation until it ended.

2. The August 20 rally and related events

Snyder credibly testified the Maryland Aviation Authority (MAA) gave the Union permission to hold an August 20 rally at BWI on the upper level outside of the main terminal, a location that skirts all the gate entrances to the four piers. Snyder testified the purpose of the rally was to show Respondent, the BAA, and the Port Authority, the workers still believed they had a union, and they wanted to continue to have a union to resolve their problems at the airport. The MAA had also given the Union permission to have three people inside the terminal handing out leaflets on August 20. Brown testified someone from BAA informed Brown the Union had been authorized to hold the rally around 2 to 3 weeks before it took place, that it was to be in front of the airport, and they would be allowed to hand out leaflets inside the main terminal. The BAA representative told Brown to make sure Respondent was properly staffed in the event large numbers of employees left the restaurants to participate in the rally and it was Respondent's obligation to stay open no matter what took place.

a. The August 18 conversations

Holmes credibly testified that: on August 18, Holmes was approached by Pena and Trusty, the MPs at Charley's on pier B, and Greer, the AM at Caribou Coffee and Mama Ilardo's at pier B. Holmes was eating her lunch in the office at Caribou Coffee and Mama Ilardo's when they approached her. Trusty spoke first to Holmes concerning the union rally scheduled for August 20. Trusty asked if Holmes knew anything about a paper employees were signing to attend the rally. Holmes responded she did not know anything about it. Trusty said if they find the paper the employees were going to be fired. Trusty said she wanted the list. Trusty said Holmes knew about it, and Holmes again denied knowledge of it. Greer said Holmes knew everything about it and that everyone knew Holmes knew about it, "because you were part of it." Greer told Holmes if Greer found out Holmes had the list, Greer was going to fire her. Holmes told Greer she did not know anything about the list. Holmes told Greer the employees had a right to attend the rally on their break or when it is time for them to go home. Pena told Holmes someone said you are a part of it. Holmes said what if she was. Pena said Holmes was not supposed to be a part of it as she was part of management. Holmes said she was not part of management as she was a shift leader. Holmes told Pena that a shift leader is an assistant, and that there was a manager and an assistant manager. Pena then left and the conversation ended. The conversation was very loud, and the employees who worked out front at Caribou Coffee could hear, as they were about 5 feet away. Holmes named employees Tiffany Simmons, Judith, and Jessica King, who were all close enough to hear. Holmes testified this all occurred in one conversation.[24]

Holmes testified that on August 18, Velardo also asked Holmes if she knew anything about a rally on August 20. This took place after the conversation set forth above. Holmes said yes, and Velardo asked what she knew about the rally. Velardo started smiling. Holmes said are you trying to say people cannot go out on the rally during their break. Velardo said he did not say anything. Holmes testified that later that day Velardo again asked her if she knew anything about the rally, and who was going to attend. Holmes told Velardo that she knew about the rally, but did not know who was going to attend.

Gould testified around mid-August Trusty asked Gould if he was joining the picket line. Gould asked why she was asking, and Trusty responded she was just asking. Gould testified they were in the office near the computer table at the time of the conversation. Gould testified he did not attend the August 20 rally.

[21] See *Days Inn Management Co.,* 306 NLRB 92 fn. 3 (1992).

[22] See *Hoschton Garment Co.,* 279 NLRB 565, 566 (1986).

[23] Here Trusty knew the employee was engaged in union activity before she questioned the employee. Trusty also informed other employees that she did not want them talking to union representatives in the unit as a result of this employee's encounter with the union official. I have concluded that Trusty's asking the employee if she was "okay" was designed to evoke a response about her union activities, and was coercive as it sent a signal to the employee that her union activities were being watched. The Board has held subtle interrogations designed to evoke a response concerning employees' union activities are violative of Sec. 8(a)(1) of the Act. See *Big Star No. 185,* 258 NLRB 300, 307 (1981), enfd. 697 F.2d 157 (6th Cir. 1983), and *Schwan's Sales Enterprises,* 257 NLRB 1244, 1248 (1981), enfd. 687 F.2d 163 (6th Cir. 1982).

[24] Holmes stated in her prehearing affidavit, that "[a]t no time prior to 8/23 did any supervisor make any comment to me about my having said I was in favor of having a union." Holmes testified, in explanation of the affidavit, that Trusty was not a supervisor, rather she was an assistant manager. Holmes testified that "[m]e and Vickie would be supervisors," in reference to Vickie Burks and Holmes being shift leaders.

1. Respondent's witnesses[25]

Trusty denied that on or about August 18, she had a conversation with Holmes or any other employees about the Union. However, Trusty testified a lot of the employees were saying that Holmes went into Charley's computer system and gave the employees' phone numbers from the system to one of the union representatives. Trusty then testified she did talk to one employee about the Union on August 18, as one employee asked what they should do, and Trusty said she had no comment. Trusty testified, "[E]verybody was so upset about the situation with Maria giving the phone numbers to the gentleman, especially the one lady named Tara Jones, ..." Trusty testified, "They even called my home also." Trusty testified she did not see Holmes go into Charley's system, rather, Nicole Winchester, a shift leader, told Trusty that Holmes went into Charley's computer and obtained the phone numbers for all of Charley's employees. Trusty testified she received this information before the August 20 rally. Trusty testified she reported to Brown and "everyone," possibly sometime shortly before the August 20 rally what was reported to Trusty about Holmes acquiring the employees' phone numbers. Trusty testified that Burks, a shift leader at Caribou and Mama Ilardo's, told Trusty that the other employees of her unit told Burks that Holmes was telling everyone she was going to the rally, she was not coming to work, and her daughter was going and following right behind her. Trusty testified the conversation with Burks was around August 18. Trusty testified she let Brown know exactly what she had heard because a lot of employees were complaining that people from the Union were calling them. Trusty testified she advised Brown of Holmes giving out employees' phone numbers.[26]

Trusty also testified upon hearing all the complaints about Holmes giving out employees' phone numbers, under Burks' advice, Trusty brought the matter to Becherer's attention. Trusty told Becherer that everyone was complaining about union representatives calling their homes and they said Holmes had given the Union their numbers, which Holmes had obtained from Respondent's computer. Trusty placed this conversation between a week to 2 weeks before the Union's rally. Becherer told Trusty he would get back to her about it.

[25] Brown testified that Respondent officials Velardo, Pena, and Greer were no longer employed by Respondent at the time of the hearing. None of these individuals testified.

[26] Contrary to Trusty, Brown incredibly testified that prior to Holmes' August 23 termination, he had no specific conversation regarding Holmes. Brown then testified that "[t]he only conversation that I had with regards to Maria where she would have come up as a name was just in general prior to the time that the rally had occurred in August." Brown testified, "[W]e sought advice of counsel as to who would be allowed to go out and march, ..." Brown testified Respondent sought counsel's advice as to what they could do to staff stores, and Holmes, being a shift leader, her name came up in the conversation. Brown testified, "[T]hat was the only other time that I recall where her name might have been referenced in my presence." Brown testified his question to counsel was whether shift leaders or management personnel could participate in the rally or whether they had an obligation to stay in the stores and manage the stores.

2. Credibility

I have considered Holmes' testimony at the hearing stating that several managers spoke to her about the Union's rally and that contained in her prehearing affidavit, wherein she stated that at no time prior to her discharge did any supervisor make any comment to her about her having said she was in favor of having a union, as well as Holmes' explanation for the statement in her affidavit as set forth above. Considering Holmes' demeanor at the hearing, her explanation of the affidavit, and the specificity of her testimony concerning the above-described conversations with management, I have concluded that Holmes' testimony at the hearing concerning these conversations was worthy of belief. I have reached this conclusion considering admissions made during the course of Trusty's testimony. For Holmes testified that Trusty as well as other managers accused her of knowing about a list of employees who were going to attend the rally, and Trusty testified she was informed that Holmes went into Respondent's computer and compiled the names and phone numbers of Respondent's employees which Holmes tendered to the Union. I find it more than mere coincidence, given Trusty's testimony, that Holmes testified Respondent's management staff confronted Holmes about having a list of employee names. I also have concluded that Trusty was aware Holmes was a union supporter prior to the rally, and that Trusty had no compunction about confronting Holmes about her prounion sympathies as Trusty had done with other employees, and in fact did so with Holmes as Holmes testified. I also found Gould to be a credible witness, and have credited his testimony, over Trusty's denial, that Trusty questioned Gould as to whether he was going to attend the Union's rally. Accordingly, I have credited Holmes and Gould's testimony as set forth above.

3. Analysis

I find that on August 18, Trusty violated Section 8(a)(1) of the Act by unlawfully interrogating Holmes, creating the impression of surveillance of employees' union activities, and threatening employees with discharge when Trusty, along with Pena, and Greer approached Holmes, and Trusty asked Holmes if she knew anything about a paper employees were signing to attend the August 20 union rally. Holmes denied knowing anything about it. Trusty said if they find the paper the employees were going to be fired. Trusty said she wanted the list. Trusty said Holmes knew about it, and Holmes again denied knowledge of it. I find that Greer interrogated Holmes and created the impression of surveillance of employees' union activities and threatened employees with discharge in violation of Section 8(a)(1) of the Act when she accused Holmes of knowing everything about the list because Holmes was part of it, and that if Greer found the list, she was going to fire Holmes. I also find that Pena created the impression that Holmes' union activities were under surveillance in violation of Section 8(a)(1) of the Act when, during the course of this same conversation, he told Holmes that someone said she was a part of it. Holmes credibly testified the conversation was within earshot of other employees. I find the supervisor's questioning of Holmes about a list of employees who are going to attend the rally was plainly coercive when taking place in the midst of threats to

discharge employees on the list, and to discharge Holmes in particular if the list was found.

I find that Velardo coercively interrogated Holmes about her union activities and the union activities of other employees in violation of Section 8(a)(1) of the Act when on August 18, Velardo also asked Holmes if she knew anything about a rally on August 20, asked her what she knew about the rally, and who was going to attend. Holmes had not announced her attendance at the rally to management, and I find this conversation coercive coming on the heels of Trusty's and Greer's threats to discharge employees who were on a list to attend the rally.

I also find that Trusty coercively interrogated Gould in violation of Section 8(a)(1) of the Act. Gould credibly testified around mid-August, Trusty asked Gould if he was joining the picket line. Gould asked why she was asking, and Trusty responded she was just asking. Gould testified he did not attend the August 20 rally. Gould testified that he wore a union button for about a 2-week period and then lost the button, and Trusty testified she saw Gould wearing the button during an incident, which Gould placed on June 16. Thus, there is no evidence that Gould was an open union supporter at the time of Trusty's questioning him in mid-August. While Respondent argues in its brief that Trusty was questioning Gould for reasons of staffing concerns, this was not the reason advanced by Trusty, who denied that the conversation even took place. I find Trusty's remark to Gould constituted a coercive interrogation coming after her prior comments to him, in which she at first stated she did not want employees talking to anyone from the Union and then, when challenged, stating she did not want them talking to the Union on working time, or in the unit, which was a public restaurant. Trusty was Gould's supervisor and a high-level respondent official, who as an MP, had the authority to discharge employees. Trusty and Greer's threats of discharge to Holmes further demonstrates that her questioning of Gould was not an innocuous conversation.

b. The August 20 rally

Snyder credibly testified that the Union held a rally on August 20, on the upper level outside of the main terminal. It was a location that skirts all the gate entrances to the four piers. The rally took place on the sidewalk closest to the entrance to pier D. There was a picket line with people marching in a circle a couple of feet from the set of sliding glass doors to the pier. The rally started at around 1 p.m. and went to 2:30 or 3 p.m. Community supporters, student supporters, members of other unions, creative Host workers, union organizers, and around five or six of Respondent's employees attended the rally. Holmes attended the rally, and she carried a sign and marched on the picket line, and sang chants along with everyone else. The signs said, "Justice for airport workers." The chants were "A2K rich and rude, we don't like your attitude. A2K unfair. What do we want? Justice. When do we want it?" The Union also distributed leaflets inside the terminal on August 20. The leaflets included photographs of some of Respondent's employees, statements from them about how conditions had changed, and how they wanted the Union. Snyder saw Brown and Becherer at the rally on at least two occasions. The first time Snyder saw Brown, Brown was outside at the picket line talking to a reporter and the second time about 30 to 40 minutes later, Brown was in the building looking through the glass with Becherer and several other people. When Brown was outside near the picket line he was about 5 to 10 feet away from Snyder. Snyder testified that he came up to and said hello to Brown. Brown was there for about 5 minutes. When Brown was inside the glass, he was around 10 to 15 feet away from Snyder. The people Brown was with were looking at the picket line and talking to each other. Snyder testified he also saw Becherer when the rally was getting started. Becherer came outside, smoked a cigarette and walked away from the picket line. Becherer was about 15 feet from the picket line. Snyder saw other people, but could not identify them and did not know if they were managers.

Holmes credibly testified she attended the August 20 rally.[27] Holmes arrived at the August 20 rally around 11 a.m., and joined the line at around 1 p.m.[28] Holmes testified she was the only shift leader to attend the rally. Holmes held up a picket sign, and walked around and chanted. Holmes testified she saw several of Respondent's officials watching the rally, including Brown, Becherer, and another head manager whose name Holmes did not know. Holmes testified she saw Reanne, an AM working at Charley's Steakery there. Holmes also saw a BAA representative there.[29] Holmes made eye contact with Brown, who was there for around 20 minutes. Holmes saw Becherer standing about 25 to 30 feet away from her. Holmes testified Becherer was there for about 15 to 20 minutes. Brown testified he saw Holmes participating in the rally. MP Linda Powell was with Brown when he saw Holmes participate in the rally.

3. Holmes is discharged on August 23

Holmes credibly testified to the following: Holmes, following the rally, next reported to work on Sunday, August 22, and she looked at the new schedule on Velardo's desk, and her name was not on the schedule. Holmes asked Velardo why Monique Yates was returned to the store and Holmes' name was taken off the schedule. Velardo said he had not finished the schedule. Holmes testified Yates is another "supervisor" in reference to Yates being a shift leader who used to work at the store, and who up until that time had been working at pier C. Holmes returned the key to lock up the restaurant to Velardo on Sunday, August 22, when he asked for it.

[27] Holmes credibly testified she told many of Respondent's employees about the rally in person and by phone during the 2- to 3-week period leading up to the rally.

[28] Holmes was not scheduled to work on August 20. However, Holmes credibly testified Greer called Holmes at home and asked her to work. Holmes replied that she had already put in a leave request and Greer had signed it. Greer said Velardo wanted Holmes to come in, although Velardo knew Holmes had requested the day off.

[29] Holmes initially testified that she saw no other managers or supervisors. She then testified she also saw Olsen there. Holmes at first testified she referenced Olsen as being present at the rally in her prehearing affidavit, but then admitted Olsen was not referenced in the affidavit, and I have concluded that Holmes was mistaken concerning her testimony that Olsen attended the rally.

Holmes reported to work on August 23, at around 9:30 a.m. and was sent to Becherer's office. Holmes met with Becherer and he told her that she was fired. When Holmes asked him what grounds, Becherer said he was not able to tell her. Holmes did not say anything else. Holmes never received anything in writing as to the reasons for the termination. Holmes testified that, prior to August 23, she had received no written or verbal warnings, and no one had talked to her about her performance. Holmes testified that to her knowledge no MPs, AMs, or other shift leaders were laid off or fired at that time.

4. On August 24 and 25, Olsen and Becherer meet with employees Johns and Reaves

Eva Johns worked for Respondent as a cashier from June until September 26. Johns worked at pier C at Nature's Table. Johns testified MP Linda Powell and AM Rayna Samuels were her immediate supervisors. Johns did not attend the Union's August 20 rally because she was working. Johns credibly testified that, around 2:30 p.m. on August 20, when the rally was over, Brown came in with one of the leaflets the Union was distributing at the rally. Brown walked over to Powell, who was standing at the register talking to cashier Phyllis Reaves. Brown handed the leaflet to Powell and said here is one of yours. Then Brown left. Johns' picture appeared on the front of the Union's leaflet. Johns testified when Brown made the remark to Powell, he looked straight at Johns.[30] There is a quote in the leaflet attributed to Johns which reads, "I was with the previous contractor for 19-1/2 years and was never without health benefits. I have to wait 3 months under A2K and during that time I had to pay $366.50 per month for benefits. Now, my doctor won't even accept the insurance that A2K is offering. Meanwhile, the GladCo workers kept their insurance, and kept their seniority and vacation time while we lost seniority and went down from 8 to 3 paid holidays."

Johns credibly testified that: On August 20, around 6:15 p.m., Johns was at her register and Becherer came over while Johns was waiting on a customer. Becherer stood behind Johns. As soon as the customer left, Becherer began yelling at Johns to move a little trash can which the cashiers used to deposit unwanted customer receipts. It had been sitting at that location for 20 years. Johns said she did not understand what Becherer meant. Becherer said, "[O]h, you're not going to do what I asked you to do?" Johns said she was going to do it, and asked where he wanted her to put the receptacle, as Johns put it on the floor. Becherer also told Johns to shut the door going to the office and stockroom. Johns said an employee was bringing out juices from the room. Becherer asked if Johns was going to disobey him again. Johns said no and shut the door. Johns then started going back to her register, and Becherer pointed to a dustpan and broom sitting near the corner of Johns' register, and Becherer said move that. Johns said the bus person had just put the equipment there because he was cleaning the floor. However, Johns moved it, and Becherer left. A man from O'Brien's, a restaurant located next door, came over and told Johns that she was going to become busy because O'Brien's computers were down. Johns relayed the information to the other cashier. Becherer turned around and came back and told Johns, that he was halfway down the hall, and he could still hear Johns talking. Johns said she was just relaying a message to the other cashier of what she was told to do. Becherer then took Johns back to the office and told her if she did not do what he told her, she could go home. Johns said, "[W]ell, I can go home." Becherer told her, "[Y]ou have a lot of mouth, don't you, and he just walked out." Johns testified that before August 20, Becherer had never given her instructions. In the past, Becherer would just come in and order his lunch.[31]

Johns credibly testified that: On August 24, Powell told Johns to come into the office, that Olsen wanted to talk to Johns. Johns testified she went into the office and Olsen and Johns were there alone. Olsen said, "I hear you have a problem . . . with your pay." Johns said she did not have a problem with her pay, rather she had a problem with her benefits. Olsen said Respondent had good benefits. Johns said they were not good for her because she called all of her doctors, and none of them would take the insurance. Olsen said they were a new company and maybe later on they could get better benefits. Olsen asked Johns if she had any other problems. Johns told Olsen how Becherer talked to her on August 20, and that the only other problem she had was Becherer. Johns related to Olsen how Becherer came up to her register on August 20, and was telling her to do this and do that, and if she did not want to do what he said she could go home. Olsen said he was unaware of that. Olsen told Johns he did not want to lose her that she was a very valuable employee. Then Olsen called Reaves back to the office.

Respondent has employed Reaves, a cashier, since June 4. At the time of the hearing, Reaves was working at main pier at the Nature's Table Café. Reaves worked for Host for 2 years prior to Respondent assuming the BWI concessions. Reaves joined the Union while she was working for Host, and she wore a union button to work while at Host. Reaves participated in the Union's August 20 rally. Reaves marched and held up a sign outside the airport. Reaves observed Brown and Powell inside the airport watching the rally through the airport's glass doors for about 10 minutes.

Reaves was working at the cash register on August 24, when Johns came out of the office and told Reaves that Powell wanted her in the office. Reaves reported to the backroom office and Powell and Olsen were there. Reaves testified Olsen, "asked me what was my likes and dislikes with the company and what could he do to make it better. I told him I didn't like—I was concerned about the benefit package, medical and vacation time and stuff." Reaves told Olsen that she did not like having Easter as a holiday, and she would have preferred having a holiday on Thanksgiving, Christmas, New Years, 4th of July, and Memorial Day. Reaves testified that when they were with Host they had all of those holidays. However, at Respondent they only had three holidays, Thanksgiving, Christmas, and Easter. Reaves asked if they could change Easter to the 4th of July or Memorial Day. Olsen said he would

[30] Browns' conduct here was not alleged to violate the Act in the complaint.

[31] Becherer's conduct here was not alleged to violate the Act in the complaint.

check into it. Reaves asked if they were getting any additional holidays, and Olsen said no. Reaves testified that Olsen asked about treatment of the customers. Olsen then told Reaves she could not wear her union button and that she had to take it off. Reaves asked why, and Olsen said because they were not a union company and Reaves could not wear the button on Olsen's clock. Reaves' button was about an inch and one half in size and said, "Organizing For Our Future Local 7 H.E.R.E. AFL–CIO." Reaves took the button off and put it in her pocket. Powell did not talk during the meeting.

Reaves testified that, prior to August 24, she wore the union button almost every day to work for about a month and one half. She wore the button on her shirt next to her nametag. Reaves testified that, during that time, Olsen, Brown, Becherer, Eugene Wright, Powell, and Samuels observed her wearing it. Reaves testified Olsen came in the restaurant on a sporadic basis to speak to everyone. Olsen would stand close to Reaves and he shook her hand on occasion. Prior to August 24, Olsen had not advised Reaves that it was wrong to wear the button, nor had any other management official. Reaves testified that, during the Christmas holiday season in 2004, Samuels wore a pin shaped like a Christmas tree that lights up on her shirt lapel almost every day. The pin was about the same size as Reaves' union button.[32]

Johns testified that on August 25, she was standing at the door going to the office talking to Powell. Johns was wearing a Local 7 button, which Johns identified as identical to the one Reaves wore. Becherer walked up to Johns and said, "I told you to take this button off before." Johns responded Becherer had never told her to take the button off. Becherer said, "I am telling you now, take it off." Powell said she never told Johns to take the button off, but Becherer said he was telling Johns to take it off. Johns took the button off and went back to her register. Johns was wearing the same button when Becherer approached her on August 20. Johns testified she had worn the button every day to work prior to August 25, beginning in June. Johns testified she also wore the button when she worked for Host. Johns testified she wore the button during her meeting with Olsen on August 24. Johns testified that Olsen did not say anything to her about wearing the button at that time, nor did Powell. Johns testified she saw Powell on a daily basis, and that every time Olsen had been there she had the button on. She had seen Olsen around two times prior to the day he called her into the office. Olsen never said anything to her about wearing the button. Johns testified that, prior to August 25, Brown and Becherer had seen her wearing the button on a daily basis as they came into the restaurant to purchase food. Brown had never told her she could not wear the button, and Becherer had never said anything prior to August 25.

Johns wore a little gold angel pin to work every day from June to September 2004. The pin was about an inch in size. No one from management ever said anything to her about wearing the angel pin, which she continued to wear after August 25. Johns was wearing the angel pin on August 24 when she met with Olsen and on August 25, when Becherer told her to remove the union button. Johns testified Nature's Tables employee Mabel Simms always wore the same angel pin as Johns. Johns testified Powell wore a Winnie the Pooh pin about two inches long on her shirt collar or apron almost every day. Samuels also wore pins almost every day, but Johns could not remember what they were. Johns was not aware of Powell or Samuels being asked to remove their pins.

a. Respondent's witness

Olsen testified he visited BWI five or six times between June and the end of August 2004, including August 24.[33] Olsen testified he spoke to Reaves on August 24 in a private meeting in the office at Nature's Table. Olsen testified that Powell, Reaves, and Olsen were present. Olsen testified he asked Reaves to remove her union button in that it was not in keeping with Respondent's uniform code. Olsen testified he was not sure whether he had seen Reaves wearing a union button prior to August 24. Olsen testified he also discussed the importance of customer service with Reaves. Olsen testified Reaves did not discuss her working conditions during the conversation, other than to pose a question about health insurance. Reaves stated the company insurance she was going to receive was not accepted by her doctor. Olsen responded the list of doctors had not come out because the insurance was not in effect at that time. Olsen stated when the list of doctors came out; Reaves could determine whether her doctor was on it. Olsen stated if Reaves' physician was not on the list, Reaves was still eligible to receive reimbursement under the plan for her doctor's charges. However, she would have to fill out a form and send it to the insurance company, as opposed to her doctor submitting the form to the insurance company. Reaves said she was not sure she was capable of filling out the form. Olsen said they would assist her in filling out the insurance company reimbursement forms. Reaves asked if she would have to pay her doctor while she was waiting to be reimbursed, and Olsen responded that was a possibility if Reaves' doctor did not accept the coverage. Olsen testified Reaves also brought up holidays and asked why Easter was a paid holiday, and why they could not have another day in its place. Olsen responded it was just what they established at that time. Olsen said if the people at the company want to switch a holiday, Respondent's officials would consider it. Olsen testified no policy changes were made based on his discussion with Reaves. Olsen testified the purpose of the meeting was to discuss Reaves wearing a union

[32] In her prehearing affidavit, dated September 13, concerning how often she wore her union button to work before Olsen confronted her, Reaves stated, "I had worn that button to work a number of times before that day on work time and nothing had been said to me about not wearing it before that day." When confronted with the affidavit, Reaves stated she did not wear the union button to work every day, stating she wore it, "mostly every day." She testified she wore it 2 or 3 days a week out of her 4- or 5-day workweek. However, she later testified that during her 4-day workweek she wore the button to work every day. Reaves also stated in the affidavit, "I do not recall seeing other employees wear other kinds of buttons on work time either before or after 8/24/04." Reaves explained this statement was not meant to encompass Samuels' Christmas pin. Rather she was just asked by the Board agent taking the affidavit, "if anybody wore any other Union button."

[33] Powell was not called as a witness.

button. Olsen testified he did not bring up benefits, rather Reaves asked the questions.

Olsen testified he talked to two other employees from Nature's Table on August 24. After being shown Johns' picture on the Union's August 20 handout, Olsen identified Johns as one of the other employees. Olsen testified he spoke to Johns because she was wearing a union button. Olsen could not recall whether he spoke to Reaves or Johns first, but he testified Powell attended both meetings. Olsen testified he told Johns, "[Y]ou're wearing a button that is not in compliance with the uniform standards of the company and we would like to request that you remove it." Johns removed the button. Olsen testified he discussed the importance of customer service with Johns. Olsen testified he thought Johns raised the same question on insurance that Reaves raised in that Johns' doctor was not on the doctors' list. Olsen responded once they received the doctors' list they could see if Johns' doctor was on it, and if the doctor was not on the list it did not mean Johns was not insured. Olsen did not recall anything else coming up in his conversation with Johns. Olsen testified Johns raised the insurance coverage to him. Olsen testified that, prior to August 24, he had never met with Johns or Reaves in a one-on-one meeting. He testified he never told either employee he was the contact person for benefits and he was not the contact person for benefits.[34]

Olsen testified, that when Respondent's officials noticed some employees wearing union buttons, they contacted counsel to learn whether Respondent had the right to make them remove the buttons. Olsen testified they knew it was not within the company uniform policy for employees to wear buttons of any type. Olsen testified he did not know the timing, but that he assumed it was within a couple of week's time that he became aware employees were wearing union buttons when he had the conversation with Reaves. He testified he probably observed employees wearing union buttons and then he contacted counsel. When asked if he actually saw employees wearing the buttons prior to his conversation with Reaves, Olsen stated, "I can't testify to that, but I would have known if they were. I mean it would have been something that would have jarred our attention." Olsen testified someone else in the company might have reported it to him or he could have observed it on his own. However Olsen testified, "I don't remember until August anybody wearing any union buttons." Olsen later testified he probably observed employees wearing union buttons on his own, without it being mentioned to him by someone else. Olsen testified he observed employees wearing the buttons on their shirts and blouses. Olsen testified that this would have been the trip just prior to the one where he told Johns and Reaves to remove their buttons. Olsen testified he did not tell the employees to remove the buttons when he first saw them because he did not know if the employees had a right to wear the buttons. Olsen contacted Respondent's attorney for an opinion between those two trips. Olsen could not recall how long before meeting with Reaves and Johns that Olsen was advised by counsel that he could tell them not to wear the buttons. Olsen testified there were no complaints from customers or employees about employees wearing union buttons. Olsen testified Respondent relied on its handbook to determine that the wearing of union buttons violated the dress code policy.

b. Credibility

Snyder credibly testified the Union began handing out union buttons around early to mid-June 2004, and they handed out about 50 to 60 buttons to Respondent's employees. Snyder testified some of the workers wore the buttons and some had them from when they were Host employees. Gould credibly testified he wore a union button around his neck for a 2-week period and then lost the button. Trusty testified she saw Gould wearing the button during an incident, which Gould testified took place on June 16. Johns credibly testified she wore her union button for the duration of their employment on practically a daily basis.[35] Johns testified she obtained the button when she worked for Host, which Snyder's testimony reveals was the subject of a prior organizing campaign. I also found that Johns and Reaves testified with specificity and in a credible fashion as to their meetings with Olsen and I have credited their testimony in full about the meetings, including Johns' testimony that Olsen did not bring up her wearing the union button during the meeting. I have also credited Johns' testimony about her August 25 meeting with Becherer and Powell.

Olsen's testimony was marked by poor recall. He could not recall meeting with Johns, until he was shown her picture on the Union's leaflet. He claimed he met with another employee in addition to Johns and Reaves, whose name he could not recall. Olsen's testimony vacillated as to whether he had seen employees wearing union buttons prior to the August 24 meetings, or whether it was just reported to him second hand. He claimed he met with Johns and Reaves because they were each wearing a union button, however, Johns credibly testified Olsen did not mention anything to her about her wearing the button. Olsen testified the timing of the meeting was a result of his receiving advice from counsel concerning the permissibility of employees wearing union buttons, although he was very vague as to when he raised the issue to counsel and when he received the advice. I also find it more than happenstance that both Johns and Reaves raised complaints about working conditions during their separate meetings with Olsen, and I do not credit his testimony that he did not solicit those complaints. Moreover, I do not credit Olsen's claim that the meetings were based on the timing of receipt of advice from counsel. Rather, I have concluded the meetings were part of Respondent's response to the Union's August 20 rally. In this regard, Reaves was a participant in the rally, which was viewed by Brown and Powell, and Johns picture and remarks were on the Union's leaflet, which Brown gave to Powell. Considering the demeanor of the

[34] Olsen testified there was another employee he spoke to on August 24, who worked in the same location. He could not recall her name. Olsen testified he told the employee the union button she was wearing was not in compliance with Respondent's uniform policy, and he asked her to remove the button.

[35] While Reaves's testimony was somewhat confused as to whether she wore the button every day, or just most days, I have concluded, given the testimony of the General Counsel's other witnesses as to the button distribution, that she wore the button throughout the course of her employment with Respondent on a frequent basis.

witnesses and the content of their testimony, I have credited Johns' and Reaves' testimony over that of Olsen as I found Reaves and Johns, as set forth above, to be credible witnesses to the extent memories would permit.

c. Analysis

1. Union buttons

In *Systems West LLC,* 342 NLRB 851, 856 (2004), it was stated that:

> . . . it is well settled that, in the absence of special circumstances, an employee's wearing of union buttons or stickers while at work is protected activity under Section 7 of the Act. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Burger King Corp.,* 265 NLRB 1507 at 1507 (1982). Examples of special circumstances include maintenance of production and discipline, safety, preventing discord, and violence between competing groups of employees, and preventing alienation of customers. *Eckert Fire Protection,* 332 NLRB 198, 202 (2000). In the latter circumstance, mere contact with customers may not serve as a basis for barring the wearing of union buttons or stickers, and absent substantial evidence that a prounion sticker or button affected a respondent's business, requiring the removal of such "small," nonproactive items is unlawful. *Burger King Corp*., supra.

I find Respondent violated Section 8(a)(1) of the Act by Olsen instructing Reaves to remove her union button on August 24, and Becherer instructing Johns to remove her button on August 25. The employees wore the same small innocuous button, which merely listed the Union's name and stated "Organizing For Our Future." While Respondent has a uniform policy in its handbook, the policy did not specifically prohibit the wearing of buttons. The handbook authorized the wearing of "simple jewelry." I find based on the credited evidence that Respondent tolerated its employees wearing union buttons for a lengthy period, but then attempted to clamp down on employees' union activities in response to the Union's August 20 rally. Reaves was a participant in the rally in plain view of Brown and Powell, and Johns' picture and statement concerning Respondent's treatment of its employees was included in the union leaflet distributed at the rally. Becherer also attended the rally.

Thereafter, Brown reacted by giving Powell a copy of the union flyer while staring at Johns, and Becherer engaged in harassing behavior towards Johns. I find that the instructions not to wear the union buttons were part of Respondent's efforts to clamp down on employees' union activity. Moreover, Respondent has proffered no evidence of "special circumstances" requiring the removal of the union buttons, as Olsen admitted there were no customer or employee complaints concerning the wearing of union buttons.[36]

2. Solicitation of grievances

In *Ryder Transportation Services,* 341 NLRB 761, 768 (2004), enfd. 401 F.3d 815 (7th Cir. 2005), it was stated that:

> In *Clark Distribution Systems,* 336 NLRB [747, 748] (2001), the Board quoting from *Capitol EMI Music,* 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), stated the following regarding solicitation of grievances:
>
> > Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. . . . [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one[.][37]

In the instant case, Respondent's secretary treasurer and part-owner Olsen on August 24, within days after a well publicized union rally, separately called Johns and Reaves into Powell's office. Olsen testified that prior to August 24, he had never met with Johns or Reaves in a one-on-one meeting and he was not Respondent's contact person for employee benefits.

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[36] I find *Burger King Corp. v. NLRB,* 725 F.2d 1053 (6th Cir. 1984), and its progeny citied by Respondent to be distinguishable from the facts here. In *Burger King Corp.,* supra at 1055–1056, the court noted the employer's uniform policy included a published regulation that "only company approved name tags, buttons and alterations in uniforms are allowed." The court in concluding there was no violation of the Act in terms of the prohibition of union buttons noted the employer "consistently enforced its policy against wearing unauthorized buttons in a nondiscriminatory manner. It is a national fast food chain deriving much of its recognition from its uniform public image. It is not asserted that this policy had its inception because of labor unions or union activities." Here, Respondent's uniform policy did not expressly prohibit the wearing of buttons, and I have found Respondent in fact allowed the wearing of union buttons, until it reacted to the Union's August 20 rally. Thus, Respondent's prohibition was in direct response to the employee's union activities and therefore unlawful. See *E & L Transport Co.,* 331 NLRB 640, 640 (2000). Moreover, in *Meijer v. NLRB,* 130 F.3d 1209 (6th Cir. 1997), the court disavowed its approach set forth in *Burger King,* supra, and found that a "special circumstance" does not exist as a matter of law allowing an employer to prohibit the wearing of union buttons merely because employees have contact with the public. Rather, the court held in enforcing the Board's order against *Meijer* that the employer must make an affirmative showing that a special circumstance exists in order to prohibit the wearing of union buttons, and that *Meijer* failed to make such a showing. The Board, as set forth above, has also held that mere public contact does not establish a special circumstance for the prohibition of wearing union buttons. See *Systems West LLC*, supra, and *Raley's Inc.,* 311 NLRB 1244 (1993). I have found Respondent's prohibition here to be discriminatorily motivated, and that even if that were not so, Respondent has established no special circumstance justifying its action.

[37] See also *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999), where the solicitation of grievances during a union campaign, in the absence of a past practice of such conduct, was found to raise the inference of an implied promise to remedy the grievances.

Johns credited testimony reveals that upon Johns entering the office, Olsen said, "I hear you have a problem . . . with your pay." Johns said she did not have a problem with her pay; rather she had a problem with her benefits. Olsen said Respondent had good benefits. Johns said they were not good for her because she called all of her doctors, and none of them took the insurance. Olsen said they were a new company and may be they could get better benefits later on. Olsen asked Johns if she had any other problems. Johns told Olsen the only other problem she had was Becherer. Johns related to Olsen how Becherer came up to her register on August 20, and was telling her to do this and do that, and if she did not want to do what he said she could go home. Olsen said he was unaware of that and that he did not want to lose Johns because she was a very valuable employee. I find Olsen unlawfully solicited and impliedly promised to remedy grievances when he questioned Johns about a problem with her pay, and told Johns that maybe later Respondent could get better benefits, and again when Olsen asked Johns if she had any other problems, and when Johns responded, Olsen told Johns she was a valuable employee and Respondent did not want to lose her. I find Olsen's conduct is violative of Section 8(a)(1) of the Act.

Reaves' credited testimony reveals that when she was called into the office, Olsen, "asked me what was my likes and dislikes with the company and what could he do to make it better. I told him I didn't like—I was concerned about the benefit package, medical and vacation time and stuff." Reaves told Olsen that she did not like having Easter as a holiday, and she would have preferred having a holiday on Thanksgiving, Christmas, New Years, 4th of July, and Memorial Day. Reaves asked if they could change Easter to the 4th of July or Memorial Day. Olsen said he would check into it. Reaves asked if they were getting any additional holidays, and Olsen said no. During the meeting, Olsen also asked Reaves to remove her union button. I find that Olsen violated Section 8(a)(1) of the Act by soliciting and impliedly promising to remedy grievances to Reaves in asking her what her "likes and dislikes with the company" were and what he could do to make it better, and by stating he would check into switching Respondent's holidays in response to one of Reaves' complaints.

C. The 8(a)(1) and (3) Allegations

In *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management, Inc. v. NLRB,* 462 U.S. 393 (1983), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee or employees, employer knowledge of that activity, and antiunion animus on the part of the employer. *Wal-Mart Stores,* 340 NLRB 220, 221 (2003). If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line,* supra at 1089.

In *Washington Nursing Home,* 321 NLRB 366, 375 (1996), it was stated that:

> Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense, and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric,* 307 NLRB 1113, 1128 (1990), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.,* 305 NLRB 219 (1991); *Visador Co.,* 303 NLRB 1039, 1044 (1991); *Asociacion Hospital del Maestro,* 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less,* 288 NLRB 597, 598 (1988).

In *La Gloria Oil & Gas Co.,* 337 NLRB 1120, 1124 (2002), the timing of discharges on the heels of union activity and evidence of disparate treatment resulted in a finding that the reasons advanced for the termination of employees were pretextual and that they were terminated for their union activity. Shifting defenses have been long held by the Board to signify the proffered reason for an action is pretextual. See *Black Entertainment Television, Inc.,* 324 NLRB 1161 (1997), where the Board, in part, relied on vacillating positions set forth in a prehearing position statement and representations made at the hearing to reject the respondent's defenses and find its conduct unlawful. See also *Vincent M. Ippolito, Inc.,* 313 NLRB 715, 724 (1994), enfd. 54 F.3d 769 (3d Cir. 1995).

I find counsel for the General Counsel has established a prima facie case that Holmes was discharged for her union activity. Holmes was hired as a shift leader on May 15. In late June or early July she was transferred to pier B Caribou Coffee and Mama Ilardo's as a shift leader. Holmes contacted union organizer Snyder shortly after she was hired and had numerous conversations in favor of the Union with her coworkers, including conversations in front of AM Greer. Respondent exhibited animus towards employees' union activity by on June 16, MP Trusty informing employees in violation of Section 8(a)(1) of the Act, that they could not talk to union representatives while the employees were on break, unless the employees left the unit. I have also found that Trusty violated Section 8(a)(1) of the Act on that date by creating the impression that an employee's union activities were under surveillance, engaging in surveillance of the employee's union activities, and by coercively interrogating that employee.

The Union obtained permission from the Maryland Aviation Authority to hold a rally on August 20 at BWI outside of the main terminal. Snyder testified the purpose of the rally was to show Respondent, the BAA, and the Port Authority the workers wanted to continue to have a union. The MAA had also given the Union permission to hand out leaflets inside the terminal on August 20. Brown testified someone from BAA informed Brown the Union was authorized to hold the rally around 2 to 3 weeks before it took place, and that they would be allowed to hand out leaflets inside the main terminal.

I have found Respondent exhibited strong animus towards employees' union activities when on August 18, Trusty violated

Section 8(a)(1) of the Act by unlawfully interrogating Holmes, creating the impression of surveillance of employees' union activities, and threatening employees with discharge when Trusty, along with Pena, and Greer approached Holmes, and Trusty asked Holmes if she knew anything about a paper employees were signing to attend the August 20 union rally. Trusty said if they find the paper the employees signed they were going to be fired. Trusty said she wanted the list. Trusty said Holmes knew about it. I have found that Greer interrogated Holmes and created the impression of surveillance of employees' union activities and threatened employees with discharge in violation of Section 8(a)(1) of the Act when she accused Holmes of knowing about the list because Holmes was part of it, and stating if Greer found the list, she was going to fire Holmes. I have also found that Pena created the impression Holmes' union activities were under surveillance in violation of Section 8(a)(1) of the Act when, during the course of this same conversation, he told Holmes someone said she was a part of it. I found Velardo coercively interrogated Holmes about her union activities and the union activities of other employees in violation of Section 8(a)(1) of the Act when on August 18, Velardo asked Holmes if she knew anything about a rally on August 20, asked her what she knew about the rally, and who was going to attend. I found Trusty coercively interrogated Gould in violation of Section 8(a)(1) of the Act when, around mid-August, Trusty asked Gould if he was joining the picket line.

The Union held the rally on August 20 as planned, and leafleted inside the terminal. Holmes attended the rally, and she carried a sign and marched on the picket line, and sang chants. Holmes was the only shift leader who participated in the rally. The signs said, "Justice for airport workers." The chants were "A2K rich and rude, we don't like your attitude. A2K unfair. What do we want? Justice. When do we want it?" Reaves also participated in the rally, and Johns' picture was on the Union's leaflets along with her comments about Respondent's treatment of its employees. Snyder and Holmes credibly testified Respondent's officials, Brown and Becherer, watched the rally for periods of time. Brown testified he saw Holmes participating in the rally, and that MP Powell was with Brown when he saw Holmes.

Johns worked for Respondent at pier C at Nature's Table. Powell was the MP for that restaurant. Johns credibly testified that, around 2:30 p.m. on August 20, when the rally was over Brown came in with one of the leaflets the Union was distributing at the rally. Brown walked over to Powell and handed her the leaflet stating here is one of yours while Brown stared at Johns. Johns picture appeared on the front of the Union's leaflet wherein she criticized Respondent's terms and conditions of employment. On August 20, around 6:15 p.m., Becherer stood behind Johns and engaged in some harassing behavior towards her concerning her work assignments. I find Brown and Becherer's actions, although not alleged as unlawful in the complaint, constitute background evidence of animus. See *Ross Stores,* 329 NLRB 573, 576 (1999), enf. denied on other grounds 235 F.3d 669 (D.C. Cir. 2001); see also *Hendrix Mfg. Co. v. NLRB,* 321 F.2d 100, 103 (5th Cir. 1963); *NLRB v. Vemco, Inc.,* 989 F.2d 1468, 1473–1475 (6th Cir. 1993); and *Orchard Corp. v. NLRB,* 408 F.2d 341, 342 (8th Cir 1960).

Holmes, following the rally, next reported to work on Sunday, August 22, and she looked at the new schedule on Velardo's desk, and her name was not on the schedule. Rather, the schedule reflected that Shift Leader Monique Yates was transferred back to the restaurant to replace Holmes. Velardo asked Holmes to return the key to close the restaurant during their August 22 conversation. Holmes reported to work on August 23, and Becherer told Holmes she was fired and he refused to provide Holmes with reasons for the termination. Holmes credibly testified that prior to August 23, she had received no written or verbal warnings, and no one had talked to her about her performance. Holmes testified that to her knowledge no MPs, AMs, or other shift leaders were laid off or fired at that time.

I have found that on August 24, Olsen violated Section 8(a)(1) of the Act by soliciting grievances from Johns and Reaves, and by telling Reaves to remove her union button. I have found that on August 25, Becherer violated Section 8(a)(1) of the Act by telling Johns to remove her union button. Both Johns and Reaves were participants in the Union's August 20 rally, Johns by her picture and statement appearing in the Union's leaflet, and Reaves by her joining the picket line.

I find that the General Counsel has made a strong prima facie case under the Board's *Wright Line* requirements that Holmes August 23 termination was motivated by her August 20 participation in the Union's rally. While Holmes had a longstanding leave request, Respondent's officials tried to cancel the request shortly before the rally. There is also strong evidence of animus on the part of Respondent directed to its employees' union activity in the form of multiple violations of Section 8(a)(1) of the Act, some of which was directed towards Holmes on August 18, concerning her and other employees' participation in the August 20 rally, including threats of discharge. Respondent's officials Brown and Becherer were present for the August 20 rally, and Brown admitted seeing Holmes participate. On August 22, Velardo removed Holmes name from the work schedule, and Yates replaced Holmes on the schedule. On August 23, Becherer discharged Holmes and refused to provide the reasons for the termination. Thus, there is evidence of knowledge of union activity on the part of Respondent, strong evidence of animus in the form of multiple 8(a)(1) violations and other conduct, and strong evidence of timing as Holmes was discharged on August 23, shortly after Holmes was the only shift leader to participate in the August 20 rally.

The burden thus shifts to Respondent to establish it would have terminated Holmes absent her union activity. For the following reasons, I find Respondent has failed to meet that burden. Respondent has only been in operation since 2004, and BWI is its initial and only contract. Olsen testified he handles financial matters for Respondent, including whether the company is overstaffed. Olsen testified Respondent intentionally overstaffed during its start up operation with the plan to eventually cut back. Olsen testified he relies on a percentage of the payroll to sales to determine when Respondent's operation is overstaffed. Olsen testified when Respondent is overstaffed they will either reduce the number of people, reduce the hours, or both. Olsen received information from BWI that Respon-

dent's costs were high and that Respondent was overstaffed in both management and hourly employees from around middle to the end of July. Olsen testified they were not as proactive as they should have been, and he did not think they started reducing staff until August. Olsen testified there was a reduction in staff in August, but he did not know how many people were let go or who would know this information.

Olsen testified sales and payroll are measured separately for each store and calculated on a weekly basis. Olsen testified he thought August was the only reduction-in-force, and Respondent's July records would have been used to determine the reduction was necessary. Olsen testified business starts slowing down in September and Respondent was getting ready to head into their drop in sales period. Olsen testified payroll and sales records were the only thing that went into the decision to layoff employees in August. Olsen testified he was not sure who made the decision to fire Holmes. Olsen testified there were certain people who would talk about it and that Weiss and Brown would have been involved.

Brown testified that when Respondent started operations in June, they were under orders from BAA to overstaff because no one knew exactly what the needs would be after they opened up. BAA also required Respondent to hire as many former Host employees as possible. Respondent hired a lot of them with the understanding there was no guarantee they would be there on a permanent basis. Brown testified, in response to leading questions, that Respondent used the period late in July and August to adjust to over hiring by reducing hours, and by cutting back the number of employees.[38] Brown testified Respondent compared gross sales versus labor costs to determine when to cut back hours or the number of employees. Brown testified there were no specific instructions given to the MPs other than those two options to reduce each restaurant's labor costs. Brown testified MP Velardo would have made the decision to lay off Holmes since the decision was left to the MPs as to how to correct the problem.

Brown initially testified he vaguely recalled a conversation about the decision to terminate Holmes after she was let go. Brown testified the conversation may have been with Becherer, or some of the staff members of pier B that Holmes was no longer there. Brown testified that, "beforehand, there was no specific conversation with regards to Maria Holmes." However, Brown then testified that "[t]he only conversation that I had with regards to Maria where she would have come up as a name was just in general prior to the time that the rally had occurred in August." Brown explained Respondent was under directions from BAA to make sure they were overstaffed in the event there were large numbers of employees leaving to go to the march. Brown testified Respondent sought counsel's advice as to what they could do to staff stores, and Holmes, being a shift leader, her name came up in the conversation. Brown testified, "[T]hat was the only other time that I recall where her name might have been referenced in my presence." I do not credit Brown's testimony on this point, as MP Trusty testified she told Brown and Becherer that she had received reports Holmes had taken employees' names from Respondent's computer system concerning the rally and provided them to the Union, and that she received complaints from employees about numerous phone calls from the Union. I do not find it likely that Brown would have forgotten the receipt of these allegations concerning Holmes, or that he and Becherer would not have discussed the matter.

Brown testified he had no firsthand knowledge of who made the decision to terminate Holmes. He testified he was not involved in the decision and he did not know if Holmes was terminated or quit. While Brown initially testified he only vaguely recalled a conversation concerning Holmes' termination, he later testified he learned Becherer informed Holmes she was going to be laid off. Brown testified that according to Respondent's policy Velardo would have made the decision to terminate Holmes, and Becherer had nothing to do with the decision. Brown testified he was not consulted. Brown then testified that Becherer may or may not have been consulted about the decision. Brown testified he had a conversation with Becherer wherein Brown was told Holmes was laid off. Brown testified that at that time, he did not recall Becherer giving him a reason for the layoff. Brown incredibly claimed he asked no questions about it. I find Brown's claim incredible because he admittedly discussed Holmes participation in the rally with Respondent's counsel, he saw Holmes attend the rally, and Trusty testified she informed Brown there were allegations that Holmes divulged employee names and phone numbers to the Union.

Brown then testified later on that week Becherer told Brown the reason for Holmes' layoff. Becherer told Brown there were some performance issues related to Holmes, that "she had called in late several times, that she wasn't doing her work up to a certain level, that there was some attitude problems with regards to her." Brown then admitted he was only told of Holmes being laid off for Respondent's whole staff during the week Holmes was laid off. Brown admitted that without the performance issues, despite the economics, Homes might not have been laid off. However, Respondent submitted a position statement through counsel to the Region dated October 12, wherein it is stated at page 2, "On August 23, 2004, after determining that it was over capacity with regard to supervisors, Airport 2000 terminated Ms. Maria Holmes." It is later stated at page 5 of the position statement, "Ms. Holmes was terminated on August 23, 2004 for legitimate business reasons. More specifically, Airport 2000 had determined that it was above capacity for supervisors." Thus, Brown's testimony at the hearing was plainly inconsistent with the reasons advanced for Holmes' termination in Respondent's position statement. Such shifting positions confirm my conclusion that Holmes' August 23 termination was caused by her August 20 participation in the Union's rally, and that the reasons Respondent advanced termination were pretextual. See *Black Entertainment Television, Inc.,* 324 NLRB 1161 (1997); and *Vincent M. Ippolito, Inc.,* 313 NLRB 715, 724 (1994), enfd. 54 F.3d 769 (3d Cir. 1995).[39]

[38] Holmes' testimony confirms that she along with other employees had their hours reduced sometime in July.

[39] I do not credit Brown's self-serving testimony that he played no role in the decision to terminate Holmes. Brown admitted Holmes'

Accordingly, I find Respondent discharged its employee Maria Holmes on August 23, because of her participation in union activity in violation of Section 8(a)(1) and (3) of the Act. The record contains evidence of Respondent's knowledge of Holmes' union activities, timing and animus towards those activities, and Respondent's reasons for the discharge are marked by vague and inconsistent testimony, shifting defenses, and the lack of documentary evidence supporting its position. I therefore have concluded the reasons advanced by Respondent are pretextual.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act.[40]

(a) By on June 16, 2004, informing employees they could not talk to union representatives during nonworktime in nonwork areas.

(b) By on June 16, 2004, engaging in surveillance and creating the impression that an employee's union activity was under surveillance.

(c) By on June 16, 2004, coercively interrogating an employee about her union activities.

(d) By August 2004, coercively interrogating an employee about his union activities.

(e) By on August 18, 2004, coercively interrogating an employee about her union activities, and the union activities of other employees.

(f) By on August 18, 2004, creating the impression that employees' union activities were under surveillance.

(g) By on August 18, 2004, threatening employees with discharge if they engaged in a job action, on behalf of the Union, scheduled for August 20, 2004.

(h) By on August 24, 2004, soliciting and impliedly promising to remedy grievances to discourage employees from supporting the Union.

(i) By on August 24 and 25, 2004, instructing employees to remove their union buttons to discourage them from supporting the Union.

2. Respondent violated Section 8(a)(1) and (3) of the Act by on or about August 23, 2004, discharging employee Maria Holmes because she engaged in union activities, and to discourage employees from engaging in union activities.

3. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged employee Maria Holmes must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from August 23, 2004, the date of Holmes' discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

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name came up in a discussion with counsel prior to the rally concerning shift leader's participation in the rally. Holmes' credited testimony reveals that, despite her prior leave request, her Supervisors Greer and Velardo attempted to have her work during the rally. Trusty also testified she reported to Brown allegations that Holmes had taken employees names and phone numbers off Respondent's computer system for the Union's use concerning the rally. Moreover, while Olsen testified he was not sure who made the decision to fire Holmes, Olsen testified Brown would have been involved. I find Respondent's officials discussed Holmes with Brown more than Brown was willing to admit. I also find she would not have been discharged without Brown's input and approval.

Trusty testified there were hearsay reports of Holmes taking information off Respondent's computer system, and Trusty reported this to Brown and Becherer. However, Respondent provided no direct evidence that Holmes had actually engaged in this conduct, nor did Respondent rely on these allegations as part of its defense in discharging Holmes.

[40] Pursuant to Respondent's motion at the hearing consolidated complaint par. 11 was dismissed due to lack of evidence.