

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

EKONKAR ENTERPRISES, LLC d/b/a ROBANDEE
APPLE MARKET

and

Case Nos. 17-CA-24095 and
17-CA-24138

UNITED FOOD AND COMMERCIAL WORKERS
DISTRICT UNION LOCAL TWO, affiliated with
UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO

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DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas on August 12 and 13, 2008. The charge in Case 17-CA-24095 was filed by United Food and Commercial Workers District Union Local Two, affiliated with United Food and Commercial Workers International Union, AFL-CIO (Union) on February 21, 2008. Thereafter, on May 9, 2008, the Regional Director for Region 17 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Ekonkar Enterprises, LLC, d/b/a Robandee Apple Market (Respondent) of Section 8(a)(1), (3) and (4) of the National Labor Relations Act, as amended (Act).

On April 7, 2008, the Union filed a charge in Case 17-CA-24138. Thereafter, on May 28, 2008, the Board issued an order consolidating cases, consolidated complaint and notice of hearing in the captioned cases alleging violations by the Respondent of Section 8(a)(1), (3) and (4) of the Act. The Respondent, in its answers to the complaint and consolidated complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel for the Union. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

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The Respondent, a Missouri LLC, with a facility in Kansas City, Missouri, has been engaged in the retail grocery business. During the period from November 14, 2007 through June 30, 2008, the Respondent has purchased and received at its Kansas City, Missouri facility goods valued in excess of \$50,000 directly from points outside the State of Missouri, and has derived gross revenues in excess of \$500,000. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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II. The Labor Organization Involved

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

III. Alleged Unfair Labor Practices

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A. Issues

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The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1), (3) and (4) of the Act in order to prevent its meat department employees from becoming represented by the Union.

B. Facts and Analysis

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Jalwinder Reelh and Robinder Bhurji, co-owners of the Respondent, began operating the grocery store, Robandee Apple Market, on November 14, 2007.

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Don Shelby, a member of the Union since 1975, has worked at the store as a meat cutter in the meat department since 2001 under the previous owners, and has continued in this capacity since the new owners took over. The Union had represented the meat department employees of the predecessor for a number of years. There were only two individuals working in the meat department, Shelby and Tony Totta, the meat department manager.¹

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Shelby met the new owners on November 14, 2007, the day they began operating the store, and was told that there would be no changes and everything would stay the same. That afternoon, according to Shelby, Totta happened to ask Reelh about the meat department schedule for the following week. Totta, according to Shelby, explained that the next week was Thanksgiving week and the union contract provided that they be paid for five days even though they only worked four days that week. According to Shelby, Reelh responded by saying, "There ain't going to be no union around here...you can take that schedule and stick it." Then he walked away. Reelh did not deny this conversation.

¹ The Union filed a charge alleging, *inter alia*, the unlawful discharge of Totta. By letter dated June 13, 2008, the Regional Director for Region 17 of the Board dismissed this allegation on the basis that Totta was a supervisor within the meaning of the Act.

I therefore find the Respondent violated Section 8(a)(1) of the Act by warning Shelby that it would be futile for him to select the Union as the collective bargaining representative of the meat department employees.

.5 On the following day, November 15, 2007, Reelh called Shelby to the office. Both Reelh and Bhurji were present. Reelh began the conversation by asking Shelby how he felt about the Union. Shelby said he had been in the Union all his life and didn't have too much longer before he retired. Reelh said, "if you keep the union out then I'll give you health and welfare and give you a raise." Shelby said he would think about it. Reelh handed him a health insurance form
10 with Shelby's name on it, but Shelby did not sign it. Reelh asked him if he could run the meat shop, and Shelby said he was qualified to run the meat shop. Reelh said, "well, then I'm going to let Tony [Totta] go," explaining that he intended to terminate Totta because he "didn't want no union around here." Then he said, "just get back to me if you want to be nonunion or not." Neither Bhurji nor Reelh denied this conversation.

15 I therefore find the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Shelby about his support for the Union, by promising health insurance and a raise if Shelby agreed to keep the Union out, and by advising Shelby that the Respondent intended to fire Totta because he was a union member, thereby impliedly threatening Shelby with
20 termination in the event he did not comply with the Respondent's admonition to keep the union out.

Shelby told Totta about the conversation that evening. He told Totta that Reelh intended to fire him so that Shelby would be the only meat cutter, because Reelh didn't want a union. Totta, according to Shelby, was too upset to come back to the store to pick up his tools, and asked Shelby to bring his tools home to him. Shelby did so, and Totta never returned to work

25 Shelby told Totta about the conversation that evening. He told Totta that Reelh intended to fire him so that Shelby would be the only meat cutter, because Reelh didn't want a union. Totta, according to Shelby, was too upset to come back to the store to pick up his tools, and asked Shelby to bring his tools home to him. Shelby did so, and Totta never returned to work

Union Representative Gloria Kraft testified that she went to the store shortly after the new owners began operations, and informed Reelh that the store's meat department had been unionized for many years. She asked Reelh to recognize the Union and enter into a contract with the Union covering the two meat department employees. Reelh told her that Totta had just been fired because he was no good. Reelh said he would get back to Kraft about her recognition request. He did not do so. Reelh did not deny this conversation.

30 Union Representative Gloria Kraft testified that she went to the store shortly after the new owners began operations, and informed Reelh that the store's meat department had been unionized for many years. She asked Reelh to recognize the Union and enter into a contract with the Union covering the two meat department employees. Reelh told her that Totta had just been fired because he was no good. Reelh said he would get back to Kraft about her recognition request. He did not do so. Reelh did not deny this conversation.

35 Shelby worked alone in the meat department for about four days. Shelby told Reelh that he needed help, and on November 19, 2007, a produce department employee, Rico Hernandez was assigned to help him. Hernandez worked with Shelby, traying and wrapping the meat, and placing it in the case. Several weeks later Reelh followed up on his previous conversation and again asked Shelby whether he had decided to go nonunion. Shelby replied he hadn't made up his mind yet, and Reelh said, "if you decide to go union, then I'm going to have to fire you. I'm going to have to let you go, get someone else." Reelh did not deny this conversation.

40 Shelby worked alone in the meat department for about four days. Shelby told Reelh that he needed help, and on November 19, 2007, a produce department employee, Rico Hernandez was assigned to help him. Hernandez worked with Shelby, traying and wrapping the meat, and placing it in the case. Several weeks later Reelh followed up on his previous conversation and again asked Shelby whether he had decided to go nonunion. Shelby replied he hadn't made up his mind yet, and Reelh said, "if you decide to go union, then I'm going to have to fire you. I'm going to have to let you go, get someone else." Reelh did not deny this conversation.

45 I therefore find the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Shelby about his support for the Union, and by threatening to terminate Shelby if he decided to go union.

Shelby, who was determined to remain union, spoke to Hernandez about union representation. Hernandez agreed that union representation was a good idea. Shelby called Business Representative Kraft, who obtained union authorization cards from both employees in the parking lot. The next day, Reelh called Shelby into the office and said, "I heard you was out there talking to the union." Shelby, who did not want to be fired, falsely told Reelh that he met

with the union representative in order to sign a withdrawal card to lock in his pension. Again, Reelh warned, “I told you I don’t want no union in this store.” Reelh did not deny this conversation.

.5 I therefore find the Respondent violated Section 8(a)(1) of the Act by creating the impression that Shelby’s union activities were under surveillance, and by reminding Shelby about the earlier conversation in which he had told Shelby he would be terminated if he decided to go union.

10 Hernandez worked in the meat department until the end of December, 2007, when he left for personal reasons. He was replaced by Todd Hayes, *infra*. Shelby and Hayes worked together five days a week in the meat department. After a couple of weeks the two had a conversation about the Union, and Shelby suggested that they contact the union representative. On February 7, 2008, Union Representative Kraft met them in the parking lot and both signed
15 authorization cards. Thereafter, Shelby and Hayes worked together in the meat department until February 16, 2008, as set forth below.

On February 8, 2008, upon obtaining the authorization cards from Shelby and Hayes, the Union filed a representation petition in Case 17-RC-12529 seeking a bargaining unit
20 consisting of “All full-time and regular part-time employees employed within the meat department...excluding clerks, courtesy clerks, office clerical employees, guards and watchmen, managers and supervisors as defined in the Act...” A representation hearing was scheduled for February 20, 2008, and was held as scheduled. At the hearing the Respondent took the position that Hayes was a security guard and should not be included within a meat department
25 bargaining unit, *infra*.

On or around February 16, 2008, Hayes was removed from the meat department. Shelby went to Reelh and asked him why Hayes had been removed from the meat department, leaving Shelby with no help. Reelh said because business was down. According to Shelby,
30 however, “Business wasn’t down” in the meat department “because I was cutting the same amount of meat I usually cut and seemed like the customers were buying the same amount...I’ve been in the business long enough to know that business was still the same.” Shelby further testified that he began overhearing customers complain that there was not enough meat in the cases. He explained to them that he couldn’t keep up by himself. Shelby
35 testified that he “just couldn’t keep up with ...filling the case, keep[ing] the meat in the case.”

Shelby testified that the meat department business is currently down because fewer customers are coming in and purchasing meat “because there’s no meat in the case” adding,
40 “one meat cutter can’t keep up with a big store like that.” He has had experience with customers complaining “all the time.”

Also, Shelby’s hours were cut. He went from 40 hours per week to 38, then to about thirty, and currently to 26, his lowest number of hours. His check stubs do not correctly reflect the hours he worked as he was told by Reelh to clock in only on two days during the week, and
45 that he would be paid in cash for the other three days.

The Respondent maintains that Hayes was removed from the meat department and Shelby’s hours were cut because business in the meat department was down and the Respondent needed to lay off employees. The record evidence shows that in January, February and March, 2008, the Respondent’s meat department sales figures were \$41,602.35, \$37,360.24, and \$38,704, respectively, showing relatively stable meat department sales. Moreover, even assuming *arguendo* that demand was down somewhat, Shelby’s un rebutted

testimony shows that he was apologizing to customers for not being able to keep the meat case supplied with meat because he could not keep up with the demand by himself. Further, contrary to the Respondent's position that it was laying off employees, the record evidence shows that in January, February and March, 2008, the Respondent employed 28, 26 and 27 employees
 .5 respectively, a relatively stable employee complement. Finally, as noted below, Hayes was told that the Respondent hoped that Shelby would quit upon learning that Hayes had been pulled
 10 form the meat department, thus indicating that the removal of Hayes from the meat department was not economically motivated, but rather constituted a deliberate attempt to rid itself of union-supporter Shelby.

On the basis of the foregoing, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act by removing Hayes from the meat department and by reducing Shelby's hours, in retaliation for the union activities of Shelby and suspected union activities of Hayes, *infra*. Even if Hayes' removal from the meat department was solely motivated by Shelby's union
 15 activities, the removal of Hayes caused him to suffer a loss in wages as a result of the discrimination against Shelby, in violation of Section 8(a)(1) and (3) of the Act. ²

Todd Hayes began working for the Respondent's predecessor in 2005. He performed a variety of jobs. As he said, "a little bit of everything": building maintenance, errand runner, loss
 20 prevention person (observing, detecting and confronting shoplifters), checkout cashier in the grocery department, and liquor store (also called the party shop) clerk/cashier. He worked seven days a week from 5:00 p.m. until 10:00 or 10:30 p.m. He continued performing these duties after the new owners took over; however his hours of work were increased so that he began work at 4:00 rather than 5:00 p.m., seven days a week, 6 or 6 ½ hours per day.

Hayes worked this schedule performing the aforementioned duties from November 14, 2007, when the new owners took over, until the end of December, 2007, when Hernandez, Shelby's helper in the meat department, quit. When Hernandez left, Hayes, who was seeking
 25 more hours of work, suggested to Reelh that he become Shelby's helper in the meat department. Reelh agreed, and Hayes, while retaining his night shift hours, also began working in the meat department from 9:00 a.m. to 2:00 p.m. five days a week, for a total of about 25 hours per week, performing essentially the same helper duties as Hernandez had previously performed.

Thus, beginning about the end of December, 2007, Hayes worked two shifts Monday through Friday and one shift on Saturday and Sunday. Hayes was advised by the Respondent that his day shift job was "on the clock" whereas his night shift job would be paid in cash. On
 30 Saturday and Sunday, when neither Shelby nor Hayes customarily worked in the meat department, the Respondent had a part-time person come in to run the meat department. As noted above, this schedule continued for Hayes until February 16, 2008.

On Friday, February 15, 2008, Hayes was called to the office. Bhurji asked him if he had joined the Union. Hayes said no. Bhurji became upset and said that Hayes was not qualified to
 35 join any unions. He grabbed Hayes' employment application and slammed it on the desk, stating, "this is what you're qualified for, a checker." Hayes didn't respond. Then Bhurji again

² Indeed, Respondent's brief provides yet an additional unlawful motive for Respondent's conduct. Thus, Respondent's brief states that since Hayes was a security guard he was thereby precluded by the Act from "working within the appropriate bargaining unit," and that [the Respondent] "thereafter removed him from the meat market *at the Board's urging* in order to comply with the Act and to allow the Union to establish a lawful unit if the circumstances warranted it." (Italics in original.)

asked Hayes whether he had joined the Union. Hayes again said no. Bhurji said, “Okay.” He shook Hayes’ hand and stated, “you’re doing a great job in the meat department, keep up the good work.” Hayes then returned to the meat department. Bhurji did not deny this conversation.

.5 I therefore find the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Hayes regarding his union activity, and impliedly threatening him with removal from the meat department if he elected to support the Union.

10 That night while Hayes was working in the party shop, Bhurji informed Hayes he was being pulled out of the meat department. Further, he was told his night shift job would be solely in the party shop as another party shop employee, Tariq Arain,³ who apparently worked in the party shop the nights Hayes was performing his other aforementioned night shift duties in other departments, was being trained in the courtesy booth. Bhurji explained “it shouldn’t take a full two weeks to get Arain trained and then everything will go back.”⁴

15 The next morning, Saturday, February 16, 2008, Hayes told Shelby about this conversation with Bhurji.⁵ Later that morning Reelh asked Hayes if he had told Shelby that he was being pulled out of the meat department. Hayes said no. Reelh said, “...good, don’t because he’ll be mad on Monday when he comes in and he’ll quit.” Hayes said okay. That Saturday was Hayes’ last day working in the meat department. Reelh did not deny this conversation.

25 I therefore find the Respondent violated Section 8(a)(1) of the Act by informing Hayes that the Respondent was attempting to cause Shelby to quit because of his union activity. Clearly, under the circumstances, it is reasonable for Hayes to have understood the Respondent’s unlawful motivation behind its attempted constructive discharge of Shelby.

30 A representation hearing was scheduled for February 20, 2008. In order to avoid the necessity of a hearing, Union Representative Kraft again went to the store on February 19, 2008, and talked to Reelh about recognizing the Union. Reelh said, according to Kraft, “I won’t be union.” Reelh did not deny this conversation.

35 Also on February 19, 2008, the evening before the scheduled February 20, 2008 representation hearing, Reelh initiated a conversation with Hayes in the party shop. Reelh said he knew Hayes had signed a union card. Hayes said, “Okay.” Reelh said, “Why didn’t you just come to us?” Hayes said that he did come to Reelh and had asked for a raise and more hours and had not gotten either, so he had to do something. Reelh said that if Hayes would have requested these things, “we would’ve just gave you the raise and the more hours because we eat off the same table.” Reelh became upset, and said, according to Hayes, “if I didn’t go in there before those people in court that I was a piece of shit. That I was supposed to lie and tell them that I only worked ten to 15 hours a week...in the meat department...and then everything would be fine.” Hayes told him he wasn’t going to lie.⁶

45 ³ According to Respondent’s records, Arain was hired in January, 2008.

⁴ Apparently, this meant that after Arain had been trained in the courtesy booth, Hayes would resume his various night shift duties, as described above, including his party shop duties on the nights Arain was not working in the party shop.

⁵ Apparently he and Shelby happened to be working together in the meat department that Saturday.

⁶ The record shows that the primary issue to be resolved at the representation hearing was Hayes’ status as a loss prevention person. Apparently the Respondent was taking the position that Hayes was principally a security guard, and should therefore be excluded from the unit,

At the end of the conversation Reelh said they were going to get rid of Shelby. This caused Hayes to say that Shelby was not to blame, and that Hayes had also wanted to sign a union card. Reelh repeated that “they would get rid of Shelby and they would not go union.”
 .5 Then he walked away and came back and threw up his hands and said, “well, this is only temporary.” Reelh did not deny this conversation.

I therefore find the Respondent violated Section 8(a)(1) of the Act by creating the impression that Hayes’ union activities were under surveillance, by coercively interrogating
 10 Hayes about his union activities, by advising Hayes that he would have been given a raise and additional hours of work if he had not signed a union card, by telling Hayes that the Respondent intended to terminate Shelby because of his union activities, by telling Hayes that the Respondent would not go union, and by admonishing Hayes and telling him he was a “piece of
 15 shit “ if he refused to give false testimony at the Board hearing the next day.

Both Hayes and Shelby testified at the Board hearing the following day. Reelh and Bhurji were present. Hayes did not lie despite Reelh’s threats. Thus, apparently Hayes testified, *inter alia*, that he worked about 25 hours per week in the meat department rather than,
 20 as Reelh wanted him to testify, only 10 to 15 hours per week in the meat department. As noted above, the Respondent took the position at the hearing that Hayes was a security guard and therefore was not eligible to be included in a meat department bargaining unit.

After his removal from the meat department Hayes worked strictly in the party shop during the evening/night shift, except for helping with meat sales on a sporadic basis. As he was
 25 no longer working during the day in the meat department, he obtained a daytime job driving a dump truck. Thereafter he began his party shop shift either at 5:00 or 6:00 p.m., apparently depending upon the day of the week, rather than at 4:00 p.m.

From the time the new owners took over on November 14, 2007, until February 26,
 30 2008, a period of over three months, Hayes had received no previous work-related warnings or reprimands.

Hayes testified that because only one person worked in the party shop it was sometimes necessary for that employee to close the party shop in order to take a restroom break if a
 35 temporary substitute was unavailable. On February 25, 2008, while working in the party shop, he phoned Reelh, who was in the office, and told Reelh he needed to take a restroom break. Reelh said that he would come to the party shop “in a few minutes.” When Reelh did not show up, Hayes summoned him again. Reelh, according to Hayes, “stated that he was busy, that he would be back there, and then the phone slammed down.” Again, Reelh did not show up. Then
 40 Hayes phoned the courtesy booth and told Assistant Store Manager Clyde Pence that he needed to have Reelh come back to the party shop. He was told that both Reelh and Bhurji had left the store and there was no one available to come to the party shop to relieve him. Hayes then locked the doors to the party shop, placed a sign in the window that he would be back shortly, and went to use the restroom. He returned after about fifteen minutes “at the most,”
 45 reopened the party shop, and continued working until the regular closing time. This, according

thereby resulting in the finding that a one-person unit, consisting only of Shelby, is inappropriate. Thus, attempting to establish that Hayes worked more hours as a loss prevention person than as a meat department helper, Reelh instructed him to lie during the representation hearing and to testify that he worked only 10 to 15 hours rather than 25 hours per week in the meat department.

to Hayes, is customary operating procedure when the party shop employee is unable to find a replacement for a restroom break.⁷

Neither Bhurji, Reelh nor Pence denied the scenario described by Hayes; nor did they testify that Hayes had incorrectly described the protocol for taking a restroom break.

The following day, February 26, 2008, Hayes was handed an “Employee Disciplinary Report,” signed by Assistant Manager Pence. The report states that Hayes “Closed down the party shop thirty minutes before store closing.” Hayes refused to sign the report.

On the basis of the foregoing, I find the Respondent violated Section 8(a)(1) and (4) of the Act by issuing a disciplinary warning to Hayes. This is the first warning Hayes had ever received. Clearly the warning was undeserved and was in retaliation for Hayes’ union activities and, in addition, for his refusal to give false testimony during the Board hearing less than a week before.

Reelh and Bhurji testified that prior to February 20, 2008, Hayes had been a good employee, but around February 20, 2008, his demeanor and attitude toward customers changed, and he had problems arriving at work on time. Accordingly, it became necessary to thereafter issue some four or five additional written warnings and give Hayes several verbal warnings for various infractions.⁸ Moreover, a customer had submitted a written complaint about Hayes.⁹ Hayes denied that he received any warnings or complaints whatsoever, written or verbal, other than the aforementioned February 26 warning.¹⁰

Hayes testified that he continued working the evening/night shift at the party shop without further incident for about a month, until March 24, 2008. On that day at about 3:00 p.m. he called the store and told the person who answered the phone, Dave McDowell, the dock manager, that he would be 30 minutes late to work as he was running behind schedule driving the dump truck. He arrived at work at 6:30 p.m. rather than 6:00 p.m. and worked until closing time. Nothing was said to him about being late to work. It turns out that this was his last day of work for the Respondent.

⁷ This procedure was also corroborated by the testimony of Kristi Petrie, another party shop employee.

⁸ Bhurji testified, in abbreviated fashion, that after Hayes’ hours were cut, Hayes “came back to the store, you know it felt like he was kind of in a threatening mode...”

⁹ The written complaint is very curious. It is dated March 11, 2008, and states in part: “I’ve experienced a lot of problems with the security guy that used to work in the Apple Market.” Hayes had not acted as a loss prevention person in the store since about February 15, 2008, after which he worked exclusively in the liquor department. Further, he was still employed on March 11, 2008, the date appearing on the complaint, yet the complaint refers to Hayes as “the security guy that *used to work* in Apple Market. (Emphasis supplied.) Under the circumstances, I deem this exhibit to be of no evidentiary value.

¹⁰ I credit this testimony of Hayes, who impressed me as a forthright and highly credible witness. He was unwilling to testify falsely under oath at the Board hearing, as noted above. Further, the record, coupled with his testimony and demeanor, convinces me that Hayes was a highly conscientious employee who valued his job and was determined to do whatever was required of him in order to avoid further warnings or the possibility of discharge, *infra*. I do not credit the testimony of Bhurji, Reelh or Pence to the extent their testimony differs from that of Hayes.

During his shift that night Hayes needed to take a restroom break and, as usual paged Reelh on the PA system. Reelh did not answer the page. Then Hayes phoned the courtesy booth. Reelh answered, and said he was busy at the time. Hayes again called the booth about 30 minutes later and was told by Assistant Manager Pence that Reelh and Bhurji had left the store. Not wanting to receive another reprimand, he did not lock up the party shop and did not take a restroom break that night. Reelh, who testified at length about other matters, did not deny or explain why he failed to relieve Hayes or why he left the store. Nor did Pence testify regarding this matter.

The complaint alleges that the Respondent violated Section 8(a)(1) and (4) of the Act by refusing to provide a relief person for Hayes on March 24, 2008, in retaliation for his union activity and refusal to testify falsely at the Board hearing. The Respondent provided no defense whatsoever to this allegation. Accordingly, I find that the Respondent violated the Act as alleged.

The following day, March 25, 2008, Hayes had to leave his day job because of a migraine headache. He phoned the store from home at 3:00 p.m. and told the store manager that he had taken some medication for his migraine, and if he was able to work that night he would be there; however, as he did not know whether the medication would be effective, he simply could not commit to being there. He was unable to work that night.

On the following day, March 26, 2008, someone ran into his dump truck during his day job. He called the store and spoke with Bhurji, telling him that he had to fill out a police report and would be at work after that. When he arrived at work at 6:30 p.m. rather than at his scheduled time of 6:00 p.m., he was told by Reelh that Arain, another employee, was working his shift and that he should “enjoy the night off.”

Hayes was scheduled to work the following night, March 27, 2008. When he arrived at work the store manager told him not to clock in, that Reelh had replaced him for the rest of the schedule because Reelh didn’t know whether he was going to be in. Hayes noticed that on the posted schedule all his hours had been crossed out. The following day, Friday, he spoke with Bhurji about the schedule and was told that he would have to talk to Reelh, who, according to Bhurji, was out sick and would not return until the following Wednesday.

Hayes was unable to speak with Reelh until the following Friday, April 4, 2008. He asked Reelh why he had been taken off the schedule. Reelh told him, “the store’s not making any money. When it makes money, I’ll put you back on the schedule.” As Hayes was leaving the store he began a conversation with one of the cashiers at the checkout stand. He was approached by Assistant Manager Pence who told him “not to be bothering the checker while she was working.” Hayes looked around and told Pence that the checker had no customers at the time. Then Bhurji came over. Hayes asked Bhurji why he had been taken off the schedule. Bhurji said the store was not making any money and he had to make cutbacks. He then told Hayes to leave the store, “that it wasn’t personal, it was business, but I needed to leave the store.” Then, according to Hayes, Bhurji “kind of nudged me in the back, you know, like to say get out.” According to Hayes, Bhurji told him “that it wasn’t personal, it was business and when we had went to court that he had told them people that I was a good employee and they could put me anywhere and I would do it.” Hayes said, “well, you’re throwing me out of the store then.” Bhurji said, “no, you can come back as long as you’re a paying customer.”

Neither Assistant Manager Pence nor Bhurji denied Hayes’ testimony.

Bhurji and Reelh do not seem to agree on the rationale for laying off Hayes. Reelh testified that despite Hayes' alleged deficiencies exhibited after February 20, 2008, Hayes was laid off due to a decline in business and/or financial hardship, necessitating a reduction in force.¹¹ Thus, as Reelh testified pursuant to questions from Respondent's counsel:

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Q. Well, why did you stop scheduling Todd [Hayes] for the party shop?

A. Because the business is so slow. I cannot afford anybody.

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Q. Well, was Todd having difficulty dealing with customers?

A. That is one of the reason (sic), but I did not stop him for that reason---because I have been giving warning. But, business was so slow, I have to put my time into it.

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However Bhurji seems to contradict Reelh in this regard. Bhurji testified that Hayes seemed to have difficulty getting to work on time, and that this resulted in scheduling problems requiring the discharge of Hayes and the hiring of a replacement. Bhurji testified:

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It was kind of tougher to adjust in that spur of the moment because, you know, contact the morning guy and stay for another two hours and then, you know, you don't have anybody to fill in. So...before it wasn't a bigger problem, you know, we had to let him go and hire somebody else.

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Respondent's records show that it employed 26 employees in February, 27 employees in March, and 24 employees in April. During these months, liquor department sales remained steady, and total store volume remained steady in February and March, but declined about ten percent in April. The Respondent essentially takes the position that the store was losing business or was not profitable and needed to lay off employees, and that Hayes, because of work-related deficiencies, was one of the three employees selected for layoff. I find the Respondent has failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 800 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982).

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Hayes was a long-time employee of the Respondent's predecessor and continued working for the Respondent thereafter. He was a versatile employee, and could work in a number of departments throughout the store performing a variety of tasks. He was considered a valuable employee and, as I have found, had been given no warnings or reprimands until after his union activities became known and he refused to commit perjury in a Board hearing; indeed, he was characterized by Reelh as a "piece of shit" if he did not help the Respondent provide false evidence in that proceeding. Shortly thereafter Hayes was given his first warning, a clearly unwarranted disciplinary warning for taking a restroom break. And on his last day of work, March 24, 2008, the Respondent contrived a scenario whereby Hayes was placed in the dilemma of either foregoing a restroom break or receiving another disciplinary warning. Hayes, to protect his job, chose the former alternative. The Respondent has provided no justification for this treatment of Hayes. Clearly the Respondent was attempting to manufacture a rationale

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¹¹ The Respondent's economic argument is not clear. The Respondent appears to be arguing that its revenues were declining; also, however, the Respondent maintains that even during the times revenues were stable, it was nevertheless losing money because it had initially expended too much for the operation and its revenues were not sufficient to cover its expenses. Thus, for either reason, it was necessary to lay off employees.

for discharging Hayes and at the same time was attempting to cause him to quit, just as the Respondent had earlier attempted to cause Shelby to quit by removing Hayes from the meat department, *supra*.

.5 After March 24, 2008, on which day Hayes was 30 minutes late, Hayes missed one day of work due to illness, and was 30 minutes late the following day. On each occasion he timely
10 phoned the Respondent in accordance with established procedure by notifying the individual who happened to answer the store phone; there is no showing that the Respondent did not know in advance of Hayes' absence or tardiness on these occasions. And on each occasion he
15 provided a compelling, truthful, non-frivolous reason for the absence or delay. Hayes had no history of tardiness or absence, and, insofar as the record shows, he was a highly dependable employee who was anxious to work as many hours as the Respondent would give him. The Respondent has not demonstrated that it would have discharged such an employee under these circumstances.

15 On the basis of the foregoing, including the overwhelming showing of blatant and vitriolic animus toward the Union and the employees supporting the Union, and the shifting rationales for Hayes' layoff, I find that Respondent has failed to meet its burden under *Wright Line, supra*. Accordingly, I find Hayes was discharged in violation of Section 8(a)(1), (3) and (4)
20 of the Act as alleged.

Conclusions of Law

- 25 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 30 3. The Respondent has violated Section 8(a)(1), (3) and (4) of the Act as alleged herein.

The Remedy

35 Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease and desist therefrom and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Having found that the Respondent has violated and is violating
40 Section 8(a)(1), (3) and (4) of the Act by reducing the number of hours of work of Don Shelby, by removing Todd Hayes from the meat department, and by laying off Todd Hayes, I shall recommend that the Respondent restore Shelby's hours of work to the number of hours he was working on or about November 14, 2007; and that that the Respondent reinstate Hayes to the position of a helper in the meat department during the day shift, and to his former position(s) of employment on the night shift without any diminution to his working hours as they existed on or about January 1, 2008, discharging replacements if necessary, without prejudice to his rights
45 and privileges previously enjoyed. Further, I shall recommend that Shelby and Hayes be made whole for any loss of earnings or other benefits they may have suffered, 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).

I shall also recommend an expunction order and the posting of an appropriate notice, attached hereto as "Appendix."

ORDER¹²

The Respondent, Ekonkar Enterprises, LLC d/b/a Robandee Apple Market, its officers, agents, successors, and assigns, shall:

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1. Cease and desist from:

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(a) Interrogating employees regarding their union activities and the union activities of other employees.

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(b) Warning employees that it would be futile for them to select the Union as the collective bargaining representative of the meat department employees.

(c) Promising to provide health insurance and a raise to employees if they agree to keep the Union out.

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(d) Telling employees that other employees will be discharged because of their support for the Union.

(e) Threatening to terminate employees if they support the Union.

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

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(g) Removing employees from the meat department because of their union activity.

(h) Reducing employees' working hours in the meat department because of their union activity.

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(i) Giving warning notices or reprimands to employees because they support the Union, or because they refused to testify falsely in a proceeding before the National Labor Relations Board.

(j) Telling employees that they should provide false testimony under oath in a proceeding before the National Labor Relations Board.

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(k) Discharging or otherwise discriminating against employees because of their interest in and activities on behalf of the Union and because they provided adverse testimony in a National Labor Relations Board proceeding.

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

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2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

¹² If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- .5
- (a) Within 14 days from the date of this Order, offer reinstatement to employee Todd Hayes to both his former day shift and night shift positions, dismissing, if necessary, any employee(s) hired to fill such position(s), and make him whole in the manner set forth in the remedy section of this decision.
- 10
- (b) Within 14 days from the date of this Order, restore employee Don Shelby to the number of hours he was working on or about November 14, 2007, and make him whole in the manner set forth in the remedy section of this decision.
- 15
- (c) Within 14 days from the date of this Order, remove from the personnel files of Todd Hayes any reference to his warnings or discharge.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of the Order.
- 20
- (e) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondent for 60 consecutive days thereafter, 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.
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- (f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 17 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.
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35 Dated: Washington, D.C. November 5, 2008

Gerald A. Wacknov
Administrative Law Judge

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¹³ If this Order is enforced by a judgment of the United States Court of Appeals, the wording 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 and Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT interrogate employees regarding their own union activities or the union activities of other employees.

WE WILL NOT warn employees that it would be futile for them to select the Union as the collective bargaining representative of the meat department employees.

WE WILL NOT promise to provide health insurance and a raise to employees if they agree to keep the Union out.

WE WILL NOT threaten to terminate employees or tell them that other employees will be discharged because of their support of the Union.

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

WE WILL NOT remove employees from the meat department or reduce employees' hours in the meat department because of their union activities.

WE WILL NOT give warning notices or reprimands to employees because they support the Union, or because they refuse to testify falsely in a proceeding before the National Labor Relations Board.

WE WILL NOT tell employees that they should testify falsely in a proceeding before the National Labor Relations Board.

WE WILL NOT discharge or otherwise discriminate against employees because of their interest in and activities on behalf of the Union, and because they refused to testify falsely in a National Labor Relations Board proceeding.

WE WILL offer reinstatement to employee Todd Hayes to both his former day shift and night shift positions, dismissing, if necessary, any employee(s) hired to fill such position(s) and make Hayes whole, with interest, for any loss of earnings and other benefits he may have suffered because of our unlawful conduct.

WE WILL remove from the personnel file of employee Todd Hayes any reference to his warnings or discharge.

WE WILL restore employee Don Shelby to the number of hours he was working in the meat department on or about November 14, 2007, and make Shelby whole, with interest, for any loss of earnings and other benefits he may have suffered because of our unlawful conduct.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of the foregoing rights guaranteed under Section 7 of the Act.

EKONKAR ENTERPRISES LLC d/b/a
ROBANDEE APPLE MARKET
(Employer)

Dated: _____ By: _____
(Representative) (Title)

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

8600 Farley Street, Suite 100
Overland Park, Kansas 66212-4677
Hours: 8:15 a.m. to 4:45 p.m.
913-967-3000.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be referred to the Board's office, 8600 Farley Street, Suite 100, Overland Park, Kansas, 66212, Phone 913/967-3000.