American Red Cross Missouri-Illinois Blood Services Region *and* Local Union No. 682, International Brotherhood of Teamsters.[1] Cases 14–CA–27956 and 14–RC–12500

June 5, 2006

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 14, 2005, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed reply briefs to each. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply 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 as modified and to adopt the recommended Order as modified and set forth in full below.[3]

The judge addressed multiple unfair labor practice allegations in this case; he found merit in some and dismissed others.[4] In addition, he sustained the Union's Objection 14, in part. Based on his unfair labor practice findings and Objection 14, the judge recommended setting aside the election and ordering a second election. We agree in part, and disagree in part, with the judge's decision.

We adopt the judge's findings that the Respondent violated Section 8(a)(1) by coercively interrogating employee Judy Allen and violated Section 8(a)(3) and (1) by isolating employees Jerri Thompson, Nicole Bishop, and Catherine Pendleton because of their union activities. A majority of the Board (Chairman Battista and Member Liebman) additionally finds that the Respondent unlawfully harassed Thompson because of her protected activities. A different majority, comprised of Chairman Battista and Member Schaumber, (1) affirms the judge's dismissal of allegations that the Respondent threatened to freeze wages,[5] (2) reverses the judge's finding that the Respondent violated Section 8(a)(1) by soliciting employees' grievances; (3) agrees with the judge, for the reasons set forth below, that the Respondent did not maintain an overly broad no-solicitation policy; and (4) overrules union Objection 14.[6] For reasons explained at other points in this decision, Member Liebman dissents from the Board's dismissal or overruling of all four of these allegations.[7] Based on the entirety of the Respon-

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 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] We shall modify the judge's recommended Order to conform to our findings. We shall also substitute a new notice in conformity with the Order as modified.

[4] No exceptions were filed to the judge's dismissal of 8(a)(1) allegations that (1) the Respondent threatened to withhold a pay increase from employee Judy Allen; (2) Senior Director of Donor Services Michelle Langley solicited employee grievances, promised to remedy grievances, and threatened loss of jobs and pay; (3) Supervisor Patricia Lasater and Recruitment Manager Lisa Wilson stated that it would be futile to elect the Union and solicited and promised to remedy grievances; (4) Langley threatened plant closure, withholding of pay increases, and loss of benefits; (5) Lasater and Wilson threatened loss of pay increase; (6) Lasater created an impression that employees' union activities were under surveillance, interrogated an employee, told an employee that the employee could not be trusted because of her union activities, and solicited an employee to sign an antiunion petition; (7) Lasater and Wilson interrogated an employee. Nor did any party except to the judge's decision to overrule union Objection 12.

[5] We adopt this dismissal for the reasons stated by the judge. We emphasize that we found the exact same language to be lawful in *Mantrose-Haeuser Co.*, 306 NLRB 377 (1992). We find no meaningful distinction between this case and *Mantrose-Haeuser.* We note that the Respondent's pamphlet stated that "wage . . . *programs*," not "wages," typically remain frozen during bargaining. Employees would reasonably interpret the pamphlet to mean that the Respondent would continue its wage programs, including its program of granting a wage increase every July. Employees could not reasonably interpret the pamphlet as communicating that the Respondent would depart from its wage programs by canceling the July increase. The fact that other conduct was unlawful does not change the reasonable reading of this pamphlet.

[6] The Union withdrew Objections 5, 10, 15, 16, and 17 before the Acting Regional Director issued his Report on Objections. Objections 1–4, 6–9, and 11–13 are coextensive with the unfair labor practice allegations. We sustain Objection 4 (coercive interrogation of Allen) and Objection 6 (discriminatory isolation of Thompson, Bishop, and Pendleton). There was no objection filed that corresponds to our finding that the Respondent unlawfully harassed Thompson. We overrule the remaining objections consistent with our decision to dismiss the corresponding unfair labor practice allegations.

[7] Member Liebman dissents from the majority's dismissal of the allegation that the Respondent unlawfully threatened to freeze the employees' wages during the bargaining process. The Respondent's practice was to grant predetermined wage increases every July, following the yearly employee evaluations and training. The Respondent stated in a campaign flyer shortly before the election that: "While bargaining goes on, wage and benefit programs typically remain frozen until changed, if at all, by contract. If the Union wins, You [sic] take the risks . . . you will have to 'wait and see' if anything happens to wages and benefits." In contrast to the majority, Member Liebman concludes that employees could reasonably interpret the campaign flyer's statements that "wage and benefit programs typically remain frozen" and that employees would "have to 'wait and see' if anything happens to

dent's unlawful conduct, we will set aside the July 8, 2004 election and direct a second election.[8]

I. BACKGROUND

American Red Cross Missouri-Illinois Blood Services Region (the Respondent) operates a network of fixed and mobile facilities to collect blood from donors. Teamsters Local 682 (the Union) filed an election petition on March 26, 2004,[9] seeking to represent the Respondent's blood-collection employees. The election was held on July 8. The tally of ballots shows 102 for the Union, 118 against, and 1 nondeterminative challenged ballot. The Union filed timely objections.

II. THE RESPONDENT'S UNFAIR LABOR PRACTICES

A. We agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) by coercively interrogating employee Judy Allen and violated Section 8(a)(3) and (1) by isolating employees Thompson, Pendleton, and Bishop because of their union activities. These violations occurred shortly after the petition was filed, in response to the Union's organizing campaign.

On April 18, approximately 3 weeks after it filed the petition, the Union held an organizing meeting. Employee Judy Allen attended that meeting. The next day, Allen's supervisor, Robert Nemec, telephoned Allen at home before her shift and directed Allen to meet that day with Interim Director of Collections Rachelle Wiedman. During the meeting, Wiedman asked Allen if she knew of anybody who attended the April 18 union meeting, whether Allen was going to vote for the Union, and who had influence over the votes. Wiedman also asked Allen whether she had attended the union meeting. Allen falsely responded that she had not attended the union meeting. Wiedman also told Allen that "it did not matter[] if we got this particular union in anyway because things would not change; not much would change, as far as work, the work environment."

Shortly after the Respondent unlawfully interrogated Allen, it discriminatorily isolated employees Jerri Thompson, Nicole Bishop, and Catherine Pendleton from other employees because of their union activities. Thompson, Bishop, and Pendleton, who were open union adherents, attended the representation hearing between April 15 and 20. Pendleton and Thompson testified on behalf of the Union at that hearing. The Respondent's agents observed them testify. Thompson was also a known union spokesperson who discussed the benefits of unionization with employees and passed out union authorization cards.

In two separate conversations in April, Scheduling Manager Helen Gwin instructed scheduler Gayle Hinklin to schedule Thompson, Bishop, Pendleton, and Marie Stratton together (and apart from other employees) "to keep them from infecting the others."[10] Gwin directed Hinklin to schedule them together "until I tell you differently." Between April 26 and 30, the Respondent scheduled Bishop, Pendleton, Thompson, and Stratton together (and apart from the other employees) every day that they were scheduled to work. The Respondent also scheduled these employees in this fashion on 19 occasions in May, 20 occasions in June, 15 occasions in July, 19 occasions in August, and 9 occasions in September.[11]

The judge found, and we agree, that the Respondent affected a term or condition of employment when it changed the schedules of Thompson, Bishop, and Pendleton, isolating them from other employees.[12]

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wages" to mean that the July wage increase, to be made pursuant to the wage program, would be withheld: i.e., that existing wages would be "frozen" as part of the program. This interpretation would tend to be reinforced by the Respondent's other unfair labor practices and objectionable conduct.

In dismissing the allegation, the judge relied on the Board's decision in *Mantrose-Haeuser Co*., in which the Board found that the identical language did not constitute a threat in violation of Sec. 8(a)(1) "in the circumstances presented." The Board observed that "there were no other allegations of unfair labor practices or objectionable conduct." Id. at 377. 306 NLRB 377, 378 (1992). Moreover, as the Board noted, the employer in *Mantrose-Haeuser* assured its employees that it would continue its past process of granting a December wage increase. In contrast, here the Respondent not only failed to reassure its employees that it would grant its customary merit increases in July, but also committed numerous unlawful acts contemporaneously with its circulation of the flyer. Under these circumstances, Member Liebman would find that the Respondent's flyer constituted an implied threat to freeze wages in the event of a union victory and violated Sec. 8(a)(1). As such, it should serve as an additional ground on which to set aside the election.

[8] Member Schaumber agrees that the election must be set aside and a second election directed based on the Respondent's unlawful and objectionable isolation of Thompson, Bishop, and Pendleton, which commenced shortly after they testified at a representation hearing and which was published to unit employees on posted work schedules. He does not rely on the so-called "harassment" of Thompson because, for the reasons set forth in his partial dissent, he finds that the Respondent's conduct in that regard did not violate the Act.

[9] All dates are in 2004, unless noted otherwise.

[10] The complaint does not allege that the Respondent discriminated against employee Stratton. Stratton was a union supporter and served as an observer for the Union at the July 8 election.

[11] The Respondent concedes that it began scheduling the alleged discriminatees together more often shortly after the representation hearing. Thus, between January 2 and April 25, the Respondent never scheduled all three alleged discriminatees together, and it scheduled two of the three alleged discriminatees together only three times per month, on average. The alleged discriminatees worked with many other employees during this time period.

[12] See *Briar Crest Nursing Home*, 333 NLRB 935, 943 (2001) ("[C]hanges in work schedules involve[] a material change in the employees' terms and conditions of employment."). We find that the Respondent affected a term or condition of employment even though

B. As found by the judge, the Respondent continued its unlawful response to the union campaign by harassing employee Jerri Thompson in violation of Section 8(a)(1). We recognize that the General Counsel has not alleged an 8(a)(3) violation. However, we believe that Thompson's testimony in support of the Union in the representation case was part and parcel of her union activity. All of that activity was protected and concerted. As discussed below, the Respondent harassed her for that activity, and it thereby violated Section 8(a)(1). As stated above, Thompson was a leading union adherent and she testified for the Union about her job duties at the representation hearing, stating that, when she served as a team leader, she did not assign tasks to employees but instead let employees decide among themselves who would perform each task. Thompson's testimony was against the Respondent's interests.

On May 4, 2 weeks after the representation hearing closed, Supervisor Robert Nemec telephoned Thompson at home and directed her to meet with him and Manager Barbara Labinjo the next day. On May 5, Thompson met with Nemec and Labinjo. Director of Human Resources Wineland and Robyn Kline, assistant to the director of collections, also participated in the meeting by telephone.[13] When Thompson asked Nemec to sign a statement that the meeting would not result in her discipline or termination, Nemec refused. Nemec then told Thompson that, based on Thompson's testimony at the representation hearing, he thought she did not understand her duties and responsibilities as team leader. Nemec, with three other managers attending, then proceeded to read the entire team leader handbook verbatim to Thompson. After each section, Nemec stopped and questioned Thompson whether she understood him, and asked whether she was performing each function with her team members. The meeting lasted approximately 90 minutes. Thompson was not disciplined.

The judge found that the Respondent violated Section 8(a)(1) during the May 5 meeting by harassing Thompson because of her union activities and the adverse testimony that she gave during the representation hearing. We agree, for the reasons set forth below.

The Board applies the *Wright Line* framework to alleged violations of Section 8(a)(1) that turn on employer motivation. *Colburn Electric Co.*, 334 NLRB 532, 533 (2001) (citing *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981)); *Tomatek, Inc.*, 333 NLRB 1350, 1354 (2001). To prove a violation under *Wright Line*, the General Counsel must first show that protected activity was a motivating factor in the Respondent's decision to take adverse action against the alleged discriminatees. The General Counsel can satisfy this initial burden by proving that the alleged discriminatees engaged in protected activity, that the Respondent was aware of it, and that the Respondent demonstrated some animus toward that protected activity. The burden then shifts to the employer to demonstrate that the same adverse action would have occurred even absent the protected activity. Applying that framework, we find that the General Counsel met his burden, and that the Respondent failed to establish that it would have taken the same action absent Thompson's protected activities.

As discussed above, there is ample evidence that the Respondent knew that Thompson was a strong union supporter and that she had engaged in the protected activity of testifying on behalf of the Union at the representation hearing. The Respondent's animus is evident from its unlawful interrogation of Judy Allen in mid-April, from its contemporaneous isolation of union supporters Thompson, Bishop, and Pendleton from other employees—to keep them from "infecting" their coworkers—and from the fact that Thompson was harassed on May 5 at least in part because of her testimony at the Board representation hearing. On these bases, we find that the General Counsel satisfied his initial burden of proving that Thompson's protected activity was a motivating factor in the Respondent's decision to harass Thompson by isolating her in a meeting of several managers, reading her the entire team leader handbook, and questioning her about the handbook provisions over the course of a 90-minute meeting.

We further find that the Respondent failed to satisfy its rebuttal burden of proving that it would have conducted this 90-minute meeting even absent Thompson's protected activities. The Respondent claims that it conducted the May 5 meeting in order to make sure that Thompson fully understood the duties and responsibilities of the team leader position. In this regard, Labinjo, who was not Thompson's direct supervisor, heard Thompson testify at the representation hearing that Thompson permitted team leaders at the mobile blood drives to choose which responsibilities they wanted to

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the Respondent did not isolate Thompson, Bishop, and Pendleton from every other employee on every day of employment. The crucial fact—and one that the Respondent concedes—is that the Respondent changed the schedules of Thompson, Bishop, and Pendleton in a way that limited their contact with other employees, thus imposing different working conditions on the three employees.

[13] The General Counsel claims that Kline and Wineland participated in the meeting from its beginning. The Respondent claims that Kline and Wineland began participating only after Thompson asked to have a coworker present and asked Nemec to sign a declaration that no discipline would result from the meeting. Our finding of a violation does not turn on this factual dispute. Hence, we need not resolve it.

perform rather than directly assigning responsibilities to each individual team member. Labinjo then requested that Nemec hold a meeting to discern if Thompson was conversant with her team leader duties. The Respondent argues that it would have conducted the resultant meeting because of Thompson's nonperformance of duty even had Thompson not engaged in any protected activity. Indeed, the Respondent contends that Supervisor Nemec similarly read the handbook verbatim to a group of team leaders in January or February "to reiterate the job responsibilities to all Team Leaders."

We find that the Respondent failed to prove that it would have held the 90-minute meeting with Thompson on May 5 absent her protected activity. That Nemec previously read the handbook verbatim to all team leaders while conducting a regular training session regarding all team-leader duties does not establish that the Respondent would have read the entire handbook to an employee whom it believed was not performing to its satisfaction one of many duties described in the handbook. The two situations are significantly different. The fact that the Respondent read the entire handbook aloud in the one context does not demonstrate that it would have done the same in the second context even absent Thompson's protected activity. The Respondent introduced no evidence that it ever called another team leader into management offices, for a meeting with several managers, during which the employee was read the entire handbook and questioned about her understanding of it, purportedly because the Respondent suspected that she did not understand a particular duty. Nor did the Respondent otherwise persuade by a preponderance of the evidence that it would have taken the same action absent Thompson's protected activities. Further, inasmuch as the Respondent's actions during this 90-minute meeting were directly motivated by, and directed at, Thompson's protected activity of testifying at the representation hearing, they had a reasonable tendency to restrain her from engaging in further protected activities.

Our dissenting colleague asserts that the Respondent's meeting with Thompson was motivated by the substance of her testimony at the representation hearing. According to that argument, the testimony revealed a lack of understanding by Thompson as to what her duties were, and thus the Respondent had to conduct a special training session for her. [14]

The argument does not withstand analysis. As discussed above, Thompson testified on behalf of the Union, and against the interests of the Respondent, in a Board hearing. That testimony was consistent with, and in furtherance of, her other union activity. Thus, under *Wright Line*, the General Counsel has shown that these activities were at least a reason for the meeting. The burden was then on the Respondent, under *Wright Line*, to show that it would have held the same meeting with Thompson, even if she had not engaged in those activities. We conclude that the Respondent has not met its rebuttal burden. The Respondent has not shown a single instance in which an employee has been subjected to the treatment involved herein because of an asserted lack of understanding of duties. In addition, the meeting was not confined to the single matter which she assertedly misunderstood. Concededly, if the Respondent had a practice of holding such meetings to remedy misunderstandings, it may have been privileged to meet with Thompson about the misunderstanding, even if that misunderstanding was revealed in testimony in a Board proceeding. However, the Respondent has not shown such a practice or otherwise established that it would have held the 90-minute meeting regardless of Thompson's protected activities, and thus the General Counsel's initial case stands unrebutted. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by harassing employee Thompson because of her protected activities.[15]

III. SOLICITATION OF GRIEVANCES

The judge found that the Respondent violated Section 8(a)(1) by soliciting its employees' grievances. We disagree. Because we find that the Respondent's actions

[14] The fact that the Respondent did not meet with Thompson until approximately 2 weeks after Thompson testified at the representation hearing undercuts the Respondent's argument that it was concerned that Thompson was not carrying out her duties.

[15] We are not holding that employers are precluded from acting on misconduct that they learn from a witness' testimony at a Board hearing. Nor are we holding that, in order to satisfy its *Wright Line* burden, an employer must show an identical past situation where identical discipline was imposed. In the instant case, the Respondent has not shown a past situation that is even similar to the instant case. As discussed above, the meetings in January and February were substantially dissimilar to the meeting with Thompson. Thus, we are merely holding, for the reasons stated above, that the Respondent failed to prove that it would have held the 90-minute meeting with Thompson absent her protected activities.

Engineered Comfort Systems, 346 NLRB 661 (2006), a case cited by our dissenting colleague, actually supports our conclusion. In that case, the Board held that a judge erred when she relied on an employer's treatment of dissimilarly situated employees when evaluating whether the employer satisfied its rebuttal burden. Here, the Respondent attempts to satisfy its rebuttal burden with evidence that it read the team-leader handbook to groups of employees in January or February as part of general training in all duties. Employees who attended these general training sessions are not similarly situated to Thompson, who allegedly failed to perform a specific duty. Consistent with *Engineered Comfort Systems*, we decline to give weight to evidence of the Respondent's treatment of dissimilarly situated employees.

were consistent with its past practice of soliciting employee feedback, we dismiss this allegation.

The Respondent has an established practice of soliciting its employees' grievances. Specifically, for several years preceding the Union's organizing drive, the Respondent solicited its employees' grievances in regular meetings, during informal conversations, and with two surveys.

Since at least 1998, the Respondent has held quarterly team meetings that provided an open forum for employees to discuss any work problems they were having. Supervisor Sherry Koenig testified that she asked employees at these quarterly meetings about their concerns. Supervisor Maria Smith testified that she too solicited employee concerns at these monthly team meetings. This past practice of soliciting grievances at quarterly team meetings is reflected in the minutes of a supervisory meeting. The minutes from a regular biweekly meeting of supervisors held on February 23, 2004, state that "[c]ommunication is an issue[;] please talk in team meetings about what staff needs[,] likes[,] and dislikes."

In addition to these quarterly meetings, CEO Chris Bales held annual town hall meetings where she communicated important information to employees and asked their input on any problems or issues that they had. In response to Bales' solicitations, employees voiced their concerns at these town hall meetings.

Prior to the union organizing campaign, the Respondent had also asked employees about their concerns during informal conversations. Supervisor Maria Smith testified during the unfair labor practice hearing that, over the 2 years preceding that hearing, she asked employees about their opinions on the "good things" and "bad things" about working for the Respondent. Additionally, Collections Manager Barbara Labinjo testified that CEO Bales told employees to discuss any concerns or issues with their supervisors. Interim Director of Collections Rachelle Wiedman testified that, in November 2003, management decided to ask employees about what they liked and disliked about working for the Respondent.

Moreover, the Respondent has a history of soliciting employee input through written surveys. In 2000, the Respondent solicited employee feedback in a written survey that it distributed to employees at the request of the national headquarters of the American Red Cross. In 2002, the Respondent further solicited employee feedback in a telephonic survey. Both surveys consisted of questions about working conditions that called for "yes" or "no" answers. Employees responded to both surveys anonymously.

Consistent with this established pattern of solicitations, Director of Collections Wiedman created a written survey in the early spring of 2004. This survey asked employees to list "five positive topics this week" and "five areas you feel can be improved." The survey—which made no mention of the Union or the organizing campaign—did not ask employees to identify themselves, but it did call for their "Center/Team." Interim Manager Robert Nemec instructed supervisors to distribute the written survey to employees and to collect written responses or record oral responses. Supervisors Sherry Koenig and Maria Smith distributed the survey to employees in April.

Employee Bishop testified that she and a group of her coworkers wrote their feedback on a single survey and returned it to Supervisor Smith. Supervisor Nemec testified that he collected 10 or more completed surveys. There is no evidence that at any time the Respondent linked the survey to the organizing campaign or promised to remedy any of the employees' complaints.

Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities. "The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances." *Amptech, Inc.*, 342 NLRB 1131, 1132 (2004). An employer can rebut that inference. *Uarco Inc.*, 216 NLRB 1, 2 (1974). Additionally, "[a]n employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign." *Johnson Technology, Inc.*, 345 NLRB 762, 764 (2005) (citing *Wal-Mart Stores, Inc.*, 339 NLRB 1187, 1187 (2003)). "However, an employer cannot rely on past practice to justify solicitation of grievances where the employer 'significantly alters its past manner and methods of solicitation.'" *Wal-Mart Stores*, supra (quoting *Carbonneau Industries*, 228 NLRB 597, 598 (1977)).

Based on the foregoing, we find that the evidence fails to establish that the Respondent unlawfully solicited grievances from its employees. Rather, we find that the April survey was consistent with the Respondent's past practice of soliciting grievances. As it had in the previous meetings, conversations, and surveys, the Respondent asked employees in its April survey about working conditions that they found satisfactory and those that needed improvement. The April survey's questions were very similar to both Supervisor Smith's practice of questioning employees about the "good" and "bad" aspects of employment and to the meeting minutes directing supervisors to ask about employees' "needs, likes, and dislikes." Moreover, the Respondent's use of a survey is

consistent with its history of soliciting employee feedback with surveys. Although there were some differences between earlier solicitations and this one, it must be borne in mind that the issue is not whether there has been a charge in method of solicitation, but rather whether the instant solicitation implicitly promised a benefit. The particular changes in methods of solicitation in this case did not give rise to an implied promise. Consequently, we dismiss this allegation.[16]

IV. NO-SOLICITATION CLAUSE

The judge dismissed the allegation that the Respondent violated Section 8(a)(1) by maintaining an overly broad no-solicitation policy. The judge found that the policy allegedly maintained by the Respondent was not unlawfully overbroad. Although we agree that the allegation must be dismissed, we do so on the basis that the General Counsel failed to satisfy his burden of proving that the Respondent actually maintained the alleged no-solicitation policy.

The complaint alleged that, "[s]ince about January 15, 2004, Respondent has maintained a Solicitation, Distribution of Literature and Access policy that provides, in part, 'No employee may engage in solicitation of any kind during working time or in working areas.'" The Respondent denied this allegation in its answer.

At the hearing, virtually no evidence was introduced to support the unlawful maintenance allegation. In her opening statement, counsel for the General Counsel stated that she intended to prove, among other violations, that the Respondent "maintained a facially unlawful no-solicitation policy." In his opening statement, counsel for the Respondent replied, "In regard to the no-solicitation policy, we believe that it is not facially overbroad and we will have testimony about that."

After the opening statements, the judge asked counsel for the General Counsel whether she had anything further before calling her first witness. Counsel for the General Counsel stated, "Yes, just to clear up—put into the record, at this point, General Counsel's Exhibit 7, which is the solicitation policy, in question." That exhibit, which is a 1-page document, reads in relevant part:

> American Red Cross Missouri-Illinois Blood Services Region
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> Section 6: Miscellaneous
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> Solicitation, Distribution of Literature and Access
>
> I. Policy
>
> Employees should not be disturbed or disrupted in the performance of their job duties. Therefore, no employee may engage in solicitation of any kind during working time or in working areas. No employee may engage in distribution of literature during working time or in working areas. Working time shall include when any of the individuals involved are supposed to be performing designated work tasks. Working time does not include authorized periods of off-duty such as meal breaks or other designated break period. Working areas include any mobile blood collection location operation.
>
> . . . .
>
> Effective Date 09–01–2002[17] Policy No. 6.2

Although the General Counsel introduced the policy, he never established that the policy was in effect. The General Counsel's allegation that the Respondent maintained that policy was denied in the Respondent's answer. Concededly, at the hearing, the Respondent's counsel said that the policy was not facially overbroad. However, this was not a clear retraction of its denial (in the answer) that the policy was maintained. On this record, we find that the General Counsel failed to satisfy his burden of proving that the Respondent actually main-

[16] Member Liebman dissents, agreeing with the judge's finding that the April 2004 survey departed from the Respondent's past practice of soliciting employee grievances and violated the Act. See, e.g., *Carbonneau Industries*, 228 NLRB at 598 (1977).

The judge found that while the employees had participated in a written survey in February 2000 and a telephone survey in 2002, these surveys were far different than the April 2004 survey. The National Red Cross organization and the Gallup Organization created earlier surveys, which solicited yes/no answers to questions. Most importantly, employees participated on an anonymous basis. In contrast, a local manager created the 2004 survey, which asked employees to name five areas of concern and which was distributed and collected by supervisors—shortly before the Board hearing concerning the representation petition. Participation was essentially mandatory and employees were identified by their center and team. Thus, the 2004 survey significantly altered the past methodology of surveying. Member Liebman would also find the Respondent's practice of having managers *orally* solicit employee grievances at meetings to be inapposite since it bore no resemblance to the *written* survey utilized in 2004. In fact, a comparison of the two methods further supports the status of the 2004 survey as a marked departure from former practices.

Clearly, the Respondent did not have a past practice of soliciting grievances that was *comparable* to the April 2004 survey. The majority suggests that a "change in method of solicitation" does not automatically establish a violation. But such a change, if significant, does create an inference that the employer is promising to remedy grievances. See, e.g., *Center Service System Division*, 345 NLRB 729, 729 (2005). In Member Liebman's view, on the facts here, there was a significant change, and the Respondent has failed to rebut the resulting inference.

[17] The policy says that it was effective September 1, 2002. But a date on a memo does not establish that the policy was actually operative on that date or at the time of the events herein. That proof would require a witness, or at least some documents showing enforcement.

tained the policy set forth in Exhibit 7, and therefore we dismiss this allegation.[18]

V. OBJECTION 14

As noted above, the Union lost the July 8 election by a vote of 118 to 102, with 1 challenged ballot. The Union filed a number of objections alleging that the Respondent tainted the election. The judge sustained Union Objection 14, finding that the Respondent treated union election observers disparately from its own observers. Specifically, the judge found that the Respondent prohibited union observers, but not its own observers, from working on election day. The judge also found that union observers were not invited to attend a preelection meeting that Employer observers attended and that the Union was not informed that it could have alternate observers. For the reasons set forth below, we disagree with the judge that the Respondent engaged in objectionable conduct.

The election was conducted on July 8. The Respondent compensated its election observers and alternate observers for certain activities on July 7 and 8. Specifically, the Respondent paid each of its observers and alternates 8 hours' pay for attending each of two meetings on July 7. The first meeting was among the Respondent's managers, election observers, and alternates. It lasted 1 hour. The second meeting was the preelection conference held by the Board agent. This meeting also lasted approximately 1 hour. The Respondent also paid each observer and alternate 8 hours' pay for serving as observers or alternates on July 8. Most of the Respondent's observers and alternates served only about 2–3 hours on election day. Some of the Respondent's observers and alternates also worked a regular shift on election day and received their normal pay in addition to the pay they received for serving as observers or alternates.

Before the election, the Respondent had several conversations with employees regarding the use of "paid time off" (PTO) if they served as union observers. Supervisor Pam Burgess telephoned Supervisor Sandy Loy, who was at a blood drive in Flora, Illinois. Employees Brenda Loy (no relation to Sandy), Angela Blake, Chrissie Harrison, and Donna Funnemann were standing next to Sandy Loy during that telephone discussion. With Burgess still on the line, Sandy Loy told Blake and Harrison that, if they served as observers for the Respondent, "you will be paid eight hours or, if you want the hours, you can go in and be an alternate and still go to the Centralia drive and get paid for that." Sandy Loy then handed the telephone to Brenda Loy. Burgess told Brenda Loy that "the union had requested for me [Brenda] to be an observer, that they had given me the day off, but I would have to take a PTO day." Brenda Loy chose not to serve as election observer.

Employee Nicole Bishop testified that Manager Labinjo called her at home and informed her that the Union had notified the Respondent that she (Bishop) was going to serve as an observer for the Union. Bishop testified that Labinjo told her that "if I was going to serve, as an observer, that I needed to let her know because she needed to put in PTO time for me." Bishop was sick on July 8 and did not work or serve as an observer.

Based on the foregoing, we disagree with the judge's finding that the Respondent committed objectionable conduct. First, we find, contrary to the judge, that the Respondent did not prohibit union observers from working on election day. The Respondent's statements that employees would have to use PTO if they wished to serve as observers did not preclude those employees from also working on election day. Nothing in the Respondent's statements forbade an employee from working a normal shift and serving as a union observer before or after that shift. Moreover, nothing in the Respondent's statements prevented a union observer from serving as a union observer during a scheduled shift, using PTO to cover the time spent observing, and working the remainder of the scheduled shift.

Further, we do not view the Respondent's conducting a meeting for only its observers, but not the Union's observers, to be objectionable. The Respondent was clearly permitted, prior to the election, to explain to its observers their role in the election process. It was not obligated to provide similar explanations to the Union's observers. Nor are we aware of any responsibility the Respondent had to inform the Union that it could have alternate observers. Thus, we cannot conclude that the Respondent's conduct with respect to observers constitutes objectionable conduct.

[18] Member Liebman disagrees with the majority's finding that the General Counsel failed to prove that the Respondent maintained the no-solicitation policy at issue. She would also reverse the judge's finding that the policy was substantively lawful because it only prohibited solicitation during working time. Regarding the maintenance of the policy, the General Counsel introduced a memo from the Respondent stating the policy with the notation, "Effective Date 09–01–2002." The Respondent had denied in its answer to the complaint that it maintained this policy; at the hearing, it only denied that the policy was facially overbroad. Member Liebman would find that the policy memo, in conjunction with the Respondent's failure to contest the policy's existence at trial, sufficed to prove that the Respondent maintained the policy. As for the policy's facial illegality, the policy states: "[N]o employee may engage in solicitation of any kind during working time or *in working areas*" (emphasis added). The Board has long found such prohibitions of all solicitation in working areas (which necessarily cover solicitation occurring during nonworking times) to be presumptively unlawful. *Our Way, Inc*., 268 NLRB 394 (1983). Accordingly, Member Liebman would find the policy to be unlawful.

The Union seeks to raise in its answering brief an additional argument that the Respondent tainted the election by grossly overcompensating its election observers. We find that this argument is not properly before the Board. The judge did not base his finding of objectionable conduct on this basis; indeed, he did not address the compensation issue at all. Further, no proper exception was filed to the judge's failure to sustain the objection based on the alleged overcompensation of the Respondent's observers. Rather, in a footnote in its answering brief to the Respondent's exceptions, the Union merely stated that it interpreted the judge's decision as sustaining Objection 14, which was a multipart objection, in full and that, assuming arguendo that the judge did not do so, it was cross-excepting. Cross-exceptions, however, may not be asserted in answering briefs. Section 102.46(d)(2) of the Board's Rules and Regulations ("The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof."); see also Section 102.46(j) ("Any brief filed pursuant to this section shall not be combined with any other brief. . . ."); cf. *Manno Electric*, 321 NLRB 278 fn. 10 (1996). The Respondent excepted to the part of Objection 14 on which it did not prevail before the judge. The Union did not except to the different part of Objection 14 on which it did not prevail. We do not agree that one party's exception to a loss can be used to somehow supply the adverse party with an exception that it did not file. Because the Union failed to properly cross-except to the judge's failure to sustain Objection 14 on the gross-overcompensation ground, we decline to pass on this issue. Consequently, we overrule Objection 14.[19]

VI. SETTING ASIDE THE ELECTION

We find that the July 8 election must be set aside, and a second election ordered based on the Respondent's unfair labor practices. Soon after the Union started its organizing campaign, the Respondent committed three unfair labor practices. It coercively interrogated Judy Allen, isolated Thompson, Bishop, and Pendleton on a continuous basis because of their protected activities, and harassed Thompson because of her protected activities.

"[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'"[20] The only exception to this policy is "where the misconduct is de minimis: 'such that it is virtually impossible to conclude' that the election outcome has been affected."[21]

Based on the facts above, we find that the Respondent's unfair labor practices, particularly the isolation of three employees, destroyed the laboratory conditions the Board requires in order to ensure a free and fair election. See *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004) (setting aside election because respondent's unfair labor practices tainted laboratory conditions). The isolated employees, Thompson, Pendleton, and Bishop, were open union supporters who testified at the representation proceeding and engaged in additional protected activities. Other employees knew of their union support. Work schedules, posted by the Respondent for all employees to observe, clearly showed that the Respondent kept Thompson, Pendleton, and Bishop away from other employees and that it commenced this practice shortly after the three employees testified at the representation hearing. Employees who observed the work schedules would reasonably infer that the Respondent was discriminating against the three because of their union support. Further, the Respondent's isolation of these employees significantly altered their ability to discuss the Union with other employees. This

[19] In addition, there were no objections based upon the Employer's paying its own observers and not paying union observers.

Member Liebman would find merit in Objection 14 on the basis that the Respondent grossly overcompensated its observers (and alternates) by paying them 8 hours of pay for attending a 2–3 hour preelection conference and then another 8 hours of pay for serving 2–3 hours as observers or alternates on the day of the election. This pay was "grossly disproportionate" to the services rendered. *Quick Shop Markets*, 200 NLRB 830 (1972), enfd. 492 F.2d 1248 (8th Cir. 1974); *Easco Tools, Inc*., 248 NLRB 700 (1980). The record indicates that the Respondent extended this overcompensation to fully one-sixth of the election unit by designating (and paying) some 33 employees as observers or alternates. Further, the Respondent's supervisors actually telephoned employees serving as the *Union's* observers and offered them duty as Respondent's observers, noting that they could make 8 hours of pay without taking paid leave or could work their normal shift and make an additional 8 hours of pay.

Member Liebman disagrees with the majority's finding that the Union failed to properly raise the gross overcompensation issue under Sec. 102.46(d)(2) of the Board's Rules and Regulations because it presented the argument in its answering brief instead of in a separate cross-exception. The Respondent brought this issue into play when it contested the judge's finding that a supervisor told an employee that if she served as an observer for the Respondent she could both work and receive 8 hours pay. Thus, under Sec. 102.46(d)(2), the compensation issue is "a question[] raised in the exceptions and in the brief in support thereof" and is properly before the Board. Finally, the Respondent was not prejudiced by the Union's manner of raising this argument since it had (and had availed itself of) the opportunity to file a reply brief to the Union's answering brief.

[20] *Clark Equipment Co.*, 278 NLRB 498, 505 (1986) (quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962)).

[21] *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1223 (2004) (quoting *Sea Breeze Health Care Center*, 331 NLRB 1131, 1133 (2000)). Chairman Battista and Member Schaumber do not necessarily agree with the "virtually impossible" standard. However, it reflects current Board precedent, no party seeks to reverse that precedent, and they therefore apply it for institutional reasons.

unlawful discrimination, which was practiced openly and posted for employees to view, together with the Respondent's other unfair labor practices, tainted the election conditions, necessitating that the election be set aside and a second election ordered.

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, American Red Cross Missouri-Illinois Blood Services Region, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Harassing any employee because of the employee's union support, union activities, or participation in a Board representation case hearing.

(c) Imposing more onerous terms and conditions of employment on employees by isolating them from other employees because of union support, union activities, or participation in a Board representation case proceeding.

(d) 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, remove the imposition of more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson.

(b) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 19, 2004.

(c) 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.

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

IT IS FURTHER ORDERED that the election held on July 8, 2004, in Case 14–RC–12500 be set aside, and that this case be severed and remanded to the Regional Director to conduct a new election when he deems appropriate.

[Direction of Second Election omitted from publication.]

MEMBER SCHAUMBER, dissenting in part.

I agree that the Respondent violated Section 8(a)(1) by coercively interrogating employee Judy Allen, and Section 8(a)(3) and (1) by isolating employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson. I also agree that these violations—particularly the isolation of Bishop, Pendleton, and Thompson, which commenced shortly after they testified at a representation hearing and which was published to unit employees on posted work schedules—warrant a new election. I disagree, however, with my colleagues' finding that the Respondent violated Section 8(a)(1) by retraining Thompson in her duties as a team leader.

There is no dispute that the initial team leader training, given to all team leaders in January or February 2004, consisted of Supervisor Nemec reading the entire team leader handbook aloud. One provision in the handbook states that team leaders are expected to "provide[ ] necessary direction as far as scheduling what the staff will be doing that day." Record evidence establishes that there had been complaints about staff members bickering among themselves about job assignments. Under union subpoena, Thompson testified at the representation hearing in April 2004. During her testimony, she stated that she allowed staff members to decide for themselves which tasks they would perform. In other words, Thompson admitted that she was not carrying out one of her duties as a team leader. The Respondent then retrained her in the team leader handbook by once again reading the entire handbook aloud. Other employees also testified at the representation hearing under subpoena from the Union. Only Thompson was retrained.

Assuming arguendo that the General Counsel established that Thompson's protected activity was a motivating factor in the Respondent's decision to retrain her, I find that the Respondent would have retrained her even

[22] 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."

in the absence of that activity. The record evidence demonstrates that "training" in the team leader handbook consisted of reading the entire handbook aloud to those being trained. Thompson admitted, under oath, that she was not carrying out one of her duties as a team leader. Considering how recently she had been trained in those duties, the Respondent could have simply disciplined Thompson on the basis of her admission. Instead, it gave her the benefit of the doubt by assuming that she did not understand her duties and therefore repeated her training. It did not retrain any other of its employees who similarly testified at the representation hearing on the Union's behalf but who did not admit under oath, as did Thompson, to dereliction of duty. Thus, the evidence shows that in retraining Thompson, the Respondent acted on her admission of nonperformance of duty.

Contending that the initial group training and Thompson's retraining constituted "significantly different" situations, the majority finds the fact that the Respondent read the entire handbook aloud at the initial training fails to show that it would have done the same at Thompson's retraining even in the absence of Thompson's protected activity. The fallacy in this analysis lies in its point of departure. The *majority* believes that the initial group training and Thompson's retraining presented significantly different situations, but there is no evidence that the Respondent so believed. Indeed, the only evidence we have indicates that the Respondent viewed the two situations alike. Both were team leader trainings, and the evidence shows that for this Respondent, a team leader training means reading the entire team leader handbook aloud. Absent evidence that *Respondent* viewed the situations as different, the consistency of its conduct in those situations supports its *Wright Line* rebuttal case.

The majority finds that the Respondent failed to carry its *Wright Line* rebuttal burden because there is no evidence that the Respondent ever comprehensively retrained another team leader as it did Thompson. But there is no evidence that a like situation had arisen before, and it is extremely unlikely that it had. As stated above, Respondent conducted its initial team leader handbook training in January or February 2004, and Thompson's admission that she was neglecting one of her duties as a team leader came just a few months later, in April. The odds of a comparable situation having arisen in the interim are vanishingly small. The majority also would require the Respondent to show, for *Wright Line* rebuttal purposes, additional instances in which it held meetings with employees to correct misunderstanding of duties. The issue, however, is not how the Respondent deals with employee misunderstanding of duties in general, but specifically how it trains team leaders. As stated above, the record evidence shows that the Respondent acted consistently in that regard. Cf. *Engineered Comfort Systems,* 346 NLRB 661 (2006) (finding that employer sustained *Wright Line* rebuttal burden based on employer's consistent treatment of employees who were specifically no-call/no-show 2 consecutive days, despite evidence showing employer's lax enforcement generally of time and attendance rules).

In finding Thompson's retraining unlawful, the majority also relies in part on the fact that Thompson was questioned about her understanding of and compliance with the handbook. In my view, such questioning was not "harassment" but, on the contrary, perfectly legitimate. Instead of disciplining Thompson for her admitted nonperformance of duty, the Respondent gave Thompson the benefit of the doubt and assumed only that she misunderstood her responsibilities. At the same time, however, the Respondent's director of human resources, Paula Wineland, informed Thompson that she could not promise that discipline would not result from further failure to do her job. Thus, it is apparent that, by asking Thompson to confirm that she understood each provision of the handbook, the Respondent wanted to eliminate misunderstanding as a potential excuse in case further noncompliance were to make discipline necessary.

To reiterate, other employees in addition to Thompson also testified for the Union at the representation hearing. There is no evidence that any of these employees admitted, under oath, that they were not performing their duties. Only Thompson so admitted, and only Thompson was retrained. Thus, Respondent showed it would have retrained Thompson even absent her protected activity. In addition, the evidence shows that the Respondent does not differentiate between or among various team leader training situations, and that a team leader training consists of reading the entire team leader handbook aloud. Thus, the Respondent showed that it would have retrained Thompson by reading the entire team leader handbook aloud to her even absent her protected activity.

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 coercively interrogate any employee about union support or union activities.

WE WILL NOT harass any employee because of the employee's union support, union activities, or participation in a Board representation case hearing.

WE WILL NOT impose more onerous terms and conditions of employment on employees by isolating them from other employees because of union support, union activities, or participation in a Board representation case proceeding.

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

AMERICAN RED CROSS MISSOURI-ILLINOIS BLOOD SERVICES REGION

Kathy J. Talbott-Schehl, Esq., for the General Counsel.
George J. Miller, Esq., of Lexington, Kentucky, for the Respondent-Employer.
Christopher N. Grant, Esq., of St. Louis, Missouri, for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on November 29 through December 2, 2004,[1] in St. Louis, Missouri, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 14 of the National Labor Relations Board (the Board) on August 31. In addition, on September 13, Region 14 ordered consolidated certain issues arising from the representation election in Case 14–RC–12500. The complaint, based upon an original and amended charge in Case 14–CA–27956, filed by Local Union 682, International Brotherhood of Teamsters, AFL–CIO (the Charging Party or the Union) alleges that American Red Cross Missouri-Illinois Blood Services Region, an Unincorporated Chartered Unit of the American Red Cross, a Federally Chartered Corporation (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

The Union's petition was filed on March 26, and sought an election among certain of Respondent's blood collection employees. An election was held pursuant to a Regional Director's Decision and Direction of Election on July 8. The tally of ballots issued on July 8, shows that of approximately 234 eligible voters, 221 ballots were cast, 102 in favor of representation by the Union, 118 against, and 1 ballot was challenged. The challenged ballot is not sufficient in number to affect the outcome of the election. The Union filed timely objections to conduct affecting the results of the election on July 15.

Thereafter, the Regional Director concluded that the allegations of the objections to the election in Case 14–RC–12500 parallel certain issues with the complaint allegations in Case 14–CA–27956, and ordered the consolidation of those cases for hearing before an administrative law judge. The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent imposed more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jeri Thompson by isolating these employees from other employees in violation of Section 8(a)(1) and (3) of the Act,[2] and engaged in numerous independent violations of Section 8(a)(1) of the Act including coercive interrogation, the enforcement of an overly-broad solicitation policy, threatened employees with loss of benefits, solicited and promised to remedy grievances, threatened to discharge employees who supported the Union, threatened employees with loss of wages and benefits, gave employees the impression that their activities on behalf of the Union were under surveillance, threatened to withhold pay increases and close one of its facilities, and threatened employees that their wages and benefit programs would remain frozen during bargaining if employees chose the Union as their bargaining representative.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the collection, processing, and distribution of blood and related matters throughout the States of Missouri, Kansas, and Illinois, with an office and place of business located in St. Louis, Missouri, where it annually derived gross revenues in excess of $250,000, and purchased and received materials and supplies in excess of $50,000 directly from points located outside the State of Missouri. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2004, unless otherwise indicated.

[2] Par. 6(a) of the complaint alleged that on May 27, Respondent terminated its employee Ramona Curtis. After the opening of the hearing the Charging Party and the Respondent entered into a non-Board settlement resolving all outstanding issues concerning the termination. Since the General Counsel did not object to the settlement, I approved the Charging Party's request to withdraw the portions of the original and amended charge alleging the discharge, the withdrawal of the underlying representation objection regarding the allegation and the General Counsel's request to withdraw par. 6(a) of the complaint. Thus, the subject decision will not address this issue as the settlement fully effectuates the purposes and policies of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a network of fixed and mobile locations in Missouri, Illinois, and Kansas to facilitate the donation of blood by individuals, corporations, schools, religious organizations, and other groups. It employs approximately 800 individuals with various job classifications including drivers, nurses, and blood collection specialists. The employees involved in this proceeding are those that principally work in fixed and mobile blood locations that draw and process blood. The Union presently represents and has a collective-bargaining agreement for vehicle drivers that transport equipment to the mobile blood locations.

At all material times Michelle Langley was the senior director of donor services of Respondent, Rachelle Wiedman held the position of interim director of collections, Paula Wineland serves as the director of human resources, Barbara Labinjo was a collections manager, Sherry Koenig, Charles Roach, and Maria Smith held the positions of collection supervisor, Pam Burgess, Patricia Lasater, Sandra Loy, and Robert Nemec were first-line supervisors, Helen Gwin held the position of scheduling manager and Lisa Wilson served as the recruitment manager.

Employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson were subpoenaed as witnesses for the Union during the mid-April 2004 representation case hearing and either testified or remained in the hearing room during the majority of the 4-day proceeding. Each of those individuals submitted subpoenas that they had received from the Union to Respondent representatives in advance of the representation case hearing.

B. The 8(a)(1) Violations

1. Allegations concerning solicitation

a. Facts

The General Counsel alleges in paragraph 5(A) of the complaint that since about January 15, Respondent has maintained a solicitation, distribution of literature, and access policy that provides, in part, "No employee may engage in solicitation of any kind during working time or in working areas." The policy further provides that working time shall include when any of the individuals involved are supposed to be performing designated work tasks. Working time does not include authorized periods of off duty such as meal breaks or other designated break periods. Working areas include any mobile blood collection location operation. (GC Exh. 7.)

b. Discussion

In evaluating rules governing employee solicitation, the Board has defined the legal consequences arising from the use of two terms-of-art, "working hours" and "working time." In its leading case on this question, the Board described and reaffirmed its previous holdings that no-solicitation rules using the term "working hours" are presumed to be unlawful, "because that term connotes periods from the beginning to the end of work shifts, periods that include the employees "own time." *Our Way, Inc.,* 268 NLRB 394, 395 (1983). By contrast, no-solicitation rules that employ the phrase "working time" are presumed to be lawful, "because that term connotes periods when employees are performing actual job duties, periods which do not include the employees' own time such as lunch and break periods." The guiding principle is that rules prohibiting employee solicitation during working time must state with sufficient clarity that employees may solicit on their own time. In the subject case I find that the Respondent's policy specifically informs employees that working time does not include authorized periods of off duty such as meal breaks or other designated break periods and, therefore, sufficiently alerts employees that no prohibition of solicitation would be found during those designated periods. In regard to "Working Areas," the Respondent's policy sufficiently informs employees that it includes any mobile blood-collection location operation. While employees are on working time in working areas they are prohibited from engaging in solicitation. On the other hand, when employees are engaged in authorized periods of off duty such as meal breaks or other designated break periods at a mobile blood collection location, they may engage in solicitation. Additionally, the Respondent's policy does not circumscribe the ability of employees to engage in personal discussions or solicitation while riding in a van in route to a mobile blood collection location. Indeed, a number of employees credibly testified that they regularly engage in personal conversations in route to the work location and on occasions talked to each other about the benefits of union representation. The Respondent has not precluded such conversations nor did they discipline any employees who engaged in union solicitation while in route to the blood collection location.

Based on the foregoing, I find that the Respondent's solicitation policy is not overly broad and does not violate Section 8(a)(1) of the Act. Therefore, I recommend that paragraph 5(A) of the complaint be dismissed.

2. Allegations concerning Sherry Koenig and Maria Smith

a. Facts

The General Counsel alleges in paragraphs 5(B) and (C) of the complaint that in April 2004, Koenig and Smith solicited employee grievances.

Supervisor Robert Nemec, who also acted as the interim manager of district II in March, April, and May 2004, was given a copy of a survey while attending a managers' meeting in March or April 2004, that sought employee responses for five positive topics and five areas that needed improvement. Nemec testified that Director of Collections Wiedman created the survey (GC Exh. 2). Nemec instructed his first-line supervisors including Koenig and Smith to either hand the survey to each team member with a request to complete and return the survey or orally record the answers provided by the employees and return all responses to him. Both Koenig and Smith followed these instructions and returned the completed surveys or oral answers that they memorialized to Nemec.

b. Discussion

The timing of this survey is significant in that it took place after the filing of the subject representation petition in March 2004, and either around the same time or just shortly after the representation case hearing in mid-April 2004. The Respon-

dent does not dispute that the survey was distributed to employees by its supervisors or that employees were requested to complete the survey and return it to their respective supervisors. Rather, the Respondent argues that there was a past practice of supervisory-employee meetings, town hall meetings, and prior employee satisfaction surveys that discussed issues of employee working conditions including feedback from employees on conditions of employment that was no different than the subject survey. Indeed, in February 2000, the Respondent received a written survey from Washington, D.C. headquarters that all Red Cross chapters were requested to distribute to its employees and in 2002 a voluntary Gallup poll survey was conducted by telephone throughout the Missouri-Illinois Region concerning employee working conditions. I find, however, that the Respondent's arguments in this regard are misplaced.

For example, the subject survey was conducted during the critical period between the filing of the representation petition and either just before or shortly after the representation case hearing but at a time before the scheduled election. According to Koenig, this was the first time in her 6 years as a supervisor that she was requested to survey her employees in this manner. The subject survey was created by an onsite high-level supervisor unlike the prior surveys that were conducted either by American Red Cross headquarters or by a third party that sought yes or no written or telephone answers. Here, employees were confronted with a series of questions to list five positive topics and five areas that needed improvement with instructions to complete and return the survey to their supervisors. Under these circumstances, I find that employees were under a directive from their supervisors to complete and return the survey at a critical period in the election process. Since the initiation of this type of survey in the same manner had not been undertaken previously, I conclude that it was created for the sole purpose of obtaining information from the employees to be used during the union organization campaign. *Wal-Mart, Inc.,* 339 NLRB 1187 (2003).

Under these circumstances, I find that Supervisors Koenig and Smith solicited employee grievances in violation of Section 8(a)(1) of the Act and recommend that the allegations alleged in paragraphs 5(B) and (C) of the complaint be sustained. *Embassy Suites Resort,* 309 NLRB 1313 (1992) (there is a compelling inference that an employer is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary).

3. Allegations concerning Rachelle Wiedman

a. Facts

The General Counsel alleges in paragraph 5(D) of the complaint that about April 19, Wiedman interrogated an employee about the employee's union activities and sympathies and the union activities and sympathies of other employees.

Employee Judy Allen testified that Nemec instructed her to meet with Wiedman on or about April 19 regarding a "communication of change" when working with copper sulfate as part of her job duties. According to Allen, after Wiedman completed the discussion about the change, she asked her if she know of anybody who went to the union meeting, whether Allen was going to vote for the Union, who had influence over the votes, and informed Allen that even if you got the Union in, things would not change as far as work.

Weidman testified that the only time she spoke with Allen during the entire critical period was during the meeting that she communicated to her the change in certain job-related duties. Weidman categorically denies interrogating Allen about any issues dealing with the Union during their April 2004 discussion.

b. Discussion

While I found Weidman to be a very sincere witness who impressed me during her testimony with her command of the issues, I am constrained to find that she did interrogate Allen about her union sympathies for the following reasons. First, I note that the meeting took place around the period that the parties were engaged in the representation case hearing and the issue of the Union was in the forefront of both employees and managers. Second, the meeting took place 1 day after the Union held an employee organizing meeting that was widely disseminated by a flyer throughout the facility (GC Exh. 22). Third, around this same time period, it was Weidman who directed that an employee survey be created and according to Nemec instructed the supervisors to obtain responses from their team members and return the completed survey to her (GC Exh. 2). Fourth, as will be discussed more thoroughly later in the decision, Nemec testified that Wiedman was one of the managers that instructed him to hold a meeting with employee Jerri Thompson on May 5 regarding testimony that she had given during the representation case hearing. Finally, employee Gayle Hinklin testified that Scheduling Manager Helen Gwin stated that higher ups instructed her to isolate three employees to keep them from infecting the others. Gwin admitted that she reported directly to Wiedman. The employees that were scheduled together were Thompson, Pendleton, and Bishop, who Wiedman knew prior to the April 19 meeting, were known union supporters.

When evaluating the credibility of Wiedman and Allen, I have taken into consideration the fact that Allen was not known to be a leading union adherent and her short tenure of employment at Respondent. These factors lead me to conclude that Allen had no reason to fabricate her testimony in light of the fact that she testified adversely to her pecuniary interest. *Flexsteel Industries,* 316 NLRB 745 (1995), affd. 83 F.3d 419 (5th Cir. 1996). Likewise, the instances of Wiedman's involvement with union activities as discussed above and her high level position in Respondent's hierarchy, leads me to believe that Wiedman made the statements attributed to her in paragraph 5(D) of the complaint. Therefore, I recommend that the allegations alleged in that paragraph be sustained.

4. Allegations concerning Charles Roach

a. Facts

The General Counsel alleges in paragraph 5(E) of the complaint that about April 26, Supervisor Charles Roach threatened

an employee with withholding a pay increase because of the employees' union activities.

Allen testified that she had a discussion with Roach to seek a pay increase because she had attended several classes to be a preceptor for the purpose of training newly-hired employees on blood-collection procedures. On direct examination, Allen stated that Roach informed her that she would not be able to get a raise until the union stuff was over. On cross-examination, however, Allen testified that Roach informed her that any raises would have to be negotiated after the union stuff was over.

Roach acknowledged during his testimony that he recalled a conversation with Allen that concerned a request for a raise. He informed Allen that if anything occurred before the Union arrived, the Respondent could give a raise but if the Union was selected by the employees to represent them then future raises will be dependent on negotiations and any resulting contract. He further told Allen that you start with a blank piece of paper in negotiations.

b. Discussion

In evaluating this allegation, I found Roach to be a very sincere and credible witness who had a good recollection of the facts and a more precise memory of the conversation that he had with Allen about the raise. Allen, on the other hand, dramatically changed her testimony from that given on direct examination when responding to questions on cross-examination regarding what Roach told her during their conversation about the raise. Under those circumstances, I am not inclined to credit Allen regarding this conversation. Therefore, I find Roach's recitation of events during the conversation concerning the raise to be more plausible and not violative of the Act.

In summary, I find that Roach did not make the statements attributed to him in paragraph 5(E) of the complaint and recommend that the allegation be dismissed.

5. Allegations regarding the harassment of an employee

a. Facts

The General Counsel alleges in paragraph 5(F) of the complaint that about May 5, a number of supervisors harassed an employee because of the employee's union activities and participation in a Board hearing.

Employee Jerri Thompson is one of the long-tenured employees at Respondent having worked there for approximately 10 years. She was an experienced donor-service specialist who served as a preceptor and a pilot when driving the van with team members to mobile blood-drive locations.[3] Thompson was also one of the leading union adherents having been subpoenaed by the Union to testify in the representation case hearing and serving as a spokesperson on behalf of the Union in discussing the benefits of the Union with coworkers during nonworktime, and in the van while driving employees to the mobile work locations. She also was heavily engaged in passing out union authorization cards to fellow employees.

On May 4, Thompson received a telephone call at home from first-line supervisor Nemec to attend a meeting with him and another supervisor the next day at work. Thompson wanted to bring someone with her as her representative but Nemec told Thompson that it was not permitted. Upon arriving at the meeting on May 5, in district 4, Interim Manager Barbara Labinjo's office, Nemec informed her that human resources assistant Robyn Kline would also participate in the meeting by telephone. Nemec informed Thompson that based on some of her testimony given in the representation case hearing it appeared to Labinjo that she did not fully understand the duties and responsibilities of her team-leader position. Nemec then proceeded to read the entire team-leader handbook verbatim to Thompson during the meeting and after each section inquired if Thompson understood and asked whether she was doing this function with team members. The meeting took approximately 1-1/2 hours and Thompson received no discipline as a result of the meeting.

The Respondent does not dispute what took place during the course of the meeting but asserts that the purpose of the meeting was not to harass Thompson but rather to make sure that she fully understood the duties and responsibilities of the team-leader position. In this regard, Labinjo heard Thompson testify at the representation case hearing that she permitted team members at the mobile blood drives to choose which responsibilities they wanted to perform rather then directly assigning responsibilities to each individual team member. Accordingly, Labinjo, who was not Thompson's direct supervisor, requested that Nemec hold a meeting to discern if Thompson was conversant with her team-leader duties. Director of Human Resources Wineland was informed in advance of the meeting and directed her assistant, Robyn Klein, to participate in the meeting by telephone. During the course of the meeting Wineland also participated by telephone. Both Wineland and Kline took notes of the meeting immediately after it concluded and their recitations do not materially differ from Thompson's version of events (GC Exh. 24; R Exh. 9).

b. Discussion

The issue for consideration is whether the actions of Respondent in holding the May 5 meeting amounted to harassment of Thompson because of her union activities.

Nemec acknowledged that in January 2004, he had met with the team leaders under his direct supervision including Thompson and reviewed the team-leader handbook either individually or in a group setting. He also admitted that no other manager attended those meetings and that he did not read the handbook paragraph-by-paragraph to the team leaders. He further acknowledged that he never received any reports or complaints that Thompson was performing her job duties in an unacceptable manner. Likewise, Nemec testified that he never read the team-leader handbook to any other employee word-for-word or called a meeting with an employee to do so.

Based on the discussion set forth above, I am of the opinion that Labinjo requested that the meeting take place solely because of the testimony that Thompson gave during the representation hearing. Prior to this meeting, there were no reports or complaints about the inadequacy of Thompson's team-leader job performance and Nemec admitted that he had never previously read the team-leaders handbook word-for-word to any

[3] Employees who held the position of pilots received extra pay when driving the van to remote mobile blood locations.

employee. Assuming that Labinjo legitimately was concerned that Thompson was uncertain about one aspect of her job duties, there was no compelling reason to read the entire handbook to her when Labinjo's sole concern rested with the responsibility of assigning duties to team members rather then permitting team members to decide which duties they would perform. I find the actions of the Respondent, when taken as a whole, were directed at an employee who was a known and vocal supporter of the Union to be nothing more than harassment rather than a legitimate inquiry concerning Thompson's knowledge of her job duties.

For all of the above reasons, I find that the actions of the Respondent violate Section 8(a)(1) of the Act and recommend that the allegations in paragraph 5(F) of the complaint be sustained.

6. Allegations concerning Michelle Langley

a. Facts

The General Counsel alleges in paragraph 5(G) of the complaint that Senior Director of Donor Services Michelle Langley about May 6, solicited employee grievances, promised to remedy grievances if employees chose not to be represented by the Union, and threatened employees with loss of jobs and pay if employees chose to be represented by the Union.

Supervisor Pam Burgess apprised a number of employees working at the Mount Vernon High School blood drive that Langley would be visiting the location and intended to give a presentation to those in attendance. Upon arriving at the location, according to employee Ramona Curtis, Langley engaged her in conversation and said that she heard some of the employees were unhappy. Curtis informed Langley that a number of employees were upset with their scheduling, inadequate staffing, and not being paid for mileage when they drove their personal vehicles to remote mobile blood-drive locations.[4] Curtis informed Langley of the names of employees who had not been fully reimbursed for mileage and later in the day wrote down the names for Langley on a piece of paper. Langley promised to look into the matter. According to Curtis, in due course, employees were eventually paid for past due mileage expenses. Curtis and Langley engaged in a further one-on-one conversation and according to Curtis, Langley informed her that she was new to her position and requested that the employees give her a chance to straighten things out. Additionally, Curtis testified that Langley told her that "I'm going to be able to do more for you then [sic] the Union can."

Employee Brenda Loy also was working at the Mount Vernon High School blood drive on May 6, and had the opportunity to talk with Langley inside the school. The topic of the Union came up and one of the employees asked Langley in Loy's presence if the Union had organized any other Red Cross facilities. Langley responded that she was aware of one Red Cross facility in Nebraska and gave this as an example that when a union comes into a facility you could lose benefits. Langley apprised those including Loy that before contract negotiations commenced in the Nebraska Red Cross facility there was a complement of 64 nurses and when the contract negotiations were finalized there were less than 10 nurses left. Loy testified that Langley informed the employees that she would be on the negotiating team if the Union won the election and she could get the nurses wages cut to $12 an hour.

Langley testified that she assumed the permanent position of senior director of donor services in April 2004. She acknowledged that she attended the Mount Vernon High School blood drive and when she first was introduced to the employees a number of them bombarded her with questions including those about inadequate staffing and lack of mileage reimbursement. Langley obtained the names of the employees who asserted they were not reimbursed for mileage and promised to look into the matter. Langley testified that she had experience in prior union organizing campaigns and was familiar with what issues could and could not be addressed with employees. Indeed, she mentioned the guidelines known as "TIPS," wherein managers should not threaten, interrogate, promise, or spy on employees but noted that managers could address issues that arose prior to the commencement of the organizing campaign. Langley acknowledged that in response to a question from one of the employees at the high school, she informed them that the Union had previously engaged in an organizing campaign in the Red Cross midwest region and that after negotiations the wages of nurses were reduced so that a large percentage of them left employment. Langley categorically denied interrogating or threatening employees or soliciting employee's grievance and promising to remedy them during her attendance at the blood-drive location.

b. Discussion

Langley impressed me as a savvy manager who had previous experience in dealing with union organizing campaigns and was conversant in what could be discussed with employees without violating the Act. In regard to Langley looking into employees not being reimbursed for mileage, it followed prior complaints to first-line supervisors before the commencement of the organizing campaign and these same questions were raised with her during her conversations with impacted employees. *Recycle America,* 308 NLRB 50, 56 (1992) (no violation where employer asked employees what their concerns were and promised to look into them; not a promise to treat complaints differently than in the past).

In the totality of what was discussed at the Mount Vernon High School blood drive, I am convinced that Langley did not engage in the statements attributed to her in paragraph 5(G) of the complaint. Rather, I believe that employees Curtis and Loy took statements made by Langley out of context and made their own interpretations of what she tried to express during their conversations on May 6. I also note that 11 employees were assigned to the Mount Vernon High School location and the General Counsel only called two employees to support this allegation. For all of the above reasons, I credit Langley's testimony that she did not solicit or attempt to remedy employee grievances nor did she threaten employees with loss of jobs and pay if they chose the Union to represent them.

[4] Curtis acknowledged on cross-examination that prior to March 26, the date the Union's representation petition was filed, she complained to Supervisors Burgess and Sandra Loy that employees were upset about not being reimbursed for mileage when driving to remote mobile blood-drive locations.

Therefore, I recommend that the allegations in paragraph 5(G) of the complaint be dismissed.

7. Allegations concerning Patricia Lasater and Lisa Wilson

a. Facts

The General Counsel alleges in paragraph 5(H) of the complaint that Supervisor Patricia Lasater and Recruitment Manager Lisa Wilson about May 17, told employees that it would be futile for them to select the Union as their bargaining representative and solicited and promised to remedy grievances if the employees chose not to be represented by the Union.

Employee Kelly Sanders testified that she attended a mandatory meeting with approximately 40 employees that Lasater and Wilson called to discuss plans going forward for automation technology at the Respondent. The meeting lasted in excess of 1 hour. At one point in the meeting, a number of employees raised questions about the Union. According to Sanders, Lasater told the employees that the Union is not good and it could take a long time. Wilson told the employees that she knows that the Red Cross has some issues but asked the employees to give the Respondent a year to straighten out some of the existing problems. Wilson also asked the employees to vote no, and told employees that in a year if things had not been worked out she will personally call the Union.

Lasater acknowledged that she did attend the May 17 meeting and that Wilson had prepared an agenda that she followed throughout the course of the meeting (R Exh. 12). Lasater asserted that during the meeting a number of staff members raised questions about the union campaign but they were few in number. Lasater stated that in response to some of the employees' questions about wage increases she told them that negotiations would have to take place in order to determine their amount. Wilson testified that at no time did she tell employees that it would be futile to select the Union as their bargaining representative and Sanders did not substantiate this allegation during her testimony.

b. Discussion

Wilson credibly testified that she had undergone prior training on how to respond to employee questions during union organizing campaigns. In this regard, she was aware that you could not discuss or elicit opinions from employees about the Union. Thus, I do not credit Sanders' testimony that Wilson asked employees to give them a year to straighten out existing problems. Even if Wilson made such a statement, the Board has found it proper for an employer to ask for a second chance in an organizational campaign (*Noah's New York Bagels, Inc.,* 324 NLRB 266 (1997)).

Based on the above recitation and testimony of Sanders, I am not convinced that either Lasater or Wilson made statements during the meeting that are violative of Section 8(a)(1) of the Act. I also note that out of 40 employees that attended this meeting, the General Counsel only produced one employee to testify to the allegations alleged in this paragraph of the complaint.

For all of the above reasons, I recommend that the allegations in paragraph 5(H) of the complaint be dismissed.

8. Allegations concerning Michelle Langley

a. Facts

The General Counsel alleges in paragraph 5(I) of the complaint that about June 24, Senior Director of Donor Services Michelle Langley threatened to close the Effingham facility, threatened to withhold pay increases, and threatened employees with loss of benefits if they selected the Union as their bargaining representative.

Employee Brenda Loy testified that she attended a meeting held by Langley with five other employees at the Effingham facility. According to Loy, Langley distributed some paperwork to show employees that if they did not pay union initiation fees and union dues, the Union would have the right to request the Employer to terminate them. During the meeting Langley mentioned that a private sector plant in the Effingham vicinity would be closing because of labor relations problems. According to Loy, Langley told the employees that she wasn't saying that it was going to happen here, but that it was a possibility. Additionally, Loy asserted that Langley told the employees that she did not want the Union at the Red Cross and asked the employees to give her a chance for a year to fix things and if matters could not be fixed, Langley would find a union for the employees.

Langley testified that she attended the meeting at Effingham due to the request of Supervisor Burgess who informed her that a number of employees had questions about the Union. Langley asserts that an employee question arose about a plant that closed in the immediate vicinity but she never informed employees that they would lose benefits or the Effingham facility would be closed. Rather, she apprised employees that any benefits would be determined under the negotiation process and that during bargaining pay increases are sometimes frozen. Human resources assistant Robyn Kline attended this meeting and credibly testified that Langley informed the employees that pay raises are normally obtained through bargaining and sometimes wage increases could be frozen while negotiations are ongoing. In regard to the private sector facility that closed in the immediate vicinity of the Effingham office, Kline noted that discussions did occur on this matter and that Langley in no way threatened employees that the same thing could happen to the Effingham facility.

b. Discussion

As previously discussed earlier in the decision when evaluating Langley's credibility in paragraph 5(G) of the complaint, I determined that she had a general understanding of what could be discussed with employees in the course of an ongoing union organizing campaign. Thus, I am hard pressed to find that Langley made the statements attributed to her by the General Counsel. Moreover, Kline accompanied Langley to this meeting and credibly testified that Langley did not threaten any employees with plant closure or loss of pay or benefits if the employees selected the Union as their bargaining representative. Moreover, I note that the General Counsel did not call any additional witnesses other than Loy to confirm that Langley threatened employees at this June 24 meeting.

For all of the above reasons, I recommend that paragraph 5(I) of the complaint be dismissed.

9. Allegations concerning Patricia Lasater and Lisa Wilson

a. Facts

The General Counsel alleges in paragraph 5(J) of the complaint that about July 1, Supervisor Patricia Lasater and Recruitment Manager Lisa Wilson threatened that employees would not get a raise and also threatened that employees would not get a raise during bargaining if the employees chose the Union as their bargaining representative.

Employee Kelly Sanders testified that on July 1, Lasater and Wilson came to her West County worksite to talk with employees and a discussion concerning the Union took place outside the breakroom. Sanders said that in response to a question, Lasater told the employees that it could take up to 2 years to get raises if the Union won the election. Sanders asserts that Wilson informed the employees that it could take around 14 days if the election vote was appealed and in negotiations with the Union it could take up to 2 years to get a raise.[5]

Wilson testified that a meeting did take place at the West County facility on July 1 to inform the employees that Lasater would be their new supervisor. Wilson asserts that no discussion took place about the Union nor did she discuss wages or pay raises with the employees. Lasater was not asked any questions about this meeting during her direct testimony.

b. Discussion

Even if Sanders testimony is credited in its entirety, I am not convinced that the statements she attributes to Lasater and Wilson are violative of the Act. I do not discern any threatening comments in Sanders recitation of what Lasater and Wilson stated at the July 1 meeting. Moreover, Sanders did not substantiate that either Lasater or Wilson made the statements alleged in paragraph 5(J) of the complaint and her testimony that she was home sick on July 1 casts doubt on her assertions.

Under these circumstances, I recommend that paragraph 5(J) of the complaint be dismissed.

10. Allegations concerning Patricia Lasater

a. Facts

The General Counsel alleges in paragraph 5(K) of the complaint that about July 2, Supervisor Patricia Lasater created the impression that an employee's union activities were under surveillance, interrogated an employee about the employee's union activities and sympathies, told an employee that the employee could not be trusted because of the employee's union activities and solicited an employee to sign an antiunion petition.

Sanders testified that she met with Lasater on July 2 to discuss her two performance evaluations and despite the signature date of June 3 that appears on both appraisals, she is certain that the meeting occurred on July 2 (R Exhs. 5 and 6). Sanders asserted that during their meeting Lasater informed her that she needed to be a team player. Sanders further testified that Lasater stated that she heard Sanders was for the Union and you should vote no. Sanders also stated that around July 1 an antiunion petition was being circulated in her work facility that not all of the staff agreed with (GC Exh. 5). Sanders testified that a fellow employee who works in a different facility than Sanders distributed the antiunion petition. When a coworker at Sanders' jobsite attempted to give her a copy of the petition to sign, Sanders told the employee to get it out of her face. Sanders asserts that after the evaluation meeting on their way to the lobby, Lasater handed the antiunion petition to her and said you need to be part of the team and sign this.

Lasater testified that she did meet with Sanders to discuss her evaluation but it did not occur on July 2 as alleged by Sanders. Rather, they met on June 3, when both she and Sanders signed the evaluations. Lasater also points to the fact that Rachelle Wiedman, the interim director, signed off on the appraisals on June 11 as the reviewing official. Lasater further testified that the antiunion petition was created and distributed by employees in the bargaining unit without any involvement from her and at no time did she give a copy of the petition to Sanders either during or after the evaluation meeting. Lasater admitted that she informed Sanders that she should be a team player and on occasions she could not trust her but indicates that these comments were made in the context of Sanders appraisals. In this regard, Lasater points to the fact that as part of the appraisal form under "Interpersonal Skills" the term "Is a team player" is used and she noted in the appraisal that Sanders often "gossips" with or about other employees and needs to be trusted more if she wants to move up in the organization.

b. Discussion

I am not convinced that the evaluation meeting took place on July 2, when alleged surveillance and interrogation by Lasater took place. Rather, based on the appraisal documents, I find that any meeting to discuss them took place in June 2004, at a time prior to Wiedman signing off on the evaluations as the reviewing official. Moreover, I am inclined to credit Lasater's testimony that any discussion about "trust" took place in the context of Sanders appraisal and was unrelated to her union sympathies or activities. Likewise, I do not credit Sanders testimony that Lasater asked her to sign the antiunion petition. Rather, as testified to by Sanders a fellow employee showed her a copy of the petition to which Sanders told that employee to get the petition out of her face. I further find that during the evaluation meeting, Lasater did not raise issues about the Union with Sanders.

Therefore, I find that the General Counsel did not sustain the allegations in paragraph 5(K) of the complaint and recommend that they be dismissed.

11. Allegations concerning Lisa Wilson and Patricia Lasater

a. Facts

The General Counsel alleges in paragraph 5(L) of the complaint that about July 7, Recruitment Manager Lisa Wilson and Supervisor Patricia Lasater interrogated an employee about the employee's union activities.

Sanders testified that Lasater asked her to be an observer for the Employer in the July 8 election. Sanders agreed to serve as an observer and on July 7, attended a preelection meeting with

[5] Further doubt is cast on Sanders' veracity as she testified at the hearing that she was sick on July 1, and did not report to work.

approximately 40–50 other employer observers that was conducted by one of Respondent's attorneys. According to Sanders, Wilson asked her "where is your vote no button." Sanders told Wilson that she must have left the button at home and Wilson then gave her another vote no button. During the course of the meeting, Lasater came over and after observing the vote no button, told Sanders that she was so proud of her.

Wilson testified that she did not talk to Sanders during the preelection meeting. Lasater testified that she did talk to Sanders at the preelection meeting and Sanders brought up the Union. Lasater asserts that Sanders said she was tired about arguing about the Union and she received pressure both ways concerning the pros and cons of the Union. Lasater stated that she never asked Sanders how she would vote but told her to vote how you want and don't try and please both sides.

b. Discussion

Even if Sanders testimony is credited in its entirety, I am not convinced that Wilson or Lasater's statements violate the Act. In this regard, the majority of employer observers at the preelection meeting were wearing vote no buttons. It was natural for Wilson, after observing other employee observers wearing their vote no buttons and seeing Sanders without one, to inquire where is your vote no button. Thus, under these circumstances, I do not find Wilson's question to be violative of the Act. Additionally, I tend to credit Lasater's version of the conversation that she had with Sanders at the preelection meeting. Since all of the employees who were in attendance at the meeting had previously agreed to be employer observers, it makes no sense that either Wilson or Lasater would single out Sanders to interrogate her about the Union.

For all of the above reasons, I recommend that paragraph 5(L) of the complaint be dismissed.

12. Allegations concerning Respondent's campaign literature

a. Facts

The General Counsel alleges in paragraph 5(M) of the complaint that about July 8, Respondent in campaign literature impliedly threatened employees that their wages and benefit programs would remain frozen during bargaining if employees chose the Union as their bargaining representative.

On or about July 8, the Respondent distributed to employees an 18-page pamphlet that included numerous questions with answers about the Union (GC Exh. 4). At page 9 of the document, it states as follows:

> If Bargaining for a First Contract is not Simple, How long would it take?
>
> - When bargaining for a first contract does begin, it can be a long and complicated process, taking weeks, months, a year . . . or longer.
> - While bargaining goes on, wage and benefit programs typically remain frozen until changed, if at all, by contract.
>
> If the union wins, You take the risks . . . you will have to "wait and see" if anything happens to wages and benefits.

b. Discussion

The Respondent argues that the above language has previously been found not to violate the Act in the Board's holding in *Mantrose-Haeuser Co.,* 306 NLRB 377 (1992). There the Board found that the same language used in the subject case was contained in a 19-page document that was devoid of any other unlawful or objectionable statements. The Board also noted that the respondent in that case, as I find in the present case, did not say that preexisting benefits would be lost if the Union won the election. The respondent's statement was that wage and benefit programs would be frozen. The statement implies only that wages and benefit programs would not change. The respondent in that case, as I find in the present case, had a past practice of granting predetermined wage increases following yearly employee evaluations and training periods. That practice continued during the election campaign. Finally, the Board in that case, as I find in the subject case, noted that the word "frozen" was preceded by the word "typically," which modified and limited its meaning, thereby reducing the possibility that employees would reasonably perceive the statement as a threat that their wages and benefits would be lost.

Based on the above holding of the Board, I conclude in the same circumstances presented here, that the Respondent's statement regarding wages and benefits, "typically remain frozen" does not constitute a threat in violation of Section 8(a)(1) of the Act. Therefore, I recommend the allegations in paragraph 5(M) of the complaint be dismissed.

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

The General Counsel alleges in paragraph 6(B) of the complaint that about April 26, Respondent imposed more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson by isolating these employees from other employees.

In *Wright Line,* 251 NLRB 1083 (1990), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in isolating the three employees

from other employees. First, the evidence establishes that Respondent knew that the three employees were leading union adherents, all of them having either testified or appeared at the April 2004 representation case hearing under subpoena from the Union. Second, one of Respondent's supervisors informed the employee who prepares the mobile blood-drive schedules, that the three employees should be scheduled together, until she is told differently, to keep them from infecting the others.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

The Respondent contends that as of April 2004, the three employees were assigned to the same team based on their expertise and experience in working with large corporate clients, and that is the reason that they were often scheduled together during the period from April to October 2004.

I find that the reasons advanced by Respondent are pretextual and suggest a predetermined plan to isolate the three employees from other employees to prevent them from engaging in union activities.

Employee Gayle Hinklin commenced her employment at Respondent in July 2001, and in December 2003, started working in the central scheduling office with the primary responsibility of preparing the schedules for mobile blood-drive employees in districts 2 and 3. Hinklin testified that the team components are forwarded to her department by the respective supervisors in each district and then she compiles the schedules with oversight from Scheduling Manager Helen Gwin. Some of the criteria that she uses when scheduling is to assign one pilot (driver of the van) and one preceptor (trainer of new employees) to each respective team if at all possible. Hinklin was aware that an election petition was filed for the mobile blood-collection employees but since she was assigned to the scheduling office, her position was not included in the petitioned-for-unit. Commencing in April 2004, when Hinklin started to compile the schedules for the district 2 mobile blood-drive employees, she noticed that three or four employees seemed to be routinely scheduled together and that several of them were qualified preceptors or pilots. The four employees were Nichole Bishop, Catherine Pendleton, Jerri Thompson, and Marion Stratton.[6] Accordingly, Hinklin inquired of Gwin why this was occurring on such a regular basis. In two separate conversations in April 2004, Gwin told Hinklin "that she was instructed to put the four employees together and we will keep these people together to keep them from infecting the others." Gwin further stated to Hinklin, "that this came from higher ups and will remain in effect until I tell you differently."

Gwin categorically denied that she made the statements attributed to her by Hinklin. I have grave doubts about Gwin's denial for the following reasons. First, Gwin denied knowing about the union organizing campaign until sometime in May 2004, and contended that she had no conversations with any managers about the union campaign in March or April 2004. Aside from the fact that the filing of the election petition on March 26 was common knowledge throughout the facility, Gwin's immediate supervisor (Wiedman) contradicted her and testified that she discussed the union organizing campaign with Gwin in April 2004. Moreover, I find that Hinklin was a very credible witness who was neutral in the union organizing campaign since her position was not included in the petitioned-for-unit. Thus, I find that she had no reason to fabricate her discussion with Gwin regarding the irregular scheduling of the four employees. Further evidence that confirms what Hinklin observed and Gwin stated is revealed in the actual schedules between January and September 2004 (GC Exh. 6(a), (b), (c), and (d)). Indeed, I personally reviewed each of these schedules and gleaned the following information. Between January 2 and April 25, there were no instances of scheduling either 3 or 4 of the above-noted employees together on even one mobile blood-drive assignment. Instances when two of the four employees were scheduled together during the same time period averaged less than three times each month. From April 26 to 30, the employees were scheduled together on each day. In May 2004, the employees were scheduled 19 times together. On other days when they were not scheduled together, the employees on a number of occasions either were not on the schedule or three of them were off on the same day. In June 2004, the employees were scheduled with each other on at least 20 occasions. In July 2004, the employees were scheduled together on 15 occasions. In August and September 2004, the employees were scheduled respectively, 19 and 9 times together. I note in September 2004 that on 10 days three of the employees were either off on the same day or not scheduled to work.

Based on the above recitation, I am convinced that the Respondent isolated Bishop, Pendleton, and Thompson from other employees to keep them from engaging in union activities or urging their coworkers to join the Union. Each of these employees was known by the Respondent as early as April 2004 to be active supporters of the Union. Indeed, the scheduling isolation commenced shortly after the close of the representation case hearing in April 2004.

Accordingly, I find that the Respondent's actions in isolating the three employees to violate Section 8(a)(1) and (3) of the Act and recommend that the allegations alleged in paragraph 6(B) of the complaint be sustained.

III. THE UNION OBJECTIONS

The Union objected on 12 grounds to conduct that they claim affected the results of the election. As set forth in the Board's order consolidating cases, 10 of the union objections to the conduct of the election are coextensive and encompassed by the complaint. The two remaining objections will be addressed below.

Objection 12

In this objection, the Petitioner alleges that on or around July 2, the Employer allowed an employee to travel from center-to-center and confront employees about signing an antiunion peti-

[6] Each of these employees either individually or in a group asked Supervisors Nemec, Labinjo, and Wiedman why they were being isolated from other employees and only assigned to work with each other on a regular basis. Respondent's answer was they were on the same team and, therefore, were regularly assigned to the same blood drive. I note that while Marion Stratton is not alleged in par. 6(B) of the complaint, she served as an observer in the election for the Union and was routinely assigned to work with the other three known union adherents.

tion containing statements that collective bargaining is a futile process, and threats of a wage freeze.

While there is some testimony in the record concerning an antiunion petition that was faxed to and then distributed at the West County Center (GC Exh. 5), the Petitioner did not offer any evidence to establish that any Respondent representative supported, condoned, or specifically permitted any employee to travel from center-to-center and confront employees about signing it. Indeed, the first part of the petition abundantly makes clear that the authors of the petition are not management but are line staff.

Under these circumstances, the Petitioner did not substantiate the underpinnings of this objection, and I recommend that it be dismissed.

Objection 14

In this objection, the Petitioner alleges that the Employer induced employees to vote against the Union, held a captive audience meeting within 24 hours of the election to encourage employees to vote against the Union, interrogated employees selected by the Union as observers, and discriminated against union observers:

(a) On or around July 1, Team Supervisor Pam Burgess approached an employee in Effingham, Illinois, and suggested that the employee was going to be an observer for the Union.

(b) On or around July 1, at a blood drive in Flora, Illinois, Supervisor Sandy Loy told a group of employees that observers for the Company would receive 8-hours pay for working as observers and could then go to their scheduled blood drive to earn extra money. The group of employees included individuals who served as observers for the Company.

(c) On or around July 6, the Employer told an employee that she could serve as an alternate observer for the Employer at the election, and she would get paid 8 hours for the 2-hour preelection conference meeting.

(d) On July 7, within 24 hours of the election, the Employer met with its observers prior to the preelection conference and asked them to wear "VOTE NO" buttons to the meeting.

(e) On July 7, the Employer paid its observers and alternates to attend the preelection conference and excused them from work. The Union did not receive notice prior to the conference that observers for the Union could attend the meeting or that the Union could have alternates.

(f) On July 7, during the preelection conference, Manager Barbara Labinjo and Manager Lisa Wilson called employees whom the Union had selected as observers and asked them if they were "alright with that" and that they needed to take PTO (paid time off) time.

(g) On July 7, after the preelection conference, Supervisor Pam Burgess told an employee whom the Union had selected as an observer that she had to use her personal time off if she wanted to be an observer.

(h) On July 8, the Employer paid its observers and alternates 8-hours' pay for working one 2-to 3-hour election-shift period. The Employer did not require its observers to take PTO (paid time off). The Employer utilized 33 observers and alternates. The Union had four observers. In one instance, the Employer had two observers and three alternates at one shift. In Effingham, Illinois, some of the employer alternate observers left the polling place after they voted and before the voting period was over. At other polling places, observers were allowed to return to work after voting and work a full shift. Observers for the Union were not given the opportunity to work their shift.

The gravamen of the Petitioner's objection is that union observers were treated disparately when compared to the treatment received by the Employer's observers.

Senior Director of Donor Services Michelle Langley testified that she authorized 8 hours of pay for those employees who were going to serve as employer observers for both July 7 and 8. In this regard, a number of the observers selected for the Employer had to travel lengthy distances in order to be in St. Louis for the preelection Employer meeting that was held before the preelection conference with Board personnel. Additionally, these same employees would be required to serve as observers or alternates for the election on July 8. Langley also approved a full day's pay on July 7 and 8, for those employees who could work their regular schedule while still being able to attend the required meetings on July 7, and the election on July 8. For example, employee Kelly Sanders testified that she was paid for 20 hours on both July 7 and 8 by working her regular schedule on both days and being paid 8 hours for her attendance as an employer observer at the required meetings on July 7 and the election on July 8. This testimony is consistent with the timecards for all employer observers and alternates that were introduced into evidence covering the period of July 7 and 8 (CP Exh. 6). On the other hand, union observers were treated differently. For example, employee Brenda Loy credibly testified that around July 7 she received a telephone call from her Supervisor Pam Burgess who apprised Loy that if she wanted to be an observer for the Employer she would be paid for 8 hours and if it did not interfere with her regular work schedule she would also be paid for working that day. Burgess then informed Loy that the Union had requested her to be an observer for the election and if she accepted, she would have to take PTO (paid time off). Loy told Burgess that this was not right since if you are an observer for the Employer you get paid and do not have to take PTO. Burgess did not testify at the hearing so Loy's testimony is unrebutted. This disparate treatment is further confirmed by the timecards that show that employees who served as union observers were required to take PTO for the election on July 8 (CP Exh. 5).

The record also establishes that union observers were not invited to attend the July 7 preelection meeting that employer observer's had with one of Respondent's attorneys nor was the Union informed that they could have alternate observers.

The Board in a recent case, *Jewish Home for the Elderly of Fairfield County,* 343 NLRB 1069, 1114 (2004), held that the employer's refusal to permit the union's observers to work on the day of the election, while permitting its own observers to work, interfered with the employees' exercise of their Section 7 rights in violation of the Act. Likewise in that case, as in the subject case, union observers were told that they would have to take a vacation day or personal day in order to serve as observers. See also *Big Three Industrial Gas & Equipment Co.,* 181 NLRB 1125 (1970), enf. denied 441 F.2d 774 (5th Cir. 1971).

Based on the above discussion, I find that the Respondent treated union observers differently than employer observers and sustain the Petitioner's Objection 14.[7]

The Board conducted the election on July 8 at the Employer's premises. The Union filed timely objections on July 15.

I have found that the Respondent committed unfair labor practices consisting of soliciting employee grievances, interrogating an employee about the employee's union activities and sympathies and the union activities and sympathies of other employees, harassing an employee because of the employee's union activities and participation in a Board representation case hearing, and imposing more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson by isolating these employees from other employees. The objections that allege these forms of misconduct are therefore sustained. Additionally, I found one of the objections filed by the Petitioner that was not alleged in the complaint to be sustained. In this regard, I found as more fully discussed above that the Respondent treated its employee union observers disparately when compared to the pay and benefits provided to Employer observers and alternates.

In *Safeway, Inc.,* 338 NLRB 525 (2002), the Board held that conduct violative of Section 8(a)(1) of he Act will, a fortiori, constitute conduct that interferes with the exercise of free and untrammeled choice in an election unless it is virtually impossible to conclude that the misconduct could have affected the election results.

Based on the violations of the Act discussed above, I conclude that these unfair labor practices and the underpinnings of Objection 14 precluded achievement of the requisite laboratory conditions and materially undermined the employees' freedom of choice. As a result, I will recommend that a second election be conducted.

[7] In its brief, the Respondent cites *Golden Arrow Dairy,* 194 NLRB 474, 478–479 (1971), for the proposition that it is permissible for an employer to pay its observers but not the union's observers. I note that the Board did not independently discuss this issue but affirmed the trial examiner's recommended order. Additionally, the issue of being paid as an employer representative at the preelection meetings and being permitted to work and being paid on the day before and the day of the election was not before the Board in that case as it is in the subject case.

CONCLUSIONS OF LAW

1. 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.
3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by soliciting employee grievances.
4. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating an employee about the employee's union activities and sympathies and the union activities and sympathies of other employees.
5. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by harassing an employee because of the employee's union activities and participation in a Board representation case hearing.
6. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by imposing more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson by isolating these employees from other employees.
7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the 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.

The Respondent having discriminatorily imposed more onerous working conditions on its employees Nicole Bishop, Catherine Pendleton, and Jerri Thompson by isolating these employees from other employees, it must immediately cease assigning these employees to the same mobile blood drives for the purpose of keeping these employees away from other employees.

[Recommended Order omitted from publication.]