

All Pro Vending, Inc. and Frederic A. Traube. Case
5–CA–32734

July 31, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

On December 27, 2006, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, All Pro Vending, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection

¹ 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), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

Choose not to engage in any of these protected activities.

WE WILL NOT impliedly threaten to not reinstate you because of your protected concerted activities.

WE WILL NOT tell you that you are not allowed to engage in union and/or protected activities at work.

WE WILL NOT suspend and discharge you because of your union and protected activities.

WE WILL NOT discharge you because you have filed unfair labor practice charges with the National Labor Relations Board.

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

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

WE WILL make Frederic A. Traube whole for any loss of earnings and other benefits resulting from our unlawful action against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge and, within 3 days thereafter, notify Frederic A. Traube in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.

ALL PRO VENDING, INC.

Lisa M. Daley, Esq. and *Thomas P. McCarthy, Esq.*, for the General Counsel.

Mark J. Swerdlin, Esq. and *Kraig B. Long, Esq.* (*Shawe & Rosenthal LLP*), of Baltimore, Maryland, for the Respondent.

Lawrence Sherman, Esq., of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Baltimore, Maryland, on May 23–25, 2006. The charge was filed on November 1, 2005,² and the complaint was issued December 15. The complaint was amended at the hearing to admit that Clarence Haskett, vice president of All Pro Vending, Inc. (the Respondent), is a supervisor and an agent under Section 2(11) and (13) of the National Labor Relations Act (the Act) (GC Exh. 2). The complaint also alleges that the Respondent twice violated Section 8(a)(1) of the Act by interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. The complaint

¹ All dates are in 2005 unless otherwise indicated.

additionally alleges that the Respondent violated Section 8(a)(1) and (3) when it discharged employee Frederic A. Traube (the Charging Party) on August 4 from its RFK Stadium operation and Section 8(a)(1), (3), and (4) when it discharged Traube. M&T Bank (Ravens) Stadium operation on September 11.

On the entire record, including my credibility determinations based on the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole and, after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Maryland corporation with an office and place of business in Baltimore, Maryland, has been engaged in providing food and beverage vending services at stadiums and arenas. During the 12-month period ending December 15, 2005, the Respondent, in conducting its business operations described above, performed services valued in excess of \$50,000 in States other than the State of Maryland. 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 UNITE HERE Local 25 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Respondent was formed in 1996 by David McDonald and Clarence Haskett, the Respondent's president and vice president, respectively. They each have over 30 years of vending experience. Stadium vending is part-time seasonal work. Both men have other employment, as does the Charging Party, and most other vendors. McDonald, who has not worked as a vendor for the last 3 years, is a real estate agent. Haskett works for the State of Maryland. Traube has been employed as a vendor since 1980, and has worked with McDonald and Haskett for years. Traube has worked at venues in New York, Maryland, and the District of Columbia. Traube was employed by the Respondent as a vendor at Ravens Stadium in Baltimore, when Haskett recruited him to also work at RFK Stadium in the District of Columbia. The Respondent had just been given the vending subcontract for the Washington Nationals 2005 inaugural baseball season. Traube had previous experience as a vendor for baseball games at Shea Stadium in New York and at Camden Yards in Baltimore. Traube was employed by Aramark Corporation when he worked at Camden Yards and was a member of UNITE HERE. Traube accepted the Respondent's offer because he preferred National League baseball as opposed to the American League and it was a shorter commute.

Aramark Corporation, the concessionaire at RFK Stadium, selected the Respondent as its subcontractor for vendor services. The Respondent's vendors are paid on a straight commission basis. The Respondent assigns the product the vendor sells based on seniority and prior sales volume. Traube is one of the Respondent's most successful beer vendors. Some ven-

dors, and others, refer to vendors as "hawkers." This reference, no doubt, is premised on the ubiquitous siren call used to announce their product, such as "beer here!" heard in professional baseball venues—at least until the seventh inning.

The Respondent's distribution system begins at a commissary. The commissaries are located throughout RFK. The commissary is where the vendors buy their product. Each commissary has a manager, a cashier, and four support personnel. The manager and the cashier stand behind a counter that separates the entryway from the stock area. A vendor pays the cashier for his product and the cashier produces a ticket. The ticket is used to keep track of the vendor's sales. Half the ticket is given to the vendor and the other half to the commissary manager. The manager tells the support staff to get the product and give it to the vendor. The vendor never goes behind the counter, nor is he permitted to switch commissary rooms.

The Respondent encourages vendors to buy and carry two cases of beer at a time, except for the first case of the game. The Respondent provides the first case of beer which is paid for from the proceeds from its sale when the vendor returns to buy a second case. After buying the beer, the vendor proceeds to the seating area to sell his product. The Respondent has a written rule that states that vendors must sell in the seating area. It is during this traverse—from commissary to seating area—that the Respondent's rule prohibiting the vendors from selling beer on the concourse, which is where the concession stands are located, collides with reality.

Concession stands sell food and beverages. Because of this diversity of product it is generally understood that a patron may have to wait an undetermined period of time before being served. Frequently, at least one thirsty patron, on his way to the concession area, crosses the path of a beer vendor. An almost instinctive reaction is for the thirsty patron to stop the vendor and ask to buy a beer. Clearly, for the vendor to react in any way other than to provide instant gratification to his customer, would be not only poor salesmanship but even worse public relations. To avoid that outcome, the Respondent allows its vendors to sell a beer in the concourse area at the request of a customer. The problem arises when other customers, on their way to buy beer at the concession stand, take the path of least delay and also approach the vendor to purchase a beer. In the interest of customer service, the Respondent allows the vendor to serve all the patrons who gather around him after the initial stop by a patron. The parties agree that "setting up," which entails stacking cases of beer on a table or the ground and announcing "beer here," is not permitted in the concourse area. For the purpose of this decision "setting up" and "hawking" are synonymous.

It is at this juncture that economic realities must be acknowledged. Standing in place and selling beer is far more efficient, and less tiring, than carrying two cases of beer up and down the aisles in the stadium. Equally apparent, is that because the vendors are paid solely on a commission basis, it is in their interest to sell as much beer as possible, regardless of the point of sale. Additionally, the more beer sold by the vendors, the more money the Respondent makes, with a corresponding decrease in revenue from the sale of beer by the Respondent's contractor—Aramark. This conflict caused some Aramark

concession managers to tell Traube to leave the concourse area. Traube admits that he was admonished more than once but less than 10 times. The parties also agree that initially the Respondent's service at the baseball games was less than satisfactory. Traube submits that part of the reason for the poor service was the vendor's low commission rate.

B. Events Preceding Traube's Discharge

Traube testified that the Aramark vendors in Camden Yards, the home field for the Baltimore Orioles, receive a 16-percent commission on sales. At the beginning of the baseball season at RFK the commission was less than 10 percent. Traube testified that he initially discussed the rates with Haskett and McDonald and later with other senior vendors, including the brothers Hahn, Daniel, Perry, and Jay. Haskett and McDonald deny that Traube mentioned his dissatisfaction with the commission rate to them. Sometime around the second week of April, Traube complained to David Cope, the vice president of sales and marketing for the Nationals, and a longtime acquaintance. Cope suggested that Traube talk to Rob Sunday, Aramark's general manager for operations at RFK Stadium.

Although Traube said that his talk with Sunday happened sometime between "early to mid-May," he was clearly mistaken. It is undisputed that the commission rates were changed effective May 1, thus the meeting most likely occurred shortly after he talked with Cope. At the meeting Traube addressed the low commissions as well as other employment concerns of the vendors. Traube opined that if the concerns were addressed it would be less likely that the vendors would vote in a union. Sunday agreed and said that he would discuss the issues with McDonald and get back to Traube.

Consistent with Traube's testimony, McDonald testified that Sunday called him sometime in mid to late April. McDonald also admitted receiving an e-mail from Sunday, sent on April 28 at 7:55 p.m., stating that he wished to discuss the commission rates, because he had heard rumblings from the guys about the rates (GC Exh. 12). McDonald testified that Sunday told him that "a little bird" told Sunday that "things are unorganized. Clancy's up at [the] Orioles working, while down here at RFK the beer is warm and, you know, I'm hearing talks of union (Tr. 28)." McDonald acknowledged that when he heard "union" he thought of UNITE HERE and that he believed that the "little bird" was one of the Respondent's vendors. The new commission rates were effective May 1. Sunday was replaced by Greg Costa around mid-May.

Sunday never got back to Traube and on April 27 Traube called John Boardman, the executive secretary-treasurer of UNITE HERE Local 25. Traube had been a member of UNITE HERE since the early 1980's and was the shop steward at New York City's Madison Square Garden from 1985 thru 1988. Boardman testified that because Traube is an articulate and well respected vendor he played a significant role in the union organizing campaign and was considered a "lead worker." In that capacity he talked with the Hahn brothers and other vendors about improving the working conditions at RFK. At about the same time it began to organize the Respondent the Union began organizing the Aramark concessions workers, as well.

Also within this time frame, McDonald testified that he was

receiving reports from Aramark concession supervisors about Traube. The supervisors complained that after being told to stop selling beer in the concession area and to move along, Traube would respond by saying the "the union's coming" and that the vendors would soon be "union organized." (Tr. 37-38, 83, 335, 340.)

Vendor Chudi Ugboaja testified for the Respondent and recounted his observations during a game in June or July. He stated that because it was a very hot day beer was selling well and the vendors were buying and selling two cases at a time. Ugboaja stated that on entering the commissary in room 327 he observed Traube putting ice on a case of Miller Lite. In addition to the case Traube was icing down, Ugboaja noticed another case of Miller Lite in front of Traube. Although the commissary manager and other vendors were in the room, no one responded to Ugboaja's general inquiry as to who owned the unattended case of Miller Lite. McDonald, who apparently entered the room as Ugboaja made his announcement, saw the unattended case and returned it to the cooler. McDonald's only verbal response was to tell the manager "there's a perfect example right there of [not] following procedures. How did it get over there? (Tr. 419.) Ugboaja testified that later that day he thinks that he told McDonald that something was going on for an extra case to be lying there and he and Traube were the only two Miller Lite vendors. (Tr. 328.)

In mid-July, Costa told McDonald that Aramark was allowing the Union to conduct a card check among its employees to ascertain if the employees wanted union representation. McDonald was asked if the Respondent would agree to a card check. McDonald agreed, after consulting with a labor lawyer, and on July 22, McDonald announced that there would be a union meeting the following day for any employee who wanted to join the Union. The meeting that was held on July 23 was not heavily attended. Less than 2 weeks after the meeting Traube was discharged. Boardman credibly testified that Traube's discharge had a chilling effect on the unit and that it had a negative impact on the organizing environment.

Traube testified that sometime in July Linda Floyd, inventory manager for the commissary in room 327, returned to work after a few days absence. Traube was assigned to buy his product from room 327. On seeing Floyd in room 327, Traube remarked to the vendors in the room that "Linda's back in the room now. You know, this room is going to run on time now. There's not going to be any fun and games in this room now." Traube explained that the commissary room is very small and there is no room for vendors to loiter. In that regard he considers Floyd exceptional at keeping the vendors moving in and out of the room. His comment was meant as a joking reminder to vendors that they could no longer dawdle in the commissary room, in essence it was a complement to Floyd's management of the commissary room.

During the evening of August 4, Traube was walking through the concourse to the seating bowl area when a patron stopped him and bought two beers. When he finished the sale he noticed Aramark Floor Supervisor Donald Washington approaching. Washington, who stands 6 feet 8 inches tall, is readily visible. Although Traube did not know him by name, he had complained to Haslett in the past about Washington's over

aggressive manner when ordering Traube not to sell on the concourse. Haskett, who did not refute Traube's testimony, advised him to try and avoid Washington.

Earlier that evening Washington had yelled to Traube to stop selling on the concourse, after Traube had made a sale that had been initiated by the customer. Traube proceeded to the seating area without further incident. This time they engaged in name calling and exchanged harsh words, after which things got physical. The police arrived and took the men to the Aramark offices. According to Traube he talked to no one while he waited for McDonald. After McDonald arrived and conferred with the Aramark representative, McDonald told Traube that he was closing him out for the evening.

Before McDonald took Traube's stadium identification and escorted him out, Traube attempted to tell him what happened. According to Traube, McDonald said that Traube "shouldn't have been there," but agreed that Traube was right in defending himself (Tr. 91). McDonald admits that as soon as Traube began his version of the incident by stating that a customer had stopped him for a beer, he "pretty much heard enough" (Tr. 466) and that he "chose not to believe him" (Tr. 53). McDonald's conclusion that Traube was lying was based on a single incident that occurred 3 weeks earlier at the same location on the concourse. McDonald alleges that unbeknown to Traube he watched him serve several customers and yell "cold beer" for 90 seconds (Tr. 54). When McDonald approached, Traube told him that a fan had initially stopped him. Based on this 90-second observation, McDonald concluded that Traube was lying, but did not confront him.

Traube contends that he never sold beer on the concourse unless first stopped by a customer. McDonald, who exhibited no tenacity towards reticence, admits that he never confronted Traube with his belief that he thought Traube had lied to him on either August 4 or 3 weeks before. (Tr. 57.)

Immediately after being escorted from the stadium, Traube reentered and went to Cope's office. Although Cope is no longer employed by the Nationals, his testimonial demeanor was that of a truthful witness who was trying to recollect the facts to the best of his ability. Although he has been a professional acquaintance of Traube's for about 13 years, he appeared to testify without bias. I fully credit his testimony regarding the following discussion between him, McDonald, and Traube.

After Traube told Cope what had happened they went to the scene of the altercation. Cope asked Traube if there were witnesses to the altercation. Traube said "Yes," but none were present. They found McDonald and they discussed the altercation. Cope listened as Traube and McDonald discussed Traube's selling beer on the concourse. Traube reiterated that he was only selling to patrons who had stopped him and that his sales were in the interest of customer service. Traube, who thought that Aramark had discharged him, asked McDonald what he could do to get him reinstated. McDonald mentioned Traube's membership in an organized group of vendors that wanted to do something about the commissions. Traube asked, "[W]hat has that got to do with?" McDonald responded by using the term "rabble-rousing" in referring to the group and he stated that he did not know how much he could do for someone who was trying to organize people. It is also during this discus-

sion that McDonald told Traube that he was not going to back him. (Tr. 57.) The discussion ended when Cope returned to work. Traube remained in the stadium and located a witness.

Traube claims that McDonald said that Traube was always making threats about bringing in the Union. McDonald claims he was merely telling Cope what Traube was saying when he was asked to move. However, both versions have McDonald using the "union," a fact that Cope categorically rejects. Cope's testimony was that of an unbiased, disinterested, and honest third party. It resonated with "the ring of truth" and as such I credit his testimony over that of Traube and McDonald. I also note that although McDonald was in the courtroom during the entire trial he did not contest Cope's statements concerning the use of the term "rabble-rousing," nor his testimony that McDonald connected the diminished probability of Traube's reinstatement directly to Traube's protected concerted activity.

Anthony Coleman was the commissary cashier in room 327 on the evening of August 4. Sometime during that evening, after learning of the altercation, Coleman talked to McDonald. Without providing any context, Coleman told McDonald of a statement Traube had made to him and Linda Floyd, the commissary room manager, a couple of weeks before. According to Coleman, Traube entered the commissary room and told them that all the vendors knew to come to their commissary "to get away with stuff," because "you guys didn't know what the hell you were doing." (Tr. 376.)

McDonald states that he heard this comment from both Floyd and Coleman after the altercation. McDonald contends that this information confirmed his suspicion that Traube was responsible for shortages of cases of Miller Lite in room 327 of the commissary that occurred throughout the season. The sole initial cause for McDonald's suspicion was what he refers to as "a theft in progress" that Ugboaja testified about, where Ugboaja stated that he saw an unclaimed case of Miller Lite beer near Traube in room 327 of the commissary.

C. The Discharge and Subsequent Events

Notwithstanding McDonald's belief that Traube's selling on the concourse caused the altercation with Washington, and that Traube was stealing from the Respondent, he still felt the need to talk with Haskett and consult with the Respondent's lawyer. On August 9, the lawyer assured McDonald that he could discharge Traube for any reason that was not unlawful. As soon as he ended the conversation with the lawyer he called Haskett. He told Haskett everything that was said between him and the lawyer and Haskett agreed that Traube should be discharged.

Thereafter, Traube called McDonald and asked about the possibility of reinstatement.

McDonald replied that Traube had not been discharged on August 4. McDonald then explained that he was being discharged then because of an inappropriate comment he made to Linda Floyd, and shortages in the commissary room. Traube responded that McDonald's statement was "an outrageous accusation" and that he was going to fight his discharge. McDonald said "fine."

On September 1, Traube reported to Ravens Stadium in Baltimore, Maryland, to work an exhibition football game for the

Respondent. On arriving, Traube asked Haskett why his name was not on the vendor list. Haskett said that he did not think that Traube was going to work the Ravens games because he had rejected a settlement offer from Aramark to return to work for the Respondent at RFK. Traube said that the settlement offer had nothing to do with his tenure at Ravens Stadium. Haskett agreed, and said that he never had any problem with Traube. Traube sold beer for the entire game without incident. At the end of the game, Haskett told Traube that McDonald wanted to see him. They were unable to meet that day. Traube did call and e-mailed both of them but his efforts availed him nothing.

Traube reported early to Ravens Stadium on September 11. While Traube was waiting to enter he saw McDonald addressing a group of new hires. McDonald saw Traube, pointed his finger at him, and asked him to come. When Traube got near McDonald he said “Yes.” McDonald said, “You don’t work here anymore.” Traube asked, “[W]hat do you mean?” McDonald replied, “I’m not going to have you stirring up union trouble in this stadium, as well. I’ll see you at the hearing.” Traube said “fine” and walked away. McDonald denies saying “I’m not going to have you stirring up union trouble in this stadium, as well.”

III. DISCUSSION

A. The 8(a)(1) Allegations

The General Counsel alleges that McDonald made two unlawful statements to Traube. The first occurred during the evening of August 4, when Cope, Traube, and McDonald were discussing the possibility of Traube’s reinstatement. Traube claims that McDonald stated that Traube was always threatening about bringing in the Union. McDonald admits only that he told Cope what the Aramark supervisors were relating to him, as Traube’s response when they told him to stop selling on the concourse.

Cope, whose testimony I credit over Traube and McDonald, testified that the “union” was never mentioned. Cope also testified as to McDonald’s response to Traube’s asking him for help in getting reinstated. McDonald noted that Traube was part of an organized group of vendors that were trying to do something about the commissions. When Traube asked “what has that got to do with,” McDonald responded by using the term “rabble-rousing” in reference to the group, and stated that he did not know how much he could do for someone who was trying to organize people.

Under Section 8(a)(1), an employer may not “interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights. “The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” “In determining whether an employer’s statement violates Section 8(a)(1), the Board considers the totality of the relevant circumstances.” *Ellison Media Co.*, 344 NLRB 1112, 1113 (2005) (citations omitted). In considering communications from an employer to employees, the Board applies the “objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric*

Pump & Plumbing, 334 NLRB 824 (2001). Further “an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.” *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). The Board has long recognized that terms such as “rabble-rouser,” “agitator,” and “troublemaker,” are normally applied by employers to individuals who are attempting to instigate other employees into engaging in concerted or union activities, particularly when there is no alternative explanation forthcoming. See *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109 (1998); *Garner Tool & Die Mfg.*, 198 NLRB 640 (1972).

The implication of McDonald’s statement—that he did not know how much he could do to have someone reinstated who was a member of an organized group of rabble-rousing vendors—in the context of Traube’s request for help in getting reinstated, made a direct connection between Traube’s concerted activities and the possibility of his continued employment. Thus, considering the totality of the circumstances, I find that McDonald’s statement was an implied threat not to reinstate Traube because of his protected concerted activity. Accordingly, the statement violated Section 8(a)(1) of the Act because it has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

The General Counsel contends that the second violation of Section 8(a)(1) occurred when McDonald told Traube that he could not work at Ravens Stadium because McDonald was not going to have him stirring up union trouble in this stadium. The Respondent does not argue that the statement, if made, violates Section 8(a)(1), but argues that the issue is one of credibility.

I was not impressed by McDonald’s testimony regarding this and other disputed issues. I found McDonald to be of poor demeanor. Additionally, as detailed herein, his testimony contains numerous self-contradictions and inconsistencies. I find McDonald’s credibility unreliable. Traube had a far more credible demeanor and his testimony appeared to be honest and sincere. He also appeared to be an emotional and passionate individual who took great pride in his ability, and his standing, as a vendor. The record also establishes that he is articulate, talkative, not averse to confrontation, and tenacious. He told McDonald that he is fully committed to fighting his discharge, and to that end he has retained an attorney.

The Respondent apparently suspended Traube on August 4. I use “apparently” because Traube was told nothing regarding his status until August 9. On that date the Respondent, acting through its co-owner, McDonald, told Traube by telephone that he was discharged. The Respondent’s contrary contention, notwithstanding, Traube was rehired by the Respondent’s other co-owner, Haskett, on September 1, only to once again be discharged by McDonald on September 11.

Based on the foregoing, it is difficult to accept McDonald’s testimony that after he approached Traube and said, “Fred Traube, you’re not working,” Traube merely responded, “Okay, so I’m fired from here, too,” and walked away. I find it far more likely that, as Traube testified, he asked McDonald for an explanation, rather than merely repeating the obvious. Such inquiry would be especially appropriate in light of Traube’s

recent rehire and having worked a game without incident.

The Respondent appears to argue that Traube should not be credited because he identified vendor Phil Lang as being nearby when this incident occurred. The Respondent contends that based on Lang's seniority number he would have already been in the stadium, and in any case, he was not called to corroborate Traube's testimony. Traube testified that McDonald had been addressing a group of new vendors before he summoned Traube. On cross-examination, Traube was asked if he recognized any of the vendors. He said he only recognized Phillip Lang. He further testified that Lang was on the periphery of the group of new vendors. Traube volunteered that Lang must have been late, because with his high seniority number he should have been inside the stadium.

McDonald said that he did not remember Lang being present. Haskett, who was present when McDonald and Traube testified, said that he did not believe that Lang was present during the exchange between McDonald and Traube. Haskett based his belief on record evidence that indicates that Lang worked out of vending room 103, "the number one vending room for sales." According to Haskett, Lang would not have been able to "get a cart" for that room had he been late, presumably because other vendors would have chosen that room before Lang arrived.

Haskett's testimony notwithstanding, I am not convinced that Lang, perhaps knowing that he was going to be late, did not make other arrangements. Regardless, no motive has been advanced as to what Traube would gain by giving a false response to the Respondent's question. Respondent implies that Lang would not support Traube's testimony and hence that is why he was not called as a witness. Traube never stated, or inferred, that Lang or anyone else heard the exchange between himself and McDonald. "Nearby" does not connote a specific distance and, without more, does not support a conclusion that the people "nearby" overheard the conversation. Thus, there is no evidence of what, if anything, was heard by Lang or the new vendors.

Based on the foregoing, I credit Traube's testimony, and I find that the Respondent violated Section 8(a)(1) of the Act when it told Traube that he was not allowed to engage in union and/or concerted protected activities at work. *Teledyne Advanced Materials*, 332 NLRB 539, 539 (2000).

B. The 8(a)(3) Allegation

The analytical framework for determining when a discharge violates the Act was set out in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the discharge was motivated by the employee's protected concerted activity. To carry the initial burden, the General Counsel must show that the employee had engaged in protected activity and that the respondent knew of the activity. The General Counsel also must establish that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence. Thus, the pretextual nature of the discharge may support an inference of discriminatory motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th

Cir. 1966); *Active Transportation*, 296 NLRB 431, 432 (1989), *enfd. mem.* 924 F.2d 1057 (6th Cir. 1991); and *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982). If the General Counsel meets this burden, the employer then bears the burden of showing that the discharge would have taken place even in the absence of the protected conduct. *Wright Line*, *supra* at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 *fn.* 12 (1996).

Regarding the first element of the General Counsel's *Wright Line* burden, establishing that Traube engaged in protected concerted activity, I credit the testimony of John Boardman, the executive secretary-treasurer of UNITE HERE Local 25. Boardman testified that Traube played a significant role in the union organizing campaign and was a "lead worker." I also credit Traube's testimony that in that capacity he talked with the Hahn brothers as well as other vendors about improving the working conditions at RFK. His testimony is consistent with the documentary evidence. On May 5, Traube sent an e-mail to employee, and vendor, Danny Hahn, rejecting a bonus plan proposed by the Respondent. Traube, who was out of the country, also urged Hahn to contact Boardman to ascertain the status of the organizing campaign (GC Exh. 6).

The General Counsel established the Respondent's general knowledge of union activity from McDonald's July 22 announcement that there would be a union meeting the following day. Specific knowledge of Traube's involvement is evidenced by Haskett's admission that Traube, who he refers to as a friend and an employee, spoke with him about bringing in a union for vendors at RFK at the start of the 2005 Nationals baseball season. McDonald also admits knowing that Traube was openly predicting that the vendors would unionize.

McDonald's unlawful statements, above, provide knowledge of Traube's protected activity, as well as establishing the requisite element of animus. Additional evidence of animus can be inferred from the baseless and pretextual reasons offered by the Respondent as justification for Traube's discharge.

1. Concourse sales and the altercation

McDonald initially testified that when he entered the Aramark office, the Aramark Representative informed him that there had been an altercation between an Aramark concession supervisor and a vendor, but that he was unaware of the details. When McDonald saw that Traube was the vendor, he thought of the previous complaints the Respondent had received from Aramark supervisors during April-July, and the first few days of August, about Traube selling beer on the concourse. McDonald, cryptically told the Aramark Representative that "he's been warned." The representative opined that as far as he was concerned Traube was out of there. McDonald said he had "no problem with that" and proceeded to take Traube's identification badge, reconcile his accounts, and escort him from the stadium.

McDonald never told Traube the status of his employment during the evening of August 4. McDonald offers no explanation for not telling Traube, especially when he testified that he was contemplating a suspension, at the minimum, from the outset. McDonald made no inquiry of anyone regarding the altercation, or the circumstances preceding it. According to

McDonald such inquiries were unnecessary. McDonald was convinced, based on the prior reports of Traube selling on the concourse, and his own 90-second observation of Traube selling in the same approximate area, that he knew what happened. His entire assumption was predicated on Traube's selling on the concourse in violation of the Respondent's written rule that "Vendors must sell in the seating bowl at all times except during rain delay." (R. Exh. 2, at 7.) His stated belief is inconsistent with his testimony, and his actions.

McDonald admits, its rule notwithstanding, that in the interest of customer service, vendors should comply with a patron's request to buy beer. Moreover, McDonald concedes that even on the concourse a vendor should serve all patrons who surround him as he serves the initial customer. (Tr. 536.) In spite of the foregoing admission, McDonald took no action to ascertain if Traube's version of the incident was true. The fact that Traube may have previously violated the rule is irrelevant to the question of whether, on that specific occasion, a customer asked Traube for service. Other than contending that his disbelief was based on his judgment, McDonald offered no explanation as to why he found that scenario to be so completely beyond the realm of possibility.

McDonald also states that he condoned neither Traube's selling on the concourse, nor his responses when asked to move. Yet his testimony, as well as that of other Respondent witnesses, demonstrates that condonation is exactly what he did. McDonald told every Aramark supervisor who complained about Traube that "he would take care of it." Yet he took no action other than repeatedly telling Traube not to sell on the concourse. Furthermore, in contradiction of his own testimony McDonald admits to condoning Traube actions because they were friends, and Traube was an experienced, high volume, vendor.

A copy of the Respondent's handbook for vendors at RFK is part of the record. (R. Exh. 1.) McDonald testified that he read and was familiar with the handbook, which was prepared by Haskett. McDonald stated that the rules (R. Exh. 2), which he drafted, are consistent with the handbook. Under "Vendor Policies and Procedures" in the handbook is "No selling on the concourse at any time." At the bottom of the page is: "Violation of company policy will result in disciplinary actions. (Verbal warning, one game suspension and or termination.)"

It is undisputed that the Respondent verbally modified this "absolute rule" with its "customer service exception," which permits sales on the concourse pursuant to a request from a customer, and any additional customers who thereafter assemble around the vendor. The exception was admitted by McDonald (Tr. 534-536), and not disputed by Haskett, who along with McDonald, was present during the entire hearing. Accordingly, I find that when McDonald and Haskett said "selling on the concourse" they are referring to "setting up" and "hawking" beer on the concourse. Conduct that Traube denies. I also find that the Aramark employees who testified were unaware of any such exception. As such, I find that they complained to McDonald even when Traube was engaged in a customer service sale as well as possibly "setting up" for sales. In that regard, I find the record unclear as to whether any of them saw Traube doing anything other than selling beer. Only one

witness mentioned that "he had drawn a crowd around himself to sell" (Tr. 338), which indicates that he was actively encouraging customers to buy beer from him.

The Respondent did not follow its own published disciplinary procedure with regard to Traube's selling on the concourse, which it now advances as a reason for his discharge. The Respondent never suspended Traube for selling on the concourse. Thus, to the extent that Traube's discharge is predicated on his selling on the concourse it is "inconsistent with its progressive discipline." *Tubular Corp. of America*, 337 NLRB 99, 99 (2001). Contrary to the Respondent's contention, this does not mean that "misconduct once tolerated at all must be tolerated forever." *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1214 (7th Cir. 1981). "An employer's decision to enforce its rules more stringently in the future is within its discretion and does not suggest discriminatory treatment." (Citation omitted.) *Camvec International*, 288 NLRB 816, 821 (1988). The record contains no evidence that the Respondent changed, or had made a decision to change, any aspect of its progressive disciplinary procedure.

McDonald refers to Traube's selling on the concourse for over a 4-month period as "chronic." His diagnosis notwithstanding, McDonald avers that he did not terminate Traube for selling on the concourse because he thought he would stop. (Tr. 462.) The Respondent could not reasonably anticipate that Traube, of his own volition, would change behavior. The Respondent had a procedure in place that could achieve its dual objectives of enforcing its rule, and retaining an experienced and valued employee. When an employer, as here, deviates from that system—without announcement or explanation—its conduct may properly be relied on to infer union animus and as evidence of pretext. *Tubular Corp.*, above; *Norris/O'Bannon*, 307 NLRB 1236 (1992). I am mindful that Board law does not permit an administrative law judge to substitute his judgment with regard to the discipline imposed for that of the employer. *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). Nevertheless, when, as here, it is alleged that the reason assigned for the discipline is pretextual, attention must necessarily turn to the reaction of the employer. *American Petrofina Co. of Texas*, 247 NLRB 183, 189 (1980).

The Respondent's reliance, or lack thereof, on the physical altercation as a reason for Traube's discharge is obscure. When McDonald was initially asked by counsel for the General Counsel for the specific reason for Traube's discharge the physical altercation was not included in his response. After noting that testimony, given only minutes before, counsel for the Charging Party concluded that the altercation played no part in the discharge. McDonald responded, "Sure it did." Yet when testifying at a later point in the hearing he again fails to mention the altercation as reason for discharge. (Tr. 416.) McDonald offered no explanation for this apparent inconsistency in his testimony. Nor did McDonald apparently feel any need to explain or acknowledge, the inconsistencies—some significant, some not—that abound in his testimony.

It is also during this phase in the questioning that McDonald inadvertently acknowledges that he knew that Traube was selling on the concourse. As background, the following is McDonald's reason for believing that Traube was a liar and

thus could never be believed.

Counsel for the Charging Party, in essence, has just asked McDonald why he never verified the basis for his nonbelief:

Because the day that I caught him, probably about three weeks earlier than that, when I actually made an effort to walk outside of the stadium and stand outside the door where I knew that he was selling—where I knew that he would probably be selling, and I stood and saw him out there for 90 seconds. Then he told me a lie, that a fan stopped him, and I saw him right there serving several customers and yelling cold beer, cold beer. [Tr. 54.]

His Freudian slip acknowledging that he knew not only that Traube was selling on the concourse but where, reinforces my previous finding of the Respondent's long standing condonation of Traube's activity conduct.

McDonald admits that as soon as Traube started his version of the altercation by stating that a fan stopped him on the concourse, McDonald "made a judgment" to not believe anything Traube said, based on his 90-second observation set forth above. McDonald also admits that he never confronted Traube, at any time, about his concern that Traube had lied to him on both occasions. In fact, at no time did McDonald ever confront Traube with his belief that Traube lied to him, let alone tell Traube that he no longer had any credibility with him. McDonald claims that the closest he came to telling Traube that he did not believe him was when he told Traube that he "wasn't going to back him." "That's the closest I came to telling him that I did not believe his story." (Tr. 57.) Which is not close at all to specifically confronting him with his disbelief and the specific reason therefore. Moreover, when asked the exact same question by the Respondent's counsel the following day, McDonald avers that he told Traube that he did not believe him. (Tr. 465.)

McDonald attempts to couple "selling on the concourse" with "the reported remarks that he (Traube) made after being asked to move" along and concludes that as result "it culminated in a fight." The first problem with this testimony has previously been addressed—that Traube told him that he was making a customer sale and that McDonald had no facts to the contrary. Similarly, McDonald admittedly had absolutely no knowledge of any remarks reported or otherwise from Washington, regarding anything said or done by Traube, before McDonald discharged Traube. Thus, McDonald had no knowledge of the facts concerning the altercation or any of the surrounding circumstances, and he undertook no investigation to acquire any information.

The time for assessing responsibility for the altercation has long passed. The adversaries, not surprisingly, each testified and cast blame on the other for initiating the conflict, each deny using racial epithets, but averred being the recipient of same. Unlike the "real time" incident, there were no third party witnesses. Regardless, McDonald found no need to resolve the conflict, and neither do I.

It is striking, however, that McDonald not only disbelieved Traube's version, but assumed a completely opposite view, without any attempt at verification of his assumed belief. This conduct is even more disturbing considering the physical dis-

parity between Washington and Traube. Washington is not only at least 8 inches taller than Traube, with commensurate reach, but is obviously in far superior physical condition. I acknowledge that physical attributes, regardless of how disparate, are not always valid predictors of outcome. On the night of the incident, however, McDonald could not help but see Washington, literally looming over him, and McDonald is taller than Traube. In addition to the foregoing, I also find, based on the obvious physical characteristics of the participant, (and without deciding who initiated the physical altercation), that McDonald did not have a reasonable good-faith belief that Traube initiated or caused the physical altercation.

McDonald also testified that this was the first physical altercation between a vendor and a concession manger during his 30 years of experience. With that testimony in mind I have considered the record in light of the possibility that the Respondent was applying a draconian rule requiring discharge for all physical altercations regardless of fault, somewhat akin to strict liability in tort. I found nothing in the handbook concerning altercations and the record contains no testimony regarding past physical altercations. Nor has the Respondent advanced that contention in its brief. It also seems probable that had the Respondent applied such a rule, it would have specifically told Traube that was the sole reason for his discharge, rather than an "inappropriate comment" made to a commissary manager, and shortages in a commissary room.

Based on the foregoing I conclude find that the Respondent has no absolute rule requiring discharge for engaging in physical altercations regardless of fault, nor did it discharge Traube pursuant to such a rule.

In *Diamond Electric Mfg. Corp.*, 346 857, 860 (2006), the Board stated:

"[F]ailure to conduct a meaningful investigation or to give the employee who is the subject of the investigation an opportunity to explain" may, under appropriate circumstances, constitute an indicia of discriminatory intent [citation omitted.] The Board has considered this factor in several recent cases to find discharges unlawful where employees were denied the opportunity to provide a potentially exculpatory explanation prior to being discharged. [Footnote omitted.]

Not only did the Respondent fail to conduct an investigation it did not avail itself of the Aramark investigation, nor did it attempt to obtain the police report. Traube located a witness and there were obviously others, most of whom would probably be neutral third parties. If McDonald was truly convinced of his assumption, what better way to have it affirmed than with the statements of disinterested eyewitnesses. McDonald's actions bring to mind the old saying "my mind is made up, don't confuse me with the facts."

Based on the foregoing, I find that the Respondent's failure to conduct any investigation is an indicia of discriminatory intent. I also find that it's failure to investigate under the above circumstances is evidence that the Respondent's alleged "belief," which it used in lieu of an investigation, is not a reasonably held good-faith belief but is, instead, strong evidence of pretext.

In any case the suspension of Traube on the evening of Au-

gust 4, generated memory bubbles in the mind of Anthony Coleman, and subsequently McDonald, that can only be described as serendipitous.

2. Coleman's testimony

Coleman is the cashier for the commissary in room 327, and Linda Floyd is the commissary inventory manager. The commissary in room 327 is also where Traube was assigned to buy his beer. Coleman and Floyd were working in room 327 the night of the altercation. Coleman remembers that the incident occurred before they were assigned to work out of the commissary in room 501. Here is how he describes his revelation on direct examination:

Actually I think that's the night when I told him, that night, that it was either that night or the next night. I think it was that night, you know, once I found out about it, I said let me tell you what this guy [Traube] said to me and Linda, you know, and that happened a couple of weeks beforehand. I felt kind of dumb. I didn't want to tell him but once that happened, I was like, look, he's been doing this for four or five years. He's not a new kid on the block. He knows not to sell out on the concourse but if he wanted to be arrogant about that, and he was arrogant when he came in to even to look at, you know.

[He continues with McDonald's response.]

Dave's response was like, from what I recall was okay, I'll handle it. That's what—I don't remember him being upset about it or not being upset, he was like, okay, thank you for telling me. [Tr. 378.]

Coleman claims that Traube's statement was made within 5 or 6 weeks after he began working for the Respondent in late April. That would place the incident around mid-June, at the latest. This would be at least 2 weeks before July, when Traube remembers making a jocular comment about Floyd running a tight ship.

The following is Coleman's description to McDonald of either Traube's jocular comment that was made in July, or of an entirely different incident which happened at least 2 weeks earlier:

Well, Fred had come in there, he was totally brazen about it, and had told me and Linda, I mean I was new doing this, and she was new, too, and he came down to the room and said, you know, this was the room to come down to. All the vendors knew it, he said you guys don't know what the hell you're doing. So, you know, we could get away with stuff down here, you know, and there were many nights when Linda and I would sit there until 12:00, 1:30 in the morning, you know, trying to find a case of beer, two cases of beer that are missing, you know. She's looking after me, I'm trying to after her happen [sic]. How does this happen every night. He [Traube] came down and he was brazen about it. I mean he just sat right there and looked at me and it was like this is the room that you came down to because you guys didn't know what the hell you were doing, so we came down here to try to get it, you know. [Tr. 376.]

McDonald confirms that he first heard about Traube's alleged comment from Coleman on the evening of August 4. What follows is his explanation of how it happened:

When, you know, of course, something like that happens, it's a rarity, so people start talking. So it was like oh, yeah, you heard what he said to Linda, right? And I said no. And then Linda told me the remark that he made, which was something to the effect of, you know, yeah, we miss the old Linda. You know, we can't get you anymore. The early part of the season, you know, it was like yeah, go to Linda. He [Traube] said now we can't get you anymore. [Tr. 44–45.]

Later, after hearing Coleman's testimony, McDonald acknowledges that it was Coleman from whom he first heard the story. He explains why he found the story believable:

I believed [the story] because I had actually been—I counsel the managers and the cashiers if they have losses and basically go over the procedure and the controls on how that will not happen again. And by that time, the season, by August—Linda was catching on and had pretty much got it, so that comment was true, that the beginning of the season she was getting beat and it kind of leveled off toward the end, so I thought there'd be an accurate comment, an inappropriate comment and a comment that just kind of further fueled my suspicions of Fred Traube being involved in this theft. [Tr. 478.]

I do not believe either McDonald's or Coleman's testimony regarding their conversation and Floyd, for some unexplained reason, did not testify. (Tr. 419.) If Coleman was referring to the incident that Traube testified about, on some unknown date in July, then Coleman's testimony is a total distortion. If Coleman is testifying about another incident, it is a complete fabrication. To be clear, Coleman swears that Traube and other vendors were stealing from the commissary located in room 327. On cross-examination, counsel for the General Counsel established that Coleman did not know what "stuff" Traube was allegedly saying the vendors could get away with. The inference being that "stuff" could mean staying longer than necessary in the commissary room. When the counsel for the General Counsel intimated that Coleman merely arrived at his own conclusion, Coleman, becoming visibly upset, replied, "No, no, no. I'll tell you exactly . . . what he—and there was really no inference, like the word was, this is the room to come down here to because you guys don't know what you're doing and we can get away with stuff down here with you." (Tr. 381.)

Coleman was a singularly unimpressive witness. In addition to his poor demeanor he admits exaggerating his testimony, and having a bias against Traube, who he considered brazen and arrogant. He testified that he and Linda stood beside each other and worked together for the entire season, sometimes under stressful circumstances—yet he did not know her last name. His testimony was inconsistent with other credited testimony and documentary evidence. He was an unusually enthusiastic witness, at least when testifying for the Respondent. He appeared to enjoy testifying against Traube, and in support of the Respondent's cause. While testifying on direct examination, I

observed him making furtive glances toward McDonald, in almost a fawning manner, as if seeking McDonald's approval.

Coleman claims not to know when Traube made the statement which he conveyed to McDonald. He does recall that he was new and had only been working as a cashier for 5 or 6 weeks. If that is correct, the incident Coleman relates happened in mid-June, not July which is when Traube remembers making his comment. It would also detract from McDonald's rationale for believing that the statement was true because the shortages "kind of leveled off toward the end" of the season. Regarding McDonald's contention "kind of leveled off" is ambiguous. It does not necessarily mean that the shortages were substantially less than in the beginning of the season. At most it indicates that the amount that the Respondent was "getting beat" had not changed for a period of time. The Respondent apparently maintained sales records that should have substantiated McDonald's claim, but those were never offered into evidence. In either case, and of even more importance, Coleman waited somewhere between over a month and a half (according to Coleman's estimate from mid-June to August 4) or at least a week, (according to Traube's more specific testimony that he made his comment sometime in July) before telling McDonald. And even then Coleman claims that it was the incident involving Traube on August 4 that, incredibly, somehow triggered Coleman to tell McDonald what was tantamount to a confession by Traube.

Traube clearly had a passion for being a vendor, especially at baseball games. His demeanor when testifying about his job makes it difficult to believe that he would risk losing something that gave him great pleasure, in exchange for however much he could get for selling stolen cases of Miller Lite (McDonald claims the total lost was \$1800). That being said, I find it even more unbelievable that having successfully "beaten" rookie commissary employees Floyd and Coleman, for over half the season, he somehow feels compelled, to not only brag to them about this accomplishment, but to also implicate his fellow vendors. Coleman's statement that "all vendors" were virtually lining up at in room 327 of the commissary to "get away with stuff" is inconsistent with Traube's uncontested testimony that vendors are assigned commissary rooms (Tr. 71). This prohibition is also contained in the Respondent's handbook, in bold print under "Vendor Policies and Procedures." (R. Exh. 1.)

Coleman did not hesitate to place blame on Traube even when Coleman admittedly was not present when the alleged incident occurred, and the alleged statement was inconsistent with all the other evidence of record. Coleman claims that "Linda," who did not testify, told him that Traube went to commissary room 501 and commented "like, oh you're up here now. Let me go to where you are." (Tr. 379.) Coleman placed the time frame for this comment as after he and Linda moved to the commissary in room 501. That move occurred after August 4, which was the last day Traube worked in RFK, and thus would have absolutely no reason to try and "beat" Linda, or to remind her that he had done so.

The testimony as well as the employee handbook establishes that the employees who are primarily responsible for all cash and inventory shortages in any commissary room are the cashier and inventory manager. In the commissary in room 327,

those positions were occupied by Coleman and Floyd, respectively. Certainly, under the circumstances, this fact alone provides ample motive for Coleman's mendacious testimony.

It is possible that Coleman fabricated his baseless scenario without prior consultation with McDonald. Possible but not plausible. Certainly it is evident that McDonald was again a willing listener for any evil doing attributed to Traube. When viewed in conjunction with McDonald's previous conduct, his statements prior to and on the evening of August 4, his conduct following Coleman's tale, and Traube's discharge, I am convinced that Coleman's story was fabricated in collaboration with McDonald.

I also have a jaundiced view of McDonald's testimony and conduct regarding the information he so readily accepted from Coleman. Just as I discredit Coleman's statement as to why he approached McDonald on the evening of August 4, I do not completely accept McDonald's reasoning that "people talk" after an incident such as the altercation. I agree that "people talk," but I see no connection between selling on the concourse and the altercation, with Coleman finally informing McDonald what he alleges Traube said to him and Floyd. I also observe that the incident did not have the same impact on Floyd. The record does not establish that she somehow felt the need to talk with Coleman or McDonald about Traube. Ugboaja was absent on August 4, but even after he learned of the incident 2 days later, he did not remind McDonald of the "theft in progress" that McDonald believes he interrupted. Indeed, McDonald indicates that it was not until Coleman provided him with the final piece of the puzzle—Traube's admission—that he was able to connect the dots and confirm his suspicion.

I find even stronger evidence of collusion in what McDonald failed to say and do. McDonald offered no evidence that he asked even one followup question after initially asking Coleman, and then Floyd, to tell him what Traube was alleged to have said. He did not ask why vendors were "beating" him in a commissary room to which they were not assigned. He did not ask the names of those vendors. He did not ask when Traube made the statement. He did not ask why they thought Traube would make such an admission. He did not ask the most important and most obvious question—why Coleman waited to report Traube's admission and why Floyd never felt that it was necessary to make a report at all.

To accept that there was no collusion is to believe that McDonald accepted, on face value, the statements of the prime suspects—without question or hesitation—and that I am unwilling to do. Once again McDonald "finds" confirmation of his preconceived notions.

3. Ugboaja's testimony

Another of McDonald's beliefs is that he interrupted a theft in progress. This perception is based on Ugboaja's testimony. Ugboaja is an experienced, high volume vendor, who sells Miller Lite, and works out of the commissary in room 327. He and Traube testified that they sell Miller Lite because of its popularity. They are competitors, in what appears to be a highly competitive job.

I find Ugboaja's concern about the case of Miller Lite near Traube puzzling. Ugboaja testified that it was a hot day and

beer was selling well. He was buying and selling two cases at a time, as the Respondent encourages vendors to do. (R. Exh. 2.) As Ugboaja entered the commissary in room 327 to buy more Miller Lite, he noticed Traube icing down a case of Miller Lite. This was not unusual because Traube and Ugboaja both sold Miller Lite. Ugboaja also noticed another case of Miller Lite in proximity to Traube. A reasonable assumption would be that Traube was going to ice the second case after he finished icing the first. This assumption becomes almost a certainty if, as Ugboaja further testifies, only he and Traube were selling Miller Lite that day. It is uncontested that the Respondent assigns approximately 12 vendors to a commissary room and they are not allowed to switch. It follows that, absent some unusual circumstance, any case of Miller Lite that is beyond the commissary counter, if not Ugboaja's must be Traube's. I see nothing wrong with that picture and there is absolutely no reason for Ugboaja to make a general announcement asking who owns the case on the floor.

Ugboaja makes the announcement and he does so because his testimony that there were only two vendors selling Miller Lite on that day is incorrect. A perusal of the Respondent's records (R. Exhs. 15B-S) rarely shows fewer than two vendors selling any brand of beer, and never less than three vendors selling Miller Lite, and frequently more. Having more than two vendors is also consistent with Ugboaja's testimony, as well as Traube's, that Miller Lite is one of the most popular brands on any day, and this would be especially true on a hot day. This explains why Ugboaja made his announcement asking who owns the case, to the entire room. Although Ugboaja testified that the unclaimed case was "in front of Fred," such phraseology, without more, does not mean that the beer was not also in front of, or near, another vendor, i.e., between two vendors.

McDonald enters on what he considers to be a "theft in progress." The use of that phrase generally indicates that the thief is still present. If that is McDonald's understanding his reaction can best be described as unconcerned. He apparently is clueless as to what, if anything, is occurring. The total extent of his investigation is to ask the commissary crew, presumably Coleman and Floyd, "How did it get over there?" Rather than "who stole this beer," a more appropriate response for someone who truly believes they have interrupted a theft in progress. The fact that none of the people in the room claimed ownership of the case, does not mean that they were without knowledge of how the case got to its current resting place, from its previous location behind the commissary counter. McDonald asks no questions.

I credit Ugboaja's testimony that at some point in time there was an unclaimed case of Miller Lite in commissary room 327. I note that even a most rudimentary inventory system would have disclosed if the case had been stolen or purchased. The Respondent offered no records to demonstrate that a theft occurred, or even that commissary in room 327 was unable to reconcile its accounts for that day. Presumably this is because McDonald was not sufficiently concerned with the "theft in progress" to even bother noting the date. The Respondent claims that it is frequently being "beaten" by the theft of cases of Miller Lite from commissary in room 327, but not once does the Respondent undertake any credible investigatory or preven-

tative measures consistent with its contention.

Assuming that the case was stolen, I find no evidence that Traube had anything to do with the theft. Ugboaja admits that he never saw Traube touch the case. Neither Ugboaja nor McDonald questioned or confronted Traube. Ugboaja initially tended to slant his testimony to place the Respondent's position in the best light, and Traube's in the worst, rather than objectively report the facts. I am uncertain whether this was because of a professional rivalry with Traube, or if he was intimidated by McDonald, who was present when he testified. In any case his opinion is not fact. McDonald has established no reason to believe that Traube had anything to do with the unclaimed case of Miller Lite and his actions are consistent with that finding, and in no way are they actions of an individual who honestly believes that he has walked in on a theft in progress.

4. Unacceptable variances

Based on McDonald's description of how a vendor "steals" a case of beer from the Respondent, it is readily apparent that the theft requires, at the very least, the cooperation of the inventory manager, either by design or accident, and possibly the cashier. According to McDonald, the vendor buys two cases of beer three or more times in a row. The next time the vendor buys one case, but the manager, conditioned to giving him two cases, continues to do so and the vendor sells his "free" case and pockets the proceeds. Clearly this method of stealing is nothing more than the combination of an individual who is inclined towards dishonesty, with a careless manager.

The procedure for buying product in the commissary is not in dispute. The vendor orders and pays the cashier. The cashier counts the money and issues a perforated commission ticket. The inventory manager, who stands beside the cashier, is presumably watching the transaction. The cashier gives the manager half the receipt and the vendor the other half. The inventory manager instructs the support staff to get the beer from the cooler and give it to the vendor. The procedure appears, on its face, to be too slow to develop a rhythm of sufficient rapidity so as to honestly overlook a case of beer, at least on anything like a regular basis. Certainly in order to make the outcome more predictable it would help to recruit the inventory manager, and to make it even more foolproof, the cashier, as conspirators.

Because the cost of a case of beer is the constant, any shortage attributable to cases of beer must be in multiples of \$144. McDonald's agreement, notwithstanding, he claims that the Respondent lost \$1800 as the result of Traube's alleged thievery. McDonald testified that he arrived at \$1800 by multiplying \$144 by the number of the times he "suspected that Fred may have done this." (Tr. 527.) Not only is 1800 not a multiple of 144, but significantly McDonald admits, well after he discharged Traube, that his decision was based solely on suspicion.

Moreover, the Respondent presents no documentary evidence from which to conclude that McDonald had any legitimate reason to suspect Traube. The extent that the Respondent relies on its records as validation for its suspicion is entirely set forth in footnote 20 of its brief:

McDonald testified that he reviews the inventory/cash reconciliation after every game and was aware, prior to Charging Party's termination, that there were many instances of unacceptable variances out of Room 327. [Tr. 511, 519–20, 532]. General Counsel Ex. 15(a)–15(s) and Respondent Ex. 13 contain records of three different three game series which reflect sales trends that caused McDonald to be suspicious of Charging Party's sales activity in the middle game of each three game series. [Tr. 500–510.]

Of all the reasons put forth by the Respondent for discharging Traube, there was never any claim that he was responsible for every variance in room 327. And yet the records supplied by the Respondent that are alleged to have been reviewed by McDonald, are not even segregated by individual commissary rooms, but instead are combined totals for all commissary rooms. The "Commission Slip Audit" reflects only the number of units sold by the individual vendors. Traube was a superior vendor and there is no contention that there is any problem with his productivity. McDonald never inquired of Traube why, in McDonald's opinion, Traube's sales were below McDonald's expectations for any given day. As stressed by counsel for the General Counsel in her brief, on June 3, Traube sold six cases of beer, an amount that McDonald found suspicious. William Pow, the top sales vendor, also sold six cases. McDonald contends that on days Traube's sales do not meet McDonald's undeclared expectations, Traube must have spent his time selling stolen cases of Miller Lite. McDonald offers no explanation for Pow's identical sales numbers. He asked neither vendor for an explanation, nor is there any evidence that he considered common denominators, such as attendance and weather, before going directly to his assumption about Traube.

Significantly McDonald did no audit, nor reviewed any documents before he discharged Traube for "beating" him by stealing cases of Miller Lite. He claims that cases of Miller Lite were stolen and that Traube was "suspected of being the culprit" but that he never confronted Traube with his suspicion. McDonald claims that the information provided by Coleman caused him to change Traube's status from suspect to perpetrator. I fully credit Traube's testimony concerning the statement he made to Floyd. Also, given my finding that McDonald and Coleman dissembled, I specifically reject their testimony that Floyd, who did not testify, corroborated Coleman's statement.

5. Haskett's testimony

I also do not credit Haskett's testimony that he too "had a couple of suspicions" that Traube was a thief. The first incident allegedly occurred before Haskett actively recruited Traube to work for the Respondent. The second, allegedly occurred while Traube was employed by the Respondent. Incredulously, Haskett states that he is not sure if he told McDonald about either incident. Surely, if Haskett had a good-faith suspicion about Traube he would have, at the very least, told McDonald that his suspicions had also been confirmed after McDonald informed him he was going to discharge Traube for theft. It also stains credibility to imagine that McDonald would not mention any "additional suspicions" entertained by Haskett when testifying.

Regardless of any real or imagined suspicions, Haskett told

Traube that "he never had any problem" with him, before rehiring Traube. Not only do I credit Traube's testimony on this matter, I note that Haskett was in the hearing room when Traube testified, and did not refute his testimony. Haskett therefore did not have a problem with Traube selling on the concourse. He also either did not have a problem with Traube "beating" him (Haskett is a co-owner of the Respondent) for cases of Miller Lite, or what is far more likely, he did not believe that the accusation was true. I find the latter. Haskett rehired Traube shortly after McDonald discharged Traube—for theft. A fact known to Haskett.

Haskett's testimony and conduct in rehiring Traube appears to be inconsistent with the actions of a person who honestly believes in the validity of the discharge. Traube was discharged for stealing, denied any guilt, offered no apology, and was contesting the discharge. Haskett avers that Traube was rehired so he could smooth things over with McDonald. I find Haskett's statements incredible, and additional evidence from which to conclude that the reasons advanced by the Respondent are not the real reasons for Traube's discharge.

The Respondent's failure to investigate the alleged reasons for Traube's discharge demonstrate that those reasons were not determinative in the decision, and that the discharge would occur without regard to the viability of the alleged reasons. Moreover, the Respondent never confronted Traube about any of the issues that it now presents as reasons that allegedly led to his discharge. Thus, Traube was "denied the opportunity to provide potentially exculpatory" explanations before being discharged. *Diamond Electric Mfg., Corp.*, 346 NLRB 857, 862 (2006); *Sociedad Española de Auxilio Mutuo y Beneficencia de P. R.*, 342 NLRB 458, 460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005).

The Respondent also argues that the Hahn brothers, who it describes as "individuals identified as union organizers" continued employment with the Respondent, mitigates against a finding of union animus. The Respondent cites no specific transcript page where the Hahn brothers are identified as "union organizers," and I am aware of none. Although the Hahn brothers were active in the organizing campaign, Traube was the only employee identified as a "lead worker." (Tr. 214.) Regardless, I find the argument without merit. The Board and the courts have long held that a finding of discriminatory motive "is not disproved by an employer's proof that it did not weed out all union adherents." E.g., *American Petrofina Co. of Texas*, 247 NLRB 183, 193 (1980); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

In addition to the foregoing, the General Counsel urges that I find that the Respondent presents shifting reasons for Traube's discharge. Shifting reasons have long been held to be a clear indicium of discriminatory or unlawful intent. E.g., *C. D. S. Lines, Inc.*, 313 NLRB 296, 300 (1993). I agree that the Respondent's statements have made it difficult to ascertain the specific reasons it alleges for discharging Traube. I observe that the Respondent's counsel appears to have the same problem. Thus, at one point the following reasons are given: "suspected theft, repeated violations of work rules related to selling on the concourse, and the physical altercation." (R. Br. at 16.) Shortly thereafter, the decision to terminate is "based on (i)

Charging Party's repeated violation of the rule against selling on the concourse, which culminated in the fight on August 4, and (ii) suspected theft, which was based on the time McDonald stopped a theft in progress, the comment Charging Party made to Coleman and Floyd, and cash variances out of Room 327." (R. Br. at 17.)

I am of the opinion that the Respondent has added reasons, "the most important being the confirmation of [McDonald's] suspicion about Traube stealing from the Company" (R. Br. 33), rather than shifting from previously espoused positions.

I also find, in agreement with counsel for the General Counsel, that all of the reasons advanced are similar. Each is baseless and pretextual—designed to conceal an unlawful motive. I find that the Respondent took opportunistic advantage of the fortuitous altercation, in order to rid itself of a "lead worker" in the union organizing campaign. It took this action less than 2 weeks after the Union held its one and only meeting with the employees. Based on the foregoing, and the record as a whole, I find that counsel for the General Counsel has met her burden. I also find that every reason advanced by the Respondent for discharging Traube is a pretext. A finding of pretext defeats any attempt by the Respondent to show that it would have discharged Traube absent his union and protected concerted activities. "This is because where the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the Wright Line analysis." *Rood Trucking Co.*, 342 NLRB 895, 898 (2004) (internal quotation omitted) (citations omitted). The evidence set forth above shows that the Respondent knew of Traube's involvement in union and protected concerted activities, and that the Respondent's asserted reasons for discharging him are pretextual and designed to disguise its unlawful motivation. Accordingly, I find that Traube's discharge violates Section 8(a)(1) and (3) of the Act.

B. The 8(a)(3) and (4) Allegations

The complaint also alleges that the Respondent violated Section 8(a)(1), (3), and (4) of the Act when it discharged Traube M&T Bank (Ravens) Stadium operation on September 11.

There is no dispute that McDonald discharged Traube on September 11. According to McDonald, as soon as he got within earshot he said "Fred Traube, you're not working." Despite the Respondent's arguments to the contrary, Traube was an employee of the Respondent when he was once again discharged by McDonald. The discharge was simply a continuation of the Respondent's unlawful conduct that began on August 4, and was only momentarily interrupted by Haskett's rehiring of Traube on September 1. Accordingly, it would serve little purpose to reiterate the *Wright Line* findings explicated above. Based on those findings, I find that the Respondent violated Section 8(a)(1) and (3) of the Act when it again discharged Traube on September 11 because of his union and protected concerted activities.

McDonald additionally acknowledges that he told Traube, once or twice, that "I'll see you at the hearing." Based on the

foregoing admission, the complaint alleges that the Respondent also violated Section 8(a)(1) and (4) of the Act.

Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating against an employee for filing charges or giving testimony under the Act. To establish a violation, the General Counsel must produce evidence, either directly or by inference, that the employer took some adverse action against Traube, and that the adverse action was motivated by the filing of the charge. *Wayne W. Sell Corp.*, 281 NLRB 529, 534 (1986). Violations of Section 8(a)(4) are analyzed using the *Wright Line* methodology, above. *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

Counsel for the General Counsel argues that because McDonald told Traube that he would see him at the hearing, immediately after discharging Traube, this remark provides a strong inference that McDonald discharged him because he filed the unfair labor practice charge. I agree. The Respondent argues; that Traube was not an employee on that day and thus there can be no retaliation for filing the charge. I reject that argument as being without merit. In the alternative, the Respondent argues that there is no evidence that McDonald knew of the unfair labor practice charge on September 11 and thus McDonald was thinking of some other hearing, other than the NLRB hearing.

Lawrence Sherman, Traube's counsel, credibly testified that he filed two charges against the Respondent and Aramark as joint employers on August 29. (Tr. 581, GC Exh. 21.) He mailed the charges to the Respondent's business addresses at RFK and a post office box in Baltimore. Additionally, because he did not have a fax number for the Respondent he faxed copies of the charges to RFK in care of Costa of Aramark and requested that the charges be given to the Respondent. The charges were never returned to Sherman as "undelivered" mail. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987) (failure of ordinary mail to be returned indicates service).

Counsel for the General Counsel also argues that McDonald's testimony, contending that he was referring to some type of possible future employment related hearing, is incredible and unworthy of belief. Counsel for the General Counsel, more specifically, argues that McDonald testified under oath in a Board affidavit signed on October 26, that when he discharged Traube from Ravens Stadium on September 11, he told Traube he would see him at the hearing because he received notice of an NLRB charge on or about August 29. (Tr. 496.)

The following colloquy is between McDonald and Respondent's counsel after McDonald was asked why he signed the Board affidavit, containing the language set forth above:

Q. Why did you sign the statement with that language?

A. Because I think the guy [the Board agent] was asking me, and I think he pointed to—he had papers all over the desk and I think he pointed to—and I think I said yeah, but it was—as I look at it now and I see the date, August 29th, that's not correct.

Q. But you read this statement before you signed it. didn't you?

A. Yeah, all 12 pages.

Q. And in fact, right above your signature it says, I read this statement consisting of 12 pages, including this page. I fully understand its contents and I certify it as true and correct to the best of my knowledge and belief.

A. Yeah, I sure did—but to be honest with you, I really didn't think this thing, and I still don't think. you know, that it's—as far as what I know about Fred and things that happened and I guess I should've been a little bit more careful. (Tr. 496–497.)

I find the forgoing to be another example of McDonald's lack of veracity. Accordingly, I find that counsel for the General Counsel has met her burden and that the Respondent has violated Section 8(a)(1) and (4) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, All Pro Vending, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent violated Section 8(a)(1) of the Act:

(a) Impliedly threatening to not reinstate employee Frederic A. Traube because of his protected concerted activities.

(b) Telling employee Frederic A. Traube that he was not allowed to engage in union and/or protected activities at work.

3. By the following acts and conduct the Respondent violated Section 8(a)(1) and (3) of the Act:

(a) By suspending and later discharging employee Frederic A. Traube on August 4, 2005, because of his union and protected activities.

(b) By discharging employee Frederic A. Traube on September 11, 2005, because of his union and protected activities.

4. By the following acts and conduct the Respondent violated Section 8(a)(1) and (4) of the Act:

(a) By discharging employee Frederic A. Traube on September 11, 2005, because he filed an unfair labor practice charge with the National Labor Relations Board.

5. The foregoing unfair labor practices 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 discharged employee Frederic A. Traube, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The record reflects that the Respondent only maintains a post office box in Baltimore, Maryland. It apparently has the use of commissary rooms at RFK and Ravens Stadium but using those venues makes the notice posting dependent on the season. Additionally, because the work is seasonal, employee turnover

may be high. Accordingly, although not requested by the counsel for the General Counsel, I shall recommend that the Respondent be ordered to mail the notice to all employees employed at either location, since August 4, 2005.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, All Pro Vending, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Impliedly threatening to not reinstate employees because of their protected concerted activities.

(b) Telling employees that they are not allowed to engage in union and/or protected activities at work.

(c) Suspending and discharging its employees because of their union and protected activities.

(d) Discharging employees because they have filed unfair labor practice charges with the National Labor Relations Board.

(e) 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 the Board's Order, offer Frederic A. Traube full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Frederic A. Traube whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharges, and within 3 days thereafter notify the employee in writing that this has been done and that the unlawful suspension and discharges will not be used against him in any way.

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

(e) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix,⁴ at its own expense, to

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judge's Order."

all current and former employees who were employed as vendors by the Respondent at RFK or Ravens Stadium at any time from August 4, 2005, the onset date of the unfair labor practices

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

found in this case. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent’s authorized representative.

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