JD(SF)-31-09
Sacramento, CA

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

BLUE DIAMOND GROWERS

and **Cases 20-CA-34199**
20-CA-34200
20-CA-34201
20-RC-18203

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 17, AFL-CIO

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DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Sacramento, California, on six days between March 25 and April 16, 2009. This case was tried following the issuance of an Amended Consolidated Complaint and Notice of Hearing (the complaint) by the Regional Director for Region 20 of the National Labor Relations Board (the Board) on March 10, 2009. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by International Longshore and Warehouse Union, Local 17, AFL-CIO (the Union, the Charging Party, or the Petitioner). It alleges that Blue Diamond Growers (the Employer or the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act).[1] The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[2]

Pursuant to a petition filed by the Union in Case 20-RC-18203 and a stipulated election agreement thereafter executed by the parties and approved by the Regional Director on October 10, 2008, an election by secret ballot was conducted on November 19, 2008[3] among a unit of the Employer's employees. Following the election, the Union filed timely objections to

[1] The correct name of the Employer appears as amended at the hearing.

[2] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. In its answer and amendments thereto, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

[3] All dates refer to 2008 unless otherwise noted.

conduct affecting the results of the election. Thereafter, on March 5, 2009, the Regional Director of Region 20 issued a report on the investigation of the objections. In his Report on Objections, the Regional Director, among other findings, ordered that certain of the objections be consolidated with the complaint for purposes of trial before an administrative law judge. Further, on March 24, 2009, the Regional Director issued a Supplemental Report on Objections adding an additional objection to be heard in combination with the complaint allegations. Accordingly, I heard the objections to the election at the same time as I heard the unfair labor practice allegations in this combined matter.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses,[4] I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent, a California corporation, has been a grower-owned agricultural market cooperative with a facility in Sacramento, California, herein called the Respondent's facility, where it is primarily engaged in the business of processing and selling almonds and almond products on a non-retail basis. Further, I find that during the calendar year ending December 31, 2008, the Respondent, in the course and conduct of its business operations, sold and shipped from its Sacramento, California facility goods valued in excess of $50,000 directly to points located outside the State of California.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[4] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 US 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

III. Alleged Unfair Labor Practices and Alleged Objectionable Conduct

A. The Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act during the Union's organizing campaign by among other conduct: soliciting employee complaints and grievances and impliedly promising increased benefits and improved terms and conditions of employment, by interrogating its employees, by denying access to its facility to employees carrying pro-union placards, by threatening employees with job loss, plant closure, or other adverse employment actions, and by disparate enforcement of its rules of conduct regarding misappropriation of property and the posting of election related material. For the most part, the objections to the election tract the alleged unfair labor practices with the additional claims that the Respondent disparately provided material support and assistance to a group of employees who opposed the Union, and that voters to the election were released by supervisors in contradiction to the previously agreed upon order of voting.

B. The History of the Dispute

The Union has been attempting to organize the Respondent's production and maintenance employees since approximately late in calendar year 2004. The Respondent is a grower-owned agricultural cooperative, with a facility in Sacramento, California, primarily engaged in processing, packaging, and selling almond and almond products. Approximately 700 employees are employed at the Sacramento facility, about 500 of whom are hourly paid employees who were eligible to participate in the petitioned-for bargaining unit. The present case constitutes the third time since 2005 that a complaint has been issued by the General Counsel alleging that the Respondent has committed unfairly labor practices during the course of the Union's organizing campaign.

California Almond Growers Exchange, d/b/a Blue Diamond Growers, NLRB Case No. 20-CA-32583, ALJ No. JD-(SF)-14-06, issued on March 17, 2006, was the first of these cases. In his decision, the administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies, by threatening to close the plant, and by threatening to take other adverse employment action if the Union won the election. Further, the judge found that the Respondent violated Section 8(a)(3) of the Act by discharging an employee and by disciplining another employee because of their union activities. No exceptions with the Board were filed to the judge's decision.

In the second case, *California Almond Growers Exchange, d/b/a Blue Diamond Growers,* 353 NLRB No. 6 (2008), the Board affirmed the decision of the administrative law judge and dismissed the complaint, which had alleged the discharge of two union supporters as unlawful. The Board found that the Respondent's conduct was not unlawful as based on the strict application of its misappropriation of property rule, which made "[m]isappropriation and/ or unauthorized possession of Company property or another employee's personal property or attempting to remove such property from Company premises" a terminable offense.

C. The Facts

In the representation matter before me, Case 20-RC-18203, the Union filed for an election on September 26, 2008, and the election took place on November 19, 2008.[5] As was reflected on the Tally of Ballots, the results of the election were that of the 502 votes counted, 353 votes were cast against representation by the Union and 142 votes were cast in favor of the Union. There were seven challenged ballots and one void ballot.[6] It was during the "critical period," from September 26 through November 19, that the alleged unfair labor practices and alleged objectionable conduct were committed.

Agustin Ramirez (A Ramirez) the lead organizer for the Union led the election campaign at the Respondent's facility. The Sacramento facility is quite extensive, covering 90 acres, and containing numerous buildings and other structures. There are a number of roads passing through the property, with various parking lots and entrances, where both employees and the public may have access to the property. (Jt. Ex. 18.)

Following the filing of the representation petition on September 26, the Union engaged in a number of demonstrations or rallies in front of the facility during the course of the election campaign. At each of these demonstrations pro-union employees, union organizers, community activists, and other interested parties and individuals would attempt to distribute pro-union flyers to employees entering and exiting the facility. Typically, the pro-union demonstrators would wear yellow tee-shirts. Major demonstrations were held on September 26, following a press conference called by the Union, and on November 13, 14, and 18, the day before the election. After a time, a group of anti-union employees, known as the "grass roots group," began to appear at the demonstrations wearing blue tee-shirts, where they would distribute anti-union flyers.

The union distribution of flyers occurred mainly at three locations around the Respondent's property, namely at the main vehicular gate at the intersection of 17th and C Streets, where the majority of the action occurred, at the pedestrian gate at 19th and C Streets, and the truck gate at 17th and North B Streets. At the 17th and C Streets gate there is a guard shack that is continually manned by security, while at the B Street gate there is a guard shack that is only sporadically manned. Flyers were passed out to employees entering and exiting from the facility on a fairly regular basis during the critical period.

Following the demonstration held on September 26, a number of employees walked away with small, approximately 8x8 inch pro-union signs on sticks, which were described by some witnesses as "fans." Employees Luz Meraz and Larry Newsome testified that when they attempted to return to the facility with the signs after the demonstration that the security guard at the main gate would not let them do so. According to Meraz, the security guard confiscated the sign telling her that she could not bring it on the property. Newsome testified in a similar

[5] Pursuant to a Stipulated Election Agreement approved by the Acting Regional Director for Region 20 on October 10, an election by secret ballot was conducted on November 19 among the employees in the following appropriate unit: All full time and regular part-time production and maintenance employees, employed by the Employer at its Sacramento, California facility including all the job titles described in Attachment 1 to this stipulation; excluding all salaried employees, professional employees, managerial employees, office clerical employees, guards, temporary employees, and supervisors as defined by the Act including leads. (Jt. Ex. 2.)

[6] Challenged ballots were insufficient in number to affect the outcome of the election.

fashion, adding that on that same day he had seen a number of employees on the property with anti-union signs. Paragraph 8(a) of the complaint alleges that this conduct on the part of the security guard constituted a violation of Section 8(a)(1) of the Act.

The Respondent admitted that its security guards were agents as defined by the Act and case authority. While the Respondent's General Manager, Bruce Lish, testified that he knew of no rule prohibiting employees from bringing signs, pro-union or otherwise, onto the property, the security guard in question was never called by the Respondent to testify.

It is undisputed that the Respondent contracted with the "Burke Group," a labor consulting firm, to represent its interests in the election campaign, specifically to train and educate its management in the Act's requirements, and to inform the employees concerning their rights during the campaign and of the Employer's position regarding union representation. As the Respondent's position was clearly to oppose the Union's organizational campaign, there is no doubt that the Burke Group was hired to assist in that effort. The complaint alleges that three of these consultants, namely an "Unidentified Asian Male Labor Consultant," later identified as Larry Wong, "Penny (last name unknown)," later identified as Penne Familusi, and "George (last name unknown)," later identified as George Wetzel were agents of the Respondent who engaged in unlawful Section 8(a)(1) activity. The Respondent admitted that these three consultants were agents of the Respondent as defined by the Act and case authority. Further, none of the consultants were called as witnesses by the Respondent to deny any of the allegations made against them by employee witnesses.

It is alleged in complaint paragraph 6(b) that on an unknown date in October 2008, a consultant, later identified as Larry Wong, solicited employee complaints and grievances and impliedly promised those employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. Employee Luz Meraz testified that some time prior to the election, around mid-October, she and two co-workers met with one of the labor consultants, later identified as Larry Wong. The meeting was held in English with no interpreter present. Ms. Meraz testified at the hearing primarily in Spanish, which is her primary language. However, she can speak and understand a certain amount of English, and was able to testify in English regarding the statements made to her by Wong. She acknowledged that her testimony was not the exact language used by Wong, but her best recollection. It should be noted that the undersigned did find her English proficiency reasonably good, and I was able to clearly understand the statements she testified were made to her by Wong.

According to Meraz, Wong asked the employees whether and why they wanted the Union. In response, Meraz told Wong they needed better pensions and benefits, including safety glasses. Further, she testified that during their meeting, Wong took notes and indicated that he was going to give the information to the Employer. In response to a question from counsel for the General Counsel, Meraz testified that previously no representative of the Employer had ever asked her what working conditions she would like to see changed.

It is alleged in complaint paragraph 6(a) that on about November 3, 2008, a consultant, later identified as Penne Familusi, solicited employee complaints and grievances and impliedly promised those employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. Employee Barry Anderson testified that near the end of October, he was with a group of about twenty-five employees, leads, and supervisors from the sanitation crew, who met with Ms Familusi. She mentioned that she was there to explain the facts, advantages, and disadvantages about having a union represent the employees. She discussed union dues, policies, and what unions can and cannot do for the employees. Further, she stressed the importance that everyone vote in the election.

During a second meeting between Anderson and Penne Familusi, occurring on November 3, 2008,[7] she is alleged in complaint paragraph 8(b) to have threatened employees with job loss or plant closure. According to Anderson's testimony, this was a one-on-one meeting in which Familusi stated that with unions there is a possibility of a strike, and with a strike, there would be no work, no money, and that would scare the growers, who are the Respondent's "money makers," and force them to pull out. Anderson claimed that at the time Familusi made this statement, there was a rumor circulating around the plant that a number of growers would leave the Employer if the union organizing effort were successful.[8] As noted earlier, Familusi did not testify at the hearing.

According to Anderson, as the conversation continued, Familusi mentioned that General Manager Bruce Lish was pro-employee. Anderson responded that he had not yet had an opportunity to meet Lish, who was relatively new to the facility. She told him that she and other representatives of management had been asking employees what the Employer could "do better." Allegedly, Familusi then directly asked Anderson what the Employer could "do better." He responded that there were lots of cliques and favoritism towards some employees on the graveyard shift, with the other employees not being treated fairly. Anderson testified that Familusi responded that she would bring the matter to management's attention. She had a binder with her in which she periodically made notes.[9]

Complaint paragraph 6(c) alleges that on about November 13, 2008, supervisor Francisco Corral solicited employee complaints and grievances and impliedly promised those employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. Paragraph 7(a) of the complaint alleges that on the same date, Corral interrogated employees regarding their union sympathies. These allegations relate to a conversation between Corral and employee Rick Dunfee. According to Dunfee, he had never previously openly expressed his views about the Union, never wore pro-union logos, and never took any action that would indicate to management his union sympathy. He testified that on November 13, while working alone laying fiber bins, he was approached by Corral, who he had known for some time, and under whose supervision he had previously worked. He also considered Corral a friend.

Dunfee testified that Corral told him that he had heard that Dunfee was for the Union. Dunfee asked Corral who had told him so, and Corral answered that nobody had, but he had just assumed it. Corral then asked whether there was something that the Employer could "change" that would cause Dunfee to change his mind about the Union. According to Dunfee, he did not respond to Corral's inquiry, and after about a minute, the conversation ended. Corral was not called to testify as a witness.

The General Counsel alleges in paragraph 7(b) of the complaint that on November 17, 2008, lead employee Francis[10] Rhymes, a/k/a Mickey Rhymes, interrogated employees regarding their union sympathies. Also, the General Counsel alleges in paragraph 6(d) that on

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[7] The date of November 3, 2008 is as amended at the hearing.

[8] Bruce Lish testified that the Employer is an agricultural cooperative in which over 3,000 growers participated.

[9] It should be noted that this conversation between Anderson and Familusi on November 3 is alleged in complaint paragraph 6(a) to constitute an unlawful solicitation of grievances, and in paragraph 8(b) to constitute an unlawful threat of plant closure.

[10] In the complaint, Rhymes' first name is misspelled as "France."

the same date, Rhymes solicited employee complaints and grievances and impliedly promised those employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. Rhymes is an admitted agent of the Respondent. Employee Florencio Chavez attended a speech given by General Manager Lish on November 17. Chavez testified that thereafter, he was within the Employer's facility returning to work from lunch alone, when he was approached by Rhymes. According to Chavez, Rhymes asked him what he thought of Lish's speech. Chavez responded that he didn't believe what Lish had said, that it didn't come from Lish's heart, as Lish was reading the speech that somebody else had written for him. In response, Rhymes suggested that Chavez give Lish "a chance to make things better," as it was Lish's first year at the facility, and "it's pretty good here." While Rhymes was a witness at the hearing, he did not testify about this purported conversation.

Rhymes is also alleged in complaint paragraph 8(d) to have told an employee on November 21, 2008 that the employee's request to be transferred to the day shift was denied because of his support for the Union. Employee Barry Anderson is allegedly that employee. Anderson, who worked the graveyard shift, testified that in September, Rhymes informed him that a few day shift spots were opening soon, and suggested that Anderson apply for such a position. Anderson testified that at the time he had a good relationship with Rhymes, with Rhymes taking the younger man "under his wing," and giving him advice on how things worked at the Company. The two men would frequently interact in the locker room in the manufacturing building when their shifts overlapped. Anderson subsequently applied for a position on the day shift.

A few weeks later, Rhymes told Anderson that the Employer had decided not to fill the day shift vacancies until after the union election. Around that same time, Rhymes informed Anderson that he had mentioned Anderson's name to supervisor Dwight Davis, with whom he claimed to be close, in connection with the day shift openings. Further, Rhymes mentioned to Anderson that employee Denise Fagens was ahead of him in seniority, but that following Fagens, he was next in line for a transfer.

At the election on November 19, Anderson served as an observer for the Union. Thereafter, on November 21, while Anderson was in the company of a number of other employees in the locker room preparing to clock out, Rhymes approached him. Anderson testified that Rhymes said that Anderson had disappointed him, and that he had been under the impression that Anderson was going to vote no. Anderson responded that it should not matter how he voted, as he was a man and Rhymes should respect his opinion. According to Anderson, Rhymes said that if Anderson "had never gotten involved with the Union, everything that was promised to [him] would have been given to [him]." However, there was no specific mention of a transfer to the day shift position.[11]

Rhymes testified at the hearing on behalf of the Respondent. He acknowledged having a conversation with Anderson about the day shift position, but claimed that Anderson initially raised the matter because Anderson was having some "issues" on the grave yard shift. According to Rhymes, he advised Anderson that Anderson first would need to talk with supervisor Dwight Davis, after which Anderson could put in for the shift change. Also, he

[11] While Anderson had not been awarded a transfer to the day shift as of the date of the hearing, counsel for the General Counsel indicated that he was not alleging the failure to be awarded the transfer as a violation of the Act. Rather, the General Counsel was only alleging Rhymes' statement to constitute a violation.

cautioned Anderson that Anderson would need to have "seniority" before the transfer was approved. Rhymes denied that following the election he told Anderson that he was disappointed in him in some way. Further, he denied that following the election he had any conversation with Anderson where his union activities were discussed. In response to questions from counsel for the Respondent, Rhymes testified that he was never involved in any decision about whether Anderson could transfer to the day shift.

It is the General Counsel's contention that the Respondent violated the Act, as alleged in complaint paragraphs 9(a) and (b), on November 17 and 18, 2008, when Bruce Lish threatened employees with job loss or plant closure by telling them that growers would not bring their almonds to the Respondent's facility if the Union successfully organized the facility; and solicited employee grievances and impliedly promised to remedy them, and promised better terms and conditions of employment to its employees if they voted against union representation. As noted above, Lish was the Respondent's General Manager. On November 17 he gave 3 speeches to groups of employees assembled in the main theater on the Respondent's facility. He gave one speech the following day, November 18, to another group of employees at the same location. Each of the four shifts of employees comprised a separate group of assembled employees, with approximately 150-160 employees in attendance for each of the two day-shift meetings, with approximately 160 employees at the swing-shift meeting, and with about 45 employees in attendance at the graveyard-shift meeting. The meetings were voluntary for the employees, and there were various labor consultants and supervisors present at each meeting, in addition to those employees in attendance.

It is undisputed that at each speech, Lish read word for word from prepared notes, with no variation other than in his introduction, which was drafted individually for each shift. In the introduction, he reintroduced himself to the two day-shift groups, since he knew many of them from having worked at the facility years earlier. As he know fewer of the employees from the other two shifts, he introduced himself to them for the first time. Otherwise, he added nothing to the prepared text, except to thank the employees for attending. Lish took no questions, and nobody else spoke at the meetings. The text of these speeches was admitted into evidence as Joint Exhibit 16.

It is the position of the General Counsel that a number of references in the speech interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. Specifically, counsel for the General Counsel contends in his post hearing brief that Lish's words constituted a solicitation of grievances. In particular, Lish's statement that because employees "were willing to speak up and share your perceptions, your thoughts, and your concerns, we now have a better understanding of your issues and the pressures and frustrations that you are experiencing" is alleged to be unlawful. Also, suspect, according to counsel for the General Counsel, was Lish's statement that the Employer would now "do a better job of listening to our employees so that these mistakes will be minimized and resolved quickly." Continuing, Lish informed the employees that he has "insisted" that his managers "do a better job in communicating with you, now and in the future."

Counsel for the General Counsel also contends in his post hearing brief that Lish's words constituted a threat of job loss or plant closure. In particular, Lish's statement that "our growers will not be happy" when union related cost increases occur, which "will put our supply in serious jeopardy," is alleged to constitute a threat to the existence of the Respondent's facility. Other remarks about the growers, which the General Counsel contends constitute an unlawful threat, are his frequent statements about the Respondent's dependency on growers. Such

statements about unhappy growers, upon whom the business is dependent, are alleged to imply less work and possible plant closure, and would, according to the General Counsel, reasonably tend to coerce employees in the exercise of their right to choose union representation.

Counsel for the General Counsel argues that Lish's statements were not based on objective facts. Not surprisingly, counsel for the Respondent argues that Lish's speech, when not taken out of context, constituted a totally lawful expression of his opinion based on objective facts and personal experiences. As such, the Respondent argues, it is lawful free speech as protected under the First Amendment to the United States Constitution, and provided for in Section 8(c) of the Act.

In October of 2008, as the union campaign intensified, a group of employees joined together, apparently spontaneously, in an effort to oppose the Union's efforts. The Employer has referred to this group as the "Grassroots Campaign" against unionization. The General Counsel views this group differently, alleging that the Employer provided material support and assistance to its members. In complaint paragraph 8(e), the General Counsel alleges that on about November 14 and 18, the Respondent provided unlawful assistance to employees who opposed union representation by tolerating violations of its published rules of conduct governing misappropriation of its property by employees who used said property in support of their demonstrations against unionization.

The General Counsel contends that some of the anti-union employees who demonstrated with signs used the trademark Blue Diamond Logo on those signs, and that at least one employee used a spool, possibly obtained from discarded material on the Employer's property. It is the position of the General Counsel that the Respondent's failure to formally investigate the misappropriation of its logo and the possible theft of its property constituted a form of material support and assistance to the anti-union employees in violation of Section 8(a)(1) the Act.

A number of anti-union employees testified at the hearing. This number included Alejandra Ortiz, Kevin Manning, and Maria Vallejo. They testified that their efforts were individually motivated. They prepared flyers to distribute at demonstrations using their personal computers and paying for the cost of copying the flyers with their own personal monies. While these individuals were some of the most active anti-union employees, they were supported by many other employees who contributed time and money in their "grass roots" effort. They all denied receiving any support or assistance from the Respondent, in the form of money, supplies, or otherwise.

From flyers the grass roots employees progressed to making signs and tee-shirts, also used at the demonstrations. Alejandra Ortiz testified at some length about her personal efforts in composing and making signs and flyers. She also testified as to the collective efforts of other anti-union employees. Regarding the use of the Blue Diamond logo, she testified that she obtained the logo from the Internet, made copies, and used "sticker paper" as backing to adhere the logos to signs and flyers.

Kevin Manning also testified at length regarding his personal efforts in composing and making signs and flyers. He indicated that many of the flyers were the result of the collective efforts of various members of the grass roots group. Manning also testified about his experience walking with anti-union signs during demonstrations. He testified regarding one incident while on the "picket line" that was particularly significant. In October while walking the picket line, Manning was approached by a man he did not know who identified himself as a "retired employee." This individual handed Manning a "bunch of [Blue Diamond] stickers,"

suggesting "they use them for signs or what have you." Manning described the number of Blue Diamond stickers that he was given as "a little stack of them." He testified that he later distributed the stickers to a number of anti-union employees, including Alejandra Ortiz, suggesting to them that they could put them on their "picket-signs."

In response to Manning's story about how he obtained the stickers, counsel for the Union offered the rebuttal testimony of union organizer Agustin Ramirez. According to Ramirez, on October 24 he noticed Manning handing out anti-union flyers. Later he saw Manning talking with one of the consultants hired by the Respondent to respond to the union campaign. While Ramirez did not see the consultant hand anything to Manning and did not hear the conversation between the two men, his testimony is intended to suggest that it was this consultant and not the retired employee who gave Manning the Blue Diamond stickers.

Further, it should be mentioned that Ramirez and a number of pro-union employees testified about a "bull horn" that they saw at various times in the possession of anti-union employees and used by them at demonstrations. According to the testimony of these pro-union witnesses, they later saw a very similar bull horn in the possession of the Respondent. Again, the suggestion is being made that the Respondent was providing the anti-union employees with material support in the form of the bull horn. However, in contradiction, grass roots employee Alejandra Ortiz testified that she used the bull horn in a demonstration, which bull horn she had gotten from another employee, Marta, and that she had no idea who actually owned the bull horn.

The General Counsel and the Union spent a considerable amount of time during the hearing on the details concerning one particular sign carried by an anti-union employee. This "picket-sign" was rather distinctive, as it was cylindrical in shape, rather than square or rectangular. It is the subject of numerous photographs in evidence in this case.[12] (Un. Ex. 1, pages 427 & 429.) The cylinder itself is apparently similar in size and shape to some type of bin used by the Respondent in the almond packing process and found on its property. Both the Union and the General Counsel take the position that the Respondent's failure to formally investigate whether the cylinder was removed from company property constituted a form of material assistance to the grass roots group, and disparate favorable treatment as compared to the pro-union employees.

There is no question that because of its cylindrical shape, the sign was unique. General Manager Lish acknowledged noticing the sign as he entered and exited from the property. He testified that at some point somebody, but he cannot recall who, brought to his attention that the materials for the sign might have been obtained from company property. The employee with the sign was identified as Alfred Ramirez, and Lish asked Ramirez' supervisor to look into the matter. It was later reported to Lish that Ramirez claimed that all the materials for the sign had been purchased at Home Depot. According to Lish, he subsequently had a private conversation with Ramirez when he was walking through Ramirez' work area. He asked Ramirez about the

[12] International Union Organizer Jonathan Brier was directed by Agustin Ramirez to take photographs at the demonstrations on November 13, 14, and 18. He took literally hundreds of photos of both pro and anti-union employees and other individuals as they crossed back and forth into and out of the Respondent's facility, and also as they demonstrated in front of the facility by carrying signs and distributing flyers. Photos were also taken of the signs themselves. (Un. Ex. 1, pages 391-750.)

sign and was told that the materials used to construct it had all come from Home Depot, including a cylindrical form used to pour concrete for posts, a surveyor stake, and painter's tape.

Alfred Ramirez testified and brought with him to the hearing the very cylindrical sign that he had constructed and used during demonstrations. He was one of the employees in the grass roots group, and made no secret of his anti-union sentiments. He testified about making the sign himself, all from materials that he paid for and purchased from Home Depot. Under redirect examination by counsel for the Respondent, Ramirez acknowledged that he was Lish's sister-in-law's boyfriend. Further he testified that Lish had questioned him about the sign and that he told Lish that he had purchased all the materials for the sign from Home Depot. However, Ramirez remembered the conversation occurring at a social event, rather than at the Respondent's facility.

Both the Union and the General Counsel also spent a considerable amount of time during the hearing attempting to show that the Respondent treated the anti-union activities of grass roots employees in a superior and disparate fashion by permitting them access to the facility with their signs and flyers, while greatly limiting access to the pro-union employees. In paragraph 8(f) of the complaint, the General Counsel alleges that on an unknown date within two weeks of the election, supervisor Matt Orlousky removed a pro-union flyer posted in the cutting/copy room, while previously tolerating the posting of anti-union flyers, or in the alternative, banned the posting of any flyers in response to the posting of a pro-union flyer. Further, in paragraph 8(g) of the complaint, it is alleged that on an unknown date within two or three weeks of the election, supervisor Dwight Davis removed and discarded a pro-union flyer from a table in the receiving/testing break room, while leaving untouched nearby anti-union flyers.

As was previously noted, General Manager Lish testified that he knew of no company rule prohibiting the carrying of signs, whether pro or anti-union, onto company property. However, the testimony of several witnesses that on September 26 their pro-union picket signs or "fans" were confiscated by a security guard at the main entrance to the facility went unrebutted. Further, there were allegations by a number of union supporters that the storage of anti-union picket signs on company property was permitted. Employee Cesario Aguirre testified that he saw anti-union signs on sticks being stored in a copy room adjacent to the cutting shop. Employee Margie Bince testified that every day for the two week period leading up to the election she saw six to ten anti-union signs being stored in the lunch/break room near the test room area. Frank Garcia, a scale attendant, testified that he saw a group of employees storing anti-union signs in the 17th Street break room. These allegations largely went unchallenged.

Pro-union witnesses Larry Newsome (an employee), Jon Brier (International Union Organizer and photographer), Augustin Ramirez (Union Organizer), Frank Garcia (employee), Margie Bince (employee), Benjamin Monarque (employee), Ricky Dunfee (employee), and Cesario Aguirre (employee) all testified as to instances where they observed employees carrying anti-union signs around and/or through the company property. These allegations also largely went unchallenged. Further, anti-union employee Alfred Ramirez admitted that while he normally stored his sign in his car, there was at least one instance when "by accident" he left his sign on the property. A fellow employee then warned him not to do so, and thereafter he did not. Also, anti-union employee Alejandra Ortiz testified that a co-worker of hers left Ortiz' anti-union sign in the cafeteria a couple of times, until told by a supervisor not to do so.

Several allegations regarding alleged Employer assistance towards the grass roots group warrants specific mention. Frank Garcia, a pro-union employee, testified that while working on the sixth floor of the North Warehouse, he observed a number of anti-union employees from the testing department gathered in the receiving yard near the silos talking with supervisor Dwight Davis. The employees carried anti-unions signs, and while Garcia admitted that he could not hear what was said, the encounter appeared friendly. The clear implication of Garcia's testimony was that Davis was coordinating the anti-union employees' picketing activity. Davis strongly denied that he had ever met with any group of anti-union employees. In preparation for his testimony, he took a series of photographs through the windows from the sixth floor of the North Warehouse building towards the silos, in an effort to show that the distance was great and the visibility very limited. Those photographs were admitted into evidence. (Res. Ex.16-19.)

Larry Newsome, a pro-union packing machine attendant, testified that he saw lead Peggy Graham[13] get approximately 6-8 anti-union signs from the employee services building and hand them to a co-worker named "Gloria," with instructions "to make sure she got enough people to cover each gate." Further, he testified that a number of employees including "Francisco Vallejo, his wife Martha, Allejandro, Al Ramirez, and Francisco's sister-in-law, Lupe" were standing around at the time apparently ready to receive the signs and begin an anti-union demonstration at the various gates. Newsome testified that this incident occurred between November 9 and 12. On cross-examination, Newsome admitted that there was nothing about such an incident in either the declaration that he gave the Union following the election or in the affidavit that he gave to a Board Agent during the investigation of this case. He testified that the reason there was no reference to this incident in either his declaration or affidavit was because "nobody asked me any questions regarding [the incident]." In fact, he claimed that he only first notified the Board Agent about this matter one or two weeks before the hearing during trial preparation. Maria Vallejo specifically denied that Peggy Graham ever handed her any signs to use in a demonstration. Similarly, Alfred Ramirez testified that Graham never gave him any sign to carry, did not tell him to demonstrate by a particular gate, and that he never saw her do any such thing with any other employees. Finally, Alejandra Ortiz, when told what Newsome had said, responded that it "never happened," and that Newsome's statement was "a bold faced lie." Further, she specifically denied that Graham had ever given her a sign to carry, or that Graham had ever told her to stand by a particular gate to campaign.

It appears that the Respondent had rules regarding the "posting" of materials, such as flyers, in its facility, but generally allowed employees to bring flyers into the facility and leave them loose and un-posted in break/lunch rooms. Both supervisors Orlousky and Davis testified as to their understanding of the Respondent's "No Posting" rule. According to Orlousky, any postings on the Respondent's "bulletin boards" must originate from the Company, or be approved, signed, or initialed by Director of Employee Services, George Johnson. Only

[13] There was no stipulation or admission by the Respondent that Graham or any other leads (with the exception of Francis Rhymes, an admitted agent) were either supervisors or agents as defined by the Act. Leads were excluded from the voting unit by agreement of the parties, but the record does not indicate on what basis that exclusion was made. Further, while counsel for the General Counsel did ask various witnesses about the duties of the leads, the evidence was insufficient for the General Counsel to have met his burden of establishing that Graham or any of the other leads exercised any of the indicia of supervisory authority. At most, the General Counsel elicited only very general, vague, conclusory testimony regarding the leads' "directing" the work of the employees, which is inadequate to establish supervisory status.

authorized materials were allowed to be posted.[14] Orlousky mentioned that during the election campaign he was reminded of the rule by Johnson and instructed to go throughout the plant to remove unauthorized postings. Davis testified that under the no posting rule, "nothing could be posted on the bulletin boards or in the plant." However, it is assumed that he meant that nothing could be posted unless it was first approved by the Employer.

Regarding documents that were not posted, the evidence is undisputed that the Respondent permitted such materials to be placed in loose form on tables in the break/lunch rooms. This apparently would have included all three types of flyers, those produced by the Union, the Employer, and the grass roots group. Presumably, such flyers would be brought into the break/lunch rooms by employees and simply left there. However, what is unclear is for what length of time the flyers would remain before being discarded with the general trash. It does not appear that there was any particular policy or practice exclusively for flyers or other campaign literature.

In paragraph 8(f) of the complaint, the General Counsel alleges that on an unknown date during the two weeks prior to the election, Orlousky removed a pro-union flyer posted by a pro-union employee in the cutting/copy room, while previously tolerating the posting of anti-union flyers, or in the alternative, created a new rule banning the posting of any flyers by removing pro and anti-union flyers in response to an employee's posting of a pro-union flyer. The evidence does indicate that for a time prior to the election that the posting policy was not being strictly enforced, as several employees noticed anti-union flyers posted at the facility in areas other than bulletin boards. Employee Frank Garcia testified that he saw lead John Eugene posting an anti-union flyer on the window near the time clock in the 17th Street break room. At the time Eugene was complaining that someone had removed the flyer and so he was putting it up again. Supervisor Orlousky testified that he had seen a couple of anti-union signs in the lunchroom and hallways. However, he indicated that this was prior to Johnson's reminder that non-authorized materials, such as flyers, must not be posted anywhere in the facility.

On November 13, Employee Cesario Aguirre posted a pro-union flyer on a window on the cutting shop doors. He testified that for some time he had seen anti-union flyers posted around the facility, specifically in the copy room, hallways, and main shop. However, Aguirre's flyer did not remain posted for long as he observed Orlousky removing it the same day it was posted. According to Aguirre, Orlousky told him that he was not allowed to post any signs. Aguirre responded that there were many signs posted against the Union, to which Orlousky said, "Not anymore." After Orlousky left, Aguirre noticed that the anti-union signs had also been removed. However, Aguirre contends that during the next several days he saw that new anti-union signs had once again been posted.

Orlousky's testimony was similar to Aguirre's, with the supervisor telling Aguirre that he had been going through the plant that day removing any postings that were not authorized by the Employer. Orlousky further testified that he told Aguirre that if Aguirre saw any postings to bring it to his attention and he would remove them. According to Orlousky, it was George Johnson's reminder about not permitting unauthorized postings that precipitated his removal of

[14] There were generally three types of flyers used during the election campaign, namely those produced by the Employer, those produced by the Union, and those produced by the grass roots group. Presumably, the only flyers that could be posted on the company bulletin boards were those produced by the Employer.

all the flyers that he saw, both pro and anti-union, including Aguirre's flyer. Following his removal of the posted flyers that he saw, Orlousky only observed one other, a pro-union flyer on a clip board, which he promptly also removed.

In paragraph 8(g) of the complaint, the General Counsel alleges that on an unknown date two or three weeks prior to the election, in the receiving/testing break room, supervisor Dwight Davis removed and discarded a pro-union flyer from the table, while leaving nearby anti-union flyers untouched. According to the testimony of employee witness Frank Garcia, on a date a few weeks prior to the election, he was directed to a meeting with labor consultant George Wetzel and some fellow employees in the 17th Street break room. On the break room table there were scattered a number of anti-union flyers, along with one pro-union flyer on yellow paper, which flyer Garcia had received that day as he drove into work. Garcia observed Supervisor Davis, who was present in the break room, pick up the yellow, pro-union flyer, crumple it up, and throw it in the trash. According to Garcia, Davis said nothing, and left untouched all the anti-union flyers that were also on the table. In should be noted, however, that Garcia also acknowledged that he had observed, apparently with some frequency, flyers being left on break and lunch room tables, both pro and anti-union.

Davis testified that it was his understanding that employees were not allowed to post flyers around the plant. The only election related material that he saw posted was on the company bulletin boards. This would have presumably been the Employer's produced flyers and related material. In any event, according to Davis, whenever he saw flyers, either pro or anti-union, in the break rooms or other places, he would remove them. He contends that this was in conformity with his understanding of the Employer's posting policy. Davis made it clear that he would remove any flyers that he saw in break rooms or other places, whether they were from the grass roots employees, or from those who supported the Union.

D. Analysis and Conclusions

The General Counsel and the Union contend that the Respondent has committed a series of unfair labor practices in violation of Section 8(a)(1) of the Act, as enumerated above. It is alleged that by these acts and conduct the Respondent interfered with, restrained, and coerced the employees in the exercise of their section 7 right to support the Union's organizational campaign. Much of the alleged unlawful conduct related to the preparation for the union demonstrations held outside the Respondent's facility and the grass roots employees' counter demonstrations. It is the position of the General Counsel and the Union that throughout the course of the Union's election campaign, the Respondent inhibited the pro-union employees from freely engaging in union activity, while aiding the efforts of the anti-union, grass roots employees, both covertly and overtly.

According to the complaint, the Respondent's illegal actions began almost immediately with the filing of the representation petition on September 26.[15] It was on that date, following a press conference called by the Union, that the Union's first demonstration was conducted. The Union had distributed to its supporters a number of small union placards, described by some as "fans." As the demonstration ended, a number of the union supports attempted to return to work carrying with them the placards that they had received. However, it is undisputed that a security guard at the main gate confiscated their placards, only after which he would allow them to enter the property and go back to work. While the Respondent's General Manager, Bruce Lish,

[15] For the most part, both the section of this decision entitled "Facts" and the section entitled "Analysis and Conclusions," will follow chronologically the sequence of events.

testified that he knew of no company policy prohibiting employees, pro or anti-union, from bringing signs onto the property, the testimony of a number of employee witnesses that the signs were confiscated by a security guard went unrebutted.[16] The guards, who are admitted agents of the Respondent, did not testify. Accordingly, I conclude that the signs were in fact confiscated.

Further, I conclude, as alleged in paragraph 8(a) of the complaint, that the security guard's action in confiscating the pro-union signs of a number of employees violated Section 8(a)(1) of the Act.[17] The case law is clear that an employer who disparately enforces or applies rules against employees based on the employees' support or opposition towards a union violates the Act. See *Seton Company,* 332 NLRB 979, 992 (2000), citing *Opryland Hotel,* 323 NLRB 723 (1997) and *Eaton Corp.,* 302 NLRB 410, 413 (1991).

There is ample credible testimony to establish that the grass roots employees would as a matter of course bring their anti-union signs onto company property in preparation for demonstrations and would frequently store the signs at the facility. Employee Cesario Aguirre testified that he saw anti-union signs on sticks being stored in a copy room adjacent to the cutting shop. Employee Margie Bince testified that every day for the two week period leading up to the election she saw six to ten anti-union signs being stored in the lunch/break room near the test room area. Frank Garcia, a scale attendant, testified that he saw a group of employees storing anti-union signs in the 17th Street break room. These allegations largely went unchallenged.

Further, pro-union witnesses Larry Newsome (an employee), Jon Brier (International Union Organizer and photographer), Augustin Ramirez (Union Organizer), Frank Garcia (employee), Margie Bince (employee), Benjamin Monarque (employee), Ricky Dunfee (employee), and Cesario Aguirre (employee) all credibly testified as to instances where they observed employees carrying anti-union signs around and/or through the company property. These allegations also largely went unchallenged.

While there apparently were some efforts on the part of management to prevent grass roots employees from storing anti-union sighs on company property, when compared to the pervasive presence of these signs on the Respondent's facility, the supervisory effort to restrict the presence of signs seems half hearted. Regarding one such instance, grass roots employee Alejandra Ortiz testified that a co-worker of hers left Ortiz' anti-union sign in the cafeteria a couple of times, until told by a supervisor not to do so. Also, anti-union employee Alfred Ramirez admitted that while he normally stored his sign in his car, there was at least one instance when "by accident" he left his sign on the property. A fellow employee (although apparently not a supervisor) warned him not to do so, after which he did not.

It appears to the undersigned that the presence of the grass roots employees' anti-union signs on the company property was so pervasive as to make it impossible for the Respondent's managers not to have known of their presence. By taking virtually no direct and affirmative action to prohibit the grass roots employees from accessing the property with their signs and storing them on the property, the Respondent was tacitly permitting the anti-union employees to

[16] Employees Luz Meraz and Larry Newsome.

[17] While complaint paragraph 8(a) alleges a individual "employee" as having had his/her sign confiscated, the evidence establishes that this confiscation involved at least several employees, and I so find. In this instance, conforming the complaint allegation to the evidence is a rudimentary matter of course, and does not require a formal amendment to the complaint.

do so. As the confiscation of pro-union signs by a security guard was clearly disparate treatment, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraph 8(a) of the complaint.

It should be noted that I make the above finding without relying on the testimony of Frank Garcia that from the sixth floor of the North Warehouse he observed a number of grass roots employees carrying anti-union signs and talking with supervisor Dwight Davis in the receiving yard near the silos. Davis testified credibly and denied that any such event occurred. Further, he offered photographs taken from the sixth floor of the North Warehouse that establish to my satisfaction that based on the distances involved, Garcia could not have determined what was happening on the ground below. In this instance, I find Garcia's testimony incredible.

Similarly, I do not rely on the testimony of Larry Newsome who testified that he saw lead Peggy Graham[18] get approximately 6-8 anti-union signs from the employee services building and hand them to a co-worker named "Gloria," with instructions "to make sure she got enough people to cover each gate." Regarding this incident, I do not find Newsome credible. Neither the declaration that he gave to the Union, nor the affidavit that he gave to the Board Agent contained any mention of this alleged incident. I do not find plausible his explanation that "nobody asked me any questions regarding [the incident.]" In my opinion, he likely concocted the story at the time he was being prepared for trial by counsel for the General Counsel, which Newsome testified was the first time that he told anyone about the incident. Further, he claimed that a number of grass roots employees were present when Peggy Graham handed the anti-union signs to "Gloria." However, of the named employees, Maria Vallejo, Alfred Ramirez, and Alejandra Ortiz, all testified credibly that no such incident had ever occurred, with Ortiz characterizing Newsome's story as a "bold face lie."

It is alleged in complaint paragraph 6(b) that on an unknown date in October 2008, a consultant, later identified as Larry Wong, solicited employee complaints and grievances and impliedly promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. As noted earlier, employee Luz Meraz testified about a meeting that she and two co-workers had with Wong around mid-October. Wong conducted the meeting in English and counsel for the Respondent challenged the testimony of Meraz on the basis that her primary language is Spanish and she speaks and understands only rudimentary English. However, I am convinced that Meraz' English proficiency is adequate to have fully understood what Wong was saying. While she testified primarily in Spanish, she did also testify in English regarding the words Wong spoke during the meeting, and I was able to fully understand her English testimony without having to resort to help from the interpreter.

According to Meraz, who I find totally credible, Wong asked the employees whether and why they wanted the Union. In response, Meraz told Wong they needed better pensions and benefits, including safety glasses. Further, she testified that during their meeting, Wong took notes and indicated that he was going to give the information to the Employer. In response to a question from counsel for the General Counsel, Meraz testified that previously no representative of the Employer had ever asked her what working conditions she would like to see changed. Wong, an admitted agent of the Respondent, did not testify, and so Meraz' testimony remains unrebutted.

[18] As I noted earlier, there is insufficient evidence to establish that Graham, or any other leads, were supervisors as defined by the Act. Lead Francis Rhymes was, however, an admitted agent of the Respondent.

Where a current employee testifies against the interest of his/her employer, and, thus, contrary to her own pecuniary and other self-interest, the Board has repeatedly held that such an employee's testimony is worthy of additional weight where otherwise credible. *See, e.g.., Natico Inc.,* 302 NLRB 668, 669 (1991); *Bohemia, Inc.,* 266 NLRB 761, 764 n. 13 (1984); *Federal Stainless Sink,* 197 NLRB 489, 491 (1972); *Gateway Transp., Inc.,* 193 NLRB 47, 48 (1972). Meraz was clearly such an employee. Further, the Respondent's failure to call Wong, its agent, to testify, gives rise to the inference that he would have corroborated Meraz' testimony. *See Master Security Services,* 270 NLRB 543,552 (1984) and *Martin Luther King, Sr. Nursing Center,* 231 NLRB 15, n. 1 (1977). Accordingly, I credit Meraz' testimony regarding what Wong said to her and several fellow employees.

The Board has repeatedly held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. *See, e.g. Center Construction Co., Inc.,* 345 NLRB No. 45, slip op. at 2 (2005) enfd. in part, den. in part by *Center Const. Co., Inc. v. NLRB,* 482 F.3d 425 (6th Cir. 2007); *Uarco, Inc.,* 216 NLRB 1, 2 (1974). The promise to remedy need not be specific or even explicit. *Grouse Mountain Associates II,* 333 NLRB 1322, 1324 (2001). Where an organizational campaign is ongoing, the solicitation of grievances creates a rebuttable presumption that the employer is going to remedy them. *Aladdin Gaming, LLC,* 345 NLRB 585, 607 (2005), citing *Maple Grove Health Center,* 330 NLRB 775, 775 (2000); *Center Construction Co., supra* at 2. This is especially true when an employer that has not previously had a practice of soliciting employee grievances suddenly initiates such a practice during an organizing campaign. *Amptech, Inc.,* 342 NLRB 1131,1136-1138 (2004).

A number of employees, including Meraz, testified that the Employer had never previously asked them whether there were changes the Employer could make that would improve the working conditions of its employees. Accordingly, when Wong asked why the employees wanted the Union, he was clearly soliciting the employees to offer changes or improvements that the Employer might make. In response, he got several suggestions relating to improved pensions and benefits, specifically safety glasses, that the three employees felt would be beneficial. Wong took notes, and specifically indicated to the employees that he was going to give the information to the Employer. In the context of an organizational campaign, this was clearly both a solicitation of grievances and an implied promise on the part of Wong to have the Employer remedy their complaints with increased benefits and improved terms and conditions of employment. Of course, the unspoken, but plainly understood *quid pro quo* was the employees' abandonment of the Union. Therefore, I find that the Employer has violated Section 8(a)(1) of the Act, as alleged in paragraph 6(b) of the complaint.

A similar allegation is found in complaint paragraph 6(a) wherein it is claimed that on about November 3, 2008, a consultant, later identified as Penne Familusi, solicited employee complaints and grievances and impliedly promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. It is also alleged in paragraph 8(b) of the complaint that in the same conversation, Familusi threatened employees with job loss or plant closure. As discussed in detail earlier, employee Barry Anderson testified that near the end of October, he was with a group of about 25 employees, leads, and supervisors from the sanitation crew, who met with Ms. Familusi. She mentioned that she was there to explain the facts, advantages, and disadvantages about having a union represent the employees. She discussed union dues, policies, and what unions can and cannot do for the employees. Further she stressed the importance that everyone vote in the election. In the view of the undersigned, there appears to be nothing unlawful in this informational meeting that Familusi held with Anderson and other employees.

However, there was a second meeting held between Anderson and Familusi, which Anderson places on November 3, this one where only the two were present. According to Anderson, during this meeting Familusi mentioned that with unions there is a possibility of a strike, and with a strike, there would be no work, no money, and that would scare the growers, who are the Respondent's "money makers," and force them to "pull out." Anderson claimed that at the time Familusi made this statement, there was a rumor circulating around the plant that a number of growers would leave the Employer if the union organizing effort were successful.

Anderson testified that as the conversation continued, Familusi mentioned that General Manager Bruce Lish was pro-employee. Anderson responded that he had not yet had an opportunity to meet Lish, who was relatively new to the facility. She told him that she and other representatives of management had been asking employees what the Employer could "do better." Allegedly, Familusi then directly asked Anderson what the Employer could "do better." He responded that there were lots of cliques and favoritism towards some employees on the graveyard shift, with the other employees not being treated fairly. Anderson testified that Familusi responded that she would bring the matter to management's attention. She had a binder with her in which she periodically made notes.

As has been mentioned, Familusi did not testify at the hearing, which gives rise to the inference that had she done so, Familusi would have corroborated Anderson's testimony. *Master Security Services, supra;* and *Martin Luther King, Sr. Nursing Center, supra.* Further, Anderson certainly seemed credible. His story went unrebutted, and, as a current employee, he clearly testified against his Employer, and contrary to his own pecuniary and other self interest, making his testimony worthy of additional weight. *Natico, Inc., supra; Bohemia, Inc., supra, Federal Stainless Sink, supra,* and *Gateway Transp., Inc., supra.*

Crediting Anderson, I conclude that Familusi told him that management had been asking employees what the Employer could do better, and she then specifically asked him what the Employer could "do better." He responded with his complaint about cliques and favoritism, and, as she made notes in her binder, she told him that she would bring the matter to management's attention.

Once again, the Respondent, which did not have a previous practice of doing so, was soliciting grievances during an organizational campaign in violation of the Act. *Center Construction Co., Inc., supra, and Uarco, Inc., supra.* While the promise to remedy need not be specific or even explicit, *Grouse Mountain Associates II, supra,* it does appear that Familusi's statements to Anderson were rather specific. In any event, as an organizational campaign was ongoing, Familusi's solicitation of grievances from Anderson created a rebuttal presumption that the Respondent was going to remedy them. *Aladdin Gaming LLC, supra; Maple Grove Health Center, supra;* and *Center Construction Co., supra.* Of course, all that Anderson was expected to do was to abandon his Section 7 right to support the Union. The General Counsel's evidence was not rebutted. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in paragraph 6(a) of the complaint.

However, during this same conversation with Anderson, I do not find that Familusi threatened him with job losses or plant closure. She pointed out to him the fact that strikes do sometimes occur in unionized facilities, and that with a strike can come lost wages. Further, she pointed out that the grower-members were necessary for the financial success of the Employer, and that if they were concerned about strikes they could send their business elsewhere. In my opinion, these statements are no more than predictions about the effects that

unionization could possibly have on the Employer, and, as such, lawful under Section 8(c) of the Act, as an expression of views without threat of reprisal or force or promise of benefit. *See Gissel Packing Co.,* 395 U.S. 575, 618 (1965); *TNT Logistics North America, Inc.,* 345 NLRB 290 (2005) (statements that client would end its contract with the employer if the employees unionized lawful); and *Tri-Cast, Inc*., 274 NLRB 377, 378 (1985) (employer's statement that if it had to bid higher, or customers feel threatened because of delivery cancellations due to potential strikes, business and jobs could be lost was not objectionable because the comments predicted what could happen if events out of its control occurred). Accordingly, I recommend that complaint paragraph 8(b) be dismissed.

Complaint paragraph 6(c) alleges that on about November 13, supervisor Francisco Corral solicited employee complaints and grievances and impliedly promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. Paragraph 7(a) of the complaint alleges that on the same date, Corral interrogated employees regarding their union sympathies. These allegations relate to a conversation between Corral and employee Rick Dunfee. According to Dunfee, he had never previously openly expressed his views about the Union, never wore pro-union logos, and never took any action that would indicate to management his union sympathy. He testified that on November 13, while working alone laying fiber bins, he was approached by Corral, who he had known for some time, and under whose supervision he had previously worked. He also considered Corral a friend.

Dunfee testified that Corral told him that he had heard that Dunfee was for the Union. Dunfee asked Corral who had told him so, and Corral answered that nobody had, but he just assumed it. Corral then asked whether there was something that the Employer could "change" that would cause Dunfee to change his mind about the Union. According to Dunfee, he did not respond to Corral's inquiry, and after about a minute, the conversation ended. Corral was not called to testify as a witness.

In observing Dunfee's demeanor while testifying, he certainly seemed calm and unemotional, and overall credible. Further, his testimony remained unrebutted as, once again, the Respondent failed to call a witness to challenge damaging testimony. As Corral did not testify, the inference is raised that he would have corroborated Dunfee's testimony. *Master Security Services, supra;* and *Martin Luther King, Sr. Nursing Center, supra.* Further, since Dunfee was a current employee, and his testimony was contrary to his pecuniary and other self interest, it is worthy of additional weight. *Natico, Inc., supra, Bohemia, Inc., Federal Stainless Sink supra;* and *Gateway Transp., Inc., supra.*

In asking Dunfee whether there was something that the Employer could "change" that would cause Dunfee to change his mind about the Union, Corral was soliciting complaints and grievances from Dunfee, and impliedly promising him increased benefits and improved terms and conditions of employment if he abandoned his support for the Union. As I have found above, in the absence of a previous practice of doing so, the solicitation of grievances by the Respondent during the Union's organizational campaign violated the Act. The solicitation of grievances created not just an inference, but a rebuttable presumption that the Respondent was going to remedy them. *See Amptech, Inc, supra*; and other case cited above for this proposition. Such a presumption was never rebutted by the Respondent. Accordingly, I conclude that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6(c).

Further, I agree with the General Counsel that during this same conversation Corral unlawfully interrogated Dunfee regarding his union sympathies. Traditionally, the Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his protected activity were coercive under the Act. *Rossmore House,* 269 NLRB 1176 (1984), aff'd. *sub nom. HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

As credibly testified to by Dunfee, he had never previously openly expressed his views about the Union, never wore pro-union logos, and never took any action that would indicate to management his union sympathy. When he was approached by Corral, Dunfee was working alone. Corral initiated the conversation, telling Dunfee that he (Corral) had heard that Dunfee was for the Union. Corral was a supervisor who Dunfee had previously worked for, and while Dunfee considered Corral a friend, he was apparently concerned enough about the inquiry that instead of telling Corral the truth, that he was in fact a union supporter, he asked Corral who had told him such a thing. Interested in keeping his union support a secret, Dunfee never did tell Corral the truth during their conversation. Corral then proceeded to commit other unfair labor practices during the same conversation by soliciting complaints and grievances from Dunfee while impliedly promising him benefits for abandoning the Union. Under these circumstances, I believe that Corral's interrogation of Dunfee was coercive and interfered with his Section 7 right to support the Union Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 7(a).

The General Counsel alleges in paragraph 7(b) of the complaint that on November 17, lead employee Francis Rhymes, a/k/a Mickey Rhymes interrogated employees regarding their union sympathies. Also, the General Counsel alleges in paragraph 6(d) that on the same date, Rhymes solicited employee complaints and grievances and impliedly promised its employees increased benefits and improved terms and conditions of employment if they abandoned their support for the Union. As I noted earlier, Rhymes is an admitted agent of the Respondent. Both these allegations arise from the same conversation.

Employee Florencio Chavez attended a speech given by General Manager Lish on November 17. Chavez testified that thereafter, he was within the Employer's facility returning to work from lunch alone, when he was approached by Rhymes. According to Chavez, Rhymes asked him what he thought of Lish's speech. Chavez responded that he didn't believe what Lish had said, that it didn't come from Lish's heart, as Lish was reading the speech that somebody else had written for him. In response, Rhymes suggested that Chavez give Lish "a chance to make things better," as it was Lish's first year at the facility, and "it's pretty good here." While Rhymes was a witness at the hearing, he did not testify about this purported conversation. Since he did not rebut Chavez' testimony, I will accept it as credible.

In any event, I do not believe that anything that Rhymes said to Chavez during this conversation violated the Act. I agree with the statement of counsel for the Respondent in his post-hearing brief that Rhymes asking Chavez what he thought of a speech they had just heard is not a coercive interrogation "by any stretch of the imagination." This was merely a general inquiry regarding how Chavez felt about Lish's speech. There was no hint that Rhymes was attempting to elicit information concerning Chavez' union activity. It certainly does not meet any of the "Bourne factors," and does not constitute coercive interrogation. *See Rossmore House,*

supra; Westwood Health Care Center, supra; and *Bourne v. NLRB, supra.* Under all the circumstances surrounding this conversation, I find no indication of unlawful interrogation, and, accordingly, shall recommend that complaint paragraph 7(b) be dismissed.

Further, I do not find that Rhymes' suggestion to Chavez that he give new General Manager Lish a chance to demonstrate that he could improve conditions at the facility was a violation of the Act. There was no solicitation of complaints or grievances by Rhymes or implied promise of improved terms and conditions of employment in return for abandoning the Union. Rather, there was merely the suggestion that the new head man should be given a chance to show what he could do. See *Airport 2000 Concessions, LLC*, 349 NLRB 958, 960-961 (2006) (statements were not unlawful as did not provide specific steps that would be taken to improve working conditions); *Flamingo Hilton-Laughlin*, 324 NLRB 72, at 72 (1997) (general request to be allowed to demonstrate management style and make improvements found to be lawful "general request," not a promise of specific benefits); and *Hyatt Hotels Corp*., 296 NLRB 259, 269 (1989) (nothing improper about new general manager asking employees to give him a chance, even though statements implied improved conditions). Rhymes never suggested any specific improvements that Lish might make, just that he be given a chance. Accordingly, I shall recommend that paragraph 6(d) of the complaint be dismissed.

Complaint paragraph 8(d) alleges that on November 21, the Respondent, through Rhymes, told an employee that his request to be transferred to the day shift was denied because of his support for and his activities on behalf of the Union. Employee Barry Anderson is allegedly that employee. Anderson, who worked the graveyard shift, testified that in September, Rhymes informed him that a few day shift spots were opening soon, and suggested that Anderson apply for such a position. Anderson testified that at the time he had a good relationship with Rhymes, with Rhymes taking the younger man "under his wing," and giving him advice on how things worked at the Company. The two men would frequently interact in the locker room in the manufacturing building when their shifts overlapped. Anderson subsequently applied for a position on the day shift.

A few weeks later, Rhymes told Anderson that the Employer had decided not to fill the day shift vacancies until after the union election. Around the same time, Rhymes informed Anderson that he had mentioned Anderson's name to supervisor Dwight Davis, with whom he claimed to be close, in connection with the day shift openings. Further, Rhymes mentioned to Anderson that employee Denise Fagens was ahead of him in seniority, but that following Fagens, he was next in line for a transfer.

At the election on November 19, Anderson served as an observer for the Union. Thereafter, on November 21, while Anderson was in the company of a number of other employees in the locker room preparing to clock out, Rhymes approached him. Anderson testified that Rhymes said that Anderson had disappointed him, and that he had been under the impression that Anderson was going to vote no. Anderson responded that it should not matter how he voted, as he was a man and Rhymes should respect his opinion. According to Anderson, Rhymes said that if Anderson "had never gotten involved with the Union, everything that was promised to [him] would have been given to [him]." However, there was no specific mention of a transfer to the day shift position.

Rhymes testified at the hearing on behalf of the Respondent and specifically addressed the claims made by Anderson. He acknowledged having a conversation with Anderson about the day shift position, but claimed that Anderson initially raised the matter because Anderson was having some "issues" on the grave yard shift. According to Rhymes, he advised Anderson that Anderson would first need to talk with supervisor Dwight Davis, after which Anderson could

put in for the shift change. Also, he cautioned Anderson that Anderson would need to have "seniority" before the transfer was approved. Rhymes denied that following the election he told Anderson that he was disappointed in him in some way. Further, he denied that following the election he had any conversation with Anderson where his union activities were discussed. In response to questions from counsel for the Respondent, Rhymes testified that he was never involved in any decision about whether Anderson could transfer to the day shift.

I am of the opinion that Anderson testified credibly, but that Rhymes did not. I agree with counsel for the General Counsel's contention in his post-hearing brief that Rhymes seemed visibly uncomfortable and nervous when testifying, and that his answers to counsel for the Respondent's questions seemed rehearsed. While it is not unusual for witnesses who are not accustomed to legal proceedings to be nervous when testifying, Rhymes appeared especially so. On the other hand, Davis showed a calm demeanor when testifying, and his story seemed plausible, was inherently consistent, and had the "ring of authenticity" to it. Further, as I have repeatedly indicated above, an employee, like Anderson, who testifies against his current employer is acting contrary to his own pecuniary and other self interest, making his testimony worthy of additional weight. *Natico, Inc., supra; Bohemia, Inc., supra, Federal Stainless Sink, supra, and Gateway Transp., Inc., supra.* Therefore, I fully credit Anderson's testimony regarding this incident.

As I have accepted Anderson's version of the events, I find that on November 21, Rhymes did in fact convey the message to Anderson that he was being denied a transfer to the day shift because of his support for and activities on behalf of the Union. While the exact words used by Rhymes, as testified to by Anderson, were not quite so explicit, their meaning was unmistakable. Anderson was told that because of his Section 7 activities, he was being denied an employment benefit, in this case a transfer.[19] Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraph 8(d) of the complaint.

It is the General Counsel's contention that the Respondent violated the Act, as alleged in complaint paragraphs 9(a) and (b), on November 17 and 18, 2008, when General Manager Bruce Lish threatened employees with job loss or plant closure by telling them that growers would not bring their almonds to the Respondent's facility if the Union successfully organized the facility; and solicited employee grievances and impliedly promised to remedy them, and promised better terms and conditions of employment to its employees if they voted against union representation. Lish spoke before potential voters at 3 meetings of employees as specified in detail above in the "Facts" section of this decision. He read from a prepared text, with the only difference in the 3 speeches being his introduction to the assembled employees. Otherwise, he did not deviate from the text, and no questions were permitted. The text of the speech was admitted into evidence as Joint Exhibit 16.

It is the position of the General Counsel that a number of references in the speech interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. Specifically, counsel for the General Counsel contends in his post hearing brief that Lish's words constituted a solicitation of grievances. In particular, Lish's statement that because employees "were willing to speak up and share your perceptions, your thoughts, and your concerns, we now have a better understanding of your issues and the pressures and frustrations that you are experiencing" is alleged to be unlawful. Also, suspect, according to

[19] It is not relevant whether Anderson was actually denied the transfer to the day shift, and in fact the General Counsel is not so alleging, merely that he was told that the transfer was being denied because of his union activities.

counsel for the General Counsel, was Lish's statement that the Employer would now "do a better job of listening to our employees so that these matters will be minimized and resolved quickly." Continuing, Lish informed the employees that he has "insisted" that his managers "do a better job in communicating with you, now and in the future."

Counsel for the General Counsel also contends in his post hearing brief that Lish's words constituted a threat of job loss or plant closure. In particular, Lish's statement that "our growers will not be happy" when union related cost increases occur, which "will put our supply in serious jeopardy," is alleged to constitute a threat to the existence of the Respondent's facility. Other remarks about the growers, which the General Counsel contends constitute an unlawful threat, are his frequent statements about the Respondent's dependency on growers. Such statements about unhappy growers, upon whom the business is dependent, are alleged to imply less work and possible plant closure, and would, according to the General Counsel, reasonably tend to coerce employees in the exercise of their right to choose union representation.

Counsel for the General Counsel argues that Lish's statements were not based on objective facts. To the contrary, counsel for the Respondent argues that Lish's speech, when not taken out of context, constituted a totally lawful expression of his opinion based on objective facts and personal experiences. As such, the Respondent argues, it is lawful speech as protected under the First Amendment to the United States Constitution, and provided for in Section 8(c) of the Act.

In large measure, I agree with the position taken by counsel for the Respondent in his post-hearing brief, and find that Lish's speech did not violate the Act. To begin with, in evaluating whether the speech was coercive and interfered with the Section 7 rights of the assembled employees, it is necessary to evaluate the totality of the remarks. An employer is entitled under the First Amendment to express its views and preferences regarding unions and the representation of its employees by a specific union. This is simply "free speech," which right has been specifically provided for in Section 8(c) of the Act. As long as an employer makes "no threat of reprisal or force, or promise of benefit[,]" it may express its "views, argument, or opinion," and the dissemination of such "shall not constitute or be evidence of an unfair labor practice…." It is clear that under the case law, employers are privileged to make statements that explicitly discourage employees from voting for a union, as long as such statements are predictions based on objective facts or personal opinions. See *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969); *TNT Logistics North America, Inc.,* 345 NLRB 290, 290 (2005); and *Tri-Cast, Inc.,* 274 NLRB 377, 378 (1985).

It is important to view Lish's speech in its totality, and not simply take sentences or phrases out of context. The speech itself was relatively short, and the evidence is undisputed that attendance was voluntary. The focus of the speech was on Lish's long history with the Employer, and his experiences working at the Sacramento facility years earlier as a young man. He offered his opinion that the Union promoted conflict between management and workers, and between the workers themselves, rather than a spirit of cooperation and teamwork, which he said had always been the norm at the facility. Certainly these general statements were non-threatening. (Jt. Ex. 16.)

In the complaint, the General Counsel focuses on two aspects of Lish's speech. To begin with, in paragraph 9(a), it is alleged that Lish threatened employees with job loss or plant closure by saying that the growers would not bring their almonds to the Respondent's facility if the Union became the bargaining representative. This is simply not accurate. Lish reminded the employees that the Employer was "a cooperative supported by our almond growers." He then said the obvious, which was that, "Anything that impacts the return that we are able to

provide our growers could have a serious impact on our operation here in Sacramento." He stated his opinion that, "Unions can and often do cause costs to increase." He continued by saying that, "Increased costs will reduce the amount of net return our growers will receive." Finally, he ended the thought by saying that, "Our growers will not be happy when that happens and it will put our supply in serious jeopardy."

These statements constituted a prediction that Lish was making about the possible effects of unionization regarding costs, which were outside the control of management. Such statements are not unlawful. In *TNT Logistics North America, Inc.,* 345 NLRB 290, 290 (2005), where a supervisor stated to an employee that "Home Depot doesn't like the Union; that if the Union comes in we wouldn't have a job with Home Depot[,]" the Board found that the supervisor's statements as to what a client might do if the employer were unionized were merely a personal opinion or prediction of what might happen, and as these matters were clearly beyond the control of the supervisor, did not constitute a threat or coercion.

Lish's statements and predictions were based on a series of objective facts. It was a fact that the Employer was an agricultural cooperative, dependent upon the growers participation to survive. It was also an obvious fact that the growers participated in the cooperative because "they are able to earn a reasonable return on what they invest to grow the almonds." It was also apparently a fact, not challenged by the Union or the General Counsel, that there were "roughly 100 almond processors that growers may choose for processing their almonds."

Lish's statements were also predictions of events, which might occur, and that were outside the control of the Employer. Such was his statement that, "Unions can and often do cause costs to increase. This can be due to increases in staffing, restrictive work practices, costly grievances and lost teamwork, among other things." Further, it was at least a reasonable prediction when he said, "Increased costs will reduce the amount of net return our growers will receive. Our growers will not be happy when that happens, and it will put our supply in serious jeopardy."

It is beyond any serious doubt that the Employer had no control over its grower members, who are independent farmers. Further, it had no control over how the growers reacted to the unionization of the Employer, or to possible increases in costs of production. It would obviously be reasonable for grower/members faced with reduced compensation for their products due to higher production costs, to take their business elsewhere, and, in so doing, place the Employer's "supply [of almonds] in serious jeopardy." This is precisely what Lish was saying in his speech when he conveyed his personal opinion as to the logical and probable consequence of events outside the Employer's control. The Board has held that such statements are not violative of the Act. *Tri-Cast,* 274 NLRB 377, 378 (1985) (employer's statement to employees that if "we have to bid higher or customers feel threatened because of delivery cancellations (union strikes) we lose business—and jobs" was not improper as the comments predicted what could happen, if events beyond its control occurred). The courts have also supported this position. See *Patsy Bee, Inc.* 654 F.2d 515, 518 (8th Cir. 1981); *Laborers' Dist. Council v. NLRB,* 501 F.2d 868 (D.C. Cir. 1974); and *NLRB v. Yokell,* 387 F.2d 751 (2nd Cir. 1967).

Further, I would note that Lish's comments about unhappy growers was in part a response to rumors, which had been circulating around the facility, regarding growers who might leave the Employer if the Union's organizing campaign were successful. Don Bender, a truck driver in the receiving department, who interacts with growers on a regular basis, testified that he spoke with grower Joe Martinez, who told him that if the employees voted for the Union, he

would leave the cooperative. Based on the campaign signs carried by certain grass roots employees, it appeared that similar stories were circulating among the employees. Lish's comments, which were in part intended to address such employee concerns, were not unlawful. *See Curwood Inc.,* 339 NLRB 1137, 1138 (2003)(conveying customer concerns about the effects unionization would have on their business not unlawful).

After viewing Lish's speech in its totality, I am of the view that it did not threaten or coerce employees in the exercise of their Section 7 rights when it referenced growers' concerns about costs and having the option of taking their almonds elsewhere. Accordingly, I shall recommend that complaint paragraph 9(a) be dismissed.

As reflected in complaint paragraph 9(b), the second part of Lish's speech that the General Counsel contends was unlawful was his alleged solicitation of employee grievances and implied promise to remedy those grievances and provide better terms and conditions of employment in return for voting against representation by the Union. The General Counsel argues that Lish's reference to the employees' willingness to "speak up and share your perceptions, your thoughts, and your concerns" resulting in management's having "a better understanding of your issues and the pressure and frustrations that you are experiencing[,]" was a sort of admission that the Respondent had been soliciting employee complaints. Further, the General Counsel contends that Lish was promising to remedy those unnamed complaints by saying that "we will do a better job of listening to our employees…mistakes will be minimized and resolved quickly…[and management] will do a better job in communicating with you, now and in the future…." Also, based on counsel for the General Counsel's brief, he seems to take issue with Lish asking the employees "to give me a year to deal with the issues that you've told me about." However, in my view, the General Counsel is "grasping at straws."

The premise of this part of Lish's speech was that he was new to the General Manager's position at the facility and that the employees should give him a chance to demonstrate his management style, and show them what he could do. Further, he told them that he had previously performed many of the tasks they were now doing, that he understood their complaints and frustrations, and that he intended to be a problem solver and to address their concerns. He promised them only that he and his management team would do a better job of listening to them than had previously been the case, and asked to have a year to prove they could do a better job.

I see nothing unlawful in these statements when not taken out of context. There certainly was no promise to resolve any particular grievance, as no specific grievances were mentioned. The Board has consistently held that this type of pro-employer, give us a chance speech, without any specific promise of benefits or specific steps to be taken, is nothing more than a generalized please support your management team type of approach. There is simply nothing unlawful about it. See *Flamingo Hotel-Laughlin*, 324 NLRB 72-73 (1997); and *Hyatt Hotels Corp*., 296 NLRB 259, 269 (1989).

One wonders what the General Counsel would agree could lawfully be said in such a speech? Since the law is clear, and an employer has the right to recommend to its employees that they vote against union representation, and as an employer is obviously entitled to say something, what could be more generic, nebulous, and non-coercive of Section 7 rights than to ask the employees to give the managers a chance to do a better job of improving the conditions under which they work? It seems to me that was all Lish was saying in his speech. I do not believe that such constituted a solicitation of grievances and implied promise to remedy those grievances and/or to improve the terms and conditions of employment if they voted against the Union. It was all very general and non-coercive. See *Airport 2000 Concessions, LLC,* 349

NLRB 958, 960-961 (2006)(no violation as no definitive promise and no specific steps to improve working conditions). Accordingly, I shall recommend that complaint paragraph 9(b) be dismissed.

In complaint paragraph 8(e), the General Counsel is alleging that the Respondent provided unlawful assistance to employees who opposed union representation by tolerating a violation of its published rules of conduct governing misappropriation of its property by employees who used said property in support of their demonstrations against unionization conducted on November 14 and 18. As noted earlier in the fact section of this decision, on those dates the pro-union and grass roots (anti-union) employees conducted counter demonstrations. Both sides handed out flyers and "picketed" outside the facility carrying signs that displayed their respective slogans. Regarding this rule of conduct governing misappropriation of property by employees, I will take administrative notice that in *California Almond Growers Exchange, d/b/a Blue Diamond Growers,* 353 NLRB No. 6 (2008), there was a finding that the Employer had a strictly enforced misappropriation of property rule, which made "[m]isappropriation and/ or unauthorized possession of Company property or another employee's personal property or attempting to remove such property from the Company premises" a terminable offense. In fact, in that case, the Board found that the Employer had not violated the Act when it discharged two union supporters for violating its misappropriation of property policy.

It is the General Counsel's contention that the grass roots employees used company property to construct their "picket signs," including the material for the placard, Blue Diamond tape for the stick, and specifically company decals, which displayed the Blue Diamond logo. The General Counsel and the Union single out one particular sign, which was distinctively cylindrical in form, as an example of a sign, which appeared to be constructed out of company material, and for which the Employer allegedly conducted an inadequate investigation over the apparent misappropriation of company property.

However, in my view, there is a paucity of evidence to support this allegation. Counsel for the General Counsel offers no eye witness testimony regarding any grass roots employee allegedly removing company property to construct a sign. Rather, the General Counsel relies on the numerous photographs taken of grass roots employees with their picket signs, and offers the testimony of a number of witnesses who indicate that, in their views, the signs look to be professionally constructed. (Un. Ex. 1, photos 392-750.) This establishes nothing.

There is no doubt that the grass roots employees' efforts were highly organized, but a number of these employees testified credibly that their efforts were in no way assisted, financed, or directed by the Employer. Among the most active of these employees, Alejandra Ortiz, Kevin Manning, and Maria Vallejo testified that their efforts were individually motivated and directed. They prepared flyers to distribute at demonstrations using their personal computers and paying for the cost of copying the flyers with their own personal monies. While these individuals were some of the most active anti-union employees, they were supported by many other employees who contributed time and money in their grass roots effort.

From flyers the grass roots employees progressed to making signs and tee-shirts, also used at the demonstrations. Alejandra Ortiz testified at some length about her personal efforts in composing and making signs and flyers. She also testified as to the collective efforts of other anti-union employees. Regarding the use of the Blue Diamond logo, she credibly testified that she obtained the logos off the Internet, made copies, and used "sticker paper" as backing to adhere the logos to signs and flyers.

Kevin Manning also testified at length regarding his personal efforts in composing and making signs and flyers. He indicated that many of the flyers were the result of the collective efforts of various members of the grass roots group. Manning also testified about his experience walking with anti-union signs during demonstrations. He testified regarding one incident while on the "picket line" that was particularly significant. In October while walking the picket line, Manning was approached by a man he did not know who identified himself as a "retired employee." This individual handed Manning a "bunch of [Blue Diamond] stickers," suggesting "they use them for signs or what have you." Manning described the number of Blue Diamond stickers that he was given as "a little stack of them." He testified that he later distributed the stickers to a number of anti-union employees, including Alejandra Ortiz, suggesting to them that they could put them on their "picket-signs."

In response to Manning's story about how he obtained the stickers, counsel for the Union offered the rebuttal testimony of union organizer Agustin Ramirez. According to Ramirez, on October 24 he noticed Manning handing out anti-union flyers. Later he saw Manning talking with one of the consultants hired by the Respondent to respond to the union campaign. While Ramirez did not see the consultant hand anything to Manning and did not hear the conversation between the two men, his testimony is obviously intended to suggest that it was this consultant, and not the retired employee, who gave Manning the Blue Diamond stickers.

I credit Manning's testimony over that of Ramirez. Manning's testimony regarding how he came to be in possession of Blue Diamond stickers was specific, direct, and unambiguous. Ramirez' testimony was vague and non-specific, and, in fact, it was too vague to even really rebut Manning's testimony that he obtained the stickers from a person who identified himself as a retired employee. I was impressed with the demeanor of both Manning and Ortiz, as they testified in a direct, no nonsense fashion. I full credit their testimony as to how they obtained the Blue Diamond logos, which were used on picket signs, and the fact that they did not obtain them from the Respondent.

The General Counsel and the Union spent a considerable amount of time during the hearing on the details concerning one particular sign carried by an anti-union employee. In his post-hearing brief, counsel for the General Counsel argues that the Respondent's failure to investigate the possible misappropriation of the materials used to construct this sign demonstrates a disparate enforcement of the Respondent's misappropriation of property rule in favor of the anti-union employees. This "picket sign" was rather distinctive, as it was cylindrical in shape, rather than square or rectangular. It is the subject of numerous photographs in evidence in this case. (Un. Ex. 1, pages 427 & 428.) The cylinder itself is apparently similar in size and shape to some type of bin used by the Respondent in the almond packing process and found on its property.

There is no question that because of its cylindrical shape, the sign was unique. General Manager Lish acknowledged noticing the sign as he entered and exited from the property. He testified that at some point somebody, but he cannot recall who, brought to his attention that the materials for the sign night have been obtained from company property. The employee with the sign was identified as Alfred Ramirez, and Lish asked Ramirez' supervisor to look into the matter. It was later reported to Lish that Ramirez claimed that all the materials for the sign had been purchased at Home Depot. According to Lish, he subsequently had a private conversation with Ramirez when he was walking through Ramirez' work area. He asked Ramirez about the sign and was told that the materials used to construct it had all come from Home Depot, including a cylindrical form used to pour concrete for posts, a surveyor stake, and painter's tape.

Alfred Ramirez testified and brought with him to the hearing the very cylindrical sign that he had constructed and used during demonstrations. He was one of the employees in the grass roots group, and made no secret of his anti-union sentiments. He testified about making the sign himself, all from materials that he paid for and purchased from Home Depot. Under redirect examination by counsel for the Respondent, Ramirez acknowledged that he was Lish's sister-in-law's boyfriend. Further, he testified that Lish had questioned him about the sign, and that he told Lish that he had purchased all the materials for the sign from Home Depot. However, Ramirez remembered the conversation occurring at a social event, rather than at the Respondent's facility.

I found Alfred Ramirez to be a totally credible witness. It was very obvious to me that he took great pride in his "picket sign," especially in the fact that it was so unique and had engendered so much interest and conversation. I think that he even found some joy in the fact that it was, in part, the subject of the Union's unfair labor practice charges. He was clearly strongly anti-union, and seemed to delight in being the center of the Union's attention. His pride in his sign manifested itself in his having retained the sign long after the election, and in his obvious satisfaction in being able to bring the sign with him to the hearing. I am convinced that he credibly testified that he obtained all the materials for the sign at Home Depot, paid for them himself, had no help from the Respondent, and did not obtain any of the materials from the Respondent's facility. Of course, the General Counsel and the Union offered no evidence to the contrary, except the testimony of a witness or two that the materials for the sign looked suspiciously similar to materials used by the Respondent in its almond processing operation.

In his post-hearing brief, counsel for the General Counsel makes much of the fact that while both Ramirez and Lish agree that at some point Lish questioned Ramirez about where he obtained the materials for the sign, they disagree as to where the conversation took place. However, I fail to see how any of this matters. The bottom line is that Ramirez did not obtain the materials for the sign from the Respondent or from the Respondent's facility. Further, it is inaccurate to suggest that the Respondent was unconcerned about where the materials came from, as it is unrebutted that Lish so inquired. Whether, Lish or Ramirez had the better memory, and whether their conversation took place at work or in a social setting, is of no particular relevance. An inquiry was made by Lish after the issue was brought to his attention, and the General Counsel falls far short of establishing any disparate application of the Respondent's misappropriation of property rule concerning Ramirez' sign.

Regarding the misappropriation of property rule, a number of pro-union employees testified that at demonstrations they observed grass roots employees using a "bull horn," which looked identical to one seen subsequently in the possession of the Respondent. One grass roots employee, Alejandra Ortiz, did testify that she used a "bull horn" at a demonstration, which she obtained from "Marta," another grass roots employees. Ortiz had no idea who was the owner of the bull horn. Again, the General Counsel offers merely a suspicion that this bull horn used by grass roots employees was one and the same as that of the Respondent. This is nothing more than supposition, and is an assumption unsupported by credible, probative evidence. According, I shall disregard it.

Finally, under the category of an alleged failure to enforce its misappropriation of property rule, counsel for the General Counsel argues that the Respondent failed to protect its trademark logo by seeking a remedy against those grass roots employees who used the logo on their campaign flyers and signs. There is no dispute that a number of the signs and flyers produced by the grass roots employees and used by them at the demonstrations did display the Blue Diamond logo. (Un. Ex. 1, p. 392.) As noted earlier, Alejandra Ortiz testified that she

obtained the logo from the Internet, made copies, and used "sticker paper" as backing to adhere the logos to signs and flyers. Further, Kevin Manning testified about obtaining a "stack" of logos from a former employee, after which he distributed them to other grass roots employees with the suggestion that they put them on their "picket signs." In his brief, counsel for the General Counsel argues that as the Respondent "vigorously protects its trademark logo," and is careful about who distributes it, and who may use it, the failure to prosecute those employees allegedly misappropriating the logo establishes the disparate application of the misappropriation rule.

General Manager Lish and Director of Employee Services Johnson did both testify that the Respondent's trademark logo is important intellectual property and must be protected vigorously. However, I generally concur with the sentiments as expressed by counsel for the Respondent in his post-hearing brief that the General Counsel's contention that the Respondent's failure to pursue legal action against its employees for "trademark infringement" establishes disparate treatment in the enforcement of its misappropriation policy is far-fetched.[20] As counsel for the Respondent points out in his brief, it does not appear that the use of the Respondent's logo by the grass roots employees violates trademark law. Section 32 of the Lanham Act imposes liability for trademark infringement on any person who, without the consent of the owner of the trademark, uses it for any number of enumerated commercial purposes.[21] On the other hand, if the use of the trademark is for expressive purposes, i.e., to communicate an idea, such as commentary, comedy, parody, news reporting or criticism, it is considered noncommercial and falls within the protections of the First Amendment. See Gilson, Trademark Protection and Practice (Bender 2005), Section 11.08[4][l][i]; and *CPC International, Inc. v. Skippy, Inc.,* 214 F.3d 456, 461-463 (4th Cir. 2000).

Clearly, the use of the Blue Diamond logo by the grass roots employees was for non-commercial purposes. It was for the express purpose of sending an anti-union message to fellow employees and to the general public. This was indisputably "free speech activity" protected by the First Amendment. Therefore, any effort on the part of the Respondent to bring legal action against the grass roots employees for trademark infringement would in all likelihood have been dismissed as a frivolous action.

While the General Counsel's argument that the Respondent engaged in disparate treatment in favor of the grass roots employees through its failure to enforce its misappropriation rule was certainly an inventive theory, it lacks any true substance. Accordingly, I shall recommend that complaint paragraph 8(e) be dismissed.

It is alleged in complaint paragraph 8(f) that during the two week period prior to the election on November 19, the Respondent engaged in disparate treatment when supervisor Matt Orlousky removed a pro-union flyer posted at the facility while previously tolerating the posting of anti-union flyers, or in the alternative, created a new rule banning the posting of any flyers by removing pro and anti-union flyers in response to the posting of a pro-union flyer.

It appears that the Respondent had rules regarding the "posting" of materials, such as flyers, in its facility, but generally allowed employees to bring flyers into the facility and leave them loose and un-posted in break/lunch rooms. Both supervisors Orlousky and Davis testified as to their understanding of the Respondent's "No Posting" rule. According to Orlousky, any postings on the Respondent's "bulletin boards" must originate from the Company, or be

[20] Counsel for the Respondent's exact choice of words to describe the General Counsel's theory was "absurd," which may be a somewhat severe characterization, but not materially so.

[21] See 15 U.S.C. Section 1114(a)

approved, signed, or initialed by Director of Employee Services, George Johnson. Only authorized materials were allowed to be posted. Orlousky mentioned that during the election campaign he was reminded of the rule by Johnson and instructed to go throughout the plant to remove unauthorized postings. Davis testified that under the no posting rule, "nothing could be posted on the bulletin boards or in the plant." However, it is assumed that he meant that nothing could be posted unless it was first approved by the Employer. As noted earlier, there were generally three types of flyers used during the election campaign, namely those produced by the Employer, those produced by the Union, and those produced by the grass roots group. Presumably, the only flyers that could be posted on the company bulletin boards were those produced by the Employer.

As mentioned, it is alleged in the complaint that Orlousky removed a pro-union flyer in the cutting/copy room, while previously tolerating the posting of anti-union flyers, or in the alternative, created a new rule banning the posting of any flyers by removing pro and anti-union flyers in response to an employee's posting of a pro-union flyer. The evidence does indicate that for a time prior to the election that the posting policy was not being strictly enforced, as several employees noticed anti-union flyers posted at the facility in areas other than bulletin boards. Employee Frank Garcia testified that he saw lead John Eugene posting an anti-union flyer on the window near the time clock in the 17th Street break room. At the time Eugene was complaining that someone had removed the flyer and so he was putting it up again. Supervisor Orlousky testified that he had seen a couple of anti-union signs in the lunchroom and hallways. However, he indicated that this was prior to Johnson's reminder that non-authorized materials, such as flyers, must not be posted anywhere in the facility.[22]

On November 13, Employee Cesario Aguirre posted a pro-union flyer on a window on the cutting shop doors. He testified that for some time he had seen anti-union flyers posted around the facility, specifically in the copy room, hallways, and main shop. However, Aguirre's flyer did not remain posted for long as he observed Orlousky removing it the same day it was posted. According to Aguirre, Orlousky told him that he was not allowed to post any signs. Aguirre responded that there were many signs posted against the Union, to which Orlousky said, "not anymore." After Orlousky left, Aguirre noticed that the anti-union signs had also been removed. However, Aguirre contends that during the next several days he saw that new anti-union signs had once again been posted.

Orlousky's testimony was similar to Aguirre's, with the supervisor telling Aguirre that he had been going through the plant that day removing any postings that were not authorized by the Employer. Orlousky further testified that he told Aguirre that if Aguirre saw any postings to bring it to his attention and he would remove them. According to Orlousky, it was George Johnson's reminder about not permitting unauthorized postings that precipitated his removal of all the flyers that he saw, both pro and anti-union, including Aguirre's flyer. Following his removal of the posted flyers that he saw, Orlousky only observed one other, a pro-union flyer on a clip board, which he promptly also removed.

In my view, the evidence does not establish the existence of any policy, rule or practice, either formal or informal, intended to discriminate against the posting of pro-union flyers. As noted, the company bulletin boards were only for approved materials, such as the flyers and posters produced by the Employer. Other materials were not permitted to be posted anywhere on the facility. This policy was apparently of long standing. However, based on the witness testimony, it does appear that in violation of the policy, more grass roots (anti-union) flyers were

[22] Regarding "posted" material, the terms flyer and sign are used interchangeably.

put up around the facility than were pro-union flyers. Never the less, I see no evidence that the Respondent acquiesced in this unauthorized posting. To the contrary, when several weeks before the election George Johnson became aware of the unauthorized postings, he directed Orlousky to remove them. He made no distinction between pro and anti-union flyers, and Orlousky went around the facility removing both types of flyers. Orlousky told Aguirre precisely that, even asking Aguirre to notify him if he noticed any postings. Aguirre acknowledged observing both types of flyers being removed. Of course, Aguirre testified that shortly thereafter he saw anti-union flyers reappear. But, there is a total absence of evidence that such was done with the consent, approval, assistance, or knowledge of the Respondent's managers.

I find the evidence insufficient to establish that the Respondent was acting in a disparate fashion in permitting the posting of anti-union flyers by the grass root employees while at the same time prohibiting the posting of pro-union flyers. Concomitantly, the evidence is insufficient to show that the Respondent created a new rule banning the posting of any flyers in response to an employee's posting of a pro-union flyer. Accordingly, I shall recommend that complaint paragraph 8(f) be dismissed.

Paragraph 8(g) of the complaint alleges that several weeks before the election, in the receiving/testing break room, supervisor Dwight Davis removed and discarded a pro-union flyer from the table while leaving nearby anti-union flyers untouched. Regarding documents that were not posted, the evidence is undisputed that the Respondent permitted such materials to be placed in loose form on tables in the break/lunch rooms. This apparently would have included all three types of flyers, those produced by the Union, the Employer, and the grass roots group. Presumably, such flyers would be brought into the break/lunch rooms by employees and simply left there. However, what is unclear is for what length of time the flyers would remain before being discarded with the general trash. It does not appear that there was any particular policy or practice exclusively for loose flyers or other campaign literature.

According to the testimony of pro-union employee witness Frank Garcia, on a date a few weeks prior to the election, he was directed to a meeting with labor consultant George Wetzel and some fellow employees in the 17th Street break room. On the break room table there were scattered a number of anti-union flyers, along with one pro-union flyer on yellow paper, which flyer Garcia had received that day as he drove into work. Garcia observed supervisor Davis, who was present in the break room, pick up the yellow, pro-union flyer, crumple it up, and throw it in the trash. According to Garcia, Davis said nothing, and left untouched all the anti-union flyers that were also on the table. In should be noted, however, that Garcia also acknowledged that he had observed, apparently with some frequency, flyers being left on break and lunch room tables, both pro and anti-union.

Davis testified that it was his understanding that employees were not allowed to post flyers around the plant. The only election related material that he saw posted was on the company bulletin boards. This would have presumably been the Employer's produced flyers and related material. In any event, according to Davis, whenever he saw flyers, either pro or anti-union, in the break rooms or other places, he would remove them. He contends that this was in conformity with his understanding of the Employer's posting policy. Davis made it clear that he would remove any flyers that he saw in break rooms or other places, whether they were from the grass roots employees, or from those who supported the Union.

Davis did not specifically address the issue of whether in the presence of a number of employees he discarded a pro-union flyer while leaving untouched other anti-union flyers on the break room table. On the other hand, employee Frank Garcia seemed credible, described the incident with specificity, and as a current employee testifying on behalf of the Union, he was

doing so contrary to his pecuniary and other self-interest, and, thus, his testimony was worthy of additional weight. See *Natico Inc., supra; Bohemia, supra; Federal Stainless Sink, supra; and Gateway Transp., Inc., supra.* Therefore, I credit the testimony of Garcia that Davis discarded the pro-union flyer, while leaving the anti-union flyers alone.

However, while Davis' action showed disparate negative treatment towards the pro-union employees' Section 7 rights, this incident standing alone, as it does, is in my view *de minimis.* Frank Garcia acknowledged that flyers, both pro and anti-union, were frequently left on break/lunch room tables. The Employer's practice was apparently to leave such loose materials undisturbed for a period of time. With the exception of the Davis' incident, there is no evidence to the contrary. Therefore, it would seem that this incident was isolated and very limited in its scope. It did not establish a policy or practice on behalf of the Employer. While it may be considered a technical violation of the Act, I view it as a very minor incident of a *de minimis* nature. By itself, it does not rise to the level of an unfair labor practice. Accordingly, I shall recommend that complaint paragraph 8(g) be dismissed.

E. Summary of Conclusions

In summary, I have found that the Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs: 6(a),(b),(c), 7(a), 8(a), and (d). Further, I have recommended that the following complaint paragraphs be dismissed: 6(d), 7(b), 8(b),(e), (f),(g), 9(a), and (b).[23]

IV. The Representation Case

As reflected in the Regional Director's Report on Objections and Supplemental Report on Objections, there are a number of objections to the election referred to the undersigned for resolution,[24] some of which are identical to the unfair labor practices alleged in the complaint. Where the objections are identical to the unfair labor practices, the issues will not be restated, but only the conclusions previously reached.

Objection Number 2

Objection number 2 concerns the speeches given by General Manager Bruce Lish to three groups on employees on November 17 and 18. For the most part, these speeches have been discussed in detail above in the unfair labor practice portion of this decision.

(a) It is alleged that Lish "promised to improve wages and working conditions within a year if employees voted against the Union." This objection is encompassed in complaint paragraph 9(b) concerning Lish's alleged promise to provide employees with better terms and conditions of employment if they voted against the Union. As I have recommended the dismissal of this complaint allegation, I hereby also recommend that objection number 2(a) be overruled for the same reasons as expressed above.

(c) This objection alleges that Lish "predicted with no basis in fact, that almond growers would withdraw from the Blue Diamond cooperative if employees voted for the Union." This objection is encompassed in complaint paragraph 9(a) concerning Lish's alleged threat to employees of job loss or plant closure by telling them that growers would not bring their

[23] Complaint paragraphs 7(c) and 8(c) were withdrawn by the General Counsel.

[24] Objections not referred by the Regional Director to the undersigned for resolution were either withdrawn by the Union or those that the Director previously recommended be overruled.

almonds to Respondent's facility if the Union were successful in the election. As I have recommended the dismissal of this complaint allegation, I hereby also recommend that objection number 2(b) be overruled for the same reasons as expressed above.

(d) In this objection it is alleged that Lish "portrayed an economic strike and permanent replacement as an inevitable consequence of a Union election victory." As this objection was not precisely encompassed by a complaint allegation, I will discuss it here. However, it should be noted that the substance of Lish's speech was fully discussed above in the unfair labor practice portion of this decision.

While counsel for the Union does not address this objection in his post-hearing brief, it is assumed that the Union's objection is based on the one paragraph in Lish's speech where he discussed strikes. There are two lines in that paragraph that presumably the Union contends were threatening. The lines are as follows: "Strikes are one of the unpleasant realities that occur in a unionized company. … Depending on the circumstances, I may have to consider replacing striking employees, perhaps permanently." (Jt. Ex. 16.)

However, I do not believe that the referenced lines in Lish's speech portrayed a strike and permanent replacement as an inevitable consequence of a Union victory. When the speech is considered in its entirety and the referenced lines not taken out of context, it is clear that Lish was merely explaining to the employees one of a number of scenarios that might result from the Union becoming the bargaining representative. It is important to note that in his speech, Lish mentions collective-bargaining, specifically that if the Union is successful in organizing the facility, "I will have no choice but to bargain with the Union." Further, he explains the bargaining process by telling the employees that a Union victory does not "guarantee" higher wages, better benefits, or improved working conditions, as "[a]ll the Union can do is ask and management does not have to agree."

Of course, economic strikes are possible at a unionized facility, and there was nothing improper about Lish explaining to the assembled employees this possibility and the related possibility of permanent replacement. *See Novi American, Inc*., 309 NLRB 544 (1992)(where the Board found statement about possible strike not coercive); and *See Eagle Comtronics*, 263 NLRB 515,516 (19892) and *Care Inc., Colliersville*, 202 NLRB 1065, 1082 (1973), enfd. 496 F.2d 862 (6th Cir. 1974)(where in both cases the Board found statements about economic strikers possibly being replaced not coercive). When Lish's speech is read in its totality, I do not find his statements regarding strikes and permanent replacements as coercive. Apparently, the General Counsel also did not consider Lish's statements as threatening or coercive, as there is no corresponding complaint paragraph alleging a violation of Section 8(a)(1) of the Act. Therefore, I shall recommend that objection 2(d) be overruled.

Objection Number 3

It is alleged in objection number 3 that supervisors and outside consultants interrogated employees regarding their union sympathies, solicited employee grievances and promised to remedy them if employees voted against the Union. For the reasons stated above in the unfair labor practice section of this decision, I found in complaint paragraph 6(a),(b), and (c) that the Respondent solicited employee complaints and grievances and impliedly promised increased benefits and improved terms and conditions of employment if the employees abandoned the Union. Further, I found in complaint paragraph 7(a) that the Respondent interrogated an employee about his union sympathy. Accordingly, as I have found merit to these unfair labor practice allegations, and, therefore, a violation of Section 8(a)(1) of the Act, I also find merit to objection number 3.

Objection Number 4

Objection number 4 concerns the alleged assistance that the Respondent provided to the group of anti-union employees known as the grass roots employees. This issue has been discussed extensively above in the unfair labor practice section of this decision.

(b) It is alleged that the Respondent supplied the anti-union employees with "materials to make picket signs." This objection is encompassed in complaint paragraph 8(e), which alleges that the Respondent provided unlawful assistance to employees who opposed union representation by tolerating violation of its published rules of conduct governing misappropriation of its property by employees who used said property in support of their demonstrations against unionization. This issue was extensively discussed above and relates to the "notorious" cylindrical sign, as well as the alleged use of other company materials, including Blue Diamond logo stickers. As I have recommended dismissal of this complaint allegation, I hereby also recommend that objection number 4(b) be overruled for the same reasons as expressed above.

(c) The Union alleges that the Respondent permitted employees to store anti-union picket signs in their workplace, while denying the same opportunities to pro-union employees. Further, it is alleged that the Respondent permitted anti-union employees to post signs inside the workplace, but tore down signs posted by pro-union employees. Regarding the first part of the objection relating to the disparate opportunity given to employees to store anti-union signs on the company property, this objection is encompassed in complaint paragraph 8(a), which alleges that a security guard denied an employee access to the Respondent's premises because she was carrying a pro-union placard. Once again, this issue was extensively discussed above, and resulted in the undersigned finding that the Respondent did tolerate the storage of anti-union picket signs on its property, while at the same time discriminatorily prohibiting the storage of pro-union picket signs. Accordingly, as I have found merit to these unfair labor practice allegations, and, therefore, a violation of Section 8(a)(1) of the Act, I also find merit to this part of objection number 4(c).

However, I do not find merit to the second part of this objection, which alleges that the Respondent permitted anti-union employees to post signs inside the Respondent's facility, but tore down signs posted by the pro-union employees. This objection is encompassed by complaint paragraphs 8(f) and (g), which allege that the Respondent removed a posted pro-union flyer while tolerating the posting of anti-union flyers, and that a loose pro-union flyer was discarded while loose anti-union flyers were left untouched. Again, this issue was discussed in detail above. As I recommended dismissal of these complaint allegations, I hereby also recommend that this portion only of objection number 4(c) be overruled for the same reasons as expressed above.

Objection Number 6

Regarding objection number 6, originally the Regional Director recommended that this objection, along with a number of others, be overruled. However, in his Supplemental Report on Objection, the Director, acting on the Union's request for review, concluded that this objection should also be considered at the consolidated hearing with the other objections and unfair labor practice allegations enumerated above. Objection number 6 as forth in the Supplemental Report, alleges that the Respondent interfered with the employees "free choice by permitting its supervisors to release employees to vote in violation of the schedule and procedure the parties had agreed upon at the pre-election conference the night before the election." Further, the Union alleges in this objection that supervisors "released employees to

go and vote before the Board [A]gent and observers arrived…" Also, it is alleged in the objection that the Respondent's "management engaged in electioneering and surveillance when the employees were released."

This objection does not mirror any of the unfair labor practices as alleged in the complaint. Therefore, the General Counsel offered no evidence concerning this matter. Counsel for the Union did offer the testimony of employee Cesario Aguirre, who acted as the Union's observer in the election, and the testimony of union representative Agustin Ramirez in support of its contention.

The Stipulated Election Agreement contains no mention of the voter release method. (Jt. Ex. 2 & 3.) According to the testimony of Agustin Ramirez, on the night before the election, November 18, the parties agreed that the voting would be conducted in "Cold 1," and that George Johnson, the Director of Employee Services, would prepare a voter release schedule, which he would present to the parties and the Board Agents on the morning of the election at about 4:30 am. Ramirez testified that on the next morning, Jonson did in fact present such a voter release schedule to the representatives of the parties and the two Board Agents conducting the election. (Un. Ex. 2.) Further, the parties reached agreement on the announcement that the Board Agent would use in advising eligible voters that they could now vote, on the translation of that announcement into Spanish, and the Board Agent was provided with a bull horn by the Employer that could be used to make the announcement. The Board Agent and the Union and Company observers were to go from building to building to the various departments releasing voters in conformity with the schedule that Johnson had prepared.

Cesario Aguirre testified that when the Board Agent and observers arrived at the 4th floor MPL, North Warehouse, and Center Warehouse, there were no employees present. Also, when they arrived at the In-Shell and 1st floor Manufacturing, there were employees working, and in both departments these employees had already been released to vote and had returned to work. On cross-examination, Aguirre acknowledged that he was unaware of whether any of the missing employees were on a break when the Board Agent came by to release them. Aguirre testified that he simply "assumed" that the supervisors released these voters before the Board Agent had arrived in their departments.

Counsel for the Union never indicates in his post-hearing brief why he is of the opinion that the failure of certain voters to wait for the Board Agent to release them to vote constitutes objectionable conduct. Also, the Union failed to offer any evidence to support its contention in the objection that the Respondent's "management engaged in electioneering and surveillance when employees were released."

The Tally of Ballots shows that over 500 employees voted in the election. At this point It is not possible to know whether the employees from the departments that the Union contends were prematurely released voted or not. No such employees testified that they did or did not vote, and under what circumstances they were released to vote. And most significantly, absolutely no evidence was offered to show that the Respondent's managers engaged in any sort of electioneering or surveillance when employees were released to vote. Since there is no evidence that supervisors released employees to vote, as they may have voted on their break time, or during some other period, there is no evidence that the Respondent's managers somehow breached the parties agreement to have the Board Agent release employees in accordance with a specific schedule.

In his Supplemental Report on Objection, reinstating objection number 6 for hearing, the Regional Director mentions that the Union cited the case of *Olympic Products, Inc*., 201 NLRB 442 (1973) in support of its request for review. However, as the Director notes, in that case the Board found that "the plant manager, contrary to agreed-upon procedures, personally released employees to vote and utilized his own breach of procedures to solicit employees…" Further, as the Director notes, in the instant matter there is no evidence of electioneering by management officials such as persuaded the Board in *Olympic Products* that "the combination of circumstances" compelled setting aside that election. The Director reinstates objection number 6 because he notes that it is conceivable that such evidence may materialize. However, the Union offered no such evidence during the course of this hearing, and none "materialized."

Further, no evidence was offered to show that any alleged breach of the voter release schedule compromised the fairness of the election. It appears that approximately 42 employees may have voted "out of turn" from the departments that the Union complains did not wait to be released by the Board Agent before voting. That is 42 out of approximately 502 employees who voted in the election. There is certainly no evidence or even an allegation that any voters were deprived of their right to vote. As there is no evidence of electioneering by managers and no evidence that any deviation from the voter release schedule compromised the fairness of the election, I find no merit to this objection. Accordingly, I shall recommend that objection number 6 be overruled.

V. Recommendation on Election

In summary, I have found merit in objection number 3, wherein the Respondent solicited employee grievances and promised to remedy them if employees voted against the Union, and wherein the Respondent interrogated employees regarding their union sympathies; and in objection number 4(c), but only such part as alleges that the Respondent permitted employees to store anti-union picket signs on the Respondent's facility, while denying that opportunity to pro-union employees. I have also found merit to the following complaint allegations, which allege a violation of Section 8(a))(1) of the Act: 6(a), (b), and (c) wherein the Respondent solicited employee complaints and grievances and impliedly promised increased benefits and improved terms and conditions of employment if they abandoned the Union; 7(a) wherein the Respondent interrogated its employees about their union sympathies; 8(a) wherein the Respondent denied employees access to its facility because they were carrying pro-union placards, while allowing anti-union employees to store their signs on its property; and 8(d) wherein the Respondent informed an employee that his request to be transferred to the day shift was denied because of his support for the Union.

In this regard, it should be noted that conduct that constitutes unfair labor practice violations may also serve as a basis for invalidating an election. The Board has held that conduct which is violative of Section 8(a)(1) of the Act is, "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Playskool Mfg. Co.,* 140 NLRB 1417 (1963); *see also IRIS U.S.A., Inc*., 336 NLRB 1013 (2001); and *Diamond Walnut Growers, Inc*., 326 NLRB 28 (1998). Further, the Board has held that this is so "because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962). *See also Overnite Transportation Co.,* 158 NLRB 879 (1996); and *Excelsior Underwear*, 156 NLRB 1236 (1996). However, not all unfair labor practice conduct will warrant setting aside an election. In *Caron International*, 246 NLRB 1120 (1979), the Board rejected a per se approach to the fortiori language of *Playskool*. Instead, the Board said the test was an objective one, that

being whether the conduct has a tendency to interfere with employee free choice. Hopkins *Nursing Care Center*, 309 NLRB 958 (1992). *See also Recycle America*, 310 NLRB 629 (1993)(where the Board found that the unfair labor practices were not sufficient to set aside the election).

The Board weighs a number of factors in determining whether Section 8(a)(1) violations of the Act, and presumably separate objectionable conduct as well, are sufficient to warrant setting aside an election. In the face of unfair labor practices and meritorious objections, the Board may still decline to overturn the results an election where it concludes that the violations are *de minimis* such that it is virtually impossible to conclude that the misconduct could have affected the election results. In determining whether the misconduct could have affected the results of the election, the Board considers "the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors." *Clark Equipment Co*., 278 NLRB 498, 505 (1986). In *Bon Appetit Management Co.,* 334 NLRB 1042, 1044, the Board found the employer's interrogation and threats against an employee insufficient to justify a new election, mentioning among other factors to be considered, the number of employees affected by the unlawful conduct. *See also Detroit Medical Center*, 331NLRB 878(2000); *Coca-Cola Bottling Co*., 232 NLRB 717, 718 (1977).

This issue is not an easy one to resolve. In the view of the undersigned, all unfair labor practices and objectionable conduct are significant. However, the reality of the election result as reflected in the Tally of Ballots is that the Petitioner received 142 votes, while the number of votes cast against participating labor organization was 353. Thus, the Union lost the election by considerably more than a 2 to 1 margin. The number of valid votes counted plus challenged ballots was 502. Obviously, this is a large voting unit, and the margin of the Union's election defeat was considerable. While I have found that the Respondent violated Section 8(a)(1) of the Act and committed objectionable conduct during the critical period, it is still necessary to determine what affect this conduct had on the employees in the voting unit in order to conclude whether or not it was *de minimis*.

I have found that a security guard/agent confiscated the pro-union placards of employees Luz Meraz and Larry Newsome as they tried to enter the Respondent's facility with those signs, while during the same period the Respondent allowed grass roots employees to access the facility with anti-union signs and to store those signs on its property. Also, I have found that consultant/agent Larry Wong solicited grievances from three employees, including Luz Meraz; that consultant/agent Penne Familusi solicited grievances from employee Barry Anderson; that supervisor Francisco Corral solicited grievances from and interrogated employee Rick Dunfee regarding his union sympathies; and that lead employee/agent Francis Rhymes told employee Barry Anderson that his request to be transferred to the day shift had been denied because of his support on behalf of the Union. Further, I concluded that this conduct by the Respondent's supervisors and agents constituted violations of Section 8(a)(1) of the Act. Regarding the Union's objections, as set forth above, I found that certain of those objections had merit, as they were encompassed by those unfair labor practices I found the Respondent to have committed.

It is difficult to measure the impact on the voting unit of the security guard's confiscation of the pro-union signs of Meraz and Newsome as they attempted to enter the facility. This confiscation only occurred on one occasion, on September 26, the day the election petition was filed. Undoubtedly, there was some dissemination of the news among other employees, but there was no specific evidence as to how widely such news was disseminated. There is also the question of the favorable treatment the Respondent provided to the grass roots employees

who were able to access the property with their anti-union signs and to store those signs at the facility. However, in reality, I doubt this disparate treatment had any material effect on the voting unit.

As is clear from the record evidence, the Union held at least two major demonstrations late in the campaign. Those demonstrations were well attended by pro-union employees who carried numerous "picket signs," displaying the Union's various slogans and pro-union symbols. There is no evidence that because the grass roots employees were able to access the facility with their signs and store those signs that it adversely impacted the Union's ability to get its message to the various members of the voting unit. While obviously the Respondent's disparate treatment constituted a violation of the Act, no evidenced was offered to establish an adverse consequence upon the Union's efforts. The pro-union signs at the demonstrations were plentiful, and the employees' ability to retrieve those signs from their cars or from some other source did not seem limited by an inability to store the signs on company property.

Accordingly, I am of the opinion that the confiscation of two pro-union signs at the start of the critical period and the disparate treatment regarding the storage of signs had only a limited impact and affect on the employees in the voting unit. It would seem that the only detrimental impact on the employees in the voting unit was upon those two employees whose signs were actually confiscated by the security guard.

Regarding the remaining unfair labor practices committed by the Respondent during the critical period, I believe those unlawful incidents had an effect that was limited to those employees directly involved. Thus, grievances were solicited from employee Luz Meraz, and two other unnamed employees with her at the time; grievances were solicited from employee Barry Anderson; grievances were solicited from employee Rick Dunfee, who was also interrogated regarding his union sympathies; and employee Barry Anderson was told, several days after the election, that he had been denied a transfer to the day shift because of his support for the Union. Obviously, in the case of Anderson, the unlawful statement was made to him after the critical period ended, and, thus, could not have affected the election. The remaining unlawful incidents, including the two sign confiscations, directly involved seven employees. While I would assume some dissemination of the incidents, there was no evidence offered as to what extent the information was passed around the voting unit, and, therefore, I would assume that it was very limited.

In his post-hearing brief, counsel for the Union argues that any of the Respondent's violations of the Act was sufficient to overturn the results of the election. However, the case authority does not support such a proposition. *Clark Equipment Co., supra; Coca-Cola Bottling Co., supra; Bon Appetit Management Co., supra; Detroit Medical Center, supra.* Under the cited case authority, I must conclude that when the totality of the circumstances are considered, the Respondent's misconduct, so far as the election is concerned, is *de minimis*. The voting unit was quite large, with just over 500 employees voting. The violations are relatively few in number, when spread over the approximately two months of the critical period. While certainly all unfair labor practices are significant, the specific violations involved in this case are, for the most part, "garden variety" violations, such as solicitation of grievances and interrogation. Further, the dissemination appears quit limited, including the incident of the sign confiscation. As I indicated, the evidence shows that only the seven employees directly involved in the unlawful incidents were adversely impacted. The extent of dissemination on the unit appears to be minimal.

Further, the election results were rather dramatic, with the Union losing 142 to 353, over a 2 to 1 margin. This was far from a close election. The record reflects that for the most part the campaign was active and open, with significant numbers of employees, both pro and anti-union, publically participating. In my view, the unfair labor practices and objectionable conduct committed by the Employer were, under these circumstances, insufficient to warrant a new election. The employees having spoken at the ballot box in such a clear and unambiguous way, my conclusion is that the misconduct of the Respondent did not affect the results of the election and should be considered *de minimis*. Accordingly, I recommend that the Board certify the results of the election of November 19, 2008, wherein the Union did not receive a majority of the valid ballots cast.

Conclusions of Law

1. The Respondent, Blue Diamond Growers, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Longshore and Warehouse Union, Local 17, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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

(a) Confiscating the pro-union signs from its employees, while disparately allowing the anti-union signs of its employees to be stored on its property;

(b) Interrogating its employees about their union membership, activities and sympathies;

(c) Soliciting employee complaints and grievances and impliedly promising its employees increased benefits and improved terms and conditions of employment if they abandon their support for the Union; and

(d) Telling an employee that his request to be transferred to the day shift was denied because of his support for and his activities on behalf of the Union.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

6. It is recommended that the election results in Case 20-RC-18203 be certified.

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 polices of the Act.

However, in his post-hearing brief, counsel for the General Counsel asks the undersigned to order "special remedies," on the basis that the Respondent was previously found to have violated the Act, and because the alleged unfair labor practices in this case "have a long-term coercive impact" on the employees' right to engage in Section 7 activity. I disagree.

The only other complaint allegations against this Employer for which merit was found is reported as *California Almond Growers Exchange d/b/a Blue Diamond Growers*, NLRB Case No. 20-CA-32583, ALJ No. JD-(SF)-14-06, which issued on March 17, 2006. In that case, the administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies, by threatening to close the plant, and by threatening to take other adverse employment action if the Union won the election. Further, the judge found that the Respondent violated Section 8(a)(3) of the Act by discharging an employee and by disciplining another employee because of their union activities. No exceptions with the Board were filed to the judge's decision. It is assumed, as no evidence was offered to the contrary, that the Respondent satisfactorily complied with the remedy provisions of that decision.[25]

The General Counsel is suggesting that the Respondent is a repeat violator of the Act, wherein "special remedies" are required to ensure that the employees will have an uncoerced opportunity to engage in Section 7 activity. While certainly any unfair labor practices constitute serious violations of the Act, both the unlawful conduct engaged in by the Employer in the earlier cited case and that case before me involve the type of routine unfair labor practices that the Board's usual procedures are intended to remedy. Of course, the Board has broad authority to craft a remedy that will address the specific unfair labor practices committed. *See Federated Logistics & Operations,* 340 NLRB 255, 257 (2003), aff'd. 400 F.3d 920 (D.C. 2005). Still, the Board will not order a remedy unnecessarily broad or severe to remedy the particular violations of the Act committed. *See Yellow Enterprise Systems, Inc*., 342 NLRB 804, 811 (2004) (Board rejected the General Counsel's request to have a notice read despite finding that the employer unlawfully discharged employees, interrogated employees, surveilled employees, made statements of futility, solicited grievances and promised remedies, prohibited employees from talking about concerted activities, and made unilateral changes).

Contrary to the General Counsel's contention, I do not find that the Respondent "has demonstrated a proclivity to violate the Act when faced with a union organizing campaign." Again, all unfair labor practices are significant and need to be remedied. However, the Employer has been found to have violated the Act under the allegations of two complaints, not so repetitious that I would consider it to be a recidivist violator of the Act. The current unfair labor practices can be adequately remedied under the standard Board remedies. As noted above, I have concluded that the unfair labor practices committed by the Respondent in the case before me did not prevent the employees in the voting unit from fully exercising their Section 7 rights in the election campaign. Further, having found that the employees were able to exercise their rights, I have recommended that the Board certify the election results. Accordingly, I shall decline to order special remedies as requested by the General Counsel.

However, as is normally required in such cases, the Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

[25] In a subsequent case involving this Employer, *California Almond Growers Exchange, d/b/a Blue Diamond Growers*, 353 NLRB No. 6 (2008), the Board affirmed the decision of the administrative law judge and dismissed the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Blue Diamond Growers, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Confiscating the pro-union signs from its employees, while disparately allowing the anti-union signs of its employees to be stored on its property;

(b) Interrogating its employees about their union membership, activities, and sympathies;

(c) Soliciting employee complaints and grievances and impliedly promising its employees increased benefits and improved terms and conditions of employment if they abandon their support for the Union;

(d) Telling an employee that his request to be transferred to the day shift was denied because of his support for and his activities on behalf of the Union; and

(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 after service by the Region, post at its facility in Sacramento, California, copies of the attached notice marked "Appendix"[27] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, 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 September 26, 2008; and

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[26] If no exceptions are filled as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. Pursuant to Sec. 102.69(f), because the representation case has been consolidated with these unfair labor practice cases for purpose of hearing, the provisions of Sec. 102.46 also govern with respect to the filing of exceptions or an answering brief to the decision and recommendation in case 20-RC-18203.

[27] 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."

(b) 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 be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. September 8, 2009

Gregory Z. Meyerson
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
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferers with these rights. Specifically:

WE WILL NOT confiscate the signs of those of you who support the International Longshore and Warehouse Union, Local 17, AFL-CIO (the Union), while at the same time discriminatorily allowing those of you who oppose the Union to store your signs on our property.

WE WILL NOT question you about your union activities, sympathies, and membership.

WE WILL NOT solicit your complaints and grievances and impliedly promise you increased benefits and improved terms and conditions of employment if you abandon your support for the Union.

WE WILL NOT suggest to you that you are being denied a transfer to the day shift or some other employment benefit because of your support for and activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor laws.

Blue Diamond Growers

(Employer)

Dated _____ By _____

(Representative) (Title)

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

901 Market Street, Suite 400

San Francisco, California 94103-1735

Hours: 8:30 a.m. to 5 p.m.

415-356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 415-356-5139.

JD(SF)-31-09
Sacramento, CA

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

BLUE DIAMOND GROWERS

and **Cases 20-CA-34199**
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INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 17, AFL-CIO

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