

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

ARKEMA, INC.

and

Cases 16-CA-26371
16-CA-26392

UNITED STEELWORKERS OF AMERICA,
LOCAL 13-227

ARKEMA, INC.

Employer

And

GREG SCHRULL

Case 16-RD-1583

Petitioner

And

UNITED STEELWORKERS OF AMERICA,
LOCAL 13-227

Union

Dean Owens, Esq., for the General Counsel.

A. John Harper, II, Esq. & A. John Harper, III, Esq.
for the Respondent.

Bernard L. Middleton, Esq., for the Charging Party Union.

DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Houston, Texas, on February 9 and 10, 2009. This case began on July 17, 2008¹ when Greg Schrull, an employee of Arkema, Inc., filed the decertification petition in Case 16-RD-1583. Pursuant to a Stipulated Election Agreement, the NLRB's Regional Director conducted an election by secret ballot on August 11 and 12 among Arkema's employees in the following stipulated unit:

INCLUDED: All production and maintenance employees, including laboratory employees.

EXCLUDED: All office clerical employees, plant clerical employees, guards, foremen and all other supervisors as defined in the Labor Management Relations Act of 1947, as amended.

¹ All dates are in 2008 unless otherwise indicated.

The tally of ballots, which issued on August 12, showed that, of the 35 eligible voters, 18 employees voted against and 17 employees voted for the Union (United Steelworkers of America, Local 13-227). There were no challenged ballots. On August 19, the Union timely filed
 5 Objections to Conduct of the Election and to Conduct Affecting the Results of the Election.² Following an administrative investigation, the Board's Regional Director concluded that the objections raised substantial and material issues of fact and credibility which can best be resolved by a hearing and, on September 3, issued an Order Directing Hearing and Notice of
 10 Hearing. The hearing on objections was scheduled for September 16.

On August 19, concurrent with the filing of objections, the Union filed the initial unfair labor practice charge in Case No. 16-CA- 26371.³ The Union filed the charge in Case No. 16-CA- 26392 on August 29.⁴ On September 5, the Region suspended processing of the Petition based on the filing of the unfair labor practice charges and postponed the hearing on objections.
 15 On December 23, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued consolidating the representation case and unfair labor practice cases for hearing on February 9, 2009. An Amended Consolidated Complaint subsequently issued on January 14, 2009. The amended complaint alleges that Arkema, Inc., the Respondent, violated Section 8(a)(1), (3) and (5) of the Act before and after the election.
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Specifically, the amended complaint alleges that the Respondent, by e-mail on July 23, requested employees to disclose to the Respondent the union activities of other employees and threatened employees with unspecified reprisals for engaging in protected solicitation; and on
 25 August 12, also by e-mail, informed employees that they no longer had a collective bargaining agreement. This conduct is alleged to violate Section 8(a)(1) of the Act. The amended complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing written discipline to Mark Saltibus on July 22 and by orally reprimanding Fred Shepherd on August 19 and issuing Shepherd written discipline on September 5. Finally, the amended complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from
 30 the Union on August 12 based on the results of the disputed election and by dealing directly with unit employees and making unilateral changes in their wages, hours, and other terms and conditions of employment after withdrawing recognition.⁵

The Respondent filed its Answer to the amended complaint on January 16. While
 35 denying that it committed any of the alleged unfair labor practices, the Respondent admits that it withdrew recognition from the Union on August 12 and further admits conferring with unit employees, after the election, regarding their terms and conditions of employment and making some of the unilateral changes alleged in the complaint. The Respondent asserts that its conduct in this regard was lawful because the Union had lost majority support, as shown by the
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² The Union's Objections are set forth in Appendix A. By letter dated December 11, the Board's Regional Director approved the Union's withdrawal of Objections 14 through 17 and that portion of Objection 18 alleging Board Agent misconduct. The Union withdrew Objection 11 at the hearing and, in its post-hearing brief, withdrew Objections 13 and 21.
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³ The Union amended this charge on October 23.

⁴ The Union amended this charge on September 9 and on September 11.

⁵ In his post-hearing brief, Counsel for the General Counsel for the first time alleged that the Respondent also violated Section 8(a)(1) of the Act by interrogating employee David Pope on August 18. While not specifically moving to amend the complaint to add this new allegation,
 50 General Counsel asked that I "conform the pleadings with the evidence in this regard." I will address this matter later in my decision.

5 results of the election. With respect to the other alleged unfair labor practices, the Respondent admits communicating with its employees via the e-mails identified in the complaint but asserts that these communications were protected by Section 8(c) of the Act. The Respondent admits that it issued a “written reminder” to Saltibus and a “written confirmation of the results of an investigation” to Shepherd but denies that this was discipline and further denies that it took this or any other action against these two employees based on union or other protected concerted activity. The Respondent has also raised several affirmative defenses in its answer.

10 As framed by the pleadings, a key to resolving many of the issues raised in this proceeding is determining whether the election conducted on August 11 and 12 was valid. If the Respondent committed unfair labor practices before the election that tainted the results, or engaged in objectionable conduct sufficient to warrant setting aside the results, then the withdrawal of recognition and subsequent actions would violate Section 8(a)(1) and (5). If the election is valid, the tally of ballots would establish that the Union had indeed lost the support of a majority of the employees in the Unit. The withdrawal of recognition and related conduct would not be unlawful. The Section 8(a)(1) and (3) allegations do not turn on whether the Union had majority support.

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

Findings of Fact

25 I. Jurisdiction

30 The Respondent, a Pennsylvania corporation, manufactures chemical products at its facility in Houston, Texas, where it annually derives gross revenues in excess of \$500,000 from the conduct of its business and annually sells and ships from its Houston facility goods valued in excess of \$50,000 directly to points located outside the State of Texas. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

35 II. Alleged Unfair Labor Practices

40 By the summer of 2008, the Respondent’s production and maintenance employees at the Houston plant had been represented by a union since 1961. The Charging Party Union was the current collective bargaining representative, following a series of union mergers and affiliations over the years. The most recent collective bargaining agreement was effective through October 10. There were 35 unit employees at the Houston facility. Fred Shepherd, a 33-year employee, has been a union member and officer throughout his employment. At the time of the election, he was the General President, the highest-ranking union official at the plant. Mark Saltibus, a 17-year employee, was a member of the Union’s bargaining committee.

45 The Respondent also operates a non-Union facility in Beaumont, Texas. Both the Houston and Beaumont facilities were the responsibility of Plant Manager Wendal Turley, a 28-year employee of the company. Terry Freeman, the Houston plant’s site manager, was responsible for the day-to-day operations of that facility. Freeman reported directly to Turley. Wendy Dupuy was the Regional Human Resources Manager, responsible for both plants and also reporting directly to Turley. Other supervisors who played a role in the events involved in this proceeding are Dennis Van Wye, who was the Operations Superintendent in charge of 22

plant operators, including Saltibus, and Gerald Barnhart, the Maintenance Superintendent in charge of the Instrument and Electrical Department where Shepherd worked.

5 The evidence in the record establishes that the decertification drive began sometime in the Spring and continued up to the election. Employees on both sides of the issue campaigned vigorously for their respective position. The first alleged unfair labor practice arose in the course of this campaign and involved Saltibus' efforts to persuade employee Susan Russell to support the Union.

10 A. The July 22 "Written Reminder" issued to Saltibus

As noted above, Saltibus worked for the Respondent for 17 years. In the Summer 2008, he held the position of utility operator, meaning he filled in for other operators who were on vacation or out sick. He was also a Step-Up Chief, meaning he filled in for the Chief Operator when absent.⁶ According to Saltibus, he acted as the Chief Operator about 11 times in 2008. Saltibus admitted that, after learning of the decertification petition, he talked to a number of employees, both union members and non-members, to enlist their support for the Union. One of the employees he spoke to was Susan Russell, a relatively new employee.

20 Saltibus testified that he spoke to Russell in the early morning of July 21, around relief time, when he encountered her near the change house where employees change into protective gear. No one else was present. According to Saltibus, he asked Russell if she knew about the decertification petition. Saltibus then told Russell a little bit about the history of labor relations at the plant and asked for her support. Saltibus admitted telling Russell that, if the Union goes away, "there's no support...the relationships going to change." At the hearing, Saltibus explained what he meant by that, testifying that, if she needed help with a physical aspect of the job, as she had in the past, he would not be able to help her, that he would not do her job for her, or "carry her load" in the plant.⁷ He testified that he did not give Russell this explanation at the time of the conversation, only telling her that the relationship would change and the Union would not be there to support her if it was decertified. Saltibus denied referring to Russell's gender during the conversation. He also denied raising his voice, using profanity or attempting to block her path. He described Russell's demeanor as "stoic" and recalled that she didn't say much but just listened. According to Saltibus, the conversation lasted about a minute.

35 Russell's version of this conversation differs from that of Saltibus. According to Russell, who testified for the Respondent, Saltibus asked her if she knew about the decertification petition. Russell did not know what he was talking about at the time, so Saltibus explained it was the paper that Petitioner Schrull was circulating to get the Union out. When Russell did not respond, Saltibus told her there was a list going around and, if her name was on it, she, being a female, would not get any assistance from the union men in the plant when she needed it. Russell admitted that she at times did require assistance from the male plant operators to do her job, and that, if none were around, she would even ask guys from the maintenance department to help her. According to Russell, she stopped listening to Saltibus at that point because she feared for her safety, imagining herself in flames without anyone helping her. She recalled nothing more from the conversation. Russell reported this conversation to Mark Wells, another operator who was training her, and he suggested she tell Chief Operator Randy Joy.⁸ It

⁶ The Chief Operator is a lead position in the bargaining unit. No one contends this is a statutory supervisory position.

⁷ There is no dispute that the job of plant operator can be physically demanding at times.

⁸ There is uncontradicted evidence in the record that Joy was opposed to the Union.

was Joy who called Site Manager Freeman to report the conversation. Russell then told Freeman what Saltibus said to her. She later signed a statement prepared by Freeman to document the incident. This statement was generally consistent with her testimony.⁹

5 On July 22, in the evening, Saltibus was called to the office over the radio. When he got there, Freeman, Dupuy and his supervisor, Van Wye, were there. He asked them what this was about and Freeman said it had to do with an employee complaint. Saltibus then asked for representation and Shepherd was called to the office. Freeman then asked if Saltibus had talked to any employees. When Saltibus asked who this pertained to, Freeman identified
10 Russell. According to Saltibus, when Freeman asked what happened, he described the conversation as he did at the hearing. Freeman then asked what Saltibus meant about his and Russell's relationship changing and he replied, as he did at the hearing, by explaining how Russell needed help to do her job and that he would no longer do her job for her, that she would have to carry her own weight. Freeman then asked what would happen if there was a fire or
15 some other danger in the plant and Saltibus said that he would help her because that would be his natural instinct. Freeman then reminded Saltibus that, in his position, he would sometimes act as the Chief Operator, and asked if he would not help Russell at those times. According to Saltibus, he replied that this was not what he meant, that he would do his job when acting as chief, including helping Russell as needed.

20 Saltibus testified further that, in the meeting, after discussing the incident with Russell, Freeman said he appreciated Saltibus' honesty but said that the Respondent had problems with him in the past harassing employees about the Union. Freeman then gave Saltibus an envelope containing a "Written Reminder" for "Violation of Company Harassment Policy." This document,
25 which is dated July 22, purports to confirm the discussion that had just taken place and starts by stating that the Respondent had "completed its investigation into your alleged inappropriate behavior towards your coworkers." The alleged violations were "making intimidating and threatening remarks toward a coworker and creating an offensive working environment." The letter characterizes Saltibus' conduct toward Russell as unprofessional and accuses him of
30 "threatening her job if she continued to pursue her non-union status." There is no mention of Saltibus' statements suggesting that he would no longer help Russell do her job if she supported the decertification petition. In addition to the Russell incident, the letter refers to "a separate occasion" when Saltibus allegedly "made threatening and inappropriate remarks to a laboratory employee concerning her wishes to not join the Union." No details regarding this
35 incident are contained in the letter. The letter concludes by stating that these incidents are "wholly unacceptable and will not be tolerated." Saltibus is then advised to "reflect upon these unfortunate incidents and determine your ability to comply with our expectations regarding employee conduct; however, please understand failure to comply with any of these requirements may result in the termination of your employment."

40 Saltibus testified that, after reading the letter, he asked Freeman about the other incident referred to in the "Written Reminder." Freeman said he didn't want to discuss it. Saltibus asked Freeman to bring the lab employee in to confront him about the allegation because he didn't know what it was about, and again Freeman said he did not want to discuss it. Saltibus told
45 Freeman that, because the Respondent no longer included information about the Union in new employee orientation, Saltibus had a right as a union committeeman to approach them and provide this information. At the end of the meeting, Saltibus turned to Dupuy, the HR Manager,

50 ⁹ In the statement, Russell reported that Saltibus also said if the Union wasn't there, she might not have a job because she wouldn't have their protection and then, "as the conversation progressed," he made the statement about not helping her on the job if she needed it.

and asked her how she defined “harassment”. According to Saltibus, Dupuy said that harassment is in the eye of the beholder.

5 Saltibus testified at the hearing that the only lab employee he had talked to about the Union was Sue Plattner and that the conversation occurred in October 2007, nine months earlier. According to Saltibus, he approached Plattner because she had just been brought into the unit after having worked for about a year as a contractor, as a result of negotiations between the parties that created a new position and wage rate for her. While in the lab performing part of his job, Saltibus mentioned to Plattner that the Union had negotiated the deal that got her the job and he invited her to be part of the Union. Plattner told Saltibus that she had been in a union before and wanted no part of the Union. Saltibus testified that he asked her why and, after 10 further discussion, the conversation ended.¹⁰ According to Saltibus, no one had mentioned this conversation, nor questioned him about it, before the July 22 meeting.

15 Shepherd also testified about the July 22 meeting that he attended as Saltibus’ union representative. He corroborated Saltibus in many regards. For example, he recalled Saltibus admitting that he told Russell that their relationship would change if there was no Union, that he would not be able to help her out. He corroborated the discussion in which Saltibus explained his statements to Freeman as being limited to physically helping her do the job, and not 20 meaning that he would not help her in a safety situation or when acting as chief operator. He denied that Saltibus admitted that he would not help her because she was a woman, or that there was any reference to Russell’s gender in the conversation. He recalled Freeman thanking Saltibus for his honesty before handing him the envelope containing the “Written Reminder”, and Freeman wanting to end the meeting quickly after that, not wanting to discuss the other 25 incident referred to in the letter. He also recalled Dupuy’s statement that harassment was in the eye of the beholder. Shepherd testified that, in his role as General President, he has attended hundreds of investigatory interviews with employees and that this meeting was different from the usual practice. According to Shepherd, discipline normally would issue a couple days after such an investigatory meeting.

30 The General Counsel questioned Freeman, under Rule 611(c) of the Federal Rules of Evidence, about Saltibus’ alleged discipline. Respondent chose not to re-call him as part of its case, having questioned him during “cross-examination” of the 611(c) testimony. Freeman acknowledged that he first learned of Saltibus’ conversation with Russell from Joy on July 21. He admitted that he spoke to Russell almost immediately upon receiving this report.¹¹ Freeman 35 also acknowledged drafting the written reminder after speaking to Russell, before he interviewed Saltibus. Freeman did not testify in detail regarding what transpired at the meeting with Saltibus on July 22 but he did corroborate Saltibus and Shepherd in many respects. The most significant difference in his testimony from that of Saltibus and Shepherd was his claim that Saltibus admitted that he referred to Russell’s gender when he told her he would not help her if she supported the decertification petition. Both Saltibus and Shepherd denied that Saltibus ever referred to Russell’s gender when discussing the conversation. The Respondent’s claim in its brief that Saltibus admitted making a reference to Russell needing help because she is a woman is not supported by the transcript of his testimony. It was the Respondent’s counsel, on 45 cross-examination, who repeatedly tried to put these words in Saltibus’ mouth. Saltibus insisted throughout that he only referred to her needing help to do the job without any mention of the fact she is a woman.

¹⁰ Plattner did not testify in this proceeding.

50 ¹¹ As pointed out by the General Counsel in his brief, the testimony of Freeman, Supervisor Van Wye and Russell regarding where and when Russell met with Freeman is not consistent.

Dupuy, who was at the July 22 meeting, was not asked any questions about it. Van Wye, who was Saltibus' and Russell's supervisor, did testify about the incident but his testimony was not consistent with that of Freeman. Van Wye recalled Russell reporting that Saltibus asked her if she was going to vote for or against the Union. According to Van Wye, Russell said that when she told Saltibus that she was voting against the Union, Saltibus replied that he would not help her anymore, that she would be on her own. Van Wye made no mention of gender in reporting the substance of Russell's complaint. Van Wye testified further that Russell reported that she felt threatened because she believed that Saltibus would not help her in the event of a fire or some other safety issue in the plant. The Respondent also questioned Wendal Turley about the incident but Turley had no direct involvement in the investigation of the incident and only relied upon Freeman's report in authorizing Freeman to issue the written reminder to Saltibus.

Shepherd and Freeman both testified about an earlier incident in which Shepherd complained to Freeman about perceived harassment of employees by pro-decertification employees. Shepherd testified that employee Madonna Trevino approached him in April 2008, shortly after rumors of a decertification effort began, about employees Vance Thomas and Chuck Rayburn repeatedly asking her to sign a decertification petition, even after she told them she was not interested. According to Shepherd, Trevino reported that Thomas and Rayburn promised her better benefits without a union. Trevino told Shepherd that she felt she was being harassed and asked if he could do something to make it stop. Shepherd said he told Freeman about Trevino's concerns shortly after speaking to her and that Freeman said he would look into it. Trevino also testified at the hearing and confirmed that she complained to Shepherd in April about Thomas and Rayburn soliciting her at work to sign the decertification petition and her request that he do something about it. According to Trevino, her supervisor, James Wheeland, did not talk to her about this complaint until about a week before the election, after the July 23 memo (to be discussed later in this decision) came out.

Freeman acknowledged receiving a complaint from Shepherd about Trevino feeling harassed by employees advocating the decertification petition. At the hearing, Freeman claimed he could not recall when this occurred but it was closer to the time the petition was filed and not in April or May, as Shepherd and Trevino claimed. This testimony is inconsistent with an affidavit Freeman provided during the investigation of the unfair labor practice charges. In the affidavit, he stated that Shepherd first came to him in April with the issue of decertification supporters promising employees raises and additional benefits and that Shepherd raised Trevino's complaint a few weeks later. Freeman testified that, upon receipt of this complaint, he instructed Wheeland to talk to Trevino and find out if there was anything to it. After Wheeland reported back to him, Freeman talked to Thomas and Rayburn and told them he had received a report that they were aggravating another employee. He took no further action. In contrast to the incident with Saltibus, no statements were taken from Trevino and no record of the meeting with Thomas and Rayburn was made. Freeman did acknowledge that, unlike his response to Russell's complaint, he did not take immediate action in response to the report he received from Shepherd. Freeman attempted to explain the apparent difference in treatment of Saltibus and the pro-decertification employees by testifying that Trevino never reported the issue through her supervisor and never indicated she wanted the Respondent to take any action.¹² In addition, in Freeman's view, Saltibus had corroborated Russell's version of the conversation. Freeman also cited Saltibus role as a step-up chief, with occasional authority over employees like Russell as

¹² Russell actually reported her concerns to Joy, who is not a supervisor. It was Joy who chose to bring the complaint to the supervisor and encouraged Russell to meet with Freeman. Trevino had asked Shepherd to keep her complaint within the unit.

justifying a heightened response to Russell’s complaint.

In October 2007, the Respondent suspended Mark Wells for four days, after he was accused of making negative remarks to another employee based on the employee’s race. This was determined to be a violation of the same Anti-Harassment Policy cited in Saltibus’ written reminder. Although the Respondent argues that this shows consistent enforcement of the policy, General Counsel points out that no discipline issued until after the Respondent met with Wells and other witnesses, and after a meeting of management personnel to review the case. Wells was issued the disciplinary letter at a second meeting two days later.

Having considered the above evidence and the record as a whole, I conclude that Respondent’s issuance of a written reminder to Saltibus on July 22 violated Section 8(a)(1) and (3) of the Act. Initially, I credit Saltibus’ version of his conversation with Russell and find that what he told her on July 21, in the course of soliciting her support for the Union in the upcoming election, was that, if there were no union, there would be no support and that their relationship would change. Russell interpreted this as a threat that Saltibus and the union men would no longer help (“support”) her when she needed it, even in the event of a fire or safety issue, and that she would be on her own.¹³ The gender issue was a mere gloss put on the conversation so that the Respondent could fit the incident under its anti-harassment policy and justify discipline. I credit Saltibus and Shepherd and find that Saltibus never said he would refuse to help her because she was a woman, either in the conversation on July 21 or during the meeting on July 22.¹⁴ In fact, even in the written reminder, there is no mention of any harassment based on Russell’s gender. Instead, the letter claims that Saltibus threatened her job if she continued to pursue non-union status, a claim not supported by any of the testimony. Even the reference to the earlier incident involving the lab employee only mentions union status as the basis of Saltibus’ alleged inappropriate remarks and conduct toward other employees. The Respondent’s Anti-Harassment Policy, as laudable as it may be, simply does not cover harassment based on an employee’s union support or non support.¹⁵

I find further that the Written Reminder is a form of discipline. There is no dispute that the reminder becomes part of the employee’s record and the last line clearly warns of further discipline if the employee continues to engage in the conduct described in the reminder. Even the Respondent seems to have abandoned any claim that the July 22 letter was not discipline when, in its brief, it concedes this point for the purpose of argument. The July 22 “Written Reminder”, on its face, is clearly based on Saltibus’ union activity and the Respondent’s belief that he engaged in misconduct in the course of that activity. Where an employee is disciplined for conduct that is part of the res gestae of protected activity, the employer’s motivation is not at issue. *Tri-County Manufacturing and Assembly, Inc.*, 335 NLRB 210, 218-219 (2001) and cases cited therein. In these cases, discipline is privileged only when an employee’s conduct is so flagrant or egregious as to warrant removal of the Act’s protection. *Id.* See also *Ogihara America Corporation*, 343 NLRB 809, 813 (2004); *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), *enfd.* 711 F.2d 1059 (6th Cir. 1983). Even an honest belief that an employee has engaged in misconduct in the course of protected activity is no defense if the misconduct did not in fact occur. *NLRB v. Burnup & Sims*,

¹³ Saltibus clearly explained during the “investigatory interview” on July 22 that this was not what he meant.

¹⁴ I thus do not credit Freeman or Van Wye to the extent their testimony regarding the July 22 meeting differs from that of Saltibus and Shepherd.

¹⁵ This incident is thus qualitatively different than the racial remark made by Wells which clearly was covered by the policy.

379 US 21 (1964). Accord: *Keco Industries*, 306 NLRB 15, 17 (1992).

5 I find that the Respondent 's asserted belief that Saltibus engaged in misconduct in the course of his union activities was not an honest one advanced in good faith. It is clear from the circumstances that the Respondent rushed to judgment by issuing the discipline almost immediately after receiving the report from Randy Joy about Russell's conversation with Saltibus. The only investigation conducted by the Respondent was to take a statement from Russell. Saltibus was not given an opportunity to respond to the allegations against him until after the discipline was drafted. The fact that the Respondent included in the disciplinary letter a 10 nine-months old allegation that had never been investigated, and then refused to discuss it when Saltibus asked for details, shows the Respondent's pre-determined intent to discipline Saltibus.

15 Moreover, the Respondent's conduct toward Saltibus is markedly different from its reaction to Shepherd's complaint that employee Trevino felt harassed by employees' persistent solicitations to sign the decertification petition. I discredit Freeman's belated attempt to change the timeline of this incident by claiming at the hearing that it was closer to the date the petition was filed than the April timeframe he reported in his pre-trial affidavit. Shepherd and Trevino were consistent in placing this incident in April, at the beginning of the decertification campaign. 20 Even assuming it occurred closer to the July 17 date the petition was filed, Freeman admittedly did not act upon it for several weeks, until after the memo issued soliciting employees to report any perceived harassment. I credit Trevino that Wheeland did not talk to her about it until a week before the election, long after the incident. Similarly, rather than obtain written statements from employees or issue a supposedly harmless written reminder to Thomas and Rayburn, 25 Freeman chose to close the "investigation" without taking any action. I find that the minimal action Freeman did take regarding the Trevino incident was merely an attempt to mask any claim of disparate treatment of pro- and anti-union employees.

30 In conclusion, the Respondent's July 22 written reminder issued to Mark Saltibus violated the Act as alleged in the amended consolidated complaint.

B. Turley's July 23 Memo to Employees

35 There is no dispute that the day after Saltibus was disciplined, the Respondent's Plant Manager Wendal Turley communicated with unit employees by e-mail. Attached to the e-mail were two documents, the NLRB's pamphlet entitled "Your Government Conducts an Election" and a letter from Turley. Employees were asked to review the attachments. In his letter, Turley informs the employees about the upcoming election and advises them that the NLRB will be sending official notices which will be posted upon receipt. He encourages employees to read the 40 notices when they are posted and to become aware of their rights. The letter then attempted to inform employees' of their rights as follows:

Your rights include:

- 45 • NO HARASSMENT-You have the right to not be harassed, intimidated or threatened in any way-physically or verbally-by anyone, including the union, for refusing to support a strike or certification.
- NO THREAT OF JOB LOSS-The union cannot threaten that you will lose your position by not supporting them in a vote.
- 50 • NO PUNISHMENT-The union cannot seek suspension, discharge or other punishment of an employee for not being a member of the union, even if the employee has paid an initiation fee and on going dues.

- NO REFUSAL TO GRIEVE-The union cannot refuse to process a grievance because an employee has criticized union officials or because an employee is not a member of the union.

5 Any activity of this type will not be tolerated at the plant and should not be tolerated outside of the plant and in your homes.

10 If you feel you have been subjected to harassment, intimidation or threats, you should immediately contact our HR Manager – Wendy Dupuy or the local NLRB office here in Houston at 713-209-4888.

15 As the Plant Manager, I have worked hard to ensure employees here are treated fairly. Hopefully, I have earned your respect and trust as someone who will listen and act on your concerns. I assure you this will not change as all of this unfolds. I personally do not feel you need a union at the Houston plant. Ultimately the outcome of this election will be your decision. Over the next few weeks, you should utilize the time to decide what is best for you as an individual.

20 Freeman testified that this e-mail and Turley’s letter had been in the works before the incident with Saltibus and Russell and the timing of its issuance was coincidental.¹⁶ According to Freeman, the purpose of the letter was to state the Respondent’s position on the need for a union at the Houston plant and to remind employees they had a right not to be harassed by anyone pro or con.¹⁷ Turley testified that his letter had three purposes: (1) to notify employees that there was going to be an election; (2) in light of the Saltibus incident, make sure everyone
25 knew what their rights were; and (3) let employees know that the Respondent did not believe they needed a union.

30 The General Counsel alleges that Turley’s e-mail violated the Act in two ways, by soliciting employees to report the protected activities of other employees, and by implicitly threatening employees with unspecified reprisals for engaging in protected activity. While the Board has historically prohibited an employer from making statements that invite or encourage employees to report on protected conduct of their co-workers, the analytical framework for determining when such a violation has occurred has recently changed, with substantial
35 disagreement among Board members. See *River’s Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007). In the past, such statements have been found unlawful where the employer’s statement could reasonably be understood as soliciting reports of conduct that employees might find subjectively offensive yet are protected by the Act. See *Ryder Transportation Services*, 341 NLRB 761, 762 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005); *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988); *Eastern Maine Medical Center*, 277 NLRB 1374 (1985).
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In *River’s Bend*, *supra*, a majority of the Board applied to this type of allegation a three-part test that the Board had adopted, in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether an employer’s maintenance of a work rule is unlawful. In

45 ¹⁶ At the hearing, Freeman attempted to backtrack from what he previously stated in a pre-trial affidavit. When asked to confirm that the memo was unrelated to the Saltibus incident, he claimed he could not speak to the intent of the memo because he had not drafted it. Yet he admitted that he had participated in its preparation with Turley and Dupuy for “some time” before the Saltibus’ incident. This inconsistency in his testimony is further reason why I found
50 him to be an unreliable witness.

¹⁷ If this was the purpose, it is curious that the letter only mentions harassment by the union.

Lutheran Heritage Village-Livonia, one of the rules at issue prohibited “harassment.” Under this three-part test, if a rule does not *explicitly* restrict protected activities, then a finding of a violation is “dependent upon one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.*, at 647. In *River’s Bend*, supra, the majority found that an employer’s letter to employees, asking them to report any harassment or threats for choosing not to go on strike so that the employer could ensure a safe working environment, was lawful. The majority relied, in part, on the fact that the letter issued after the employer had received reports that an employee had been threatened.

This case is distinguishable from *Lutheran Heritage Village-Livonia*, supra, because that case involved the mere maintenance of a rule where there was no evidence that the employer had applied it to protected activity. This case is also distinguishable from *River’s Bend*, supra, because the evidence establishes that Turley did not issue the July 23 memo to employees in response to any reported threats or harassment. In this regard, I discredit Turley’s testimony that the incident involving Saltibus was one of the reasons he issued the memo. Freeman contradicted that testimony by acknowledging that the Respondent began drafting this memo some time before the Saltibus incident came to light and the timing was “coincidental.” Moreover, I have already found above that the Respondent’s discipline of Saltibus was unlawful, thus his activity which purportedly generated this memo was protected. The Respondent’s treatment of Saltibus, when contrasted with its response to the Trevino complaint of harassment by pro-decertification employees, shows that the Respondent would not apply this rule in an even-handed fashion. This is further evidenced by the memo itself which only addresses threats and harassment by union adherents, suggesting that those who support the decertification petition would not be subjected to the same rules. Thus, I find that the memo violated Section 8(a)(1) of the Act because it satisfies at least the second prong of the *Lutheran Heritage Village-Livonia* test, as applied in *River’s Bend*, i.e. it was promulgated in response to union activity. I find further that Turley’s e-mail and attached memo to employees, because of its one-sided nature, would have the reasonable tendency to encourage employees to identify union supporters based on an employee’s subjective view of harassment and to discourage employees from engaging in protected union activities out of fear another employee would consider it harassment. Accordingly, I conclude that the memo violated the Act as alleged in the complaint.

The General Counsel also alleges that Turley, by issuing this e-mail and memo, made an implied threat of unspecified reprisals for engaging in protected activities. I agree. In soliciting employee reports of “harassment” by union supporters, Turley told the employees that such conduct “would not be tolerated.” This clearly implies that the Respondent will discipline any employees reported to have subjectively harassed another employee on behalf of the Union. As noted above, solicitations such as these tend to discourage employees from engaging in conduct that is protected by the Act. Accordingly, I find that the July 23 memo was also unlawful under this theory. *Tawas Industries, Inc.*, 336 NLRB 318, 322 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), *enfd.* 134 F.3d 1307 (7th Cir. 1998).

C. The Election and the Respondent’s Response

As shown by the tally of ballots, the Union lost the August 11-12 election by one vote. The polls closed at 5:30 pm on August 12. At 6:54 pm the same day, the Respondent notified its employees, by e-mail from Turley, that “the collective bargaining agreement no longer exists at this facility.” Turley went on to advise the employees that all existing policies and practices that were in effect would continue to be followed for the time being, but that employees could expect changes over the next few months, including an announcement about wage increases in mid-

September. Turley further advised the employees that the Respondent would:

5 Look for opportunities to improve and enhance some of our current policies and practices that we were unable to do when the union existed. When changes are being considered you will have an opportunity to voice your opinions and provide input into the changes. Ideas you already have about this are welcome.

10 There is no dispute that, since the polls closed on August 12, the Respondent has acted as if there were no union representing its employees. Human Resources Manager Dupuy admitted communicating directly with employees regarding changes in the employees' time-off and sickness and accident policies "because we didn't think they [the Union] existed anymore." Later on in her testimony, Dupuy succinctly stated the Respondent's position as to why it ceased union dues deductions when she said, "because we were under the impression we won the election."

15 The parties stipulated at the hearing to the following facts:

- 20 • On or about September 5, the Respondent removed the plant bulletin boards that had been utilized by the Union.
- On or about September 4, the Respondent transmitted dues to the Union for the last time.
- On or about September 1, the Respondent implemented a new Sickness and Accident Policy without affording the Union an opportunity to bargain with respect to the policy.
- 25 • On or about October 1, the Respondent implemented a new Time Off Policy without affording the Union an opportunity to bargain with respect to the new policy.
- On or about October 20, the Respondent granted wage increases to bargaining unit employees.¹⁸
- 30 • The Respondent did not respond to union grievances, information requests, or requests to bargain on the Sickness and Accident Policy and the Time Off Policy, that were submitted by the Union on and after August 21.

35 The evidence in the record also establishes that the Respondent, at least initially, refused to arbitrate two grievances that were pending on August 12. One involved a dispute over the grievance procedure and the other involved the discharge of employee Richard Fore. Shepherd testified that he asked Freeman if the Respondent was going to arbitrate these grievances and Freeman said no. This testimony was corroborated by Respondent's Human Resources Manager Dupuy. Although Respondent did communicate with the Union in January 2009 to schedule an arbitration over the Fore discharge, this was after the complaint had issued in this case. Testimony and correspondence in the record also shows that the Respondent has refused to process grievances that had been filed before the election, including one involving Saltibus July 22 written reminder.

45 Under current Board law, a union that loses a decertification election remains the established collective bargaining representative of unit employees until certification of the results of the election and any unilateral changes made while challenges and objections are

50 ¹⁸ Trevino testified, without contradiction, that employees received a 4½ % increase, which was more than had been provided under the collective bargaining agreement.

pending would violate Section 8(a)(5) of the Act. The rule in initial certification cases, that an employer that makes unilateral changes during the pendency of objections proceeds at its peril, announced in *Mike O'Connor Chevrolet-Buick-GMC, Inc.*, 209 NLRB 701 (1974), has not been extended to decertification elections. *W.A. Krueger Co.*, 299 NLRB 914
 5 (1990). Accord: *Kentucky River Medical Center*, 340 NLRB 536, 544 (2003); *VOCA Corp.*, 329 NLRB 591, 592-593 (1999); *G. H. Bass Caribbean, Inc.*, 306 NLRB 823 (1992). The Board explained the reason for the difference. To allow an employer to make unilateral changes before the results of a decertification election are certified would destroy the Union's ability to represent the employees should its objections be found to have merit and
 10 the Union prevail in re-run election. *W.A. Krueger Co.*, supra, at 915

The Respondent relies on the Board's decision in *Levitz Furniture Company of the Pacific*, 333 NLRB 717 (2001), which held that an employer may withdraw recognition where it has objective proof that the union has in fact lost the support of a majority of unit
 15 employees. *Id.* at 725-726. *Levitz* and its progeny would be inapposite to the facts here because, unlike those cases, the Board has already conducted a secret ballot election and the results of that election have been contested by the unfair labor practice allegations and objections filed by the Union. If those allegations have merit, the "actual loss of majority" demonstrated by the election would be tainted and could not be relied upon as the basis for
 20 withdrawing recognition. See *Underground Service Alert*, 315 NLRB 958 (1994), a pre-*Levitz* case where the Board found unlawful an employer's withdrawal of recognition based on an employee petition submitted while the parties were awaiting resolution of a decertification election hung up on challenges.

I have already found that the Respondent committed two unfair labor practices before the election, i.e. the discipline of Saltibus on July 22 and the e-mail and memo from Turley to the employees on July 23. Both of these unfair labor practices are included in the Union's election objections. Because they occurred during the critical period before the
 25 election, they are sufficient to overturn the results of that election. As the Board held in *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962):
 30

Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election. This is so because the test of conduct which may interfere with the laboratory conditions for an election is
 35 considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1).

The memo to employees, soliciting them to report on the protected activities of coworkers and impliedly threatening unspecified reprisals for engaging in protected activity, was
 40 circulated to the entire bargaining unit. In addition, although the violation with respect to Saltibus directly affected only one employee, there is evidence that other employees were aware of Saltibus discipline before the election. Considering the closeness of the election, I find that these objections/unfair labor practices had a reasonable tendency to interfere with the employees' free choice and would warrant setting aside the election and ordering a new vote.
 45 *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995).

Based on the above, it is clear that the Respondent's withdrawal of recognition from the Union based on the results of the August 12 election was premature. The Respondent's
 50 subsequent refusal to recognize the Union's status as the continuing collective bargaining representative of unit employees, and the unilateral changes it implemented after August 12, are therefore unlawful. Moreover, under *W.A. Krueger Co.*, supra, the unilateral changes are unlawful even if I had found there were no unfair labor practices or objections affecting the

results of the election because all occurred before the results of the election were certified.

D. The Alleged Direct Dealing

5 Having found that the Union was still the exclusive collective bargaining representative
of unit employees pending certification of the results of the August 12 election, it naturally
follows that any attempt by the Respondent to bypass the Union and deal directly with unit
employees would violate Section 8(a)(5) of the Act. *Medo Photo Supply Corp. v. NLRB*, 321
10 U.S. 678, 684 (1944); *E. I. du Pont and Co.*, 311 NLRB 893 (1993). See also *Permanente
Medical Group*, 332 NLRB 1143, 1144 (2000). There is no dispute that, on August 20 and
September 4, Dupuy e-mailed unit employees soliciting volunteers to participate on committees
to “review, alter if necessary and implement” new Sickness and Accident and Time Off policies,
respectively, for the Houston plant. Dupuy, Trevino and employee Chuck Rayburn testified
15 regarding what transpired when these committees met. While Dupuy and Rayburn testified to
the effect that that no “negotiations” took place, Trevino’s testimony shows that employees
made suggestions, some of which were accepted, before the Sickness and Accident Policy was
implemented.¹⁹ I find, as alleged in the complaint, that Dupuy’s communication with employees
and her meetings with the two committees aimed at developing new policies which clearly
20 impacted employees’ wages, hours and terms and conditions of employment, violated Section
8(a)(5) of the Act.

E. The Respondent’s Discipline of Shepherd

25 As previously noted, Shepherd is a long-term employee of the Respondent who has
been active in the Union for many years. He was the highest-ranking Union official in the plant
at the time of the election. The Respondent’s management was well aware of his union activities
because they met with him on a regular basis regarding contract negotiations and administration
and grievance processing. Freeman also admitted being aware that, in the week following the
election, Shepherd was talking to employees about the election and events preceding it, asking
30 some employees to talk to the Union’s lawyer. It is apparent that Shepherd’s conduct in this
regard was an attempt to investigate potential objections to the election.

35 On August 19, the same day that the Union filed its objections and the first unfair labor
practice charge, Shepherd was called into a meeting with Freeman. Plant Manager Turley was
also present. There is no dispute that Freeman told Shepherd that the purpose of the meeting
was to look into complaints the Respondent had received about Shepherd. Freeman identified
three complaints: (1) that Shepherd was throwing things around the shop; (2) that he had told
employees they were either with him or against him; and (3) that he told an employee not to
explain something to another employee because that employee was non-union. According to
40 Shepherd, he responded to all three complaints. He denied the first two.²⁰ With respect to the
third, Shepherd said he thought it referred to an incident involving employee Byron Duncan that
occurred about two weeks before the election. Shepherd told Freeman and Turley that the plant
had been shut down because of a problem with a gas line. In his capacity as lead man,
Shepherd had given Duncan two work orders that were critical to restoring operations. He later
45 found Duncan in the DCS control room talking to Mark Wells about an unrelated work matter.
Shepherd acknowledged calling Duncan into the lunch room and telling him that the work orders

¹⁹ I have already found that the Respondent’s unilateral implementation of these new
policies violated Section 8(a)(5) of the Act.

²⁰ Shepherd told Freeman and Turley he had no idea what the first two complaints referred
to. Neither Freeman nor Turley gave him any details regarding these complaints.

he had been given were critical and that Duncan did not have time to explain things to Wells that were unrelated to the work orders. Shepherd also acknowledged that he may have mentioned the fact that Wells was non-union. After providing this explanation, Freeman and Turley then talked to Shepherd about his role as a lead man and the need to be
5 nonconfrontational. They then counseled Shepherd not to create a hostile work environment within his group.

Freeman and Turley both testified about this meeting. Although Freeman essentially corroborated Shepherd's version, Turley differed in one significant respect. According to Turley,
10 Shepherd did not deny the allegations. I do not credit Turley in this regard. I note that, despite the purported seriousness of these complaints, Turley was unable to recall one of them until he was shown a document listing the three issues he and Freeman discussed with Shepherd. Turley also testified that he and Freeman had prepared a written reprimand to give to Shepherd before the meeting, but after discussing the complaints and talking to Shepherd about
15 leadership, they decided this was not the type of situation that warranted that level of discipline.

After the August 19 meeting, Shepherd continued to act as a union representative, attempting to represent the employees in the unit. On one occasion in late August, he stopped by Freeman's office where he asked Freeman and Dupuy, who was also present, if they would
20 arbitrate the Fore discharge grievance. As previously noted, he was told at that time that Respondent would not. On September 4, Shepherd met with Freeman in his office. He asked Freeman four questions: (1) Whether the Respondent still recognized the Union and Freeman said they did not. (2) Whether the Respondent forbid the use of the Union bulletin boards and Freeman said they did. (3) Whether the Respondent would continue to process existing
25 grievances and Freeman said they would not. (4) Whether the Respondent was going to arbitrate the two grievances that were pending arbitration. Freeman said he would have to get back to Shepherd on that. Freeman essentially corroborated Shepherd, recalling a meeting with him in which Shepherd said he was going to resume posting material on the Union bulletin boards and operating as a Union. Freeman admits telling Shepherd not to do this. As noted
30 above, the Respondent admitted removing the Union bulletin boards the next day (September 5).

On September 5, at 2:12 pm, Shepherd sent Freeman an e-mail to confirm the discussion they had the previous day. Specifically, Shepherd asked Freeman to respond with
35 any objections to the following statements: "(1) The Company does not recognize the Union in the Houston plant. (2) The Company has forbid the use of Union bulletin boards. (3) The Company will not proceed with arbitration previously scheduled. (4) The Company will not continue forward with grievances filed before or after the decert vote." At 3:30 pm the same day, Freeman approached Shepherd in his work area, told him that the Respondent would not
40 arbitrate cases and handed Shepherd an envelope containing a document entitled: "Written Confirmation – Alleged Violation of Company Anti-Harassment Policy." Freeman told Shepherd to reflect on the contents of this letter.

The September 5 letter described the same three incidents that Freeman and Turley had
45 discussed with Shepherd more than two weeks earlier and stated that the Respondent had "completed its investigation into your alleged inappropriate behavior towards your coworkers." Shepherd testified that he had heard nothing more about these complaints between the August 19 meeting and his receipt of this letter. Freeman admitted that the Respondent conducted no additional investigation after the August 19 meeting and received no further complaints about
50 Shepherd. In fact, Freeman testified that he spoke to Duncan, who was the source of all three complaints, in late August, and asked how Duncan was getting along with Shepherd. According to Freeman, Duncan said: "fine."

In the September 5 letter, after reviewing the allegations against Shepherd and the discussion that had taken place on August 19, Freeman reaches the following conclusion:

5 There are obviously significant discrepancies in your rebuttal and the allegations toward you. You provided further explanation of the incident with the I&E technician, which may help explain the context of the meeting, although the reported statements differ greatly. You further categorically denied the other reports. What we're left with is differing statements, some of which are corroborated.

10 Fred, it is important that you provide appropriate leadership to accomplish the company's work with the resources entrusted to you, including the personnel carrying out the work. You need to take this opportunity to reflect on your responsibilities and work in a way that does not lead to complaints such as those presented here as *verified reports of such actions could lead to further disciplinary action up to and including termination.* (emphasis added)

Freeman testified that the first complaint he received about Shepherd occurred on July 26, when Supervisor Wheeland reported a conversation he overheard the day before between Shepherd and Duncan in the lunch room. Freeman testified that he investigated this allegation "within days" by interviewing Duncan and that he decided not to take further action at that point. According to Freeman, he found it unnecessary to interview Shepherd at the time. The next complaint he received was on August 18, when Duncan approached him in the plant and said there were some things he wanted to talk to Freeman about. Freeman invited Duncan to his office to discuss the matter. Freeman and Dupuy interviewed Duncan and took a statement from him on August 18. According to Freeman, Duncan told them that Shepherd was throwing things around the shop and he felt uncomfortable with the situation.²¹ After talking to Duncan, he and Dupuy conducted further investigation by interviewing and taking a statement from James Wright, another employee in Shepherd's department. Wright did not testify in the hearing. In his statement, Wright did not corroborate Duncan's complaints about Shepherd throwing things around the shop or otherwise threatening employees.

Freeman and Dupuy also interviewed David Pope on August 18. Pope testified that Freeman asked if Shepherd was creating a hostile work environment. Pope told Freeman and Dupuy that he had never seen anything or had any dealings with Shepherd that led him to believe Shepherd was doing that. Pope was also asked if Shepherd was being fair in handing out the work orders and Pope said he was. They asked Pope if he had heard Shepherd make derogatory remarks about any employees, union or non-union, and Pope said he had not. Freeman then asked Pope if he thought the department would be better off without a lead man and Pope said they needed a lead. Pope was asked if Shepherd was fair and Pope said he was. Finally, Freeman asked Pope if he had been approached by anybody trying to sway his vote one way or the other. Pope replied that he had been, a few times, and that he just wanted to be left alone to do his job. Freeman asked who had approached him and Pope identified the three employees involved, i.e. Vance Thomas, Greg Schrull and Mark Wells. Pope recalled that Dupuy took notes during the interview and read them back to him. He was not asked to read or sign a statement. The document that the Respondent offered at the hearing purporting to be the notes of this meeting is not consistent with his testimony. When Pope reviewed the document,

²¹ To the extent this testimony was offered for the truth of what Duncan said, it was rejected as hearsay. Duncan did not testify at the hearing and the Respondent did not offer his written statement into evidence.

which he had not seen before, he said it omitted 75% of the meeting. Dupuy testified that the purported statement was a complete record of the meeting but acknowledged that she did not have Pope sign it. Her testimony that he was too busy to sign it is incredible. I found Pope's testimony at the hearing to be credible and more reliable than Dupuy's unsigned "notes" from this meeting.

The testimony of Freeman and Turley, and that of Dupuy to the extent she was involved in the investigation of these complaints, as well as the statements obtained by the Respondent from employees, demonstrate that the allegations against Shepherd were remote in time, unsubstantiated, trivial and, essentially, baseless. It is apparent that the Respondent did not consider these allegations serious enough to warrant a response until Shepherd persisted in his efforts to represent the employees on behalf of the Union. This is demonstrated by the timing of Freeman's meeting with Shepherd on August 19 and the issuance of the September 5 letter. Both coincided with recent protected activity by Shepherd and occurred some time after the complaints that supposedly justified the Respondent's actions were received and investigated.

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) by orally reprimanding Shepherd on August 19 and by issuing him written discipline on September 5. Respondent's initial defense to these allegations is that Shepherd was never disciplined, characterizing the meeting and letter as nothing more than reminders of Shepherd's responsibilities as a lead man. I disagree. It is clear that, in the August 19 meeting, Shepherd was advised to work on his leadership skills and warned not to create a hostile work environment. This meeting was followed up several weeks later by the letter "confirming" the discussion at the meeting and essentially warning Shepherd that any "verified reports" of similar conduct in the future could result in "further" disciplinary action. Freeman was unable to explain why he used the word "further" if the September 5 letter was not a form of discipline. Freeman also acknowledged that this letter would be placed in Shepherd's personnel file for future reference. At a minimum, the letter was written confirmation of an oral warning that had been conveyed to Shepherd during the August 19 meeting. To conclude otherwise would be ignoring the realities of the workplace.

Having found that Shepherd was in fact disciplined on August 19 and September 5, I must next determine whether that discipline was unlawfully motivated by Shepherd's union activities. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth the analytical framework for deciding cases where employer motivation is at issue. See also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983) in which the Supreme Court approved the Board's use of this test. Under this analysis, the General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected activity, that the employer had knowledge of that activity and had animus against such activity, and that the activity was a motivating factor in the employer's decision to discipline the employee. *United Rentals, Inc.*, 350 NLRB 951 (2007); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) and cases cited therein. Proof of motive may be based on direct evidence, which is rarely available, or inferred from circumstantial evidence, including elements such as timing, disparate treatment, or inconsistent or shifting reasons for the discipline. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Embassy Vacation Resorts*, 340 NLRB 846 (2003); *Ronin Shipbuilding*, 330 NLRB 464 (2000). Once the General Counsel has established this prima facie case, the burden shifts to the employer to produce evidence to establish that the employer would have taken the same action even in the absence of union activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The Board has said that it is not enough for an employer simply to present a legitimate reason for the discipline. Rather, it must persuade by a preponderance of the evidence that it in fact acted upon that reason. *Wright Line*, supra; *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993); *Manno Electric, Inc.*

321 NLRB 278, 280 fn. 12 (1996). Finally, where the General Counsel establishes that the asserted reason for discipline is pretextual, there is no burden shift because, by definition, the employer has failed to show it would have taken the same action absent the protected activity. *Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

The evidence recited above and the record as a whole clearly demonstrates that Shepherd was involved in union activity and that the Respondent was fully aware of this activity. The Respondent's animus toward the Union is established by the unfair labor practices found above, including violations of Section 8(a)(1) occurring before the election, the unlawful discipline issued to Saltibus for engaging in protected solicitation of other employees, and the Respondent's precipitous withdrawal of recognition and abrogation of the collective bargaining relationship immediately after the close of the election and before the results could be certified. Because of the timing of the discipline, as well as the totality of circumstances surrounding the Respondent's discipline of Shepherd, I find that General Counsel has met his burden of proving that Shepherd's union activities were a motivating factor in the decision to discipline him on August 19 and September 5. I find further that the Respondent has not met its burden of proving that it would have taken the same action against Shepherd had he not been active in preserving the Union's status at the plant. Turley admitted that, at the end of the August 19 meeting, he and Freeman had decided that discipline was not warranted based on the complaints the Respondent had received from Duncan. There is no dispute that no further investigation was conducted after August 19 and no further complaints were received regarding Shepherd's conduct between August 19 and September 5. Respondent's witnesses never explained why it chose to issue this letter at that time when it apparently felt most if not all of the allegations against Shepherd had not been substantiated. The obvious conclusion is that the letter was a response to Shepherd's attempts to continue to represent the Union in the face of the Respondent's eagerness to be done with the Union at the Houston plant. Accordingly, I conclude that the Respondent had violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint, by disciplining Shepherd on August 19 and September 5.

F. The Alleged Interrogation of Pope

As described above, Pope testified that, during his August 18 interview with Freeman and Dupuy regarding the complaints against Shepherd, Freeman asked him some questions regarding his contacts with other employees preceding the election. The General Counsel, for the first time in his brief, asks that I find that this questioning constituted unlawful interrogation. Rather than formally move to amend the complaint to specifically allege this violation, he asks that I "conform the pleadings to the proof." I decline to do so. Regardless of whether an amendment to add such an allegation to the complaint would be appropriate under Section 10(b) of the Act,²² I find that it would be a violation of the Respondent's due process rights were I to find a violation now when the issue has not been fully and fairly litigated. When General Counsel elicited this testimony from Pope, he gave no indication to opposing counsel that he considered Pope's answers to the question to be evidence of an unfair labor practice. Thus, Respondent did not offer competing evidence nor did the Respondent have an opportunity to argue that the questioning of Pope, even if it occurred as he testified, did not amount to unlawful interrogation. Accordingly, I shall deny General Counsel's motion to conform the pleadings in this regard. See *Desert Aggregates*, 340 NLRB 289, 292-293 (2003).²³

²² *Redd-I*, 290 NLRB 1115 (1988). See also, *Carney Hospital*, 350 NLRB 627 (2007).

²³ Decision modified on other grounds at 340 NLRB 1389 (2003).

III. The Union's Objections

5 The Union timely filed 22 objections to conduct of the election and conduct affecting the results of the election. As noted in footnote 2 above, the Union has since withdrawn seven and a part of an eighth objection. Some of the objections have already been resolved above because they were also alleged as unfair labor practices by the General Counsel, based on unfair labor practice charges that were filed concurrently. Below I will address the remaining objections:

10 **Objections 2-4**

15 Objections 2 and 4 are consistent with my findings that the Respondent violated Section 8(a)(1) of the Act on July 22 when it issued the written reminder to Saltibus. Accordingly, I shall recommend that Objections 2 and 4 be sustained. Objection 3, which alleges that the Respondent also created the impression of surveillance during Freeman's July 22 meeting with Saltibus, by referring to the incident involving Saltibus' solicitation of the lab employee, goes beyond the complaint's allegations and is not supported by the record. Accordingly, I shall recommend that Objection 3 be overruled.

20 **Objection 5-8**

25 Union counsel argues that the evidence in support of these objections can all be found in the July 23 memo to employees that Turley distributed by e-mail that day. I have already found that Respondent violated Section 8(a)(1) of the Act in this memo by soliciting employees to report the protected activities of coworkers and by impliedly threatening unspecified reprisals for engaging in protected activity. Accordingly, I shall sustain Objections 7 and 8 which raise these allegations.

30 The Union's Objections 5 and 6 go further, however, arguing that, in this memo, the Respondent promulgated, and unlawfully implemented an anti-union policy and misled employees regarding information provided by the NLRB. It is well-established that statements that are merely misleading are not sufficient to set aside an election. *Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 133 (1982). I find that the evidence does not support these claims and shall recommend that Objections 5 and 6 be overruled.

35 **Objections 9 and 10**

40 In support of this objection, the Union relies on a July 29 letter sent by Turley to all unit employees that contained the following statement:

45 In Beaumont, our sister plant that is union-free, we enjoy an excellent work place and open channels of communication throughout the organization...If we worked directly with the employees – in a union free environment – much of the bureaucracy and slowness to incorporating impacting and meaningful change for our employees would be eliminated...I ask that you give us the opportunity during this year to work with you and demonstrate that this is a change that you will be happy with.

50 The Union alleges that these statements promised employees benefits if they voted to decertify the Union. The Union also cites the following language from the letter:

The majority of my 27 years in chemical plants has been in non-union facilities. I

know the importance of listening and acting on employees concerns is key to having a safe, successful, and efficient operation.

5 The Union argues that, in this statement, Turley is promising employees to adjust grievances in exchange for decertifying the Union. The quoted language, containing vague predictions of a better work environment, without any specific promises, is not sufficient to set aside the election. See *Noah's New York Bagels*, 324 NLRB 266, 267. Moreover, I find nothing in the second statement that could be read as a solicitation for employees to have their grievances adjusted by management. Accordingly, I shall recommend that Objections 9 and 10 be overruled.

Objections 12 and 18

15 There is no dispute that the Respondent designated Greg Schrull, the employee who filed the decertification petition, to be its election observer. The Union contends that this interfered with employee free choice in the election because it gave employees the impression that the petitioner was acting on behalf of the Respondent in pursuing the decertification petition. The Respondent contends that there is nothing in the Board's rules, case handling procedures or case law that would prohibit an employer from utilizing a decertification petitioner as its observer, and there is no evidence that Schrull, in his capacity as an observer, engaged in any misconduct. The Union has not cited any cases dealing with this issue and I have been unable to find any. The Board has held that, in order to maintain the desired neutrality and integrity of Board-conducted elections, it prohibits supervisors and agents of the employer, as well as other employees "closely associated with management" from serving as observers. 25 *Butera Finer Foods*, 334 NLRB 43 (2001) and cases cited there. In *Butera*, the Board extended that rule to bar non-employee union agents from serving as a union's observer in a decertification election.

30 While I find the Respondent's use of the petitioner as its observer troubling, I am unable to conclude that this was objectionable conduct. The Union offered no evidence that Schrull engaged in electioneering or any other misconduct while serving as the Respondent's observer. The Union also offered no evidence that would show that Schrull was "closely associated" with management other than its speculation that the Respondent was behind the decertification effort. Accordingly, I shall recommend that Objection 12 and the remaining portion of Objection 35 18 be overruled.

Objection 19 and 20

40 In support of these objections, the Union relies on an e-mail dated July 25 from Turley to the employees. In the e-mail, Turley reminds employees that the Respondent has a bulletin board policy for the Houston plant which must be followed. After citing a recent incident where an e-mail was found posted in various locations of the change house that were not authorized, Turley closes by stating:

45 Any documents posted in the plant that are not authorized will be removed.

50 The Union argues that Turley's e-mail was an overly broad policy that disregarded the Union's rights under the collective bargaining agreement to post on its bulletin boards in the plant. I disagree. The evidence establishes that the Respondent did not interfere with the Union's right to post material on its bulletin boards. The collective bargaining agreement already contained language requiring that all postings on union bulletin boards be pre-approved by the Plant Manager. In addition, the evidence shows that Turley's e-mail was in response to

complaints from the Union that pro-decertification employees had posted material on the walls in the change house. I find that the Union has not met its burden of proof and shall recommend that Objections 19 and 20 be overruled.

5 **Objections 1 and 22**

10 These objections allege that the Respondent initiated, orchestrated/directed and supported the decertification petition. The Union offered no direct evidence to support this claim, choosing instead to rely on a “totality of evidence” theory to suggest that the Respondent’s
 15 conduct between the filing of the petition and the election proves the objection. While the Respondent did commit unfair labor practices before the election, advised its employees of its position that they did not need a union, and campaigned in favor of decertification, these acts do not prove that Schrull was acting as an agent of the Respondent when he circulated and filed the petition. Mere rumor, conjecture and speculation as to the Respondent’s support of Schrull’s efforts do not amount to evidence that the Respondent improperly aided the decertification drive. Accordingly, I shall recommend that Objections 1 and 22 be overruled.

20 In summary, I have sustained the Union’s Objections No. 2, 4, 7 and 8, which conform to the unfair labor practice allegations found to be meritorious above. I am recommending that the remainder of the Union’s Objections, to the extent they have not already been withdrawn, be overruled. As discussed above, the sustained objections are sufficient to warrant setting aside the election. Accordingly, I shall recommend that the Board direct a second election, to be held after the unfair labor practices have been remedied, so that employees will have the opportunity to express their desires for or against union representation under circumstances free of
 25 interference.

Conclusions of Law

30 1. By soliciting employees to report the protected activities of their coworkers, by impliedly threatening employees with unspecified reprisals for engaging in protected activities, and by informing employees that they had no rights under the collective bargaining agreement at a time when it was still in effect, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

35 2. By issuing a written warning to Mark Saltibus on July 22, 2008 for engaging in protected solicitation on behalf of the Union, the Respondent has interfered with, restrained and coerced employees in the exercise of their statutory rights and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

40 3. By issuing oral and written warnings to Fred Shepherd on August 19 and September 5, 2008 respectively, the Respondent has discriminated against its employees on the basis of their union membership, activity and support and has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

45 4. By withdrawing recognition from and refusing to recognize and bargain with United Steelworkers of America, Local-13-227 since August 12, 2008; by making unilateral changes to unit employees’ wages, hours, and other terms and conditions of employment without affording the Union notice and an opportunity to bargain regarding such changes; and by bypassing the
 50 Union and dealing directly with unit employees, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Sections 2(6) and (7) of the Act.

(e) Bypassing the Union and dealing directly with unit employees regarding their wages, hours and terms and conditions of employment.

5 (f) 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.

10 (a) Within 14 days from the date of the Board's Order, rescind the July 22, 2008 "written reminder" issued to Mark Saltibus and the September 5, 2008 "written confirmation" issued to Fred Shepherd, remove any references to this discipline from their files, and within three days thereafter notify them that this has been done and that the unlawful discipline will not be used against them in any way.

15 (b) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

20 All production and maintenance employees, including laboratory employees but excluding all office clerical employees, plant clerical employees, guards, foremen and all other supervisors as defined in the Labor Management Relations Act of 1947, as amended.

25 (c) Restore the Union's bulletin boards, resume the processing of grievances and the scheduling of arbitrations, as necessary, and resume the check-off and remission of union dues pursuant to the terms of the collective bargaining agreement.

30 (d) If the Union so request, rescind the unilaterally implemented Sickness and Accident and Time Off Policies and wage increases that were granted since August 12, 2008.

35 (e) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix B."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 16, 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 July 22, 2008.

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

50 ²⁵ 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."

DIRECTION OF SECOND ELECTION

IT IS FURTHER ORDERED that a second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems
5 appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not
10 work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees
15 who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented by United Steelworkers of America, Local 13-227.

20 To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must
25 be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper
30 objections are filed.

Dated, Washington, D.C., September 17, 2009.

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Michael A. Marcionese
Administrative Law Judge

Appendix A

Petitioner’s Objections to Conduct of the Election and to Conduct Affecting the Results of the Election

- 5
1. The Employer through its agent, Greg Schrull, unlawfully initiated, orchestrated/directed, and supported the filing of the Petition in this proceeding on July 17, 2008.
 - 10 2. On, or about, July 22, 2008, the Employer unlawfully disciplined an employee, because he engaged in protected concerted and union activities.
 - 15 3. On July 22, 2008, the Employer created the impression of surveillance of its employees Union activities by informing an employee that he had, on an unspecified date, made threatening and inappropriate remarks to a laboratory employee concerning her unwillingness to join the Union.
 4. On July 22, 2008, the Employer threatened an employee with discharge, if he continued to engage in protected concerted and union activities.
 - 20 5. On, or about, July 23, 2008, the Employer promulgated, and unilaterally implemented, an anti-union policy, which unlawfully interfered with the Section 7 Rights of the employees.
 - 25 6. On, or about, July 23, 2008, the Employer unlawfully misled the employees by informing that:
 - A) “... the Notice sent by the NLRB, which will include...important information describing how to cast your vote correctly (for example, to vote against the union, you would vote “NO”)", and,
 - 30 B) “No punishment – the union cannot seek...punishment of an employee for not being a member of the union, even if the employee has paid an initiation fee and ongoing union dues.”
 - 35 7. On, or about, July 23, 2008 the Employer threatened its employees with reprisals, if they engaged in protected concerted activities and union activities.
 8. On, or about, July 23, 2006 the Employer solicited complaints against employees, who engaged in protected concerted and union activities.
 - 40 9. On, or about, July 29, 2008 the Employer promised its employees “...an excellent work place and channels of communication throughout the organization.”, if they voted to decertify the Union. [Emphasis Added]
 - 45 10. On, or about, July 29, 2008 the Employer promised its employees, that if they voted to decertify the Union, the Employer would “...demonstrate that this is a change you will be happy with.”
 11. [Withdrawn]
 - 50 12. On August 11, 2008 the Employer unlawfully designated the Petitioner to serve as the Employer’s observer during the decertification election, that was held on August 11 and 12, 2008.

13. [Withdrawn]

14. [Withdrawn]

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15. [Withdrawn]

16. [Withdrawn]

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17. [Withdrawn]

18. The conduct of the Employer, ... as set forth in paragraph 12 ... above, created the impression that the NLRB supported the Petitioner's efforts to have the employees vote to decertify the Union through the Board's election process.

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19. On, or about, July 25, 2008, the Employer promulgated an unlawful bulletin board policy in violation of the Act.

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20. On, or about, July 25, 2008, the Employer unlawfully threatened its employees with reprisals, if they posted items on the plant bulletin board, which were not pre-approved for posting by the Employer.

21. [Withdrawn]

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22. Prior to, and during the critical period, July 17, 2008 through August 12, 2008, the Employer assisted and supported the Petitioner's efforts to decertify the Union by encouraging the bargaining unit employees to vote to decertify the Union in violation of the Act.

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APPENDIX B

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 solicit you to report the protected activities of coworkers, nor threaten you with unspecified reprisals for engaging in protected activity, nor make statements informing you that you have no rights under a collective bargaining agreement that is still in effect.

WE WILL NOT issue "written reminders", "written confirmations", or other discipline to you because you join, support or assist the Union or engage in any other concerted activities protected by Section 7 of the Act.

WE WILL NOT refuse to recognize and bargain upon request with United Steelworkers of America, Local 13-227 (the Union) as your exclusive collective bargaining representative.

WE WILL NOT unilaterally change you wages, hours and terms and conditions of employment.

WE WILL NOT bypass the Union and dealing direct with you regarding your wages, hours and terms and conditions of employment.

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

WE WILL, within 14 days from the date of the Board's Order, rescind the July 22, 2008 "written reminder" issued to Mark Saltibus and the September 5, 2008 "written confirmation" issued to Fred Shepherd, remove any references to this discipline from their files, and WE WILL, within three days thereafter, notify them that this has been done and that the unlawful discipline will not be used against them in any way.

WE WILL recognize and, on request, bargain with the Union and put in writing any agreement reached on terms and conditions of employment for our employees in the following appropriate unit:

All production and maintenance employees, including laboratory employees but excluding all office clerical employees, plant clerical employees, guards, foremen and all other supervisors as defined in the Labor Management Relations Act of 1947, as amended.

WE WILL restore the Union's bulletin boards, resume the processing of grievances and the scheduling of arbitrations, as necessary, and resume the check-off and remission of union dues pursuant to the terms of the collective bargaining agreement.

WE WILL, if the Union so request, rescind the unilaterally implemented Sickness and Accident and Time Off Policies and wage increases that were granted since August 12, 2008.

ARKEMA, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

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

819 Taylor Street, Room 8A24

Fort Worth, Texas 76102-6178

Hours: 8:15 a.m. to 4:45 p.m.

817-978-2921.

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, 817-978-2925.