UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BASHAS', INC., d/b/a BASHAS',
FOOD CITY, and A.J.'S FINE FOODS

and **Cases 28-CA-21435**
28-CA-21501

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99

and **Cases 28-CA-21590**
28-CA-21592

UNITED FOOD AND COMMERCIAL **28-CA-21639**
WORKERS INTERNATIONAL UNION **28-CA-21640**
28-CA-21646
28-CA-21676
28-CA-21739
28-CA-21785
28-CA-21803

GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

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GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

Counsel for the General Counsel (CGC), pursuant to Section 102.46(e) of the Board's Rules and Regulations, files the following Brief in Support of Cross-Exception to the Decision of Administrative Law Judge William L. Schmidt [JD(SF) 29-09] (ALJD), issued on September 24, 2009, in the above captioned cases.[1] Under separate cover, CGC also files with the Board on this date an Answering Brief and Motion to Strike Respondent's Exhibit 1 to Exceptions Brief. It is respectfully submitted that in all respects, other than what is

[1] Bashas', Inc., d/b/a Bashas', Food City, and A.J.'s Fine Foods is referred to as Respondent. The United Food and Commercial Workers Union, Local 99 is referred to as Union. References to the ALJD show the applicable page number. "Tr. ___" refers to pages of the transcript from the hearing held between April 15 and August 14, 2008. "GCX ___" refers to exhibits introduced by General Counsel at the hearing. "RX___" refers to exhibits introduced by Respondent at the hearing. "UX___" refers to exhibits introduced by the Union at the hearing.

excepted to herein, the findings of the Administrative Law Judge (ALJ) are appropriate, proper, and fully supported by the credible record evidence.

The ALJ found that Respondent committed numerous and serious unfair labor practices over the course of a year, not only in its retail stores but also in its large Distribution Center (DC). These violations include Respondent's issuance of unwarranted discipline to known Union supporters as well as Respondent's subcontracting of its entire baler operation at its DC in violation of Section 8(a)(1) and (3) of the Act. Moreover, Respondent was found to have violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain in good faith with the Union concerning represented employees' wages at several stores. More specifically, the ALJ found that Respondent violated Section 8(a)(1) of the Act by:

- threatening employees with further withholding of wage increases and other benefits (ALJD at 22);
- undermining and disparaging the Union (ALJD at 23);
- creating an impression of surveillance (ALJD at 38, 74-78, 81);
- intimidating and harassing employees by subjecting them to an unwarranted investigation and interview because they engaged in union and other concerted activities (ALJD at 43);
- threatening employees with discharge (ALJD at 43, 82);
- threatening to transfer employees to other stores (ALJD at 59);
- threatening employees with unspecified reprisals (ALJD at 68-70);
- orally promulgating an overly-broad and discriminatory rule prohibiting its employees from distributing, during working hours, material not provided to them by Respondent (ALJD at 77); and
- interrogating employees. (ALJD at 37-38, 43, 66, 74-78, 80)

The ALJ also found that Respondent violated Section 8(a)(1) and (3) of the Act by:

- denying wage increases to Union represented employees (ALJD at 23);
- suspending and transferring employees Teresa Cano and Ruben Salazar (ALJD at 43);
- suspending employee Paul Romero (ALJD at 43);
- transferring employee Maria Acosta (ALJD at 57); and
- subcontracting the baler operations at its DC, resulting in the lay off of approximately 30 employees (ALJD at 93).

The ALJ also found that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union over wage increases and other benefits (ALJD at 22).[2]

In addition to the standard remedies for the violations found, the ALJ also ordered Respondent to restore its baler operation to how it existed the day before the subcontracting took effect. (ALJD at 94)

I. BACKGROUND

A. Respondent's Operations

Respondent is a retail grocery chain that operates approximately 160 stores throughout the State of Arizona under the store names Bashas', Food City, A.J.'s Fine Foods, and Ike's Farmers Market (Tr. 1075). See *Bashas' Inc.*, 352 NLRB 391 (2008).[3] Each store, regardless of the type, is identified by a given store number.

Respondent also operates a large warehouse and distribution center, indentified as the DC. (Tr. 1075, 2474; RX 86, RX 103) This structure of roughly 60,000 square feet is the central nervous system of Respondent operations, where all products are loaded onto trucks for distribution to stores throughout the state. (Tr. 1077-1081; 2477) At its DC, Respondent employs approximately 600 to 700 employees ranging from order selectors, forklift drivers, utility workers, and, before such work was unlawfully subcontracted, baler employees.

During material times, Michael Basha (Basha) was Respondent's Senior Vice President of Operations (Tr. 2474, 2476, 2507-09); Steve Schrade (Schrade) was

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[2] Respondent granted wage increases to senior employees at all of its' stores with the exception of those employed at Union-represented stores. When the Union informed Respondent that it wanted to bargain over wage increases, stating that it had no objection to the wage increases being awarded, Respondent refused to bargain and instead informed the Union-represented employees that they were not getting a wage increase because they were represented by the Union.

[3] On October 10, 2007, Administrative Law Judge William G. Kocol issued his decision, which was adopted by the Board in *Bashas', Inc.*, 352 NLRB 391 (2008), finding that Respondent had violated Section 8(a)(1) and (5) of the Act, including by its unlawful withdrawal of recognition from the Union and making unilateral changes to wages, hours, and other terms and conditions of employment of its Union-represented employees.

Respondent's Human Relations Manager for the DC (Tr. 1073); Mel Kelley (Kelley) was supervisor of dry receiving, an area that includes the baler operations (Tr. 2476-77); David Vasquez (Vasquez) was a supervisor in the dry shipping warehouse (Tr. 1118); and David Lizarraga (Lizarraga) was a lead on the baler dock (Tr. 779-80, 782, 784, 898). As to Lizarraga, the ALJ found him to be a statutory agent of Respondent but not a statutory supervisor within the meaning of Section 2(11) of the Act. (ALJD at 71)

B. History of Respondent and the Union's Relationship

In about 1993, Respondent purchased seven ASI stores, which were assigned Respondent store numbers 63 through 69, respectively. *Bashas', Inc.*, supra. At the time of the purchase, the Union-represented employees in those stores were those in the clerk and meat units. Respondent agreed to recognize the Union at that time. In 2002, Respondent purchased two stores from ABCO Supermarkets, which became Respondent's Stores 124 and 125, respectively. Respondent signed a recognition agreement at that time, agreeing to recognize the Union as the representative of the employees in the clerk and meat units at those two stores. As a result, since 2002 and continuing until today, the Union has represented employees in clerk and meat units at nine of Respondent's stores.[4]

C. Previous Unfair Labor Practices

On October 10, 2007, ALJ Kocol's decision, later affirmed by the Board, found merit to numerous unfair labor practice allegations, including Respondent's unlawful withdrawal of recognition from the Union, the unilateral installation of scanning devices into Union-represented stores, and the unilateral closing of a store. *Bashas', Inc.*, 352 NLRB 391 (2008).

[4] Store 68 has since closed and Respondent's closure of that store without notifying the Union and allowing the Union to bargain over the effects was found to have been an unfair labor practice. See *Bashas' Inc., et al.*, 352 NLRB 391 (2008).

Despite the Board's decision in the prior case, Respondent continued in its litany of unfair labor practices, stepping up the quantity and breadth of its conduct to stamp out all semblance of the Union among its employees. In addition to the unfair labor practices already found by the ALJ in this case, CGC respectfully requests that the Board grant General Counsel's cross-exceptions, as discussed below.

II. ANALYSIS

A. The ALJ Erred by Failing to Find that Respondent's Written Warning and Suspension Issued to Ramon de la Torre (Complaint Paragraphs 6(k) and (l))Violated Section 8(a)(3) of the Act and by Failing to Find that Respondent's Statements, by Warehouse Manager Mel Kelley (Complaint Paragraph 6(x)) and Human Resources Manager Steve Schrade (Complaint Paragraph 6(y)(1)-(3)) Violated Section 8(a)(1) of the Act.

1. Allegations

The Third Consolidated Complaint (the Complaint) alleges that Respondent issued employee Ramon de la Torre (de la Torre), a known Union supporter, an unwarranted written warning and, on or about October 10, 2007, suspended de la Torre because he engaged in Union activities. De la Torre was invited by Respondent to provide a written response to the warning and suspension. When de la Torre provided a written response, de la Torre was asked by supervisor Kelley if the response had been prepared by someone from the Union. When de la Torre informed Respondent that his written response had been prepared by the Union, Human Resources manager Schrade threatened de la Torre with discharge and other unspecified reprisal if de la Torre continued to insist on presenting the response prepared by the Union. The ALJ found that Respondent met its burden under *Wright Line*, 251 NLRB 1082 (1980), of establishing that it would have taken the same actions even in the absence of de la Torre's protected activity, and failed to find an 8(a)(1) and (3) violation

concerning the written warning and suspension. CGC excepts to such findings and conclusions.

a. The Record Evidence Concerning De La Torre's Discipline

On October 10, 2007, Kelley called de la Torre into his office with Administrative Assistant Denise Sierra (Sierra) as the interpreter. (Tr. 836) De la Torre is a Spanish-speaking employee who had worked as a baler for Respondent at the DC for ten years. (Tr. 779-780) A baler is responsible for loading and unloading trailers, cleaning and separating boxes, cartons and pallets. (Tr. 780, 783) Kelley questioned de la Torre about a "green" key. (Tr. 837) The green key is a key that is used to operate a stand-up forklift. (Tr. 812, 2676) When questioned as to where he had obtained the green key, de la Torre told Kelley that he had found the green key about a month previously and had informed his lead man, David Lizarraga[5], about the discovery. (Tr. 837) Kelley continued to question de la Torre as to why he was using the green key and a stand-up forklift. De la Torre informed Kelley that he could perform his job more effectively by using the stand-up forklift than with another piece of equipment. Kelley then informed de la Torre that he was not trained to change the battery on the equipment. De la Torre told Kelley that he had been changing the batteries for eight years and had never been told not to do so. (Tr. 838) Kelley then told de la Torre that the key used to lock up the baler dock had been lost, and later discovered inside a pallet jack resulting in the pallet jack motor being burned. (Tr. 839) De la Torre denied knowing anything about the lost key. (Tr. 841) At that point, Kelley issued de la Torre a conference memorandum accompanied by a decision-making leave (DML) and a one and a half day suspension. (GCX 2, pp. 1-4) Upon the end of the suspension, de la Torre was to have completed the DML

[5] As stated above, the ALJ found Lizarraga to be an agent of Respondent within the meaning of Section 2(13) of the Act, though not a statutory supervisor. (ALJD at 71)

"Member Statement of Accountability" form containing a space for employees to provide a written statement accepting responsibility for the conduct that led to the DML, setting forth an "action plan" for resolving the deficiency, and recommitting themselves to Respondent and to their job. (GCX 2 p. 3) The conference memorandum and the DML form were all written in English. At the end of the meeting, Sierra wrote a rough Spanish translation of the three questions asked in the DML and de la Torre took the documents home. (Tr. 847-848)

Between October 10 and 15, 2007, de la Torre filled in his answers to the three questions on the DML Form. (Tr. 853) When he returned to work, de la Torre submitted two documents to the Respondent -- handwritten responses to the DML questions written in Spanish and a separate, typed statement that had been prepared by an agent of the Union. The ALJ determined that his responses to the three questions "contained contrite discourse" that Respondent accepted. (ALJD at 69) However, de la Torre's responses clearly reflected his belief that his actions did not warrant discipline. In response to question A, for example, he acknowledged finding a key in the garbage and using the stand-up forklift to perform his job more quickly, but offered assurances that he would no longer use the stand-up forklift because Kelley now had notified him that he could no longer use it. Similarly, de la Torre wrote in response to question B that his action plan consisted of not using any machine that employees could not use. De la Torre did sound a conciliatory note by stating, in response to question C, that, in conclusion, he was sorry for having used the machine and believed that he was doing some good. (GCX 2)

As to de la Torre's typed statement in English, which had been prepared for de la Torre by the Union (Tr. 859), it was more forceful in tone while supporting de la Torre's denial that he had committed any wrongdoing. (GCX 3) It expressed that de la Torre's

supervisor, Lizarraga, had ordered him to use stand-up forklifts; that de la Torre had attended training for the stand-up forklifts; denied responsibility regarding the lost key that ended up in a pallet jack motor; and stated that unduly keeping a separate key found in the trash was illogical. (GCX 3) The statement prepared by the Union also accused Respondent of retaliating against de la Torre for being one of the signatories to a recent (September 13, 2007) request for Respondent's OSHA safety logs.[6] (GCX 3)

b. Record Evidence Regarding Kelley's October 15, 2007, Statements

On October 15, 2007, when de la Torre delivered to Kelley the completed DML document and the typewritten statement in English prepared by the Union, Kelley asked de la Torre who had prepared the typewritten statement and whether it was the Union. (Tr. 863, 915)[7] De la Torre told Kelley a lawyer had filled out the document. Upon hearing that, Kelley took the documents and told de la Torre that Schrade would have to look at "this," and sent de la Torre back to work. (Tr. 864) Counsel for the General Counsel, as discussed further below, excepts to the ALJ's failure to find Kelley's questioning of de la Torre to be unlawful interrogation.

c. The Record Evidence Regarding Schrade's October 23, 2007, Statements

It is alleged that on October 23, 2007, Respondent, by Schrade, violated the Act by threatening de la Torre with termination, with unspecified reprisals, and by refusing to accept his written responses to the DML because they were prepared by a Union representative.[8]

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[6] In August 2007, de la Torre, along with approximately ten to fifteen other employees, engaged in two efforts to deliver and discuss safety concerns in the DC with Basha at his office in the DC. (Tr. 792-793) On or about September 13, 2007, de la Torre also went to Respondent's corporate office to deliver the petitions to Respondent's management. (Tr. 794-795; GCX 25)

[7] This questioning as to whether the document was prepared by the Union is alleged to be unlawful interrogation at paragraph 6(x) of the Complaint.

[8] See Complaint paragraphs 6(y)(1) – (3).

More specifically, on October 23, nine days after de la Torre submitted his paperwork to Kelley, de la Torre was called into a meeting at Respondent's Human Resources building with Kelley, Schrade, and Juan Grano, a training manager who interpreted. Schrade told de la Torre that they were going to fix a problem concerning the papers that de la Torre had turned in to the Respondent. (Tr. 865) Schrade then showed de la Torre his handwritten response to the DML on the DML form, the typewritten responses to the DML, and the copy of the conference memorandum with de la Torre's notes on it. (Tr. 866; GCX 2) Schrade asked de la Torre whether he was going to turn in the English-language or the Spanish-language documents, and de la Torre responded that he was going to turn in all the documents. (Tr. 866) Schrade then said that the English-language papers were wrong. Not surprisingly, in view of de la Torre's limited English proficiency, de la Torre retorted that he would not know if they were wrong. (Tr. 866) Schrade then proceeded to quiz de la Torre on the latter's knowledge of English. (Tr. 867)

Schrade told de la Torre that the English-language letter stated that a forklift, rather than a pallet jack, had been damaged by the missing bailer key. (Tr. 867) De la Torre agreed that it was the motor of a pallet jack, not a forklift that had been damaged, so the letter was wrong if it contained information to the contrary. (Tr. 867) Schrade told de la Torre that he would accept the handwritten Spanish-language documents but would not accept the material written in English, and that Schrade would fire de la Torre if the latter continued to insist. (Tr. 867) Schrade admitted that he told de la Torre during this meeting that if de la Torre insisted on submitting the typewritten statement, de la Torre would be terminated. (Tr. 1625) Schrade also asked de la Torre if he "thought that these people would be helping" him. (Tr. 874) At no time did de la Torre withdraw any of his answers on any of the documents that he

had submitted to Kelley, and he consistently testified that it was up to Schrade to accept or refuse to accept submitted documents. (Tr. 868, 874, 920-21) Notwithstanding de la Torre's refusal to withdraw the documents, at the end of this meeting Schrade handed de la Torre a disciplinary Note to File which stated that de la Torre had withdrawn the typewritten English-language statement and allowed his handwritten response on the DML form to be his statement of accountability. (Tr. 872-73; GCX 3)

d. De la Torre's Alleged Conduct

De la Torre's written warning and suspension were, according to Respondent, issued for four reasons: (1) de la Torre allegedly used the stand-up forklift when he was not authorized to use that equipment; (2) de la Torre allegedly failed to report finding the "green key" that operates the stand-up forklift; (3) de la Torre was not authorized to change the batteries of a stand-up forklift; and (4) de la Torre was allegedly responsible for the lost baler dock key that ended up in the pallet jack motor.

With regard to the stand-up forklift and its batteries, the record is full of de la Torre's experience over the past ten years with diverse machinery and relevant battery sources. For example, de la Torre had used pallet jacks and sit-down forklifts for at least eight years to stack pallets and load trailers. (Tr. 799-801) De la Torre also had used the sit-down forklifts for the same length of time to separate pallets stuck together. (Tr. 800-807) In early 2007, de la Torre found that a stand-up or upright forklift could separate pallets much more quickly than a sit-down forklift. (Tr. 809-810) A fellow baler showed de la Torre how to operate the stand-up forklift, and balers Jaime Lazaro (Lazaro) and Miguel Cornejo (Cornejo) also used them. (Tr. 810-812) Before early October 2007, de la Torre used the stand-up forklift about two or three times per week. (Tr. 811-812)

De la Torre was equally adept at changing the batteries of all three of these machines. (Tr. 800) For at least eight years, he used one of two large battery-changing machines located inside the baler area to change the batteries of the pallet jack and sit-down forklift, and since early 2007, to change the batteries of a stand-up forklift. (Tr. 800-807) De la Torre even attended a training class concerning stand-up and sit-down forklifts between February and May 2007. (Tr. 819)

A new battery-changing system (referred to as "BMS") was installed in April 2007, requiring the user to scan the batteries being used and, by September 2007, to enter a "personal number." (Tr. 822, 825) However, during this entire time, and specifically through October 8, 2007, de la Torre openly continued to use the stand-up forklift to separate pallets and the BMS to change the stand-up forklift's batteries. (Tr. 825, 905-07)

The record facts surrounding de la Torre's possession of the lost green key show that he did not act improperly in finding or using the key. Moreover, these facts show that while the ALJ was correct in observing that Respondent's reaction to de la Torre regarding the key was "piling on" (ALJD 72:14-16), the record erred in finding that Respondent met its *Wright Line* burden with regard to the discipline and suspension of de la Torre. (ALJD 72:20-22)

More specifically, in early September 2007, as stated above, de la Torre found one of the green keys to the stand-up forklift in a garbage can near the baler dock. (Tr. 814) He notified Lizarraga of his find, and Lizarraga told de la Torre to keep it in case "we" need to use it. Per Lizarraga's instructions, de la Torre kept the key and used it that week on a stand-up forklift. About one week later, Lizarraga conveyed to de la Torre that Kelley had approved de la Torre to keep the key until such time as there was a need to use it. (Tr. 815)

With regard to the use of the BMS, on October 8, 2007, de la Torre was working in the baler area and wanted to use a stand-up forklift. He found one, but it needed a battery charge. (Tr. 827-828) De la Torre approached someone nearby who was changing the battery of his stand-up forklift and asked him to change the battery for de la Torre's stand-up forklift because de la Torre did not have a personal number. (Tr. 828) The individual finished changing his own battery and then told de la Torre that someone had called him and that he could go ahead and use the individual's number already in use. (Tr. 828) De la Torre changed the battery of his stand-up forklift without incident and returned to work. (Tr. 828) That same day, supervisor Dennis Connors, who was with the individual who had lent de la Torre his personal number, asked de la Torre if he had changed the battery of a stand-up forklift. De la Torre confirmed that he had. (Tr. 829) The individual muttered something to the effect that de la Torre had done something wrong with the machine. (Tr. 829-30)

On October 9, 2007, while de la Torre was changing the battery of a sit-down forklift, leadman Lizarraga passed by and told him that Kelley wanted de la Torre to change a battery of a stand-up forklift. (Tr. 831) Lizarraga left as Kelley and mechanics supervisor Fernando observed de la Torre change the battery. (Tr. 832) De la Torre used the green key that he had found in the garbage to turn on the forklift and move it closer to the BMS. (Tr. 832) At this point, Kelley took the green key from de la Torre and asked him where he had found it, to which de la Torre responded that he had found it in the trash bin. (Tr. 832) De la Torre then lined up the stand-up forklift to the BMS, removed the relevant door, climbed on the machine, and waited. (Tr. 833) De la Torre asked how to change the machine because he needed a number, and Fernando gave him his number. (Tr. 833) De la Torre used the number, began to scan the battery, and as he was removing the battery, Kelley told him to stop. (Tr. 830-33)

e. De la Torre's Union Activities

Respondent was well-aware of de la Torre's Union support and activities. During one of Respondent's anti-Union training sessions for supervisors on July 17, 2007, being conducted by Schrade, another supervisor identified de la Torre's picture on the cover of a report of an alleged union-backed organization called "Hungry for Respect." (Tr. 1105-1106; RX 5) The next day, Schrade determined that due to the Union activities among the balers, Respondent should outsource the baler operation. (GCX 70) Schrade also informed Basha and Felix about de la Torre and three other balers who were pictured in the publication.

Moreover, in August and September 2007, on three separate occasions, de la Torre was involved in efforts to present a petition about safety concerns to Respondent. (Tr. 787-790; GCX 21) Schrade was aware of de la Torre's participation in these events. (Tr. 1594-1595, 1598)

2. Legal Analysis

a. De La Torre's Discipline

The ALJ found that CGC met its burden under *Wright Line*, supra, to establish that de la Torre's protected activities substantially motivated his October 10 suspension. (ALJD at 71) The ALJ correctly found that CGC had succeeded in showing that de la Torre engaged in Union activities, Respondent knew about de la Torre's activities, and Respondent generally harbored animus toward such Union activities. (ALJD at 71) The ALJ also found a nexus between the employees' protected activity and the adverse employment action. (ALJD at 71:43-46)

However, the ALJ erred in finding that Respondent established that it would have taken the same action against de la Torre even in the absence of his protected activity. (ALJD

at 71) The ALJ fails to address key questions that Respondent failed to answer regarding its conduct.

First, Respondent argued that it punished de la Torre because he was not authorized to ride a stand-up forklift in the first place. However, Respondent can point to no general announcement or communication of any sort to balers that would advise them of such a policy. Respondent notes an alleged incident between training manager Grano and de la Torre that allegedly occurred during a tour of the DC allegedly conducted by Grano for a temporary agency. During the tour, Respondent suggests that Grano noticed de la Torre separating pallets on a stand-up forklift 200 feet away from the tour, and walked over to speak to de la Torre and to tell him that he now needed a key to operate the stand-up forklift. (Tr. 2688-89) Though this incident appears to be farfetched, even assuming that it occurred, it would not change the fact that Kelley and Schrade were not aware of this purported interaction when disciplining de la Torre. In fact, Grano admitted that the first time that he told any management official about his observation of de la Torre on the stand-up forklift was in October 2007, during a meeting "about inconsistencies on a DML form" -- a meeting that occurred well after Respondent issued the discipline to de la Torre on October 10, 2007. (Tr. 2686) Moreover, and contrary to Grano's suggestion, de la Torre was told by his leadman, Lizarraga, to continue to use the stand-up forklift, testimony that was not discredited by the ALJ. The ALJ does not square this evidence with his finding.

Second, Respondent argued that it punished de la Torre because he failed to report finding one of the green keys. However, according to de la Torre, he reported finding the key to Lizarraga, who told de la Torre that he could retain it. (Tr. 815) Furthermore, de la Torre openly operated a stand-up forklift with a green key after he found the key in the trash and

before he was suspended. (Tr. 815-16) The ALJ does not discredit de la Torre's testimony that he informed Lizarraga that he, de la Torre, had found the key and was instructed by Lizarraga to continue using the key.

Third, Respondent argues that it suspended de la Torre because he was not authorized to change the batteries of a stand-up forklift. Once more, Respondent failed to provide any documentation that any such training was required or necessary.

Fourth, Respondent argues that it suspended de la Torre because he was responsible for the baler lock key that allegedly disappeared. There is no direct evidence that a key was ever missing other than a statement from Kelley that someone had told him the key was missing. (Tr. 192) Moreover, even if Kelley had learned that the baler lock key was missing on October 9, a Tuesday, this could mean that Lizarraga would have been the leadman on that day (Tuesday), and that he would have been responsible for keeping track of such keys.

Moreover, the record reflects that Respondent's investigation was minimal and lax, a fact not mentioned by the ALJ in his decision. Specifically, Kelley very briefly spoke to de la Torre as he observed him change the battery of the stand-up forklift (Tr. 192), and then spoke to Schrade. Without more, they decided to punish de la Torre by imposing a decision-making leave and suspension. (Tr. 193) They did not ask de la Torre for any information before making the decision. The failure to conduct a meaningful investigation and to give an employee the opportunity to explain has been found to be indicia of a discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 (1987). An employer may not assert a reasonable belief that an employee has engaged in misconduct based upon an unfair investigation. *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1004 (2004).

The record also fails to show that any other employee has been disciplined for the conduct attributed by Respondent to de la Torre. Schrade testified that employee Jessie Medina had been disciplined because he had lent de la Torre his "personal number" to use the BMS (Tr. 1620), but, unlike de la Torre, Medina only received a "Note to File," despite his extensive record of damaging Respondent's equipment.[9] (GCX 83-88) The ALJ makes no mention of this disparate treatment in his decision. In fact, the ALJ states that Respondent's presentation of previous discipline of employee Michael Jovner, who also used a stand-up forklift that resulted in a serious and costly accident, is a "big stretch" by Respondent in showing it has treated other employees in a similar fashion. (ALJD at 68, fn. 81)

As discussed above, the ALJ characterizes Respondent's decision to hold de la Torre responsible for the lost baler lock key as "piling" on (ALJD at 72), suggesting that the ALJ recognized that in doing so, Respondent inappropriately added to the allegations against de la Torre in order to justify its discipline. The record shows that "piling on" is exactly what Respondent did -- piling on allegations of misconduct in an attempt to justify and mask the disparate nature of the punishment meted out to this Union adherent. Inasmuch as the record fails to support a finding that Respondent met its *Wright Line* burden, Respondent violated Section 8(a)(1) and (3) of the Act.

b. Statements of Kelley

It is alleged that Kelley's interrogation of de la Torre regarding whether the Union had assisted him with his statement is violative of Section 8(a)(1) of the Act. Contrary to the record evidence, the ALJ found that the question was justified in light of Respondent's legitimate DML policies and processes that require employees to prepare their own written statement accepting responsibility for a misdeed, and that Kelley's inquiries were a reasonable

[9] Respondent's position is that a "Note to File" is not discipline. (Tr. 191, 2771-2772)

pursuit of his managerial responsibilities. (ALJD at 72) Such a finding by the ALJ condones Respondent's conduct which, in essence, prohibits employees from seeking the assistance of the Union in preparing response to discipline. Such conduct by Respondent infringes on de la Torre's and other employees' rights to engage in Section 7 activities. Obtaining assistance from a union in preparing a response is akin to asking either an attorney or a friend to assist one in responding to a disciplinary action. Although the Union did not have representational status at the time, and Respondent would not have violated the law by not allowing de la Torre to have a Union representative present during an investigatory interview that might lead to discipline, questioning de la Torre about the Union's assistance to him is akin to interrogating de la Torre about his Union activities and Respondent should not be allowed to engage in such conduct.

Factors used by the Board in determining whether questioning amounts to unlawful interrogation include: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. *Medicare Associates, Inc.*, 330 NLRB 935, (2000); *Bourne v. NLRB*, 332 F. 2d 47 (3d Cir. 1964). The circumstances surrounding Kelley's questioning of de la Torre demonstrate a high degree of coerciveness. The week before he questioned de la Torre, Kelley, a high-ranking manager, had suspended de la Torre and directed him to answer the questions on the DML form and return the answers to him. As soon as de la Torre returned to work, he was called into Kelley's office where the interrogation took place. When de la Torre submitted his answers, Kelley immediately expressed his displeasure over the typewritten letters by questioning de la Torre about any Union involvement with such letters.

Kelley's response, therefore, would suggest that Respondent would not stop coercing de la Torre unless he stopped supporting the Union. Kelley's immediate telephone call to Schrade also signaled that Schrade was coordinating the anti-union campaign and increased the coerciveness of the interrogation. If Kelley had any purpose in asking the question other than to harass and coerce de la Torre, it was to discover to what extent the Union was directly helping de la Torre. There was no legitimate business reason for the questioning as to whether the Union had prepared the document. The totality of the circumstances shows that Kelley's interrogation of de la Torre was highly coercive and violated Section 8(a)(1) of the Act. See, e.g., *East Buffet and Restaurant, Inc.*, 352 NLRB 116, slip op. at 19-20 (2008) (asking employees to identify who signed a letter protesting discharge of another employee was unlawful interrogation). Accordingly, it is respectfully submitted that the ALJ erred by failing to find and conclude that Kelley's questioning was violative of the Act.

c. Respondent's Refusal to Accept the Union-Prepared Statement and the Statement of Schrade

By refusing to accept de la Torre's typewritten, English-language response to the questions on the DML form, while at the same time accepting de la Torre's Spanish-language responses, Respondent, by Schrade, interfered with employees' Section 7 rights. The substantive differences between the two responses is evident, as discussed above. (GCX 2) Moreover, the Respondent knew from Kelley's interrogation of de la Torre that the Union had helped him write the letter. In essence, Respondent forced de la Torre to choose, on penalty of discharge, to submit only his handwritten response to the DML, a document which raised no claims of retaliation, and to withdrawal the response that had been prepared with help from the Union. By such conduct, Respondent interfered with, coerced, and restricted de la Torre's right to engage in union and concerted activities and violated Section 8(a)(1) of the Act.

The ALJ held that Schrade was justified in threatening de la Torre with termination and refusing to accept the typewritten response because that response did not, in the view of Respondent, sufficiently admit wrongdoing or remorse, noting Respondent's policy of terminating employees who do not admit wrongdoing when confronted with discipline. (ALJD at 73). Such a finding overlooks the facts that de la Torre also submitted a handwritten response, which Respondent views as sufficiently contrite, and that by submitting the typewritten statement, de la Torre engaged in conduct protected by Section 7 of the Act.

There is no dispute that Schrade threatened to fire de la Torre if he insisted on submitting the typed document. Schrade's threat to fire de la Torre was coercive for two reasons. First, as discussed above, the genesis of the threat was Respondent's general knowledge of de la Torre's Union activities and the Respondent's specific knowledge that de la Torre was, by the content of the typewritten statement, engaged in Union and other protected concerted activities. Second, the very DML to which de la Torre was asked to respond was in itself unlawful retaliation against him because of his Union and concerted activities. The threat of discharge related to that discriminatory DML is also violative. Third, the threat occurred in an atmosphere of other unfair labor practices. Based on the foregoing and the record evidence, Schrade's threat to fire de la Torre violated Section 8(a)(1) of the Act. See *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1284 no. 1, 1288-89 (2001) (threatening to discharge employees for insisting on right to engage in union and concerted activities violative).

Similarly, by Schrade's statement to de la Torre regarding whether he "thought that these people would be helping" him, Respondent conveyed to employee de la Torre that the Union would not be helping him, that the Union's assistance had failed to help him, and that

accepting such assistance was to his detriment. In light of the severe discipline that Respondent had recently issued to de la Torre, and in the context of Respondent's myriad unfair labor practices against de la Torre and other balers, the coercive effect of Schrade's question is palpable. In the circumstances reflected by the credited record evidence, by posing such a question to de la Torre, Respondent engaged in conduct violative Section 8(a)(1) of the Act. See *Brookwood Furniture,* 258 NLRB 208, 214 (1981), enfd. 701 F. 2d 452 (5th Cir. 1983) (violation where employer asked employee "what good" he thought the union would do). See also *Evergreen America Corp.*, 348 NLRB No. 12, slip op. at 26 (2006) (telling known union proponent "Why did you lead this campaign? Now I can't help you anymore" was unspecified threat of reprisal). The ALJ erred in not finding Schrade's conduct violative of Section 8(a)(1) and his finding should be overruled.

B. The ALJ Erred in Failing to Find a June 1, 2007 Letter Barring Union Representatives from its Facilities Violated Section 8(a)(1) and (5) of the Act as set Forth in Complaint Paragraphs 6(m) and 9(e).

1. Allegations and Evidence Regarding Respondent's June 1 Letter

The Complaint alleges that Respondent, by its June 1, 2007, letter (GCX 70) informing the Union that its "salespersons" license and invitation to enter any Respondent store for any purpose was permanently revoked was independently violative of Section 8(a)(1) as well as an unlawful unilateral change in violation of Section 8(a)(1) and (5). The ALJ found that this letter did not violate Section 8(a)(1), nor was it a unilateral change to the parties' past practice regarding Union representatives' access to represented employees. (ALJD at 16-17) The ALJ dismissed the allegations pertaining to the letter, determining that it is reasonable to infer that the letter did nothing more than ban access to Respondent's stores

for purposes of engaging in ordinary solicitation and distribution activities that are organizational rather than representational. (ALJD at page 16)

In so doing, the ALJ concluded that Respondent could lawfully bar nonemployee Union agents from any of its properties absent a proven need and prior request for access grounded on employees' Section 7 rights. (ALJD at 16) The ALJ found that since the letter does not address any pending legitimate request for access associated with representational functions, the letter bars access because Respondent perceived that the Union abused the general, but limited, access privilege a supermarket operator grants to the public in general. (ALJD at 16) Further, the ALJ dismissed the Section 8(a)(5) unilateral change allegation with respect to this letter, noting that the lack of evidence of access from 1993-94 to 2006 mitigates heavily against a finding that a past practice exists that would support the finding of a duty to provide notice and an opportunity to bargain about the letter. (ALJD at 17)

The ALJ erred in finding that the June 1, 2007, letter did nothing more than ban Union representatives from organizational rather than representational activities. The letter is clear on its face -- the Union's "salespersons" license and invitation to enter Respondent stores for any purpose**,** including shopping, was thereby permanently revoked. (GCX 70) Respondent's letter does not distinguish between organizational activities and representation activities. By its terms, and contrary to the meaning given it by the ALJ, it is a complete bar of access of the Union's representatives to employees it represents at their work site. Further, Respondent never rescinded the letter, and it remains in effect to this day.

a. The Record Evidence of Past Practice

The record evidence shows that in the past, Union agents entered stores where represented employees worked to conduct representational activities. The record evidence

centers on the conduct of Union representative Lillian Flores (Flores). Flores testified that she had entered Store 124 in Yuma, Arizona, and Store 125 in Oro Valley, Arizona, occasionally over the past fifteen years, but that she began to visit on a more regular basis in the May 2006 time frame, a time when Respondent made unilateral changes to employees' health care plans.[10] (Tr. 1875-1876) Flores visited employees in the stores as well as outside in the parking lot areas, and also at various establishments in town. (Tr. 1877, 1903) Flores and Store 124 Director Mike Decker (Decker) knew each other for many years. (Tr. 1878)

Flores continued to meet with employees in Store 124 during most of 2006. (Tr. 1876) On January 16, 2007, Flores, identifying herself as a Union representative, approached Decker in the store and gave him a copy of a Complaint and Notice of Hearing. She also gave copies to six employees. (Tr. 1879) Decker did not order Flores out of the store at that point, but, rather, said "thank you" and Flores continued on her way. (Tr. 1880)[11]

Despite not crediting Flores testimony concerning the frequency of visits to the stores, the ALJ did not make a finding that Flores did not go into the stores on any occasion for the representational purposes. (ALJD at 6, fn. 11) Further, Respondent failed to call Decker to establish that Respondent was unaware of Flores' visits to the store for the purpose of speaking with represented employees. Flores' testimony that is not discredited by the ALJ is that she and Decker knew each other for many years (Tr. 1878), indicating that Decker would have recognized Flores when she was in the store and, therefore, would have been aware of her purposes for entering the store, i.e., to speak with represented employees.

[10] Respondent's changes to the health care benefits of represented employees were alleged as violations of Section 8(a)(1) and (5) in *Bashas', Inc.*, supra. These allegations were dismissed on Section 10(b) grounds.
[11] Respondent failed to call Decker or other witnesses to testify concerning Flores' various visits to Respondent's stores.

2. Legal Analysis

a. Section 8(a)(1) Violation

A union-represented employee has a Section 7 right to be contacted and observed by union representatives on the employer's property. *New Surfside Nursing Home*, 330 NLRB 1146 (2000). "[T]he Union has a statutory right of reasonable access to the [employer's] facility to observe how work is performed in preparation for collective bargaining." *CDK Contracting Co.*, 308 NLRB 1117, 1121 (1992) (holding that a general contractor committed an unfair labor practice by barring the union from accessing its jobsite to communicate with union members who worked for a subcontractor.) "Personal contact with a union representative is typically essential to, and an integral part of, employees' exercise of Section 7 rights." Id.

This right of access exists even if the union and employer have not entered into an agreement. *C.C.E., Inc.*, 318 NLRB 977, 978 (1995) (holding that an employer committed an unfair labor practice by denying union representatives access to its property even though the parties had never entered into a collective-bargaining agreement). In fact, union representatives have a stronger access right when no collective-bargaining agreement is in effect. *C.C.E.*, 318 NLRB at 978. ("[W]ithout a collective bargaining agreement, the Union has no other avenue, such as a grievance procedure or arbitration, for obtaining the desired information.")

The Supreme Court, in *Lechmere v. NLRB*, 502 U.S. 527, 541 (1992), held that an employer did not commit an unfair labor practice by barring union organizers from its property. That holding is limited to union representatives who are seeking access to jobsites strictly for organizing purposes. The Board has distinguished *Lechmere* from cases where the

employees were already represented by a union. See *CDK Contracting Co.*, 308 NLRB 1117 (1992); *Wolgast Corp.*, 334 NLRB 203 (2001), enf. 349 F. 3d 250 (6th Cir. 2003).

In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and *Holyoke Water Power Company*, 273 NLRB 1369 (1985), enfd. 788 F. 2d 49 (1st Cir. 1985), the Board held that in assessing a union's request for access, it will balance the employer's property rights against the employees' right to proper representation. Additionally, even if an employer does have the right to impose rules relating to access in protecting their property rights, those rules must not be unreasonable or discriminatory. *C.E. Wylie Construction Co.*, 295 NLRB 1050 (1989), enfd. as modified 934 F. 2d 235 (9th Cir. 1991).

By its June 1 letter (GCX 70), Respondent communicated to the Union that no Union representative would be allowed access to any store for any reason. In *CDK Contracting Co.*, supra, the Board found that this out-and-out bar to a union from accessing a jobsite to communicate with represented workers was a violation of Section 8(a)(1). Respondent's letter was an intimidation tactic, refusing to acknowledge that the Union has representation rights concerning Respondent's employees. In fact, this letter was sent exactly one year after Respondent filed a civil complaint against the Union, claiming that the Union did not represent any of its employees (UX 4), an act found to be an unlawful withdrawal of recognition. *Bashas', Inc.*, supra.

As is evident from its content, Respondent's June 1 letter shows that Respondent failed to even attempt to balance employees' rights against its own, contrary to the requirements of *Babcock & Wilcox Co.*, supra. The letter is devoid of any exception to its blanket ban, such as the Union's legitimate right to reasonable access to conduct representational activities. Respondent's outright prohibition of Union representatives' access

to employees at Respondent's facilities is both unreasonable and discriminatory. The ALJ's refusal to find this violation was in error.

b. Section 8(a)(5)

The ALJ also erred when he failed to find Respondent's prohibition of access by Union representatives to the represented stores a violation of Section 8(a)(1) and (5). The record shows a past practice of Union agents making in-store visits to the represented stores during 1993-94 and then on a more regular basis starting in 2006. The evidence shows that Union representatives, for almost a year before the letter, were visiting Union-represented employees at the stores. (ALJD at 16)

The ALJ notes that Respondent filed one of several state court actions for trespass against the Union in 2006. However, the evidence show that the incidents in response to which Respondent sent its June 1 letter took place between May 18 to 20, 2007, when Union representatives entered almost exclusively non-Union stores and engaged in organizational activities such as distributing flyers and business cards to employees and engaging employees in the "Hungry for Respect" project. (ALJD at 7-8) There is no evidence that the Union was abusing its representational access to the *represented* stores, and there is no evidence suggesting Flores' visits to the Union-represented stores prompted the June 1 letter.

Further, even in its contacts with the Union, Respondent justification for its June 1 letter is limited to the Union's organizational activities, not its representational visits. More specifically, the Union, through its president, James McLaughlin, responded to the June 1 letter on June 14, 2007, informing Respondent that the Union had access rights, though it understood that Respondent had legitimate property interests as well, and asking Respondent to contact him to resolve its concerns. (GCX 71) Respondent responded by pointing to

Union representatives entering stores for organizational purposes, but does not address any incidents involving representational activities. (GCX 72) The Union then sought bargaining with Respondent, informing Respondent that the wholesale prohibition of access without bargaining is unlawful. (GCX 73) Respondent never agreed to bargain over the access issue at that time.

Store access by union agents is a mandatory subject or bargaining. *Ernst Home Centers, Inc.,* 308 NLRB 848, 849 (1992); *Smyth Mfg. Co.,* 247 NLRB 1139, 1168 (1980); *Granite City Steel Co.,* 167 NLRB 310, 315 (1967). The parties' accepted practices can serve to establish a new right never before agreed upon. *Riverside Cement Co.,* 296 NLRB 840, 841 (1989). Changes to those past practices, unless notice is given to the Union and the Union is given an opportunity to bargain over those changes, violates Section 8(a)(5) of the Act. *Dow Jones and Co., Inc.*, 318 NLRB 574, 579 (1995) (an employers denial of access to union representatives after the union had established a past practice of conducting meetings on the employer's facility found to be a violation of Section 8(a)(5)).

The ALJ erred in finding that Respondent's outright ban of all Union representatives from its stores, including represented stores, was not a violation of Section 8(a)(5), particularly where, as here, there was a past practice of access and the Union sought bargaining to address Respondent's concerns.

C. The ALJ Erred in Failing to Find Supervisor Rincon (Complaint Paragraph 6(g)(2)) and Warehouse Manager Hansen's Statements to Employees (Complaint Paragraph 6(u)(3)) Violated Section 8(a)(1) of the Act.

1. Allegations

The ALJ erred by failing to find that supervisor Balthazar Rincon's (Rincon) statement to known Union-supporting employees[12] that they were known as the "night crew infestation" was violative of Section 8(a)(1) of the Act. The ALJ dismissed this allegation, finding it "so inherently ambiguous" that it could not be considered to be disparagement of the Union. (ALJD at 38)

The ALJ also erred when he failed to find that Warehouse Manager John Hansen's statement to employee Arturo Mendoza (Mendoza), i.e., "what do you guys want? You guys get paid good, you guys get good benefits, what do you guys want?" was violative of the Act. These statements were made during the same conversation in which Hansen interrogated Mendoza and created an impression that Mendoza's Union activities were under surveillance. (ALJD at 81) By Hansen's questions, Respondent soliciting grievances and making implied promises of increased benefits. Mendoza asked employees to identify for Respondent the issues that were driving employees to speak to the Union so that Respondent could be in a position to correct those issues.

2. Statements of Rincon

a. Record Evidence

Sometime in the beginning of April 2007, while employees Cano, Salazar, and night crew chief Acevedo were at work (Tr. 243-244), supervisor Rincon approached and asked them if it was true that they had spoken to people from the Union. (Tr. 243) Salazar

[12] Teresa Cano (Cano), Ruben Salazar (Salazar) and Manuel Acevedo (Acevedo), members of Respondent's night crew.

responded "yes" to Rincon and the employees went back to work. The ALJ found such questioning to be violative of Section 8(a)(1) of the Act. (ALJD 37-38) Approximately ten days later, Rincon approached Cano, Salazar, and Acevedo in the aisles at the store and asked the three employees whether they knew what they were called by the Union. (Tr. 244) Rincon told them they were referred to as the "night crew infestation." (Tr. 245) This statement was made after Rincon had already interrogated the employees about their union activities.

b. Legal Analysis

The ALJ found that Rincon's "night-crew infestation" remark was "so inherently ambiguous" that it could not be considered to be disparagement of the Union. (ALJD at 38) The ALJ also stated that the remark could be construed to mean that the Union was making inroads among the employees, in which case, the remark could be considered praiseworthy of the Union. (ALJD at 38) Later, however, the ALJ contradicts that interpretation when he uses the "night crew infestation" comment to show that employee Cano was the leader of Union activity in the store. (ALJD at 38)

The ALJ was correct determining that the term "night crew infestation" refers to Union supporters. Further, it is not reasonable to infer that a word -- infestation -- commonly used to refer to vermin, could be construed to be a compliment. The word "infestation" means "a spread or swarm of a troublesome manner." Merriam-Webster's Collegiate Dictionary, Tenth Edition. The use of terms relating to vermin have been historically used to threaten and disparage union supporters. See, e.g., *Jorgensen's Inn v. Bartenders, Culinary Workers and Motel Employees Union Local 158, AFL-CIO*, 227 NLRB 1500, 1501 (1977) (supervisor threatened that [h]e would stomp on these people [who work for the union] like

they were cockroaches"), enfd. 588 F.2d 822 (1978) (table); *Tetrad Co., Inc*., 125 NLRB 466, 475 (1959) (manager referred to union representatives as "cockroaches and communists").

Use of disparaging language by an employer to describe union supporters to other employees is coercive and a violation of Section 8(a)(1) of the Act. *M.K. Morse Co.*, 302 NLRB 924 (1991). While "words of disparagement alone" are insufficient for a finding a violation of Section 8(a)(1), the Board said that disparaging remarks in "their context among other coercive statements," may be sufficient. *Sears, Roebuck, and Co.*, 305 NLRB 193 (1991). Rincon's disparaging remark was the second coercive statement from Rincon to the employees which had the effect of warning the employees that Respondent knew they were talking to the Union and they were a 'swarm of trouble-makers' because of their Union activities. *Domsey Trading Corp*, 310 NLRB 777, 793 (1993) (an employer's use of slurs or derogatory comments to union representatives is considered unlawful). The ALJ erred in failing to find that this statement was violative of Section 8(a)(1) of the Act.

3. Statements of Hansen

a. Record Evidence

Sometime in September-October 2007, employee Mendoza, a forklift driver at the DC, was approached by manager Hansen while performing his duties in the dry receiving dock. (Tr. 501, 2619) Hansen asked Mendoza if Mendoza was involved in Union activities. (Tr. 501) Mendoza replied that he was. (Tr. 501) Hansen admitted that Steve Schrade had told managers to go out, approach employees, and initiate conversations about the Union. (Tr. 2618) Hansen then asked Mendoza what the employees were mad about. (Tr. 501) Hansen told Mendoza that they were paid good, received good benefits, so what was it that the employees wanted. (Tr. 501) Mendoza told Hansen that the pay was good but that the

benefits were not. (Tr. 502) Hansen told Mendoza that Respondent "would not budge for nothing if the union did go in. He said they would not budge. He also told me that he used to work for a union company and the Union is no good." (Tr. 502) Mendoza again reiterated that the benefits were not good and told Hansen that now he has to pay $80 a month for health insurance and he did not pay anything before. (Tr. 502) Hansen told Mendoza that Respondent had to make changes in order to compete with other companies and ended the conversation. (Tr. 502)

b. Legal Analysis

The ALJ found that although certain statements of Hansen in the conversation with Mendoza violated Section 8(a)(1) of the Act, i.e., unlawful interrogation (ALJD at 80) and creating an impression of surveillance (ALJD at 81), other statements in the conversation did not violate the Act. Specifically, the ALJ determined that Hansen's inquiry regarding "what you employees mad about," "[y]ou guys get paid good, you guys get good benefits, what do you guys want?" (Tr. 501-502), did not constitute solicitation of employee complaints or grievances and did not impliedly promise benefits or improved terms and conditions of employment for refraining from union activities. (ALJD at 81)

The ALJ did not discredit Mendoza, but found that Hansen's assertions that Respondent would not budge on economic issues if the Union succeeded disprove that Hansen was also soliciting grievances and making promises of benefit. (ALJD at 81) The ALJ failed to consider that a supervisor asking an employee why all the employees are mad and what is it they want is inviting that employee to relay employee grievances. It follows that once the employee identifies such grievances, as Mendoza did, the supervisor's threats that Respondent would not budge if the Union was chosen as employees' representative

conveys to employees that Respondent is in the position to be able to take care of some of those grievances. Moreover, a combination of threats and solicitations of grievances are not a mutually exclusive approach to thwarting employees' exercise of Section 7 rights, nor is it uncommon.

The relevant principles regarding the solicitation of grievances are well established. Absent a previous practice of doing so, the solicitation of grievances during an organizing campaign accompanied by a promise to remedy those grievances, whether express or implied, violates the Act. *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (solicitation of grievances made during the midst of a union campaign inherently constitute an implied promise to remedy the grievances, which is rebuttable by showing that the employer had a past practice of soliciting complaints). Here, Respondent had no previous practice of meeting with employees to discuss concerns and stating they would try to fix the problems. C*hartwells, Compass Group, USA, Inc.*, 342 NLRB 1155, 1168 (2004) (employer solicited grievances and impliedly promised to remedy them by asking employees, for the first time, for input on benefits and their problems at work); *Beverly California Corp*., 326 NLRB 153, 153 n. 2 (1998) (employer unlawfully solicited grievances by inviting employees to contact the employer directly about their work related problems and offering to resolve them).

Respondent, through Hansen, interrogated Mendoza about his Union activities, created an impression that Hansen's Union activities were under surveillance, and then followed up with unlawful solicitation of grievances and an implied promise of better benefits *if the union did not get in* (emphasis added). The Board should, based on the credited record evidence, find that Respondent violated the Act by such statements.

D. The ALJ Erred in not Ordering a Consolidated Notice Posting to be Posted at all Affected Facilities Rather than Three Separate Limited Notice Postings

The ALJ failed to grant the request of General Counsel to require Respondent to post one Notice to Employees, encompassing all unfair labor practices found to have been committed by Respondent, at all of Respondent's facilities. Though the ALJ denied Respondent's pretrial motion to sever the cases in this consolidated matter, he determined that separating the violations into three categories-- those involving represented stores, the unrepresented stores, and the DC -- made sense. (ALJD at 95) Despite his denial of Respondent's motion to sever, the ALJ, by his ALJD, ordered Respondent to post three separate Notices, essentially in keeping with the severance previously proposed by Respondent. In ordering three separate notices, the ALJ suggests that employees at unrepresented stores would be "confused" by a Notice remedying violations at the represented stores. Further, the ALJ states that issues at the DC are only marginally relevant for remedial purposes to the issues involved at the retail stores, organized or unorganized. (ALJD at 95)

The purpose of a Notice posting is to not only inform employees of their rights under the Act but to set forth publicly and in clear language a respondent's remedial obligations. Casehandling Manual, Compliance Procedures, Section 10518 (emphasis added). There is ample evidence in the record that employees throughout Respondent's organization were aware of the Union organizing campaign. In fact, Respondent was requiring all employees at the DC, as well as at several stores, to attend anti-Union meetings and observe a video wherein the owner of Respondent, Eddie Basha, speaks to them about why employees should not support the Union. (Tr. 500, 594-595, 2096) The ALJD notes these "captive audience meetings" in his decision. (ALJD at 63) Employees in the DC have an interest in knowing

that other employees who engaged in Section 7 conduct and were subjected to unfair labor practices by Respondent are receiving a remedy. Likewise, employees at all of the stores, represented and unrepresented, have an interest in being informed that Respondent is being required to remedy its unfair labor practices and providing assurances that such unlawful conduct will not occur in the future. The record fails to establish that posting one full Notice will be "confusing" to employees at unrepresented stores. For these reasons, it is respectfully requested that the Board order Respondent to post one Notice to Employees, encompassing all unfair labor practices that have been found, at all of its facilities. In the alternative, General Counsel would request that one complete Notice to Employees be posted at the DC, all represented stores, and the five unrepresented stores outlined in the ALJD. (ALJD at 95)

E. ALJ Erred in not Ordering Interest to be Compounded on a Quarterly Basis.

In determining make whole relief for the discriminatees, the General Counsel asserts that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. Only the compounding of interest can make adjudged discriminatees fully whole for their losses. IRS practice, along with precedent from other areas of law, provide ample legal authority for assessing compound interest to remedy unfair labor practices.[13] See, 26 U.S.C. § 6622(a) (as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress had mandated that the IRS compound interest on the overpayment and underpayment of taxes); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993) (compound interest appropriate in Title VII case); *Doyle v. Hydro Nuclear Services*, 2000 WL 694384, at *14 (DOL Admin. Rev. Bd. May 17, 2000) (involving whistleblower protection under Energy

[13] When Congress amended the Internal Revenue Code in 1982 to require the Internal Revenue Service to access compound interest on the overpayment or underpayment of taxes, it noted that it was conforming the IRS computation of interest to commercial practice. See S. Rep. No. 97 – 494(1), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047.

Reorganization Act of 1974), revd. on other grounds sub nom. *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002) (Department of Labor Administrative Review Board adopts policy of compounding interest on backpay awards); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) (patent infringement case; compounding interest "will conform to commercial practices and proved the patent holder with adequate compensation for foregone royalty payments"); *Brown v. Consolidated Rail Corp.*, 614 F. Supp. 289, 291 (N.D. Ohio 1985) (Vietnam Veterans Readjustment & Assistance Act case; compound interest awarded regardless of defendant's good faith or justification); *United States v. 319.46 Acres of Land More or Less*, 508 F. Supp. 288, 291 (W.D. Okla. 1981) (eminent domain case; Fifth Amendment "just compensation" standard would be satisfied only by compound interest award). Indeed, the trend in recent years has been increasingly towards remedies that include compound interest, and the Act will soon be an anomaly if the Board continues with its current practice.

Accordingly, Counsel for the General Counsel asks that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987). Because the short-term Federal rate is updated on a quarterly basis, it would make administrative sense to also compound interest on the same basis. Id at 1173-74. In addition, compounding interest on a quarterly basis is more moderate that daily compounding, which has not been applied in the analogous Title VII context, but is more reflective of market realities than annual compounding, which is inadequate because it provides a significantly lower interest rate from that charged by private financial institutions that lend money to discriminatees.

III. CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board reverse the ALJ's rulings that are the subject of the instant cross-exceptions and find that Respondent committed said violations of Section 8(a)(1), (3), and (5) of the Act, as discussed above; order that Respondent post, at all of Respondent's facilities, full Notices to Employees that address and remedy all violations found; order that interest on all backpay be compounded on a quarterly basis; adopt the ALJD in all other respects; and order other relief deemed appropriate by the Board.

Dated at Phoenix, Arizona, this 21st day of December 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS in BASHAS', INC., d/b/a BASHAS', FOOD CITY AND A.J.'S FINE FOODS, Cases 28-CA-21435, et. al. was served by E-Gov, E-Filing and by E-mail, on this 21st day of December 2009, on the following:

Via E-Gov, E-Filing

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, DC 20570-0001

Via Electronic Mail

_____
Sandra L. Lyons
Counsel for the General Counsel