UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRED MEYER STORES, INC.

and Case 36-CA-10555

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO.555, affiliated with UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by,

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I. INTRODUCTION

This case concerns the efforts of representatives of United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union ("Union") to speak with the employees it represents on the store floor pursuant an established contractual access/visitation provision and practice, and the extraordinary and unlawful conduct of Fred Meyer Stores, Inc. ("Respondent"), particularly its anti-Union manager, Jim Dostert, to repel those efforts, culminating in the arrest and initial criminal prosecution of the representatives for trespass. The access/visitation provision is set forth in all of the relevant collective-bargaining agreements between the parties and states as follows:

> **Store Visitation. It is the desire of the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore, representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as not to interfere with service to**

customers nor unreasonably interrupt employees with the performance of their duties.

Following issuance of a complaint and amended complaint, a three-week trial was conducted before Administrative Law Judge Clifford H. Anderson.

On December 8, 2010, Judge Anderson issued a Decision in which he correctly found that Fred Meyer Stores, Inc. ("Respondent"), had engaged in numerous unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act. Finding that the collective-bargaining agreements between Respondent and United Food and Commercial Workers Local No. 555, affiliated with United Food and Commercial Workers International Union ("Union"), granted Union representatives the right to contact and talk to Respondent's represented store employees on the store floor during business hours for a reasonable period of time under reasonable circumstances, the Judge properly found (JD 42:15-49)[1] that Respondent violated Section 8(a)(1) by: directing employees represented by the Union and Union representatives not to speak to each other; requiring Union representatives to go to the employee break room to speak to employees; making several disparaging remarks about the Union and Union representatives in the presence of employees; threatening to have Union representatives removed and arrested; instructing its security officer to summon the police; and thereafter causing the police to arrest the Union representatives for trespass and causing their criminal prosecution.

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[1] References to the administrative law judge's decision appear as (JD ___: ___), and references to the transcript of the hearing before the administrative law judge appear as (Tr ___: ____). The first number refers to the pages; the second to the lines. References to Acting General Counsel Exhibits appear as (GCX __); References to Respondent Exhibits appear as (RX __); and References to Joint Exhibits appear as (JX ___). References to Respondent's brief in support of its exceptions appear as (R Br ____).

The Judge further found (JD 42:51 - 43:3) that Respondent violated Sections 8(a)(1) and (5) by unilaterally altering, in a manner inconsistent with the parties' past practice, the Union's rights to contact employees on the store floor on October 15, 2009, without first notifying the Union or granting it the opportunity to bargain over the change. In order to remedy Respondent's unfair labor practices, the Judge ordered (JD 43:35-39) Respondent to, *inter alia:* make the Union and/or its representatives whole for any and all legal, representational, and related costs arising from the representatives' arrests; notify appropriate law enforcement and court authorities of the illegality of the arrests; and seek expungement of the associated records.

Following issuance of the Judge's well-reasoned decision, Respondent filed exceptions and a supporting brief with the Board seeking reversal of the Judge's decision. As shown below, however, Respondent's exceptions and brief seek to resurrect discredited testimony, mischaracterize record evidence, the Judge's decision, and the Acting General Counsel's brief to the Judge, and wrongly depict the remedial relief ordered as extraordinary and unsupported by Board precedent. In particular, Respondent fails to acknowledge or undermine the conclusion that Respondent's unfair labor practices stem from Dostert's absolute denial of the Union representatives' bargained-for rights to have *substantive* conversations with (rather than merely introducing and identifying themselves to) employees on the store floor for a reasonable period of time, provided such conversations do not interfere with customer service or interfere with employees' work duties. The Acting General Counsel therefore respectfully requests that the Board reject the exceptions, affirm the Judge's rulings, findings, and conclusions, and adopt the remedial relief ordered.

II. FACTS

The Acting General Counsel adopts the comprehensive findings of fact set forth in the Judge's decision (JD 3-33:7).

III. ARGUMENT

A. Record Evidence, Board Precedent, and the Judge's Credibility Resolutions Demonstrate that the Judge Correctly Concluded that Respondent Violated Section 8(a)(1) of the Act by Directing Employees and Union Representatives Not to Speak to Each Other; Threatening to Have the Union Representatives Removed and Arrested; Causing the Police To Evict Them from the Premises and Arrest Them for Trespassing; and Causing the Criminal Prosecution of the Representatives, Because the Representatives Refused to Comply with Respondent's Unlawful Demand to Speak to Employees Only in the Breakroom

The credited record evidence amply demonstrates that Respondent prohibited employees and Union representatives from speaking to each other on the store floor, directed the Union representatives to speak with employees only in the breakroom, demanded that the representatives leave Respondent's premises when they would not comply with that direction, threatened to call the police to remove them, instructed its security officer to summon the police to remove them; caused the police to arrest them, and caused their prosecution for trespass. As the Judge correctly concluded (JD 29:9-12; 31:36-43; 33:11-22; 33:28-42; 34:51 – 35:7; 36:7-17; 37:13-20; 39:43-46; 42:15-28, 35-49), each independent action of Respondent's conduct (*i.e.*, prohibition; direction, demand, threat, instruction; arrest, and prosecution) violates Section 8(a)(1) because it interferes with union-related communications with employees and directly restrains employees from engaging in the protected activity of having substantive conversations with their bargaining representatives. Board precedent fully supports the Judge's conclusion. *See, e.g., Turtle Bay Resorts,* 353 NLRB 1242 fn. 6, 1273-74 (2009),

adopted by the Board in *Turtle Bay Resorts,* 355 NLRB No. 147 (2010); *Roger D. Hughes Drywall,* 344 NLRB 413, 415 (2005); *Wild Oats Community Markets,* 336 NLRB 179, 180-81 (2001); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), *enfd. sub nom. NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995).

1. There is No Basis for Overruling the Judge's Credibility Resolutions

In arguing (R Br 23-25) that the Union representatives were not engaged in protected conduct because they allegedly sought "unlimited visitation" with employees, Respondent seeks to resurrect Dostert's discredited testimony and overturn the Judge's credibility resolution rejecting that testimony. Under its established policy, the Board will not overrule an administrative law judge's credibility resolution unless a party convinces the Board through a clear preponderance of all the relevant evidence that the resolution is incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). Respondent's argument falls woefully short of meeting this heavy burden.

There is no merit to Respondent's contention (R Br 24) that the Judge improperly credited the testimony of Union representative Jenny Reed, who denied Dostert's testimony that she told Dostert on the morning of October 15 that she and representative Witt intended to speak to employees on the floor as long as they wanted. Although Respondent relies on a few lines of Reed's voluminous testimony in which Reed answered Respondent counsel's hypothetical question that there was not a specific time limit regarding the duration of contact between Union representative and employee on the store floor characterize Reed's knowledge of the parties' visitation practice as patently wrong, Reed's answer was *correct* and *consistent with* others' testimony. Thus, the contractual visitation clause does *not* specify any time limit as to

the amount of time that Union representatives may speak with employees on the floor. Rather, as Reed explained in the same answer (Tr 246:10-14), the contractual clause restricts the interaction only by requiring the Union representative "to not interfere with the service to customers nor unreasonably interrupt employees with the performance of their duties."

Moreover, Reed's knowledge of the parties' practice was also correct. Record testimony (Tr 372:3-19; 1561:12-14) demonstrated that, pursuant to the parties' visitation practice, there are no specific restrictions with respect to the length of time that contact on the floor may last because the length of the conversation varies depending on the circumstances, such as whether the employee has a complex insurance problem for the representative to investigate or something more mundane/routine. Even witnesses called by Respondent acknowledged this. For example, Hillsboro Store Director Catalano testified (Tr 1057:20-1058:3; 1058:10-24) that Respondent does not have any specific time restriction as to how long the conversations on the floor may last before the Union representative has to go to the breakroom.[2]

In sum, the Judge properly credited Reed's and Witt's testimony that Dostert prohibited them from having any substantive conversations with employees on the store floor and directed them to go immediately to the breakroom.

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[2] Respondent's contention regarding Reed fails to address why the Board should overturn the judge's determination (JD 29:5-9; 30:40-43) to credit the testimony of Union representative Brad Witt, who was also present for these conversations, over that of Dostert. Witt specifically denied (Tr 872:1-12; 915:9-17; 1488:2-10) that he or Reed told Dostert that morning they intended to have lengthy conversations with employees on the store floor or that they had the right to talk to employees as long as they wanted.

2. Respondent's *Post-Hoc* Efforts to Justify Its Unlawful Conduct Based on the Number of Union Representatives Present or Their Possession of a Petition Should be Rejected

As Judge Anderson correctly found (JD 33:3-7) that Dostert unlawfully denied the Union its visitation rights solely because he disputed the representatives' right to speak with employees on the store floor, he properly rejected Respondent's *post-hoc* defenses to justify its unlawful conduct, such as the number of Union representatives present in Respondent's 165,000 square foot store on October 15. Although Respondent now asserts (R Br 25-28) that the Judge ignored the Union's alleged "undisputed" breaches of the contract and visitation practice that justified Respondent's unlawful conduct, ample evidence supports the Judge's finding.

The Judge properly determined (JD 33:3-7) that the sole reason that Respondent summoned the police to remove and arrest the Union representatives was because they would not agree Dostert's unlawful directive that they speak with employees only in the breakroom. The credited testimony of Reed and Witt (Tr 567:20-569:18; 938:10-939:22; 1527:10-19) demonstrates that no one in management ever told them that they had to leave, or that Respondent was summoning the police, because there were too many representatives in the store, representatives had disrupted store operations, or representatives had interfered with customer service or employees' work duties. Nowhere in Dostert's report of his observations of the events on October 15, which he drafted that same day (Tr 1339:19-1340:9; RX 36), does he state that he was forced to remove the representatives and summon the police because there were too many representatives in the store, or because he had observed representatives interfering with customer service or unreasonably interrupting employees in the performance of

their duties. Indeed, as Dostert acknowledged in his testimony (Tr 1353:15-17), Dostert called the police to remove the Union representatives solely because "they would not listen and they would not go by our direction...." (1353:15-17).

Respondent's attempts to distort the record to argue that the number of representatives in the store "clearly motivated" Respondent's decision to summon the police to remove and arrest them should be rejected by the Board. Although Respondent correctly argues (R Br 26) that Dostert became aware later that morning that Union representatives other than Reed and Witt were in the store, it does not cite any record evidence to refute the above cited credited testimony of Reed and Witt; nor does it refute Dostert's own report and testimony, that the number of Union representatives was *not* the reason Respondent summoned the police.

There is no evidence to support Respondent's contention that Thornton directed Dostert to call the police because there were too many representatives in the store. Thornton was not present in the store that morning and did not know how many representatives were present or what they were doing (Tr 1229:19-22; 1236:15-24). Thornton also did not testify that she directed Dostert to call security and the police because there were too many representatives in the store. Respondent's reliance on Union representative MacInnis' testimony that Dostert stated that 'there's so many people here" is misplaced. That statement alone, in contrast to the credited testimony above showing otherwise, does not establish that that was the reason why Dostert denied the Union representatives their contractual right to speak to employees on the floor or summoned the police to arrest them. In any event, the cited statement of Dostert to MacInnis occurred well *after* Dostert had denied the representatives their

rights and had instructed Respondent's security officer to summon the police (Tr 1567:5-23).

Further, Respondent's repeated contentions (R Br 25-27) that the presence of eight Union representatives in Respondent's store that morning constituted an "undisputed" breach of the parties' contract and practice are misleading and wrong. Respondent did not present any evidence establishing that number of representatives present disrupted store operations or interfered with customer service or employees' work duties. In fact, its own surveillance videos (JX 9) do not reveal such disruption or interference.

Moreover, none of its witnesses testified that they observed such disruption or interference. Of the eight witnesses called to testify by Respondent, only Dostert and security manager Michael Kline were present in the store before the police arrived at Respondent's store. As noted above, the Judge properly discredited Dostert's testimony. In any event, nowhere in Dostert's summary report of the day's events (RX 36) does he mention that he observed Union representatives disrupting store operations, interfering with customer service, or interrupting employees in the performance of their duties. That leaves Kline. Kline, however, candidly admitted (Tr 1175:24-1176:6) that he had not observed or heard any disturbances or problems in the store that morning when Dostert instructed him to summon the police to remove and arrest the representatives.

The presence of 8 representatives in the store that morning also did not contravene any established past practice regarding visitation. The party which alleges an established past practice has the burden of showing that the other party was aware

of the practice's existence so that it would be expected to honor it. *Regency Heritage Nursing and Rehabilitation Center,* 353 NLRB 1027, 1027-1028 (2009); *BASF Wyandotte,* 278 NLRB 173, 180 (1986). Although one or two Union representatives usually conduct store visits, there were no established practices restricting the number of Union representatives who may be present in Respondent's stores to conduct store visits (Tr 1561:15-18). Historically, the number of representatives who enter a store at one time has depended on the circumstances; where there are problems at the store or the Union has to place flyers with employees quickly, the Union has sent in multiple representatives at one time (Tr 137:18-138:17; 1600:23-1602:10). On the other hand, in organizing situations where employee representation and a contractual visitation clause do not apply, the number of representatives who enter at one time has been restricted to two (RX 35).

There is also no merit to any suggestion that the presence of 8 Union representatives in a store at one time constitutes a *per se* disruption of store operations or interference with customers and employees. Circumstances such as the size of the store floor, date of visit, time of visit, and representatives' activities, rather than the number of representatives present, are more realistic and accurate measures of whether the mere presence of Union representatives disrupt a store's operations or otherwise forfeit their protections under the contract and the Act. For example, 8 Union representatives in a 165,000 square foot store may be too few to interfere with customers, whereas the same number in a much smaller store may have a greater risk of such interference. Similarly, the presence of 8 representatives on a weekday night, when there are relatively fewer customers, may have little chance of causing disruption

in service whereas the same number on a weekend afternoon or the day after Thanksgiving would arguably have a much greater risk of disrupting operations or customer service. Even the presence of one representative could be disruptive depending on her actions. Obviously a representative's conduct would be disruptive and unprotected if she runs around the store with a picket sign yelling and throwing flyers at customers and employees.

Finally, Respondent's assertions (R Br 27-28) that the Union representatives' solicitation of employee signatures on a petition that morning justified its unlawful conduct should be rejected for the simple reason that Respondent failed to present evidence to support these *post-hoc* assertions. The record evidence demonstrates that the Union representatives brought petitions to hand out to employees in the store that morning. Respondent has not, and cannot, point to any evidence, however, demonstrating that employees stopped working to read or sign the petitions that morning, or that representatives solicited signatures on the petitions from employees in front of customers.

Although Respondent relies on the testimony of Union representative Spicher that employees must stop working to read petitions, Spicher could not have observed any employees reading petitions or representatives soliciting signatures in the Hillsboro store on the morning of October 15. She was not one of the 8 representatives present that morning and did not return to that store until the afternoon of the 15th (Tr 383:21-23), after Respondent had the Union representatives evicted and arrested. As noted above, the credited testimony demonstrates that neither Dostert nor any official of Respondent stated that morning that the Union representatives had to go to the

breakroom or leave the store because they were soliciting signatures in violation of the contract or the parties' visitation practice.

3. Dostert Unlawfully Prohibited Union Representatives from Speaking with Employees on the Store Floor

The Judge correctly found (JD 31:36-43; 33:11-22) that Dostert prohibited the Union's representatives from speaking with employees on the store floor beyond an introduction and identification and thereafter had them removed when they refused to conduct such conversations only in the breakroom. The credited testimony of Reed and Witt (Tr 149:16-150:1; 872:13-20; 1518:16-20) fully supports the Judge's conclusion as it demonstrates that Dostert insisted that they go to the breakroom merely because they informed him that they had a contractual right to meet with employees on the floor and "talk to the associates while they are working...."

There is no merit to Respondent's contention (R Br 29-30) that the Judge's findings are not supported by the record and are inconsistent with the Acting General Counsel's brief and amended complaint allegations allegedly because they don't mention that Dostert permitted the representatives to introduce and identify themselves. Respondent's contention that there is no record support conveniently ignores Dostert's *own admission* in his report of the day's events (RX 36) that he told Reed and Witt that "they could approach associates and hand out their card [but] they would be in the break room for further information." As the Judge noted (JD 30:20-26), Dostert's report was entitled to significant evidentiary weight because he wrote it when the day's events were fresh in his memory and, unlike his testimony, was untainted by notions of what he

should say after listening to the testimony of virtually every witness at the hearing.[3]

Finally, the complaint allegations properly did not refer to Dostert permitting the representatives to meet and identify themselves. Respondent's unlawful conduct at issue was Dostert's immediate and continuing denial of the representatives' bargained-for right to have substantive conversations with employees on the floor regarding matters that affected their terms and conditions of employment (not the right merely to greet and identify) when they told him that was their purpose in coming to the store.

For the same reason, Respondent's attempt (R Br 30) to distinguish the *Turtle Bay Resorts* decision[4] is misguided. That decision is particularly applicable here because it stands for the proposition that an employer violates Section 8(a)(1) by verbally denying union representatives their contractually-established rights of access. 353 NLRB 542 at fn. 6. Here, the contractually-established right of access denied by Dostert was his prohibition against having the Union representatives speak with employees on the store floor concerning matters that affected the employees' terms and conditions of employment. Moreover, Respondent's additional claim (R Br 30) that Dostert's instructions to the Union's representatives were consistent with the parties' visitation practice as found by the Judge is baseless because Respondent relies on Dostert's discredited testimony to support its claim. The credited evidence, including

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[3] To the extent that Respondent argues (R Br 29-30) that Acting General Counsel's brief to the Judge does not mention that Dostert permitted the Union representatives to introduce and identify themselves, Respondent is simply wrong. In the very next line of Acting General Counsel's brief following that quoted in Respondent's brief, Acting General Counsel cited Dostert's report (RX 36) and stated: "Dostert told both Union representatives that they 'could approach associates and hand out their card and they would be in the breakroom for further information.'"

[4] *Turtle Bay Resorts,* 353 NLRB 1242 (2009), *adopted* in *Turtle Bay Resorts,* 355 NLRB No. 147 (2010).

Dostert's report, establishes that Dostert *never* told any Union representatives on the morning of October 15 that they could walk the store floor or speak to employees for a couple of minutes on the store floor.

Finally, Respondent's suggestion (R Br 31-32) that the dispute is simply a matter of Dostert's "inartful" instructions and that Reed could have simply ended the dispute by walking away from her argument with Dostert and undertaking her visitation, is insulting to the Union representatives who were willing to risk their liberty and go to jail instead of waiving the Union's contractually-established rights. Moreover, it ignores the undisputed evidence. Reed *did* attempt to walk away from Dostert and undertake her visitation with employee Alicia England, but Dostert *immediately* followed her and prohibited her and employee England from speaking with each other.

4. Respondent's Insistence that the Union Representatives Be Removed from Its Premises for Unlawful Reasons Caused the Representatives' Arrests and Prosecution for Trespass

In light of his finding that Respondent had unlawfully demanded that the Union representatives restrict their conversations with employees to the breakroom, the Judge further concluded (JD 33:37-36:17; 42:35-49) that Respondent also violated Section 8(a)(1) by instructing its security officer to summon the police to remove or arrest them, and causing their arrests and criminal prosecution for trespass. Supreme Court and Board precedent support the Judge's conclusion that Respondent is liable for the arrests and prosecution, even though Respondent did not specifically ask the police to arrest them or the prosecutor to charge them, because those were the proximate and foreseeable results of Respondent summoning the police when the representatives refused to accede to Dostert's unlawful demands. *Sure-Tan, Inc. v. NLRB,* 467 U.S.

883, 884 (1984); *Wild Oats Community Markets*, 336 NLRB 179 (2001); *Giant Food Stores,* 295 NLRB 330, 332-33 (1989). Although Respondent argues (R Br 35-39) that the representative's own intervening conduct caused their arrests, the record evidence refutes such argument.

Respondent's contention (R Br 36) that Reed's arrest occurred because she allegedly did not have the right under the parties' contract to conduct a store visit that morning borders on the frivolous. The contractual access/visitation provision (JX 3; RX 2) grants access rights to *representatives* of the Union and it is undisputed that Reed had been dispatched to the Union to coordinate its bargaining campaign and educate the Union's members. The fact that Reed was not an *employee* of the Union is simply irrelevant to the access/visitations afforded by the parties' contract and practice. Respondent's additional contention (R Br 36) that it is not responsible for Reed's arrest because she would not comply with Dostert's unlawful demands to leave and sought to be arrested, is also baseless. As the Judge correctly noted (JD 32:22-28), Section 7 rights would be meaningless if a union's or employee's failure to back down and waive the rights in the face of an employer's unlawful resistance to the exercise of such rights rendered the union's employee's conduct unprotected.

Respondent contentions (R Br 36-39) that it did not cause Marshall's and Clay's arrests because those arrests occurred due to the representatives' arguments with the police, are equally unpersuasive. Marshall and Clay were not arrested or charged with disorderly conduct, resisting arrest, or disobeying a police officer (Tr 636:2-8; 1448:24-1449:9; 1453:23-1454:3; 1478:1-6). Rather, as the reports (GCX 25-28) and testimony of arresting officers Mace and Kamenir demonstrate (Tr 169:4-7; 1448:8-15; 1479:4-13;

1479:21-1480:12), the officers arrested them solely for criminal trespass because they refused to comply with Respondent's directives to leave the premises. Indeed, the Oregon statute for criminal trespass (JX 4), under which the representatives were arrested and charged, requires that the person in charge direct the representatives to leave the premises before the representatives can be charged with criminal trespass.

As arresting officer Mace explained (Tr 1425:4-7; 1446:2-22), the only consideration in determining whether the representatives were to be arrested was whether the person in charge (Dostert) wanted them out of his store. Thus, Mace confirmed (Tr 1444:21-22; 1454:4-9) the Union representatives would not have been removed from the premises, or arrested and charged with trespass, but for their refusal to comply with Dostert's and Respondent's directive to leave. The arrests and prosecution for trespass were clearly the foreseeable result of Respondent summoning the police to enforce its unlawful directive that the Union representatives vacate the premises because they would not restrict their protected activities to the breakroom.

B. As Respondent Caused the Arrest of the Union Representatives, and Thereby Interfered with Employees' Section 7 Rights, the Judge Properly Ordered Respondent to Reimburse the Union for All Costs Arising from the Arrests, to Notify the Authorities of the Illegality of the Arrests, and to Seek Expungement of the Arrests

In light of his conclusion that Respondent caused the Union representatives' arrests and subsequent proceedings related to their prosecution, Judge Anderson correctly ordered (JD 43:35-39) that Respondent make the Union and/or its representatives whole for all legal, representational and related costs arising from the arrests and subsequent proceedings; notify the appropriate law enforcement and court authorities of the illegality of the arrests; and to seek expungement of the associated

records. Abundant Board precedent supports the Judge's order. *See, e.g., Downtown Hartford YMCA,* 349 NLRB 960 (2007); *Roger D. Hughes Drywall*, 344 NLRB 413 (2005); *Schear's Food Center,* 318 NLRB 261 (1995); *K Mart Corp.,* 313 NLRB 50 (1993); *Baptist Memorial Hospital,* 229 NLRB 45 (1977), *aff'd.,* 568 F.2d 1 (6th Cir. 1977).

The above Board precedent demonstrates that there is no merit to Respondent's argument (R Br 39) that the Board orders reimbursement of legal fees and costs only in cases where an employer has engaged in frivolous litigation or has a history of blatant disregard for Board orders. Contrary to Respondent's additional contention (R Br 40-41) Respondent *did* act egregiously by denying the Union representatives their bargained-for rights to meet and speak with employees and then summoning the police to remove and arrest them when they would not waive those rights. The Board has recognized that union representatives' efforts to meet with employees pursuant to a contractual access provision constitute the exercise of compelling Section 7 rights. *See, e.g., C.E. Wylie Construction Co.,* 295 NLRB 1050 (1989). Moreover, as argued above, there is no evidence to support Respondent's baseless claims (R Br 40-41) that the Union representatives disrupted store operations on October 15. Thus, the imposition of such make-whole relief is entirely proper here.[5]

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[5] The Board should also reject Respondent's contention (R Br 44) that it should not affirm the Judge's finding and order that Respondent violated the Act by summoning the police allegedly because that finding would be cumulative and would not materially affect the remedies pursuant to *Strand Theatre of Shreveport Corp.*, 346 NLRB 523 fn. 2 (2006). The *Strand* decision is entirely inapposite because it did not concern an employer summoning the police when union representatives refused to comply with an unlawful demand to waive their contractual access rights. Rather, the proper guiding precedent is *Turtle Bay Resorts*, 353 NLRB 1242 fn. 6, 1244 (2009), adopted by the Board in *Turtle Bay Resorts,* 355 NLRB No. 147 (2010), in which the Board found that

C. Record Evidence Fully Supports the Judge's Conclusion that Respondent Violated Section 8(a)(1) by Making Disparaging Remarks About the Union and Its Representatives

The Judge correctly concluded (JD 37:37-44; 38:49-51; 42:30-34) that Respondent violated Section 8(a)(1) by making disparaging statements about the Union and its representatives in the presence of employees. The credited record testimony supports the Judge's conclusions.

Respondent argues (R Br 43) that the Acting General Counsel failed to meet his burden in proving these 8(a)(1) violations and of failing to ask the appropriate questions to employee Alicia England. Respondent also, astoundingly, accuses the Judge of fabricating evidence and Acting General Counsel. Respondent is wrong on all counts.

As argued above, the Judge properly credited the testimony of Union representative Reed and discredited the testimony of Dostert. Reed credibly testified (Tr 161:1-14) that Dostert stated in the presence of employees that the Union and its representatives "were only here for people's dues money, that people—these members did not need a union. He asked me how much money we'd stolen from these members. That he didn't believe in unions, that we didn't need unions . . . ."

Moreover, Acting General Counsel did ask England what she heard Dostert say (Tr 725:18-19). England did *not deny* that Dostert made such statements or that she did not hear them. Rather, she testified (Tr 725:20) that she did "not recall." Thus, there was no need for the Judge to "fabricate evidence" because he credited Reed's testimony that Dostert made those disparaging remarks in front of employees and that

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an employer's action in summoning the police to remove or assist in removing the union representatives in violation of their contractual access rights constituted a separate and independent unfair labor practice.

employee England would have heard those statements at the time even if she could not recall them 6 months later. Finally, these is no merit to Respondent's other assertion (R Br 42-43) that the surveillance videos demonstrate that England could not have heard Dostert's statements due to her auditory impairment because her back was turned to him. As the videos do not have any sound, it is impossible to know exactly when Dostert uttered his disparaging statements and, therefore, whether England had her back to him or was facing him at that particular point in time.

D. Respondent Violated Section 8(a)(5) and (1) By Unilaterally Changing The Parties' Visitation Practice When Dostert Prohibited Union Representatives from Speaking with Employees Except in the Breakroom

An employer violates Sections 8(a)(1) and (5) by unilaterally altering the parties' contractual access provisions or practice. *See, e.g., Turtle Bay Resorts,* 353 NLRB 1242, 1274 (2009), adopted by the Board in *Turtle Bay Resorts,* 355 NLRB No. 147 (2010); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992), *enfd. sub nom. NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir. 1995); *Ernst Home Centers,* 308 NLRB 848, 848-49 (1992). In light of his findings concerning the parties' visitation practice and his crediting of Reed's and Witt's testimony, the Judge properly concluded that Respondent violated Section 8(a)(1) and (5) when Dostert prohibited Reed and Witt from meeting with and speaking to employees on the store floor on October 15. Board precedent fully supports the Judge's findings. *Ernst Home Centers,* 308 NLRB 848, 848-49 (1992).

Respondent does not raise any contentions with respect to this finding beyond those raised, and refuted, above with respect to the Judge's 8(a)(1) findings. Indeed, Respondent concedes (R Br 23) that the Judge accurately describes the parties' visitation practice as permitting the Union's representatives to communicate with

Respondent concedes (R Br 23) that the Judge accurately describes the parties' visitation practice as permitting the Union's representatives to communicate with employees on the store floor for a reasonable time, which can be a minute or two or longer depending on the circumstances. Here, the undisputed evidence demonstrates that Dostert prohibited Reed and Witt from communicating with employees on the store floor for any time whatsoever.

IV. CONCLUSION

In light of the above and the record as a whole, Counsel for the Acting General Counsel respectfully requests that the Board affirm the Judge's ruling, findings, and conclusions that Respondent violated Sections 8(a)(1) and (5), and to adopt the remedial relief ordered by the Judge.

DATED at Seattle, Washington this 18th day of January, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of The Administrative Law Judge was served by e-file, e-mail, and the United States post-paid regular mail on the 18th day of January 2011, on the following parties:

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