JD–38–11
Louisa, KY

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

K-VA-T FOOD STORES,
INC. D/B/A FOOD CITY

and

RETAIL, WHOLESALE &
DEPARTMENT STORE
UNION, UFCW, CLC

Cases 9-CA-46125
9-CA-46126
9-CA-46127
9-CA-46152
9-CA-46153

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DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Louisa, Kentucky, on March 22, 23, and 24, 2011. The Retail, Wholesale & Department Store Union, UFCW, CLC (the Union or the Charging Party) filed charges 9-CA-46125, 9-CA-46126, and 9-CA-46127 on November 22, 2010, and charges 9-CA-46152 and 9-CA-46153 on December 13, 2010. The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued the consolidated complaint on February 2, 2011, and the second consolidated complaint (the complaint) on February 25, 2011. The complaint alleges, inter alia, that K-VA-T Food Stores, Inc. d/b/a Food City (the Respondent or Food City) violated section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating a rule that interfered with employees' exercise of their rights under section 7 of the Act, and violated section 8(a)(3) of the Act by discharging, disciplining, and assigning more rigorous duties to employees because those employees assisted the Union and engaged in concerted activities.[1] The Respondent filed a timely answer in which it denied that it had committed any of the alleged violations of the Act.

[1] At trial, I granted the General Counsel's unopposed motion to withdraw all of the complaint allegations relating to the individual charging party, Daniel C. Cole, who filed case 9-CA-46201.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact[2]

I. Jurisdiction

The Respondent, a corporation, operates a grocery supermarket in Louisa, Kentucky, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Union Activity at Louisa Store

The Respondent operates the Food City chain of supermarket stores. The Food City store involved in this litigation is located in Louisa, Kentucky, and is one of 55 locations operated by the Respondent in its tri-cities division. The tri-cities division includes five districts and employs approximately 5500 individuals. John Cecil is the Respondent's executive vice president for the tri-cities division. Jamie Vaughn is a district manager who oversees a district that encompasses 11 stores, including the Louisa store. Adam Baldridge is the store manager for the Louisa location, and Kevin Garrett is the assistant store manager. Donnie Meadows is the Respondent's vice president for human resources.

The Louisa store has approximately 80 employees. Those employees are not represented by a union for purposes of collective bargaining. Indeed none of the eleven stores in the same district are unionized. The earliest mention of unions in the record is in a document that the Respondent has maintained as part of the personnel file for alleged discriminatee Glenda Burton. That document is a print-out of a January 2004 email exchange between Burton's non-employee spouse and the Respondent's vice-president for human resources, Meadows. In the exchange, Burton's spouse complains about working conditions at the store and states that if he had his way there "would definitely be a UNION of some kind involved." General Counsel's Exhibit Number (GC Exh.) 13. The Respondent continued to retain this document in Burton's personnel file at the time of the alleged discrimination against her.[3]

In July 2009, about a year before the Union campaign began, Burton discussed unionization with a number of co-workers. Tommy Bush, an employee who was also a close

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[2] The Respondent's unopposed motion to correct the transcript, dated, May 17, 2011, is granted and received in evidence as Respondent's Exhibit Number (R Exh.) 33.

[3] I recognize that this communication was from Burton's spouse, not Burton, and that it occurred somewhat distant in time from the alleged violations. However, I agree with the General Counsel that because the Respondent continued to maintain this document in Burton's personnel file at the time of the alleged violations it is, at a minimum, evidence that the Respondent suspected, or had reason to suspect, Burton's support for unionization and I received the document as an exhibit over the Respondent's relevancy objection.

personnel friend of assistant store manager Garrett, reported these conversations to Baldridge. Another employee also told Baldridge that Burton was talking about unionization. Baldridge was concerned enough about Burton's union discussions with her co-workers that he required Burton to meet with him in his office. Baldridge told Burton that he heard she had been talking about a union. He warned Burton that the presence of a union would mean he could no longer "do anything for" employees, and would "have to go through a union rep . . . to do anything." Then Baldridge asked Burton whether she was happy with her job, and Burton answered that she was. Baldridge encouraged Burton to talk to him about any "problems" she might have at work in the future.[4]

In late 2009, Bush, the same individual who had reported Burton's union remarks to Baldridge, began telling employees, including alleged discriminatees Ruth Ann Kirk and Martha Smith, that representatives of a union had visited him at home. This prompted Kirk to approach Baldridge and ask him about unions. Baldridge told Kirk that unionization would not be good for the store and would "take it out of his hands and he wouldn't have no management controls."[5]

The first meeting that Union officials had with employees of the Louisa store took place on January 12, 2010, at a restaurant in Louisa. Burton and one other employee attended, along with the spouses of both employees. The Union officials present were David Harper, Ken Burns, and Gene Allen Mayne. During this meeting, Burton provided the union officials with an incomplete list of the names and addresses of employees at the Louisa store. Burton also signed a union card authorizing the Union to represent her for purposes of collective bargaining.

As far as one can tell from the record evidence, there was only limited union activity at the Louisa store for several months following the January 2010 union meeting. Then, in the summer of 2010, Burton, with Kirk's help, created a more complete list of employees and their addresses. In July, Burton forwarded the list of employees to representatives of the Union. In addition, Burton approached Smith, an alleged discriminatee, and asked her if she was interested in having someone from the Union come to speak to her at home. Smith said that she was interested. Thereafter, Burns and Harper visited employees at their homes in order to discuss unionization and attempt to persuade the employees to sign union cards. These house visits were shown to have started by September 2, 2010, but the evidence does not establish whether or not there were earlier visits.[6]

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[4] Based on my observation of the demeanor of the witnesses, their testimony, and the record as a whole, I found Burton's testimony that Baldridge discussed unions during this meeting, Transcript at Page(s) (Tr.) 359-360, more credible than the testimony of Baldridge and another manager that Baldridge never mentioned unions, but only asked whether Burton was happy with her job, Tr. 492, 692. I note that Burton's account is lent corroboration by the testimony of other witnesses who stated that immediately upon leaving the meeting with Baldridge, Burton told them that Baldridge had discussed unions with her. Tr. 106-107, 185. Moreover, even Baldridge conceded that he held the meeting with Burton because he heard that she was discussing unionization with co-workers, Tr. 490-491, and therefore it makes sense that he would raise the subject of unions during the meeting.

[5] Neither Bush, nor any union official, was called to testify about whether Bush had, in fact, been contacted by a union around this time. Therefore, I reach no conclusion about whether such a contact actually occurred. However, I credit the uncontradicted evidence that Bush was *telling* other employees that he had been contacted by a union, and that this led Kirk to raise the subject of unionization with Baldridge in about November 2009.

[6] Excerpts from a log maintained by the Union report that Burns and Harper made house visits to employees of the Louisa store on September 2 and afterwards. R Exh. 31. Neither

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As part of the organizing campaign, the Union created a committee of prounion employees who would help with the organizing effort. The four members of that committee were Burton, Kirk, Smith and Melissa Holley – all long-time employees of the store. Smith and Kirk signed cards authorizing the Union to represent them on September 3 and September 9 respectively. In October and November 2010, the Respondent discharged three of the four members of the union organizing committee. These were the only individuals among the store's approximately 80 employees who were discharged during the period from September to December 2010. GC Exh. 22; Transcript at Page(s) (Tr.) 913-914. Indeed, the record shows that the Respondent did not discipline anyone during that time period aside from the five persons alleged in the complaint to be victims of unlawful conduct.

During the union campaign, Burton, Holley, Kirk and Smith did not wear pro-union paraphernalia or generally distribute pro-union materials in an open manner. Many of their conversations about the organizing effort were with union officials and among themselves. Of the four, Burton had the most frequent interactions with officials of the Union. In September 2010, Burton met with Harper and Burns twice at a restaurant in Louisa. At the second of those two meetings, Kirk was also present. Burton also met with Union officials in nearby Huntington, West Virginia. Holley held meetings with union officials at her home on multiple occasions, and Burton, Kirk and Smith attended some or all of those meetings. Smith, in addition to attending union meetings and signing a union card, assisted the union campaign by compiling a list of people who she thought would be interested in unionization and providing that list to the Union's organizers.

Members of the employee organizing committee did have some direct discussions about the Union with employees. During approximately the last two weeks of September 2010, Holley discussed the Union with two or more employees in a break room. In early September, Smith asked a co-worker if he was interested in the Union and then provided that employee with a video about unionization. Smith provided the video while the two were in the Louisa store's parking lot. In September 2010, Kirk met with a group of individuals – including the bakery/deli manager at the Louisa store (Tanya Vanover), and the bakery/deli manager at another Food City store (Tanya Moore) – and asked those present whether they had been contacted by the Union yet. [7]

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side introduced log entries showing house visits before September 2. In his testimony, Burns stated that for about 2 weeks before he began joining Harper on house visits, Harper had been making such visits without him, and that Harper's solo visits started in August. However, Burns did not state the basis for his belief that Harper had made visits in August, Harper was not called to testify, and there was no other evidence corroborating Burns' apparently hearsay testimony about what Harper had done. I find that the record shows house visits beginning on September 2, but does not establish whether or not the Union was making house visits prior to that time.

[7] Kirk and Smith testified that, on about October 9, 2010, they had a conversation about the Union with Joseph Cantrell, a designated assistant store manager. Cantrell denies that he ever had a conversation with them about the Union. On the record here, I do not find a basis for reaching a conclusion as to whether such a conversation took place. The accounts of the General Counsel's witnesses, Kirk and Smith, were inconsistent in significant respects. According to Kirk, Cantrell overheard her telling Smith that she had signed a union card. Tr. 97. After Cantrell overheard Kirk's statement, he told her that unionization would not be to her advantage because she was a part-time employee. In Smith's account, on the other hand, Kirk did not inadvertently reveal her union sympathies. Rather Cantrell approached and asked Kirk

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At about the time the union activity increased, Bush – the same employee who had informed Baldridge about Burton's 2009 statements regarding unionization – began making efforts to obtain information about union activity from other employees. For example, at some point prior to August 2010, Bush asked Burton whether the Union had "started doing anything yet." Burton responded that she did not know. On another occasion, Bush told Holley that he heard a rumor that she was holding Union meetings at her house. During that approximate time period Holley was, in fact, meeting with other union supporters at her house, but she denied this to Bush and told him not to spread rumors. Bush persisted in attempting to discuss the subject with Holley.

B. Respondent Reacts to Discovery of Union Activity and Disciplines Smith for Missing Management- Led Meeting about Union.

In September 2010, Baldridge heard a rumor that an employee had been visited at home by officials of the Union. Although Baldridge was on vacation at the time, he contacted Vaughn to convey what he had heard. The very next day, Vaughn held a department head meeting for the Louisa store to discuss management's response to the union activity. Cecil and Meadows also attended this meeting.

Soon thereafter, in the fall of 2010, the Respondent disseminated an anti-union note to employees along with their paychecks. This note, which came from Cecil and Baldridge, stated, inter alia, that:

"what she thought about the stuff going on" and Kirk answered that she thought the Union would be a "great thing." Tr. 187-188. In Smith's version, Smith told Cantrell that she agreed with Kirk's statement in favor of the Union, whereas Kirk did not recount Smith saying anything during the exchange. In Smith's account, Cantrell said that unionization would be a good thing, whereas Kirk said that Cantrell said that the Union would *not* be a good thing for Kirk. According to Smith, Cantrell also said that unionization would never happen at the Louisa store, something that Kirk did not recount Cantrell saying. I find that the testimony of Kirk and Smith does not outweigh that of Cantrell on this point, not only because Kirk's and Smith's accounts are inconsistent, but also because those accounts are implausible in certain respects. For example, I consider it implausible that, on October 9, Kirk would find it necessary to tell Smith that she had signed a union card given that Kirk signed the union card a month earlier on September 9 and that Kirk and Smith were both members of the four-person employee organizing committee. By the same token, I found the Respondent's witness, Cantrell, less than fully credible on the subject of the encounter. I was left with the impression that Cantrell was straining to deny things that he thought might support the position of the General Counsel and/or the Union. For example, Cantrell claimed not only that he had not engaged in a conversation with Kirk and Smith about the Union, but that he had not even heard about the Union until the Respondent's first antiunion meeting on September 29. Tr. 769. That is not plausible given that the Union's home visits started on September 2 at the latest, and that even Garrett, another witness for the Respondent, stated that everybody at the store was talking about the union activity and spreading rumors about who was involved. Tr. 744-745. Similarly, Cantrell not only denied asking Kirk and Smith about the Union, but denied that he had ever asked either of them what was "going on." Tr. 771-772. Since the schedules of these employees overlapped it is improbable that Cantrell would never make a general inquiry of this type to them. On balance I find that the record evidence fails to show whether or not Cantrell knew about the union activity of Kirk and/or Smith.

> No matter what a[union] organizer tells you, they are not permitted in your home unless you allow it – just like any other visitor or traveling salesman. . . . Union organizers are paid to manipulate you into signing your rights over to the union through union authorization cards – and home visits are one of their favorite ways to do this. While it's your right to sign a card, **it is also your legal right not to sign a card and to oppose the Union.** So, if you don't want them to visit, don't let them in. If they refuse to leave, they can be considered trespassers. If they continue to refuse to leave, then call the police. Also, you may want to mail a letter to the Union and tell them to leave you alone.

GC Exh. 12 (emphasis in original).

The Respondent also discusses "organization membership" in its employee handbook. There the Respondent states that "federal law gives you the right not to have to join any organization in order to hold your job." It states further:

> We believe that a labor organization is an unnecessary third party and could seriously interfere with our ability to treat you and our customer in the manner you both deserve.
> In the best interests of you and the Company, we will oppose by every moral and legal means any attempt by an outside organization to disturb or break up the fine relationship we enjoy.

R Exh. 15, Page 13.

In addition, the Respondent conducted multiple meetings to communicate its views regarding unions to employees and supervisors. These meetings were held on September 29, October 5, and October 21, 2010, with "make-up" meetings on October 28 and 29, 2010, for those who did not attend the October 21 meeting. The first two meetings were mandatory, but out of concern that the meetings were overburdening employees, the Respondent made the third meeting optional. The Respondent's employees did not all attend a day's meeting at the same time. Rather the Respondent repeated the presentation throughout the day for groups of approximately 15 to 20 employees.

The September 29 meetings were attended by company officials Cecil, Meadows, Vaughn, Baldridge and Garrett. The Respondent posted notice of the September 29 meeting in the workplace and one employee testified that she was informed about it 2 or 3 days in advance. At the September 29 meetings, Cecil gave a presentation during which he stated that signing a union authorization card was comparable to signing a legal document. He stated that if the employees voted to make the Union their bargaining representative, all terms and conditions of employment would be "on the table," and could go up, or down, or stay the same.

At one of the September 29 meetings, Smith asked Cecil whether employees' pay would go up if the employees selected the Union as their bargaining representative, and Cecil said that it was a "possibility." After that meeting, Smith and Burton approached Cecil, and Smith stated that employees could make more money at the nearby, unionized, store of a competitor. When Cecil expressed doubts about this, Smith challenged him by stating that the information about the competitor's pay rates could be found on the internet. Smith also asked Cecil whether the reason that the Respondent had increased the frequency of visits by supervisors from outside the store was "so people from the Union wouldn't come in with guns and knives and wrestle us to the ground and force us to sign cards." Cecil responded that the supervisors were there for

"security reasons," not because of the Union.

The Respondent held the second group of meetings about the Union on October 5. During these the Respondent presented a video that was introduced by Cecil. It appears that the notice the Respondent gave employees about the October 5 meetings was less formal than the notice given for the prior meeting. For example, Holley was not notified about the October 5 meeting until she happened, on the day of the meeting, to stop as a customer at a gas station that the Respondent operates near the Louisa store. The manager of the gas station mentioned to Holley that meetings were underway that day, but Holley said she would was not be able to attend because she had to take care of her young child.[8] Kirk, who at this time was on a part-time schedule, also did not attend, and the Respondent did not inform her about the meeting. Smith did not find out about the meeting until she was leaving work on October 4 and a co-worker mentioned that there was a meeting the next day. October 5 was a scheduled day off for Smith, and so she contacted Baldridge and asked whether she was expected to attend the meeting anyway. Baldridge told her that the meeting was mandatory. This was the first time in Smith's 10 years with the Respondent that she remembers being required to come to the store for a meeting on a day when she was not scheduled to work. Smith, who was celebrating her wedding anniversary on the day of the meeting, failed to come. She contacted Baldridge later that day to tell him that she had forgotten about it. Baldridge asked Smith if she was aware that the meeting was mandatory and Smith said that she was aware. Baldridge told Smith that he could have excused her from the meeting if she had notified him in advance that she was unable to attend.

The third group of meetings were held on October 21. This time, once again, Cecil presented a video to the employees. The October 21 meeting was not mandatory, and approximately eight employees failed to attend either on that date or on one of the make-up dates.

On October 6, the Respondent disciplined Smith by issuing a "written correction" [9] to her for missing the October 5 meeting. This was the first discipline of any kind that Smith had

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[8] The parties stipulated that the gas station manager, Mary Bloomfield, is a supervisor for purposes of section 2(11) of the Act. However, Holley works at the market's deli counter, not in the gas station and her supervisor is Tanya Vanover, not Bloomfield.

[9] In addition to written corrections, the Respondent uses a less serious form of discipline known as an oral/verbal correction. The progressive discipline policy in the Respondent's employee handbook provides:

> Normal steps in the disciplinary process are outlined below. However, at management's discretion, management may enter into any level of disciplinary action including termination.
>
> **Oral Correction –** The supervisor will provide an oral correction to the associate. A written record of the correction will be placed in the associate's personnel file.
>
> **Written Correction –** The supervisor will consult with higher management and prepare a written correction. The associate will be asked to sign indicating receipt of a copy of the written correction, and a copy will be placed in the associate's personnel file.
>
> **Suspension Without Pay –** If the written correction does not correct the problem, the associate may be suspended without pay for a minimum of three (3) days. This suspension without pay must have the approval of the Chief Executive Officer.
>
> **Termination –** The supervisor may recommend termination of associates. Recommendations will be reviewed by management, which will determine the action to be taken.

R Exh. 15, Pages 18 to 19.

received during the approximately 10 years she worked at the Louisa store. When she received the discipline, Smith wrote the following comment on it: "I don't agree with this totally. And this is my first one in 10 years. And I believe I wouldn't have got it now if it wasn't for this union shit."

The record shows that 12 employees missed each of the Respondent's mandatory meetings about the Union, and that seven employees missed both meetings. However, Smith was the only employee who was disciplined for missing either or both of the meetings. Baldridge attempted to explain this apparent discrepancy by stating that Smith was the only employee who failed to attend without being excused by him. However, based on the record evidence I find that, at a minimum, neither Kirk nor Holley had been excused by Baldridge.

C. Kirk Terminated

Kirk began working for the Respondent in January 2001, shortly after the store opened. She served in multiple capacities over the years of her employment there, but her most recent full-time position was as the store's scanning deputy. The main duty of the scanning deputy is to change the price tags, price stickers, and price signs, for products when the Respondent sets new prices for them. In November or December 2009, Kirk accepted a full-time job with another employer, but she continued to work for the Respondent on a part-time basis as an assistant scanning deputy. Kirk understood that she would keep working part-time until the Respondent obtained coverage for her duties, but she was not sure how long that would take and believed that she would be provided with notice before being terminated. When Kirk became a part-time employee, she initially worked weekends and helped train Bush as a replacement,[10] and in approximately January 2010, the Respondent allowed Kirk to switch to an even more limited part-time schedule – helping out on just the one day each month when the Respondent changed the prices on a particularly large number of items. This was not a unique arrangement – the Respondent had previously allowed another employee to perform assistant scanning duties on a once-a-month schedule for a period of 2 years.[11]

Bush, who Kirk had been helping to train as assistant scanning deputy, did not remain in the position. This meant that Smith, who had assumed the scanning deputy position, was left without an assistant who could fill-in when she wanted to take vacation or had to miss work for personal or health reasons. Smith raised this situation with Baldridge, telling him that she needed more assistance that Kirk was able to provide on her one-day-a-month work schedule. Baldridge responded that "we need to find you somebody." The record does not show when this conversation took place.

On October 16, Baldridge called Kirk to the office and told her that the Respondent was going to train a full-time employee as a back-up for Smith and that Kirk's services were no longer needed. Baldridge told Kirk that he was not firing her, but rather eliminating her part-time position. Baldridge testified that this action was necessary because he was allowed a limited

[10] According to Baldridge, he and Kirk discussed that her employment was being continued on part-time basis so that she could train a replacement. Tr. 622-623. Kirk essentially corroborated this, recounting that she agreed to work part-time to help train a replacement. Tr. 72.

[11] In the last annual performance review that Kirk received as a full-time employee, the respondent rated her as "Excellent 96[out of 100]" on August 1, 2009. In the performance review that was completed for her on August 1, 2010, after she became a part-time employee, the Respondent gave her a rating of "Meet[s] Expect[ations] 87[out of 100]".

number of employee-hours each week for operating the grocery department and did not have enough hours to continue to employ Kirk once-a-month as an assistant scanning deputy. The Respondent did not introduce any evidence, other than Baldridge's testimony, showing the existence of a total employee-hours limitation, or stating how many employee-hours the store was using at the time it claims to have concluded that it could no longer have Kirk work the once-a-month shift. As Kirk was leaving the meeting, she told Baldridge that it was not in his "best interest [to] be letting go of part-time employees with the Union trying to come in." Baldridge responded that the decision had "nothing to do with the Union." After Kirk was terminated, the Respondent named another employee, Lee Maggard, to be trained as the next assistant scanning deputy.[12]

D. Increased Presence of District-Wide Supervisors

At about the same time as the Respondent held the first meetings regarding the Union, the Respondent dramatically increased the presence of its district supervisors at the Louisa store. Among the district officials who began coming more frequently were Vaughn (the district manager) and James Spears (the district produce supervisor). Previously, the store received a visit from a district supervisor approximately once or twice a week. Starting in September 2010 the Louisa store began receiving visits from one or two district supervisors on a daily basis. In Vaughn's case, he went from visiting approximately 1 to 4 times per month to visiting 2 or 3 times each week.

Vaughn testified that the reason for the increased supervision was that the Louisa store had a problem with what the Respondent refers to as "shrink." The Respondent defines shrink as "the difference" between what a store is "supposed to sell an item for, and what we actually receive for it." This difference includes the lost revenue that the Respondent experiences when, inter alia: product is stolen from the store; product the Respondent's pays for is not actually received by the store; and product cannot be sold because it is damaged or beyond the sell-by date. The record evidence shows that, as of March 2010, the shrink level for the Louisa store was well within the acceptable range. However, as of the quarter ending in June 2010, the Respondent knew that the shrink level at the store had more than doubled to a level that the Respondent considered unacceptable. Tr. 814. The Respondent's analysis for the quarter ending September 30, 2010, shows that the store's shrink level was marginally worse at that point than it had been in June 2010.[13] The record does not show how common it is for the Respondent's stores to have unacceptable shrink levels, nor does it show how severe the problem was at the Louisa store as compared to other high-shrink stores. In addition, the

[12] On February 10, 2011, Kirk and the Respondent executed an agreement and release, which stated that Kirk was waiving any claims against the Respondent for reinstatement or back pay. The document provided that Kirk would be paid $1000 when she signed the release and another $1500 when the Board approved withdrawal of the complaint The Respondent made the $1000 payment to Kirk. Kirk's understanding was that she would receive the additional $1500 if she contacted the Board and said she wanted to be removed from the complaint. She did that, but the Board did not approve withdrawal of the complaint, and the Respondent did not pay the additional $1500 to Kirk. The Charging Party Union was not a party to, and apparently had no involvement with, the release and agreement. Both the Union and the Board oppose giving the agreement and release any effect outside the context of a compliance proceeding.

[13] The shrink level for the quarter ending March 31 was .49 percent, for the quarter ending June 30 it had increased to 1.22 percent, and for the quarter ending September 30 it was 1.34 percent. R Exh. 19. The average shrink level for the Respondent's stores is .75 percent.

Respondent did not show that it implemented comparable increases in supervisory presence at other stores that had unacceptable shrink levels.

The record shows that the Respondent was aware of the shrink problem at the Louisa store by the end of June 2010, but did not begin the increase in supervision by district managers until September 2010, when it discovered that a union campaign was underway. I infer that the union organizing campaign was the reason that the Respondent dramatically increased the presence of district supervisors at the Louisa store starting in September 2010. I base this on the totality of the evidence regarding the increase, and in particular on the fact that the increase in supervision coincided with the Respondent's discovery of the union campaign and the lack of another plausible explanation for that timing. *Electrical Workers Local 429*, 347 NLRB 513, 517 (2006) (Board finds action was motivated by section 7 activity based on the timing of the action and the pretextual nature of the union's explanation), remanded on other grounds 514 F.3d 646 (6th Cir. 2008); see *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005), pet. for review denied 265 Fed. Appx. 547 (9th Cir. 2008); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB,* 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994).

E. Respondent Disciplines Burton, and then Branham and Sweeney, for Visiting the Break Room While On the Clock.

The Respondent's employee handbook states that it is a violation of policy for an employee to leave their "regular working place during working hours for any reason without authorization." Under this policy, the Respondent has required that employees "clock out" before taking their breaks. The evidence establishes, however, that, prior to the union campaign, the Respondent did not enforce this policy to preclude employees from making brief on-the-clock visits to the break room[14] or the restroom. Numerous employees testified that they, and other employees, would frequently stop in the break room while on the clock to talk with co-workers. These break room visits were generally brief, lasting no more than 2 to 3 minutes. Employees made such visits in the presence of management personnel, including Baldridge, but prior to the union campaign the managers did not make an issue of the behavior. Among those who testified on this subject was Sandra Jobe, a particularly credible witness in my view based on her demeanor and apparent lack of bias. Jobe is a former long-time employee of Louisa store who left her position there voluntarily and was not shown to be a union supporter or to have any personal interest in the outcome of this litigation. Testifying pursuant to the General Counsel's subpoena, Jobe stated that when she passed by the break room and saw a co-worker, she would generally "step inside and say how's it going or, you know, just speak a few words to them." Jobe testified that none of the store's managers or supervisors had ever told her to leave the break room even though almost all of them had seen her visiting the break room during periods when she was on the clock. In addition, Burton, Kirk, and Smith testified that they frequently made brief stops in the break room and saw other employees doing so, but that prior to the union campaign none of the managers who witnessed this conduct ever told them it was impermissible. Smith, a former designated assistant manager, also testified that at times when she herself was acting as a manager she would frequently see employees in the break room who were not on break, and that she would allow this behavior "as long as it wasn't busy or they wasn't needed on the front."

[14] There were actually two break rooms – one where smoking is permitted and the other, a rarely used break room where smoking is prohibited. The break room involved this case is the smoking break room.

The first time that the record shows the Respondent disciplined any employee for making a visit to the break room without clocking out was on October 23, 2010, when Garrett disciplined Burton. On October 23, Burton stopped at the break room to accept a piece of candy from a co-worker. The break room was approximately 20 to 25 yards from Burton's work area. Burton returned to work after about a minute. This brief on-the-clock visit was not unusual for Burton – a 10-year employee of the Respondent who had been making such visits on a daily basis. This time her visit to the break room was observed by both Garrett, who saw her stopped by the door to the break room, and Vaughn, who observed Burton in the break room.[15] After Vaughn left the break room area, he asked Garrett whether Burton had been on-the-clock at the time that she was in the break room. In response to Vaughn's inquiry, Garrett approached Burton in the receiving area and asked if she had clocked out before visiting the break room. Burton told Garrett that she had not clocked out and that she had been in the break room for about a minute. Later that same day, Garrett called Burton to his office and gave her a formal "verbal correction." The discipline was recorded on a disciplinary form signed by Garrett and retained in Burton's personnel file. The disciplinary form stated that Garrett had broken a company rule by being "in the break room while on the clock." The form went on to warn that "[t]his will be closely monitored." Burton asked Garrett if he would have given her the discipline if Vaughn had not been present in the break room, and Garrett answered that "anytime I observe somebody in the break room on the clock . . . they would have the same . . . treatment." However, in his 7 years as the store's assistant manager Garrett had never before disciplined anyone for such conduct.

The next day, October 24, Garrett saw employees Richard Branham and Daryle Sweeney in the break room while on the clock. Garrett issued a verbal correction to each of them. Garrett testified that the reason he took the actions he did upon seeing Branham and Sweeney in the break room was to show Burton that he was going to be "fair" and treat other employees the same way he treated her.

Garrett testified that prior to October 23 he had never seen anyone in the break room while on the clock. Tr. 724-725. I do not credit this testimony. I find it completely implausible that Garrett would work as a manager at the store for 7 years without ever observing what the record shows was frequent and open conduct by employees. Moreover, it is even more implausible that Garrett would not see this conduct during 7 years as a manager and then happen to notice three different employees engaging in it over the course of just 2 days time. By his own account, Garrett had noticed Burton at the break room on October 23, but did not discipline her until after Vaughn raised the matter with him. At any rate, it is clear that, prior to October 23, Baldridge and other managers had frequently been present when employees paused in the break room without clocking out, but management had not discouraged that conduct. Tr. 87, 159-60, 198-200, 318-320, 373-374.[16] I find that, prior to October 23, the

[15] The Respondent asserts that Burton made two separate visits close in time to each other – one of which was seen by Garrett and one by Vaughn. I conclude that the record does not establish that Garrett and Vaughn saw two separate visits by Burton. Burton credibly testified that she only remembered making one on-the-clock visit to the break room that day. Tr. 424. Garrett, whose testimony the Respondent relies on to show that there were two visits, conceded that he did not know whether Vaughn and himself witnessed Burton during two separate visits or the same visit. Tr. 758.

[16] To the extent that Baldridge's testimony can be seen as denying that he knew that, prior to October 23, employees visited the break room while on the clock I find that testimony implausible. Indeed, Baldridge was so intent on providing testimony favorable to the

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Respondent did not enforce its break policy to prohibit employees from briefly stopping in the break room at times when they were on the clock.

F. Respondent Posts Policy Prohibiting Employees from Being in the Break Room When Not on Break.

On October 24, Garrett drafted a policy limiting employees' use of the break room during non-break periods. He called Baldridge at home to discuss the policy, and Baldridge agreed that posting such a policy was warranted. The following Monday, October 25, Baldridge and Garrett both signed the policy and posted copies in the break room areas and near the time clock. The policy states:

> ATTENTION ALL ASSOCIATES
>
> Please be advised that according to company policy, while you are clocked in, you are to be located in your designated work area and performing your job duties. If you do not understand where your designated work area is, please ask your immediate supervisor for clarification. The only obvious except[ions] to this is a restroom break, or if a manager asks you to perform some other job duty. What this means specifically is, you are not permitted to be in the breakrooms unless you are clocked out for break, out for lunch, or not on the clock. Corrections have been, and will continue to be issued for this.

This was the only document that the Respondent has ever posted regarding employees' use of the break room during non-break times. The notice was still posted near the time clock at the time of trial, but was no longer posted in the break areas.

G. Respondent Assigns Significant New Duties to Burton and then Disciplines Her the Next Day for Tardiness.

Burton's position at the Louisa store was "receiver." The primary duty of the receiver is to monitor the three doors at the back of the store. Representatives of various suppliers/vendors deliver product through the main receiving door and then place that product on the shelves in the store's customer areas. The receiver is required to "check in" these deliveries by scanning the product and determining that the Respondent is receiving everything that it is paying for, and also that everything it is receiving has been authorized/ordered for the store. In addition to delivering items, the vendor representatives remove past-due product from the shelves and the vendor usually credits the store for these items. The receiver "checks out" the vendor representatives when they leave the premises with past-due product so that the store receives proper credit. In addition, the receiver inspects what the vendor is removing from the store to ensure that none of it is new product, or anything else that is meant to stay in the store. The receiver is also responsible for scanning "reclaim" items – i.e., items that have been damaged and cannot be sold.

The receiver's duties include controlling employees' passage through the back receiving door to dispose of trash. The receiver is expected to confirm that what the employee is bringing out is, in fact, trash, and not salable product that the employee is misappropriating.

Respondent on this score, that he even claimed that he never saw any employees come into the break room when they were *off* the clock. Tr. 636 at lines 2 to 6.

The receiver is also responsible for taking out trash that collects near the receiving door, taking empty crates out of the store, and cleaning the porch outside the main receiving door. When the receiver is not present in the receiving area, he or she is required to keep the receiving doors locked.

On November 3, Baldridge and Garrett informed Burton that, in addition to her duties as receiver, she was being assigned responsibility for stocking a section of the store where the Respondent offers its own brand of pies and cakes. Burton's "pies and cakes" duties included ordering the product, putting date labels on the new product, placing the product on the shelves, rotating the older product to the front of the shelves, putting discount coupons on product that is about to expire, and removing expired product from the shelves. Since the pies and cakes are supplied to the store by the Respondent itself, the store receives no credit when this product fails to sell by its due date. Thus, the Respondent has a particularly strong incentive to avoid "shrink" by doing what it can to sell the pies and cakes products before they expire.

During an earlier period, ending in approximately 2005, Burton had performed the pies and cakes assignment while working as a receiver. In 2005, Baldridge relieved Burton of those duties, stating that it was too difficult for someone to perform the pies and cakes work while also performing the receiver assignment. Baldridge began to handle the pies and cakes assignment himself in approximately February 2006. From that time until November 2010 Baldridge performed the assignment with assistance from Garrett.

In late October or early November 2010, Cecil and Vaughn were together in the Louisa store when Baldridge and Garrett were performing tasks related to the pies and cakes assignment. Cecil and Vaughn told Baldridge that this was not an appropriate use of the managers' time,[17] and said that Baldridge "need[ed] to find somebody else to do that job." Baldridge and/or Vaughn decided that Burton should take over the pies and cakes assignment. The Respondent identified one other store, among the eleven locations in the district, where the receiver was required to perform the pies and cakes assignment.

Between the time that Burton had last performed the pies and cakes work in 2005, and the time that work was assigned to her again in 2010, the volume of the work had increased significantly. In 2005, the store devoted about eight feet of shelf space to stocking the pies and cakes, but by November 2010 it was devoting 20 feet of shelf space to those products. In addition, the requirement that the employee place discount coupons on items that were about to expire was new. At the time Burton started doing the pies and cakes assignment again in November 2010, the work took her about 2 hours a day, 5 days a week.[18] When Baldridge

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[17] When Vaughn was asked whether he had ever previously seen Baldridge performing the pies and cakes work, he replied "Not to my knowledge, no." Tr. 827. When asked whether he knew who had been doing the assignment, he answered that he knew the receiver had done it, Id., although this had not been true for almost 5 years. To the extent that Vaughn is claiming that he was unaware that either Baldridge or Garrett had been performing this assignment, I find any such claim implausible. Baldridge had been performing this assignment for close to 5 years for 30 minutes to an hour daily, and Garrett had also been helping out for 30 minutes to an hour daily. Tr. 661-663. Vaughn was the district manager during that entire period. I do not accept that Vaughn would not have seen, or otherwise been aware of, this activity by Baldridge and Garrett. This implausibility is increased by the fact that Vaughn was aware that the receiver had done the assignment for a shorter period of time close to 5 years in the past.

[18] I credit Burton's testimony that she devoted "a couple hours" per day to this task. Tr.387-388. Baldridge, who was sharing the assignment with Garrett during the period leading up to

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assigned this work to Burton on November 3, he did not relieve her of any of her other duties. The new assignment meant that Burton would sometimes be in the pies and cakes section, not the receiving area, when vendor representatives arrived to make deliveries at the receiving area. The pies and cakes section was at the far end of the store from the receiving area, and the vendor representatives would have to locate Burton there and ask that she return to the receiving area to inspect deliveries.

After the pies and cakes work was assigned to Burton, Baldridge continued to have a hand in it. Baldridge would ask Burton if she had completed the work on a particular day, and when necessary, have another employee complete the work. Vaughn testified that the store manager is required to check that the pies and cakes have been properly discounted and rotated on the shelves, Tr. 828, and Cecil testified that the assistant store manager and other supervisory personnel are expected to perform the pies and cakes assignment when needed, Tr. 882. A document maintained by the Respondent states that it "is the responsibility of all Assistant Store Managers to execute the [pies and cakes][19] program." GC Exh. 21. The document further states that "All Assistant Store Managers are responsible for: (1) Marking the order and sending in at the assigned time . . . (2) Ensur[ing] that [pies and cakes] are filled daily as needed. (3) Ensur[ing] product is filled, rotated, all dates pulled and any and all reductions completed by closing time each night." Ibid. Cecil testified that the assistant manager's responsibility for the pies and cakes work is that of a manager who has other employees do the work, not as the individual who actually does the work. The Respondent identified one other store in the same district as the Louisa location at which the pies and cakes work was assigned to the receiver. At a number of other stores it was assigned to staff of the frozen food department.

Vaughn and Baldridge gave inconsistent explanations for their selection of Burton for the pies and cakes assignment. Vaughn claimed that he asked Baldridge to assign the work to Burton because the receivers at other stores did the assignment and it "works out pretty good." Tr. 787. Baldridge, however, attributed the decision to the fact that Burton had past experience with the assignment, and the view that Burton "had the time" to do it along with her receiver duties. Tr. 553.

On November 4, 2010, Burton began performing the pies and cakes assignment in addition to her receiver duties. She arrived for work approximately 20 minutes late that day. Garrett discussed Burton's tardiness with her. He also completed a verbal correction form, but did not show the form to Burton. The verbal correction stated, in part:

> On 11/4 Glenda [Burton] was scheduled to work 6a-3p. She was 20 minutes late for work. Glenda is habitually late for work and/or returning from her lunch period. Explained to Glenda [Burton] that her tardiness directly affects her ability to complete her job duties in a timely manner.

Despite stating on this disciplinary form that Burton "is habitually late," Garrett testified that he had no personal knowledge that Burton had been tardy in the past, had not checked her

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November 3, testified that he had been spending 30 to 60 minutes per day on the task, and that Garrett had also been spending 30 to 60 minutes per day on it. Tr. 661-663. Thus Baldridge's estimate – a total of 1 to 2 hours per day – was consistent with Burton's testimony.

[19] The document actually calls it the "bread/sweets program," but Cecil testified that this refers to the pies and cakes program.

timecards to see if she had been tardy, and had not previously disciplined her for tardiness.[20] Garrett testified that other individuals told him that Burton had been late, but he did not identify those individuals and they were not called as witnesses. Both of Burton's last two annual performance evaluations rated her an excellent employee. I find that the record fails to show that Burton was habitually late for work or even that she had ever been late for work prior to November 4.

H. Burton Checks in Unauthorized Product

As discussed above, one of Burton's tasks as the store's receiver was to scan all products that vendors attempt to deliver to the Louisa store and make sure that the Respondent's buyers had authorized the delivery. At some point prior to November 12, Burton was scanning a delivery from a baked goods vendor. Deborah Chapman, the Respondent's district grocery supervisor was also present and evaluating some elements of Burton's work. The vendor's representative was attempting to deliver orange cupcakes to the store, but this item was not authorized in the scanning system. As Burton acknowledges, the Respondent's rule is that if an item "won't scan in, we're not to take it." Tr. 431. Burton told Chapman that the orange cupcakes would not scan, but added that the store had stocked the item in the past and that it "sold good." Chapman responded by telling the vendor's representative that the vendor had to contact the Respondent to obtain approval to deliver the orange cupcakes. Chapman also told Burton that she would check to see if the orange cupcakes were on the "plan-o-gram" – a document that shows which items from a particular vendor are authorized for the store and where they go on the shelf. Chapman stated that she would also contact the Respondent's offices about the issue. The understanding, according to Burton, was that if Chapman found that the orange cupcakes were on the plan-o-gram, they should be accepted, and if they were not on the plan-o-gram they should not be accepted. Chapman never returned to tell Burton whether or not the orange cupcakes were on the plan-o-gram. Nevertheless, at some point after Chapman left, Burton accepted the orange cupcakes into the store. To do this, Burton had to mis-identify them for scanning purposes as chocolate cupcakes – an item that was authorized for the store.

Burton testified that, prior to the orange cupcake episode, management officials had on one or two occasions directed her to make an exception to policy by accepting certain items that were not authorized in the scanning system. However, when pressed, Burton could not identify any official who had told her to do this. Tr. 393-394, 432. At any rate, there is no dispute that, on the day in question, no management official told Burton to make an exception and accept the unauthorized orange cupcakes or mis-identify those cupcakes as another item. To the contrary, the understanding between Burton and Chapman was that the cupcakes should be accepted *if* Chapman found that they were on the plan-o-gram.

A few days after Burton and Chapman had the discussion regarding the orange cupcakes, Chapman reviewed her notes and called Baldridge to have him check whether the orange cupcakes had made it onto the shelf. Chapman testified that she made this call simply to follow-up on her notes, not because she had reason to suspect that Burton violated the policy

[20] The record shows that on November 7, 2010, a few days after the Respondent disciplined Burton, it issued a written correction to Branham for tardiness. The evidence shows that Branham was 2 hours late on that occasion and that he had a longstanding problem with tardiness that stretched for his entire period of employment at the store. Nevertheless, the Respondent had not issued any discipline to Branham for these failings for 1 to 2 years prior to November 7. Tr. 655-656, 754; GC Exh. 9(i).

regarding the receipt of items that were not authorized in the scanning system. Baldridge found that the orange cupcakes were, in fact, on the shelf. Baldridge consulted with Vaughn and decided to discipline Burton for accepting the orange cupcakes. Although Baldridge testified that it was customary for him to consult with Vaughn before disciplining an employee, Tr. 643-644, the record indicates that it was actually unusual for him to do so, Tr. 652-659.

On November 12, 2010, the Respondent conducted a disciplinary meeting with Burton that was attended by Vaughn, Chapman, Baldridge, and Burton. At the meeting, Burton admitted that she had allowed the vendor's representative to bring the unauthorized orange cupcakes into the store and that she had mis-identified the item in the system as chocolate cupcakes. Chapman stated that she had told Burton not to accept the orange cupcakes. During the disciplinary meeting, Burton did not deny that Chapman had directed her to reject the orange cupcakes, but at trial Burton testified that she did not remember Chapman giving that direction. Burton defended her actions by telling the company officials that, in the past, she had been directed to accept an unauthorized item on one or two occasions. She also explained that the orange cupcakes sold well. Vaughn and Baldridge made a decision to issue a written correction to Burton on November 12. The correction form stated:

> Explanation or reason for corrective action: Insubordination. Directly disobeying a direct order given to her by the Grocery Supervisor. Glenda also broke our receiving procedure.
> Type of corrective action given: Any further violations of any company policy from this day forward will result in further disciplinary action up to, and including, discharge.

GC Exh. 10B. At the disciplinary meeting, Baldridge also read a prepared statement, which stated that "with two other corrections in the last month, you are being given this written correction as a final correction." R Exh. 10. At trial, Baldridge testified that he did not have any idea what motivation Burton would have had for intentionally checking in an item that she knew was not supposed to be in the store, and did not know whether she acted for innocent reasons.

When unauthorized product is brought into the store, the Respondent has authority to discipline not only the receiver, but also the vendor that delivered it. However, the Respondent did not attempt to discipline the vendor for delivering the unauthorized orange cupcakes, or even notify the vendor that its representative had made such a delivery.

I. Events of November 19

On November 19, about a month after Kirk's position was terminated, she contacted Burton by telephone and told her that she was visiting the store to drop off Tupperware that Burton had purchased at a party. Kirk said that, in order to save time, she would deliver the Tupperware by bringing it to the back door of the store, rather than by entering the front of the store and walking to the back door receiving area where Burton usually worked. Burton invited Smith to go outside with her to meet Kirk. On the way out, Burton also asked Smith to help her carry empty crates to the location where crates were collected outside the store. After depositing the empty crates, a task that took about 30 seconds, Burton and Smith stayed outside to talk with Kirk. During this conversation, the receiving door was approximately 10 to 15 feet from Burton and Smith and remained open. Kirk gave Burton the Tupperware in a clear plastic bag.[21]

[21] Kirk put the Tupperware in a clear bag so that management could see that it was not

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During the period that Burton was outside, away from her work station, a vendor's representative arrived in the receiving area. The vendor's representative was alone in the receiving area for approximately 2 minutes. It is not clear what portion of those 2 minutes the vendor's representative spent completing necessary work tasks and what portion he spent waiting for assistance from Burton.[22] Next, the vendor's representative exited through the back door and returned almost immediately with Burton and Smith. Burton was carrying the clear plastic bag containing the Tupperware that she had received from Kirk. After a few moments, Burton attended to the vendor's representative. In all, Burton and Smith spent approximately 7 to 8 minutes outside before re-entering.

A document that the Respondent maintains setting forth the receiver's duties and authorities states, inter alia, that "It is the responsibility of the store receiver to assure that all exits in the receiving area are closed and secured at all times in accordance with company procedures when not being used for receiving functions." The record indicates that, in practice, the receiver would leave the receiving door open as long as she was in a position to monitor it, even when no delivery was being made. Tr. 82, 140-141. Employees were required to take trash out through the receiving door with some frequency, and leaving it open meant that the door did not have to be unlocked, opened, and then closed and locked again each time. Baldridge and Garrett witnessed the departure from the stated policy of keeping the door closed, but they did not discourage it. Tr. 82.

On November 19, at least two district-wide supervisors – Vaughn and Spears – were present at the Louisa store. These were among the supervisory personnel whose presence at the store had dramatically increased starting in September 2010. At approximately the same time that Burton, Smith, and Kirk were meeting behind the store, Vaughn was inside the store scrutinizing the section where Burton attended to the Respondent's house brand of pies and cakes. Maintenance of that section was the assignment that, at Vaughn's direction, Baldridge had added to Burton's responsibilities about 2 weeks earlier. As a result of this scrutiny, Vaughn discovered that a number of items were still on the shelves even though they were past their sell-by dates. In addition, Vaughn discovered that some of the items that were approaching the sell-by date had not been discounted as required by the Respondent's procedures. Vaughn called Baldridge over, and the two began removing the past-due product and placing it in a shopping cart.

As Vaughn and Baldridge were wheeling the shopping cart to the back of the store to dispose of the expired product, Spears reported to them that he had observed Kirk driving to the rear of the store. Tr. 668. Baldridge stated that this information caused him to become suspicious because it was "not the normal traffic flow." Baldridge talked to Vaughn and they decided to view the store's surveillance video for the receiving area of the store. Although they testified that this viewing was motivated by the fact that Kirk was driving behind the store, the video they watched did not show the area behind the store; rather the video showed Burton's work area inside the store. Baldridge and Vaughn watched the video, which shows: Burton and Smith picking up empty crates and exiting through the receiving door; a vendor's representative arriving in the receiving area about 6 minutes later; the vendor's representative exiting through the receiving door after approximately 2 minutes; and, almost immediately thereafter, Burton,

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product for the store.

[22] Burton testified that while she was outside she could see that the vendor's representative was in the receiving area, but that he appeared to be performing tasks that did not require assistance. Tr. 407.

Smith, and the vendor's representative all returning through the receiving door. The video indicates that Burton and Smith were outside for between 7 and 8 minutes.

On November 19, after Vaughn and Baldridge reviewed the surveillance video of Burton's work area, Vaughn consulted with security personnel at headquarters and then told Baldridge to find out what was in the bag that Burton was seen bringing in through the receiving door. Baldridge asked Burton, and she explained that it was Tupperware that she had purchased and which Kirk had delivered to her. Baldridge communicated this to Vaughn. Vaughn conferred with Jesse Lewis (chief operating officer) Cecil, Meadows (vice-president for human resources), Charles Fugate (corporate attorney), and security personnel. During this conference call, the Respondent's officials made the decision to terminate both Burton and Smith for failing to keep the receiving door secure and being unproductive while on the clock. Vaughn testified that there had never been another instance when so many of the Respondent's top officials conferred on the phone before deciding to terminate employees. Prior discipline against Burton was not discussed during this call.

Before making the decision to terminate Burton and Smith, the Respondent did not contact the vendor's representative involved to find out whether he had been waiting for Burton rather than performing work functions that did not require Burton's attention, prior to exiting through the back door. Burton testified that it appeared that the vendor's representative had been engaged in work activities that did not require her involvement during that period. Tr. 407. Nor did the Respondent ask Burton and Smith whether they had been in a position while outside the receiving door to deny passage to unauthorized persons or material. In fact, Burton was only 10 to 15 feet from the receiving door and could see that door the entire time she was outside talking to Kirk. Vaughn testified that there was no reason to doubt that what Burton had brought in through the back door was her own Tupperware, and that this action by Burton did not negatively affect the store's "shrink" level.

J. Respondent Discharges Burton

Burton was a 10-year employee of the Respondent, who had been at the Louisa store since it opened, and who the Respondent had long rated as an excellent employee. The annual performance review that the Respondent issued to her on July 1, 2010, gave Burton a rating of "Excellent 96 [on a scale of 1 to 100]". Similarly, the annual performance review that the Respondent gave to Burton on July 1, 2009, rated her as "Excellent 96." These were the last two performance appraisals received by Burton prior to her discharge, and the only ones in the record.

Vaughn communicated the decision to discharge Burton to Baldridge and together they prepared the discharge notice. The notice states that the action was being taken because of Burton's "gross misconduct." It states:

> Explanation of reason for corrective action: We found out of date cakes on the shelf. Some cakes were not couponed, but yet they were still out of date. Glenda's aware of our shrink problem and she is in charge of the warehouse cakes. She was also outside on company time.
> Type of corrective action given: We terminated Glenda due to gross misconduct.

At the end of Burton's shift, Vaughn and Baldridge met with her. Baldridge stated that he and Vaughn had found it necessary to remove pies and cakes from the shelf because the items were past their sell-by dates. He asked Burton whether she understood her

responsibilities with respect to product rotation and the placement of discount stickers on pies and cakes that were nearing the expiration date. Burton said she understood this. Then Vaughn asked Burton whether she had finished work on the cakes, and she replied that she had. Vaughn asked her whether she had placed the discount stickers on the pies and cakes that required them, and she answered that she had not done so. Baldridge also talked to Burton about: going outside for 8 minutes while on company time; leaving the receiving door open; and keeping the vendor's representative waiting while she was outside talking to Kirk. Then Baldridge told Burton that the Respondent was terminating her employment.

Cecil testified that one of the reasons Burton was terminated was that she had brought in personal Tupperware through the back door, Tr. 871, however, this was not among the reasons stated in the termination paperwork and the Respondent did not show that it was mentioned during the disciplinary meeting at which Burton was terminated. The Respondent did show that its policy was that unauthorized product could not be brought in through the receiving door. There was conflicting testimony as to whether this prohibition extended to personal items that employees were bringing in for their own use. None of the parties introduced any written policy regarding employees' use of the receiving door to bring in personal items. Baldridge testified that the policy precluded employees from bringing personal items in through the back door. Tr. 589-590. Burton, Smith, and Kirk – all of whom had worked in receiving – gave testimony indicating that the prohibition did not extend to personal items, and that employees brought such things as lunches and wallets through the receiving door. Tr. 82-83, 116-117, 134, 217-218, 267, 349.[23]

K. Respondent Discharges Smith

Smith was a 10-year employee of the Respondent. In her last position with the Respondent she was the scanning deputy. In addition to performing the scanning duties, Smith filled in as receiver when Burton was on break or absent, and helped Burton take accumulated trash outside and clean the outdoor area near the receiving door. The Respondent rated Smith an excellent employee in each of her last two performance appraisals. In the annual appraisal that the Respondent completed for Smith on November 1, 2009, the Respondent gave her a rating of "Excellent 96" out of 100. In the prior, November 1, 2008, annual appraisal, the Respondent rated her "Excellent 95." The first discipline the Respondent ever issued to Smith was the written correction for missing management's October 5 meeting about the union campaign.

As discussed above, on November 19, Smith exited through the receiving door with Burton, briefly performed work activities involving empty crates, and then talked outside with Burton and Kirk. During the period she was outside talking to Burton and Kirk, Smith was not

[23] On February 7, 2011, Burton and the Respondent executed an agreement and release, which stated that Burton was waiving any claims against the Respondent for reinstatement or back pay. The document provided that Burton would be paid $2000 when she signed the release and another $8000 when the Board approved withdrawal of the complaint for a total of $10,000. Burton's understanding was that she would be paid the full amount of $10,000 in exchange for waiving reinstatement to her old position. The Respondent made the $2000 payment to Burton, but withdrawal of the complaint was not approved and the Respondent never made the additional payment of $8000. The Charging Party Union was not a party to, and apparently had no involvement with, the release and agreement. Both the Union and Board object to giving the agreement and release any effect outside the context of a compliance proceeding.

performing any work activity. She was outside for a total of between 7 and 8 minutes. Vaughn discussed the occurrences at the receiving door with Cecil, Meadows, and other company officials on November 19, and decided to terminate Smith, as well as Burton. Before Smith left for the day, Vaughn stopped her and said she should be present the following Monday, November 22 – her next regular work day – because he needed to speak with her. On Monday, Vaughn and Baldridge met with Smith and gave her a disciplinary notice, dated November 22, 2010, which stated:

> Explanation of reason for corrective action: Martha [Smith] was seen going out the receiving door without authorization. She took pop crates outside without authorization. She was outside the receiving door for approximately 8 minutes on the clock which is considered stealing time. She was also an accomplice to bringing an unauthorized item through the back.
> Type of corrective action given: Terminated Martha for breaking . . . company rules and policies.

Baldridge told Smith that the Respondent was "going to have to let you go." Smith protested that employees frequently went out the back door and engaged in non-work activities. Baldridge disagreed with her. Smith said, "I guess this don't have anything to do with the Union," and Baldridge said that "it didn't."

Vaughn and Meadows testified that Smith was terminated, in part, for failing to keep the receiving door secure. However, at trial Vaughn testified that when the discharge decision was made he did not know whether Burton and Smith had, in fact, compromised the security of the back door because they could have been blocking it from the outside during the entire period in question. He conceded that the decision to terminate Smith was made without asking Smith what she had been doing outside the door. In addition, although Meadows testified that one of the reasons Smith was discharged was her failure to secure the receiving door, he also conceded that it was not Smith's responsibility to keep that door secure.[24]

Burton, Kirk and Smith – three of the four members of the Union's employee committee – were the only individuals among the store's approximately 80 employees who the Respondent discharged during the period from September to December 2010.[25] GC Exh. 22; Tr. 913-914.

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[24] On February 9, 2011, Smith and the Respondent executed an agreement and release, which stated that Smith was waiving any claims against the Respondent for reinstatement or back pay. The document provided that Smith would be paid $5000 when she signed the release and another $10,000 when the Board approved withdrawal of the complaint. Smith is not aware of the process by which a complaint can be withdrawn by the Board. The Respondent made the $5000 payment to Smith. Smith's understanding was that in order to receive the additional $10,000 all she had to do was contact the Board and ask that she be removed from the complaint. She made such a request to the Board, but withdrawal of the complaint was not approved and the Respondent did not make the additional $10,000 payment. The Charging Party Union was not a party to, and apparently had no involvement with, the release and agreement. Both the Union and the Board object to giving the agreement and release any effect outside the context of a compliance proceeding.

[25] There was some evidence regarding actions taken against employees at other stores. Meadows testified that Harold Rollen the receiver at another store was terminated on 12/2/10 after he was observed accepting deliveries without checking to see what he was receiving. Meadows recounted further instances when receivers at other stores were terminated, but this testimony, Tr. 898 ff., and the summary document regarding it, R Exh. 17, were not based on

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Indeed, the only other Louisa store employees to receive discipline of any kind during that period were the other two alleged claimants, Branham and Sweeney. Vaughn and Baldridge each testified that they had no knowledge of the Union activities of Burton, Kirk and Smith at the time the various disciplinary actions were taken against those employees.

L. Complaint Allegations

The complaint alleges that the Respondent attempted to discourage employees' union activities in violation of section 8(a)(1) of the Act on about October 23, 2010, by promulgating and maintaining a new rule limiting employees' use of the break rooms, and violated section 8(a)(3) of the Act on about October 24, 2010, by issuing verbal warnings to Branham and Sweeney for violating the unlawful break room rule. The complaint further alleges that the Respondent discriminated on the basis of union activity in violation of section 8(a)(3) of the Act: on about October 6 when it issued a written warning to Smith; on about October 16, 2010, when it discharged Kirk; on about October 23, 2010, when it issued a verbal warning to Burton; on November 3, 2010, when it assigned additional more onerous duties to Burton; on about November 4, 2010, when it issued a verbal warning to Burton; on about November 12, 2010, when it issued a written warning to Burton; on about November 19, when it discharged Burton; and, on about November 22, 2010, when it discharged Smith.

III. Discussion

A. Change in Policy Regarding Visits to the Break Room.

1. Discipline of Burton on October 23.

The complaint alleges that the Respondent violated section 8(a)(3) by discriminating against Burton on the basis of union activity when it issued a verbal warning to her on October 23 for making a minute-long stop in the break room without first clocking out. As discussed above, in the past the Respondent required employees to "clock out" before taking their formal breaks, but did not require them to do so before using the restroom or pausing briefly in the break room. Prior to the start of the Union campaign, employees frequently made on-the-clock visits to the break room, and this conduct was witnessed by Baldridge and other store supervisors, but was not discouraged. The Respondent introduced no evidence showing that such visits had resulted in discipline even once prior to the start of the union campaign. Then, on October 23, the Respondent disciplined Burton for stopping in the break room for about one minute without clocking out – exactly the type of conduct that it had routinely permitted before. The next day, the Respondent disciplined two other employees for the same conduct in order, Garrett testified, to show that the Respondent had been "fair" to Burton.

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personal knowledge, but rather on what Meadows was able to glean from personnel records. The Respondent did not have the personnel records that Meadows was summarizing at the hearing and did not otherwise make those records available to the other parties. Pursuant to Federal Rule of Evidence 1006 (summaries of voluminous writings), I conclude that Meadow's summary description of information in personnel records, and the summary exhibit, should be give little if any weight and based on my observation of Meadow's demeanor and the record as a whole, I do not credit that evidence. Even were I to credit that testimony and/or the related exhibit, I conclude that the circumstances of those terminations were not shown to be meaningfully similar to the circumstances of Burton's and Smith's terminations.

Under the Board's decision in *Wright Line*, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-75 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). An inference of animus or discriminatory motive may be proven by direct evidence or inferred from the record as a whole, including timing and disparate treatment. See, *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, Slip Op. at 4 (2011). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

Regarding the first element of the General Counsel's initial burden, the record shows that Burton was one of the most, if not *the* most, active supporter of the Union among the store's approximately 80 employees. By July 2009, she had initiated discussions regarding unionization with a number of her co-workers. She was one of four employees on the union organizing committee at the facility and one of only two employees who attended the first meeting that officials of the Union held with employees. In addition, Burton provided union officials with the names and addresses of employees and signed a union authorization card.

The record also establishes that the Respondent was aware of the union campaign, and of Burton's protected activity regarding unionization. First, the evidence shows that in September 2010, Vaughn was apprised of information that a union campaign was underway at the Louisa store. The very next day, he met with managers at the Louisa store to discuss how to respond to the union campaign. Thus the Respondent was acting with knowledge that union activities were underway by the time of the allegedly unlawful activity in this case – all of which took place after September.

Moreover, the Respondent was specifically aware that Burton had engaged in protected activity regarding the Union. Baldridge testified that in July 2009 two employees reported to him that Burton was talking about unionization with co-workers. After he received this information, Baldridge met with Burton to argue against unionization and encourage her to bring any workplace concerns she might have to him. At trial, Baldridge testified about receiving that information in 2009, meaning that when the union campaign was reaching its peak, and during the time period when the alleged discrimination took place, he still remembered that Burton had discussed unionization in 2009. This is enough, on its own, to meet the second element of the General Counsel's initial burden. At any rate, the record as a whole supports an inference that when the Union campaign was fully underway, the Respondent concluded that Burton was an active union supporter. In addition to knowing that Burton had raised the subject of unionizing with multiple employees in 2009, the Respondent kept a document in Burton's personnel file that memorialized the pro-union statements of her spouse. The record also shows that Burton was sufficiently associated with employees' interest in unionization that when Bush – an employee who had previously informed management about union activity – wanted to find out if union activity was underway, he asked Burton. See *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn.36 (2007) ("The General Counsel need not prove knowledge by direct evidence; knowledge may be reasonably inferred or imputed."), enf. denied

on other grounds, 570 F.3d 354 (D.C. Cir. 2009); *Camaco Lorain*, supra.

Regarding the third element, I find that the Respondent's animosity to unionization is well-documented by the record. As discussed above, when the Respondent found out that Burton was discussing unionization with co-workers she was immediately required to meet with Baldridge, who made an effort to discourage her from supporting the idea of a union at the store and encouraged her instead to come to him with any work-related problems she might have. When the Respondent found that a union campaign was underway, it distributed an antiunion notice to employees with their paychecks. That notice compared union officials to "traveling salesm[e]n" who are "paid to manipulate you." It directed employees to "call the police" if they were visited at home by a union official who declined requests to leave. In its employee handbook, the Respondent describes a union as "an unnecessary third party" that "could seriously interfere with our ability to treat" employees "in the manner [they] deserve." In the handbook, the Respondent also vows to oppose unionization by every legal and moral means possible. *Overnite Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001) (employer statements in employee handbooks indicating that employer values union-free working conditions are indicative of union animus); see also *Mammoth Coal Co.*, 354 NLRB No. 83, Slip Op. at 19 fn. 27 (2009) (finding of animus may be based on unalleged conduct and conduct that is not necessarily violative of the Act); *Stoody Co.*, 312 NLRB 1175, 1182 (1993) (same); *Gencorp*, 294 NLRB 717 fn. 1 (1989) ("Board has consistently held that conduct that may not be found violative of the Act may still be used to show antiunion animus."). Weight is added to the other evidence of animus by the fact that the Respondent retained in Burton's personnel file a 6-year-old email exchange between Burton's spouse and Meadows in which Burton's spouse stated his support for bringing a union to the store. The Respondent has offered no explanation for keeping this document in Burton's personnel file. The record evidence is more than sufficient to meet the General Counsel's burden of showing antiunion animus during the October to November 2010 time period when the Respondent took the allegedly unlawful actions against Burton and others.[26]

Moreover, based on the record as a whole, I find that the Respondent's antiunion animus was connected to its decision to discipline Burton on October 23 for briefly pausing in the break room without clocking out. This same conduct had been engaged in on a daily basis by numerous employees and was tolerated by Baldridge and other store managers prior to October 23. Before disciplining Burton, the Respondent had not promulgated any written rule directly addressing such conduct.[27] The Respondent's eagerness to seize upon this previously

[26] In its brief, the Respondent argues that by the time of much of the discrimination alleged the union campaign had essentially stalled, and that the discrimination therefore cannot be seen as a reaction to an ongoing campaign. The Respondent has not demonstrated that the Union's efforts, which did not really get underway until August or September 2010, had already been abandoned by October and November 2010, and certainly not that the Respondent knew that the campaign was over. Even if it the Respondent had demonstrated that it believed the union campaign was over at the time it acted, that would not mean it did not discriminate in order to retaliate and reduce the likelihood of future unionization efforts. See, e.g., *Miami Coca-Cola Bottling Co.*, 140 NLRB 1359, 1368 (1963) (employer violated the Act by "cleaning house" of union activists subsequent to representation election), enfd. in part, 341 F.2d 524 (5th Cir. 1965).

[27] "Unwritten policies, as opposed to written policies, can be easily turned into tools of discrimination". *Dunning v. National Industries*, 720 F. Supp. 924, 931 (M.D. Ala. 1989); see also *Planned Building Services*, 347 NLRB 670, 715 (2006) (the fact that a putative policy is unwritten, and not strictly adhered to, lends support to a finding that it is pretextual); *Kentucky General, Inc*. 334 NLRB 154, 161 (2001) (policy on which union applicants were rejected is

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tolerated conduct to discipline Burton is evidence that the Respondent was motivated by the union campaign and the Respondent's knowledge of Burton's support for unionization. The Respondent no longer allowed employees to have even brief conversations in the break room since those conversations might be used to support the Union, especially when one of the speakers was a known union sympathizer like Burton. Moreover, it is worth reflecting briefly on the big picture. The Louisa store had a workforce of approximately 80 employees, of whom just four were on the union committee. During the period from September to December 2010, after the Respondent discovered the union campaign, the Respondent terminated only three individuals, all of whom came from among the four individuals on the union committee. Those three union activists were long-time employees of the store and the Respondent had rated each as a satisfactory or excellent employee in the two most recent performance evaluations. Moreover, during the period from September to December 2010 the Respondent disciplined two of the union activists multiple times. Besides the five persons who the complaint alleges were victims of unlawful discipline, no other employees were disciplined even once during this same period of time. Numbers this stark are hard to write off to mere coincidence, [28] especially given that the explanations offered by the Respondent are not related to a particular pro-union action that the employees engaged in together. "[T]he Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination." *American Wire Products*, 313 NLRB at 994; see also *Baker Mfg.*, 269 NLRB 794, 816 (1984) ("Such a lopsided percentage favoring layoff/ termination of only union supporters is indicative of an unlawful motivation and has been so recognized by the Board and the courts"), enfd. in relevant part, 759 F.2d 1219 (5th Cir. 1985); *The Holding Co.*, 231 NLRB 383, 390 (1977) (disproportionate number of union adherents discharged is evidence of discrimination).

Since the General Counsel has established discriminatory motive, the burden shifts to the Respondent to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra. For reasons that have already been discussed the Respondent cannot do this. Rather the evidence shows that the Respondent disciplined Burton on October 23 for conduct that was widespread and permitted prior to that time, and for which it has not shown that it ever disciplined even a single employee before Burton. See *Camaco Lorrain*, 356 NLRB No. 143, Slip Op. at 4 (disparate treatment is evidence of discrimination); see also. *Champion Laboratories, Inc.,* 316 NLRB 1133, 1136 (1995) (disciplining an employee for union solicitation, while tolerating widespread solicitation on other subjects is discriminatory in violation of section 8(a)(3)), enf. granted in relevant part 93 F.3d 223 (7th Cir. 1996). The Respondent has failed to meet its burden of establishing that it would have taken the action it did against Burton on October 23 if not for the antiunion motivation.

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pretextual where, inter alia, policy was unwritten); *Sioux City Foundry*, 241 NLRB 481, 484 (1979) (alleged policy relied on to reject applicants who were strikers from other employers "is a mere pretext" where, inter alia, "this 'policy' was not written down anywhere").

[28] Since there were four union committee members and the first discharge came from among about 80 employees, the odds of a committee member being randomly selected for discharge is approximately 4 out of 80 (or 1 in 20). That leaves 3 union committee members among the remaining 79 employees, meaning that the odds that the second employee discharged would randomly come from among the committee members is 3 out of 79. Since that would leave only 2 union committee members, the chances that the third person discharged would randomly come from among the union committee members is 2 out of 78 (1 in 39). The odds that all three of those selected for discharge would randomly come from the union committee is only about 1 in 20,540 (i.e., 4/80 x 3/79 x 2/78 = 24/492,960 = 1/20,540).

For the reasons discussed above, I conclude that the Respondent violated section 8(a)(3) of the Act by discriminating against Burton on the basis of union activity when it issued a verbal warning to her on October 23, 2010.

2. Discipline of Branham and Sweeney.

The complaint alleges that the Respondent violated section 8(a)(3) on October 24, 2010, when it issued verbal warnings to Branham and Sweeney for violating a new break room rule that the Respondent promulgated for the purpose of discouraging union activity. An employer violates section 8(a)(1) of the Act when it promulgates a new rule, or more strictly enforces an existing rule, in order to discourage union activity. *Michael Adkins,* 323 NLRB 311, 321-322 (1997); *Dilling Mechanical Contractors, Inc.,* 318 NLRB 1140, 1144-1145 (1995), enfd. 107 F.3d 521 (7th Cir. 1997), cert. denied 522 U.S. 862 (1997); *Premier Maintenance,* 282 NLRB 10, 11 (1986). Disciplining employees pursuant to such an unlawful rule is itself a violation of section 8(a)(3). *Tuscaloosa Quality Foods, Inc.,* 318 NLRB 405, 411 (1995); *Hyatt Regency Memphis,* 296 NLRB 259, 260-62 (1999). Prior to the start of the union campaign, the Respondent permitted employees to make brief stops to the break room without clocking out. However, as found above, on October 23, the Respondent, motivated by anti-union animus, expanded enforcement of its rule requiring employees to clock-out before their formal breaks to discipline an employee for briefly pausing in the break room. The next day, the Respondent applied the new standard to Branham and Sweeney in a conscious effort to make the expanded enforcement appear "fair." Disciplining Branham and Sweeney pursuant to this unlawfully motivated policy was a violation of the Act. *Tuscaloosa Quality Foods*, supra, and *Hyatt Regency Memphis*, supra.

I find that the Respondent violated section 8(a)(3) on October 24, 2010, when it issued verbal warnings to Branham and Sweeney.

3. Posting of New Enforcement Policy Regarding Employee Usage of Break Room While On the Clock.

The complaint alleges that the Respondent violated section 8(a)(1) of the Act by promulgating and maintaining a new rule limiting employees' use of the break rooms for the purpose of discouraging employees' union and concerted activities. On October 25, 2010, the Respondent, for the first time, issued a written rule stating that employees could not enter the break room unless they clocked-out beforehand. The posting told employees, inter alia, that "you are not permitted to be in the breakrooms unless you are clocked out for break, out for lunch, or not on the clock." This was a formalization of the new rule – initiated over the past two days – that expanded the requirement that employees clock-out before official breaks to also prohibit employees from entering the break room even briefly without clocking out. Moreover, as discussed above, the evidence shows that the Respondent's new rule was an attempt to interfere with and discourage union activity.

The Respondent argues that it has the right to maintain a policy requiring employees to work during working time. Brief of Respondent at 33. Nevertheless an employer violates section 8(a)(1) when it promulgates otherwise innocuous work rules, or more strictly enforces existing work rules in response to union activity. *Michael Adkins,* supra; *Dilling Mechanical*, supra; *Premier Maintenance,* supra. That is what the evidence regarding the treatment of Burton, Branham and Sweeney shows the Respondent did here.

For the reasons discussed above, the Respondent interfered with, restrained, and coerced employees' exercise of their section 7 rights in violation of section 8(a)(1) of the Act: on October 23, 2010, when, because of employees' union activities, it promulgated a new rule requiring employees to clock-out before entering the break room; and, on October 25, 2010, when it posted a written policy to that effect.

B. Burton: Assignment of New Duties; Subsequent Discipline and Discharge

After disciplining Burton for briefly pausing in the break room, the Respondent took multiple additional actions against her in rapid succession. First, on November 3, the Respondent assigned substantial additional duties to Burton regarding the store brand of pies and cakes. Then on November 4, it gave her a verbal correction for tardiness. On November 12, it gave her a written correction citing insubordination as the reason. Finally, on November 19, the Respondent discharged Burton for what it called "gross misconduct." The complaint alleges that the Respondent took all of these actions for discriminatory reasons in violation of section 8(a)(3). I consider each of these allegations in chronological order using the *Wright Line* framework set forth above.

On November 3, the Respondent assigned responsibility to Burton for stocking the Respondent's brand of pies and cakes. For the reasons already discussed above, I conclude that the General Counsel has met all three elements of the *Wright Line* initial burden – showing that Burton engaged in protected union activity, that the Respondent was aware that Burton had engaged in such activity, and that the Respondent bore antiunion animus. Only about two weeks earlier, on October 23, the Respondent discriminatorily disciplined Burton because of her union activity. Moreover, based on my consideration of the record as of whole, I am convinced that the Respondent's antiunion animus is connected to its decision to assign the more onerous duties to Burton. The additional duties associated with the pies and cakes work consumed about 2 hours of Burton's time per shift, but the Respondent assigned those duties without relieving Burton of any of her other work. The record indicates that in 2005 the Respondent had relieved Burton of the pies and cakes assignment specifically because management concluded that the assignment was too burdensome to perform concurrently with Burton's receiver duties. Since 2005, the amount of work associated with the pies and cakes assignment had only increased, and, from all appearances, increased significantly. Thus, when the Respondent again assigned that work to Burton on November 3, the demand it was placing on her was, if anything, more burdensome than it was in 2005 when the Respondent had concluded the demand was already too burdensome.

The Respondent has failed to meet its responsive burden of showing that it would have assigned the more onerous duties to Burton on November 3 even if she had not engaged in union activity. To begin with, the Respondent has failed to show that it would have reassigned the work from Baldridge to *anybody* else if not for the discriminatory motive. Baldridge had been performing that assignment for several years, with Garrett's assistance for at least part of that time. The Respondent has failed to show a credible nondiscriminatory reason why, once the union campaign started, it suddenly decided that this was not an appropriate assignment for managers and had to be reassigned to non-managerial staff.[29] Even if the Respondent had

[29] As discussed above, timing can be evidence of an employer's unlawful motivation. See *Electrical Workers Local 429*, 347 NLRB at 517; *LB&B Associates, Inc.*, 346 NLRB at 1026; *Desert Toyota*, 346 NLRB at 120; *Detroit Paneling Systems*, 330 NLRB at 1170; *Bethlehem Temple Learning Center*, 330 NLRB at 1178; *American Wire Products*, 313 NLRB at 994.

proven that it had a lawful reason for relieving Baldridge and Garrett of the assignment, it would still fail to meet its burden because it has not shown a legitimate reason for choosing Burton as the employee to whom the work was transferred. As discussed above, the Respondent made a determination in 2005 that the pies and cakes assignment was too burdensome for Burton to perform concurrently with her duties as receiver. The Respondent did not attempt to explain what had changed since 2005 that might have caused it to honestly reassess that determination. In addition, Baldridge and Vaughn offered inconsistent explanations for choosing Burton for the assignment on November 3. Baldridge stated that he chose Burton because she had past experience with the assignment and had the time to do it, while Vaughn stated that he chose Burton because the work was assigned to receivers at some other stores. Neither attempted to explain why the Respondent did not transfer the pies and cakes assignment to an employee for whom the assignment had not already been determined to be too burdensome to complete along with his or her primary assignment.

I conclude that on November 3, 2010, the Respondent discriminated in violation of section 8(a)(3) by assigning additional and more onerous duties to Burton because of her protected union activity.

There is no dispute that, on November 4, Burton arrived approximately 20 minutes late for work. Garrett placed a formal verbal correction in her personnel file based on this lapse. For the reasons already discussed, the General Counsel has met the elements of its initial *Wright Line* burden with respect to the Respondent's actions against Burton. Moreover, given the Respondent's discrimination against Burton on October 23 and November 3, I conclude that the Respondent was targeting Burton because of her union activity. Since the General Counsel has shown discriminatory motive, the burden shifts to the Respondent to show that Burton would have received formal discipline for her tardiness on November 4 even in the absence of her protected activity. It has failed to do that. The Respondent produced no evidence showing that any employee other than Burton had received discipline for being late by as little as 20 minutes on a single occasion. The record did show that on November 7, 2010, the Respondent disciplined Branham for tardiness. However, Branham was 2 hours, not 20 minutes, late and had an ongoing problem with tardiness that stretched for the entire period of his employment at the store. The Respondent allowed this problem to go on for 1 to 2 years – until just 3 days *after* it disciplined Burton for tardiness – before it disciplined Branham on that basis for the first time. Given these circumstances, the disciplinary action against Branham does not demonstrate that the Respondent would have taken the action it did against Burton on November 4, absent discrimination. To the contrary, the Respondent's actions with respect to Branham show that the Respondent was willing to tolerate longstanding tardiness problems before taking action, but disciplined Burton for being 20 minutes late on one occasion. Moreover, I note that Garrett admitted that after he disciplined Burton for an on-the-clock visit to the break room, he took certain action against other employees for the same conduct in a conscious effort to show that the Respondent's treatment of Burton was "fair." Given the parallel circumstances, I infer that concerns about the appearance of "fairness" played a part in the Respondent's decision to finally stop tolerating Branham's tardiness just 3 days after it disciplined Burton for tardiness.

I conclude that on November 4, 2010, the Respondent discriminated in violation of section 8(a)(3) when it disciplined Burton for tardiness.

Eight days later, on November 12, the Respondent again took disciplinary against Burton. This time the discipline was a written correction issued for Burton's "insubordination" in allowing a vendor's representative to bring unauthorized orange cupcakes into the store. For the reasons discussed above, I conclude that the General Counsel has met its initial *Wright Line*

burden. However, I find that, in this instance, the Respondent has met its responsive burden of showing that it more likely than not would have issued the written correction to Burton even absent its discriminatory motive. The record shows that one of Burton's most fundamental responsibilities as a receiver was to ensure that any product that vendors brought into the store was product the Respondent had decided to purchase and stock. Burton acknowledged that the rule was that if an item "won't scan in, we're not to take it." Here Burton knowingly failed to meet that fundamental responsibility by allowing a vendor's representative to deliver product that would not "scan in" and which she had no basis for concluding the store had currently agreed to purchase. In order to do this, Burton actually mis-identified the product in the Respondent's system. The Respondent's control over what products it purchases and puts on its shelves is such an important part of running its business that it would be surprising to me if, once management discovered Burton's failure, the Company failed to take some disciplinary action.

Nevertheless, I consider the legality of the November 12 action a close question because there is reason to suspect that the Respondent would not have discovered Burton's lapse if not for both the increased supervision in response to the Union campaign and Chapman's somewhat curious decision to call Baldridge and ask whether the orange cupcakes had made it onto the shelf. See *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003) (employee misconduct that is discovered during an investigation undertaken because of employees' protected activity cannot make resulting discipline lawful). However, the record evidence does not identify Chapman as one of the supervisors who was visiting the Louisa store more often, and, on balance, I credit Chapman's testimony that her call to Baldridge was routine follow-up on her part. That testimony was facially plausible and was not significantly called into question on cross-examination or by other evidence. The record does not undercut Chapman's testimony that she routinely visited the store and followed-up on her notes by making phone calls to the store.

I conclude that the record fails to establish that the Respondent discriminated against Burton in violation of section 8(a)(3) on November 12, 2010, when it issued a written correction to her for allowing the delivery of product that was not authorized for the store.[30] That allegation should be dismissed.

On November 19, the Respondent took additional, and final, action against Burton – terminating her employment with the company for purported "gross misconduct" that day. For the reasons already discussed, I conclude that the General Counsel has met its initial *Wright Line* burden of demonstrating that antiunion animus was a motivating factor in the challenged actions against Burton during October and November 2010. The Respondent attempts to show that it would have discharged Burton even absent its antiunion motivation based on essentially four nondiscriminatory reasons: (1) Burton seriously breached the Respondent's policy by bringing personnel items in through the back receiving door; (2) Burton was in dereliction of her duties by leaving the back receiving door open and unsecured while she talked to Smith and Kirk; (3) Burton had failed to complete aspects of the pies and cakes assignment that had been

[30] When the Respondent issued this discipline to Burton, it verbally told her that the correction was a "final correction" because she had already been disciplined twice in the last month. In finding that the written correction issued that day was not unlawful, I do not mean to suggest that the correction can lawfully be treated by the Respondent as "final." Since the "final" designation was based on the unlawful prior discipline, that designation is void. The relief I recommend for the prior unlawful discipline includes expunging that discipline from Burton's record and not considering it for any purpose.

added to her duties on November 3, and (4) Burton was unproductive for 7 to 8 minutes while on the clock and, as a result, a vendor's representative was forced to wait for her. For the reasons discussed below, I conclude that the Respondent has failed to establish that these factors would have caused it to discharge or otherwise discipline Burton absent its discriminatory motive.

The evidence does not support finding that, absent the Respondent's unlawful motivation, it would have dismissed Burton for bringing a bag of her own Tupperware in through the receiving door. That reason was not even mentioned among the explanations the Respondent reported in the disciplinary paperwork for Burton's termination. Moreover, while the Respondent had a policy against bringing unauthorized product into the store through the receiving door, there was credible testimony that there was no policy against employees using that door to bring in personal items for their own use. The Respondent introduced no documentary evidence showing the existence of an established policy prohibiting such conduct prior to when the company discharged Burton. See, supra, footnote 27 Moreover, the Respondent failed to identify a single other employee who had ever been disciplined for bringing a personal item in through the receiving door. Nor has the Respondent articulated any way in which Burton, by bringing a bag of personal items into the store through the receiving door, meaningfully compromised security or created an increased risk of "shrink" or other problems at the store.

I also conclude that the Respondent has failed to show that Burton would have been discharged for leaving the back door open and unsecured for 7 to 8 minutes. Prior to November 19, the Respondent permitted receivers to leave the back door open for extended periods of time because doing so facilitated the removal of trash from the store. The Respondent has not shown the existence of a nondiscriminatory explanation for its decision to depart from that practice on November 19 and begin to more strictly enforce its receiving door policies. The Respondent claims that on the occasion at issue here Burton not only left the door open, but left it unguarded. However, the record shows that the Respondent did not know whether Burton had left the door unguarded at the time it decided to terminate her, and did not bother to find out. From all appearances, the receiving door could be effectively guarded from immediately outside it. The Respondent knew that Burton was outside the door for a period, but it made the decision to terminate her without asking Burton, Smith, or the vendor's representative, or anybody else, whether Burton had been in a position to guard the receiving door against improper passage during the time she was outside of it. See *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471, 1477 (1998) (an employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee is an indicia of discriminatory intent), enfd. 201 F.3d 592 (5th Cir. 2000). In fact, while she was conversing with Kirk, Burton was only 10 to 15 feet from the receiving door and, according to her uncontradicted testimony, was able to see the receiving door the entire time.

Nor do I accept the Respondent's defense that it would have discharged Burton for failing to properly complete aspects of the pies and cakes assignment. This is the explanation that figures most prominently in the paperwork that the Respondent prepared for Burton's discharge. As discussed above, the Respondent unlawfully added the pies and cakes duties to Burton's workload because of her union activity. Since the Respondent intentionally made Burton's working conditions more difficult in retaliation for her union activity, it would be improper to allow the Respondent to use Burton's inability to complete the unlawfully assigned work as grounds for discharging her. Cf. *Tuscaloosa Quality Foods, Inc.,* 318 NLRB at 411 (when an employer unlawfully adopts a new rule in retaliation for protected activity it is well established that discharging an employee pursuant to that rule is itself violative of the Act). Indeed, the Board has held that when an employer discriminatorily assigns more onerous duties

to an employee with the hope of forcing him or her to resign, that employee may still obtain reinstatement and make whole relief even if the employee resigns the job altogether. See, e.g., *San Luis Trucking, Inc.*, 352 NLRB 211, 232-233 and 238 (2008); *Bolivar Tee's Mfg. Co.*, 334 NLRB 1145 (2001), enfd. 61 Fed. Appx. 711 (DC Cir. 2003). Indeed, in this case it appears that the Respondent was purposely setting Burton up for failure by assigning her additional work that it had previously determined was too burdensome to complete along with her existing duties.[31]

Finally, I reject the notion that, even absent its antiunion motivation, the Respondent would have discharged Burton because she was unproductive for 7 to 8 minutes during which time a vendor's representative was forced to wait for about 2 minutes. Surely such time-wasting conduct was not unknown to the Respondent before the union campaign, yet the Respondent failed to identify a single other Louisa employee who it had discharged for a similar lapse prior to September 2010. Not only was Burton the first employee of the store who the record shows the Respondent treated so harshly, but she was an individual with a long and excellent track record at the store. She had been employed at the Louisa location since it opened, had served in a number of different capacities, and the Respondent had rated her as an "excellent" employee in both of the last two annual performance appraisals. Moreover, although the Respondent claims that Burton's conduct meant that a vendor's representative was left waiting for her help for up to two minutes, it never interviewed that vendor's representative to see if that was, in fact, the case. Burton testified that, to the contrary, she could see from outside the receiving door that the vendor's representative was engaged in work activities that did not call for her involvement during the time period in question. At any rate, the Respondent's supposed concern about keeping the vendor's representative waiting for 1 to 2 minutes seems disingenuous given that the Respondent had recently assigned Burton the pies and cakes work, which necessarily meant that Burton would often not be available in the receiving area when vendors arrived.[32]

In conclusion, the record does not persuade me that the Respondent would have discharged Burton for legitimate reasons if it had not targeted her because of her union activity. I find that the Respondent violated section 8(a)(3) on November 19, 2010, when it discriminatorily discharged her because of her protected union activity.

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[31] At any rate, the Respondent's own witnesses testified that it was Baldridge's job as store manager to ensure that the pies and cakes were properly discounted, Tr. 828, and to help out with pies and cakes when needed, Tr. 882. Yet when the assignment was not completed the Respondent discharged Burton, but does not claim to have held Baldridge accountable at all. Even assuming that I gave weight to Burton's failure to complete the unlawfully assigned pies and cakes work when evaluating the Respondent's defense, I would find that the Respondent had failed to show that it would have discharged Burton for that failure absent antiunion motivation.

[32] Burton's prior discipline on October 23 and November 4 was not discussed during the conference call that resulted in the decision to discharge Burton and so should not be considered at this time to preclude Burton's reinstatement. See *Sikorsky Aerospace Maintenance*, 356 NLRB No. 144, Slip Op. at 19 (2010). At any rate, in all cases but one the prior discipline against Burton was unlawful and for that reason cannot be used for any purpose including, naturally, to justify her termination.

C. Smith: Written Correction for Failure to Attend October 5 Meeting; November 22 Discharge

The Respondent issued a written correction to Smith on October 6 for failing to come to the store on her scheduled day off to attend management's October 5 meeting regarding the union campaign, and discharged her on November 22, citing "breaking Company rule or regulation" as the reason. The General Counsel alleges that both of these disciplinary actions were discriminatorily based on Smith's union activity and violated section 8(a)(3).

I find that the General Counsel has met its initial *Wright Line* burden with respect to the actions taken against Smith. Regarding the first element, the evidence shows that Smith engaged in union activity by, inter alia: serving on the union organizing committee, attending multiple union meetings, signing a union authorization card, providing the Union with information about employees she thought might be interested in unionization, distributing a union video to a co-worker, and publicly challenging Cecil on September 29 regarding the subjects of whether employees could make more money working for a unionized competitor, and whether the Respondent had increased the level of supervision "so people from the Union wouldn't come in with guns and knives and wrestle us to the ground and force us to sign cards." Regarding the second element of the General Counsel's burden, the record shows that the Respondent was aware, at a minimum, of Smith's comments to Cecil regarding the superior wages at a unionized competitor and the connection between the Respondent's decision to increase supervision and its opposition to the union campaign. Moreover, Smith's comments to Cecil were tantamount to a declaration of support for the union campaign and were, I have no doubt, understood by Cecil as such. As for the final element of the General Counsel's initial burden, for the reasons discussed above, see supra section III.A.1., the record shows that the Respondent harbored animosity towards the Union.

I find that the Respondent has failed to show that it would have issued a written correction to Smith for missing the October 5 meeting if not for its antiunion motivation. Smith was the only employee the Respondent chose to discipline for failing to attend that meeting even though there were eleven other employees who also missed it. Indeed seven employees missed *both* mandatory meetings and still received no discipline at all. Baldridge's claim that the difference in treatment is explained by the fact that he had excused all of the other employees in advance is not only unsupported by evidence other Baldridge's own self-serving testimony, but is contradicted by the evidence showing that at least some of the other employees who missed the mandatory meetings were not excused by Baldridge in advance. I note also that Smith was a 10-year employee of the store who was rated an excellent employee in both of her last two annual performance reviews and that the Respondent had never once found it necessary to discipline her in any way prior to her participation in the union campaign. The fact that, after Smith revealed her union sympathies to Cecil, the Respondent disciplined her for a relatively minor lapse that it tolerated in other employees not only prevents the Respondent from meeting its burden of showing that it would have taken the same action absent its antiunion motivation, but the disparate treatment adds weight to the other evidence meeting the General Counsel's initial *Wright Line* burden.

For the reasons discussed above, I find that the Respondent violated section 8(a)(3) of the Act on October 6, 2011, when it issued a written correction to Smith.

I also find that the Respondent violated section 8(a)(3) when it discharged Smith on November 22 based on her actions on November 19. For the reasons discussed immediately above, I find that the General Counsel has met its initial burden of showing that the Respondent's discipline of Smith was motivated by antiunion animus. In its brief, the

Respondent claims that it meets its responsive burden based on Smith's "inappropriate conduct behind the store" on November 19. The Respondent's termination paperwork for Smith describes that conduct as exiting the receiving door and removing empty crates "without authorization," "stealing" approximately 8 minutes of time, and being "an accomplice" to Burton bringing in an unauthorized item (i.e., a bag of her own Tupperware). Two of these supposed violations barely warrant comment. It is not disputed that removing empty crates through the receiving door was part of Burton's job, and it is hard to imagine that the Respondent would discourage, much less discipline, an employee for lending a co-worker a helping hand as Smith did Burton. The Respondent has not shown that employees' tasks were so strictly delineated at the store as to render the provision of such assistance something other than commendable, much less punishable by discharge. Indeed, for some time prior to November 19, Smith had been helping Burton take out trash and clean the outdoor area near the receiving door. Other employees also cooperated with Burton by removing trash through the receiving door rather than leaving it for Burton to dispose of. Regarding the claim that Smith was an accomplice to Burton's bringing in the bag of Tupperware, it is unclear what the Respondent means by that. The Respondent has not shown that Smith facilitated Burton's action in any way or knew that it was unauthorized. At any rate, as discussed with respect to Burton, the Respondent failed to show that, prior to November 19, its policy prohibited Burton from occasionally bringing personal items into the store through the receiving door.

The Respondent's claim that it would have discharged Smith for "stealing time," has the most facial appeal of the defenses it forwards, but is also unpersuasive on the record here. The Respondent failed to show that before it found out about the union campaign it had disciplined any employee of the Louisa store for "stealing time," much less that it had gone so far as to discharge a long-term, excellent, employee for being unproductive for period of, at most, 8 minutes.

Also, as with Burton, I think it is worth reflecting on the big picture here. During the four months after it found out about the Union campaign the Respondent discharged just three of its 80 employees, and all three of the discharged employees were among the four employees serving on the union organizing committee. Numbers that stark are difficult to attribute to mere coincidence. See *American Wire Products*, 313 NLRB at 994; *Baker Mfg.*, 269 NLRB at 816; *The Holding Co.*, 231 NLRB at 390; see also, infra, footnote 27 and accompanying text.

For the reasons discussed above, I conclude that the Respondent violated section 8(a)(3) by discharging Smith on November 22, 2010, because she supported the Union.

D. Kirk: Position Eliminated
On October 16.

On October 16, 2010, the Respondent terminated Kirk's part-time employment as a scanning deputy and the General Counsel alleges that the Respondent did this because of Kirk's union activity, thereby violating section 8(a)(3).

The General Counsel easily establishes the first and third elements of its initial *Wright Line* burden. Regarding the first element, the evidence shows that Kirk was a member of the union committee, attended multiple union meetings including one public meeting at a restaurant in Louisa, helped provide union officials with a list of employees and their addresses, and signed a union card. In addition, in September 2010, during a gathering that included Vanover, a manager from the Louisa store, Kirk asked those present whether they had been contacted by the Union. Earlier, in late 2009, Kirk approached Baldridge to ask about unions and Baldridge responded with negative comments about unionization. Regarding the third element of the

General Counsel initial burden, the evidence shows, for the reasons discussed above, that the Respondent bore animus towards the union activity.

The second element – i.e., that the Respondent had knowledge of Kirk's support for the Union – is a closer call. The record shows that the Respondent was aware of the union activity at its facility, but contains no direct evidence that the Respondent had information about Kirk's membership on the union committee or about her various activities in support of the union campaign. Kirk openly attended a union meeting at a restaurant in Louisa, but the evidence does not establish that any official of the Respondent had knowledge of this. The record does show that the Respondent had knowledge of Kirk's conversations about unions with Baldridge and with a group that included another manager at the store, but although those conversations revealed that Kirk was curious about unionization, none of what Kirk was shown to have said revealed that she supported unionization or had engaged in pro-union activity. The absence of direct evidence of knowledge, however, does not end the inquiry. The General Counsel need not prove the Respondent's knowledge of union activity by "direct evidence," but rather may prove this element through evidence from which "knowledge may be reasonably inferred or imputed." *Windsor Convalescent Center*, 351 NLRB at 983 fn.36. Under all the circumstances present here, I infer such knowledge. In particular I am persuaded by the evidence that, during the 4 months after the Respondent discovered the union campaign, management discharged only three of its approximately 80 employees, and those three discharged employees all came from the ranks of the four members of the union committee. Since only four out of its 80 employees were on the union committee, the odds that union committee members would randomly be the only three employees selected for discharge are exceedingly small. See supra footnote 28. "[K]nowledge of union activity can be inferred from the disproportionate number of union adherents" among those discharged. *Meyers Transport of New York*, 338 NLRB 958, 972 (2003); see also *Hurst Performance, Inc.*, 242 NLRB 121, 128 (1979). As the Board stated in *Camco, Inc.*, "While it may be theoretically possible that the Respondent should have fortuitously selected for termination only those employees active in the Union, commonsense and the laws of mathematical probability indicate that such fortuity was highly improbable. 140 NLRB 361, 365 (1962), enfd. in part 340 F.2d 803, 810 (5TH Cir. 1965), cert. denied 382 U.S. 926 (1965). The disproportionate number of union committee members selected for discharge, the timing of Kirk's discharge, the direct evidence showing that the Respondent had knowledge that Kirk was, at a minimum, curious about unionization, and the record as a whole, leads me to find that the General Counsel has met the second element of its initial burden.

The Respondent endeavors to meet its responsive burden by showing that it would have terminated Kirk even absent antiunion motivation because Kirk's part-time position was always temporary and Smith had told the Respondent that she needed more help than Kirk was able to provide on her once-a-month schedule. This defense is plausible on the surface, but does not withstand closer scrutiny. First, although Kirk's part-time work was understood to be temporary, the plan had been that she would stay on to help until a new assistant scanning deputy was trained. She continued to work during the entire time that Bush was training in that capacity. Thus, when Bush did not work out in the position, one would expect that the Respondent would continue to employ Kirk on a part-time basis until a replacement was trained. However, at the time the Respondent terminated Kirk, the replacement, Maggard, had not even been named much less trained. Thus, the Respondent's decision to terminate Kirk on October 23 was not, on this record, consistent with the understanding regarding the temporary nature of her position.

The Respondent has also failed to show that the timing of Kirk's termination was the result of Smith's request for additional help. First, the record does not demonstrate that Smith's request was made close in time to Kirk's termination or that the termination was more closely tied chronologically to Smith's request than to the Respondent's discovery of the Union

campaign. Even assuming that Smith's request for additional help was made close in time to Kirk's termination, it would not explain why Kirk was terminated before Maggard was trained. Baldridge attempted to justify this action by stating that he had a limited number of employee-hours each week to use for operating the grocery department and claiming that this limitation precluded him from continuing to employ Kirk while also assigning a new full-time assistant scanning deputy. Based on my review of the record, I conclude that Baldridge's testimony on this point was self-serving, unsubstantiated by other evidence, and in many respects implausible. First, the Respondent introduced no evidence documenting the weekly number of employee-hours that Baldridge was limited to or showing that the Respondent had reached that limit. Indeed there is no evidence, other than Baldridge's testimony, showing that the Respondent had arrived at a weekly employee-hours limit for the store's grocery operation. Second, Maggard was already an employee of the store when the Respondent selected him to train as an assistant scanning deputy. Absent additional information, not provided by the record, it has not been shown that assigning some scanning duties to Maggard would result in any increase in the number of employee-hours being used by the store's grocery department. Finally, I note that Kirk was working only one day per month – meaning that her job amounted to no more than 2 or 3 or maybe 4 hours per week. In a store with about 80 employees it is hard to believe that Kirk's miniscule number of hours would push the Respondent over some weekly employee-hours limit, even assuming that such a limitation was shown to exist. Thus the Respondent has failed to show a reason why Kirk was not retained until a new assistant scanning deputy was trained.

I find that the Respondent discriminated in violation of section 8(a)(3) by discharging Kirk on October 16, 2010, because of her support for the Union.

Conclusions of Law

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

2. The Union is a labor organization within the meaning of section 2(5) of the Act.

3. The Respondent interfered with, restrained, and coerced employees in violation of section 8(a)(1) of the Act on October 23, 2010, when, because of employees' union activities, it promulgated a new policy requiring employees to clock-out before entering the break room, and on October 25, 2010, when it posted a written policy to that effect.

4. The Respondent violated section 8(a)(3) on October 24, 2010, when it disciplined Branham and Sweeney for violating the unlawfully promulgated policy regarding employees' use of the break room.

5. The Respondent violated section 8(a)(3) of the Act when it took the following disciplinary actions against employees because those employees engaged in protected union activities: on October 23, 2010, when it issued a verbal correction to Burton; on November 4, 2010, when it issued a verbal correction to Burton; on November 19, 2010, when it discharged Burton; on October 6, 2010, when it issued a written correction to Smith; on November 22, 2010, when it discharged Smith; and on October 16, 2010, when it discharged Kirk.

6. The Respondent discriminated against Burton in violation of section 8(a)(3) of the Act on November 3, 2010, by assigning her additional duties because she engaged in protected union activities.

7. The record does not establish that the Respondent discriminated against Burton in violation of section 8(a)(3) of the Act on November 12, 2010, when it issued a written warning to her.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to rescind the rule that it unlawfully promulgated on October 23, 2010, regarding use of the break room and remove any postings or other written statements of the new rule from the Louisa store. In addition, I recommend that the Respondent be ordered to offer reinstatement to Burton, Kirk and Smith and make them whole for any losses of wages, overtime pay and other benefits that they may have incurred as a result of the unlawful discrimination against them as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971) plus interest, compounded daily, as computed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent argues that no relief should be awarded to Burton, Kirk, and Smith because they each signed a settlement agreement with the Respondent and received a sum of money in return. Although I expect that during a compliance proceeding amounts already paid to the discriminatees would be considered in determining what, if anything, those individuals are still entitled to, I reject the Respondent's claim that those agreements bar the discriminatees from obtaining any relief at all. See *Weldun International*, 321 NLRB 733, 734 n.6 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998) (Table). I note, first of all, that the charges were filed by the Union, not the individual discriminatees, and none of the individuals who signed settlement agreements are parties to this action. The Respondent did not notify the Union that it was seeking the settlements and the Union was not involved in the discussions that led to the execution of those agreements. Neither the Union nor the General Counsel approved the agreements and both now oppose giving effect to them outside of a compliance proceeding. See *Independent Stave*, 287 NLRB 740, 743 (1987) (whether or not the charging party and General Counsel support giving effect to a settlement are among the factors bearing on whether non-Board settlement should be given effect). Perhaps most importantly, none of the alleged discriminatees have received the full amounts discussed in the settlement agreements. Each of those agreements provides that the employee will be paid one sum upon signing the agreement and a considerably larger sum when the Board approves withdrawal of the consolidated complaint. However, despite the discriminatees' requests, the Board did not approve withdrawal of the complaint and the Respondent never made the larger payments set forth in the agreements. Based on the record here I find that the individual discriminatees, unfamiliar with the procedures for withdrawal of a Board complaint, understood the agreements to mean that they would receive *both* payments in exchange for forgoing the relief to which they might be entitled. Tr. 285-286, Tr.293-94, 296-297, 410-11, 453-454. Since Burton, Kirk, and Smith never received the full amounts that they understood they were entitled to under the agreements, it would not effectuate the policies underlying the Act to allow the agreements to bar all relief for the Respondent's unlawful discrimination against those individuals. Relief can and should be ordered subject to appropriate adjustments during the compliance stage of this litigation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[33]

ORDER

The Respondent, K-VA-T Food Stores, Inc. d/b/a Food City, Louisa, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating new rules or more strictly enforcing existing rules in response to union activities in support of the Retail, Wholesale and Department Store Union, UFCW, CLC ("the Union") or any other labor organization.

(b) Disciplining employees pursuant to any rule that the Respondent created or more strictly enforced because employees supported the Union or any other labor organization.

(c) Disciplining, discharging, or otherwise discriminating against employees because of their support for the Union or any other labor organization.

(d) Assigning additional and/or more onerous duties to employees because of their support for the Union or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease giving effect to the policy that the Respondent promulgated and posted prohibiting employees from being in the break rooms unless clocked out for break, out for lunch, or not on the clock.

(b) Within 14 days from the date of the Board's Order, offer Glenda Burton, Ruth Ann Kirk, and Martha Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Glenda Burton, Ruth Ann Kirk, and Martha Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Glenda Burton, Ruth Ann Kirk, and Martha Smith, and the unlawful discipline issued to Richard Branham, Glenda Burton, Martha Smith, and Daryle Sweeney, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline and discharges will not be used against them in any way.

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

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

(f) Within 14 days after service by the Region, post at its facilities in Louisa, Kentucky, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region Nine, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 6, 2010.

Dated, Washington, D.C. July 11, 2011

_____
PAUL BOGAS
Administrative Law Judge

[34] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT create new rules, or more strictly enforce existing rules, in response to union activities in support of the Retail, Wholesale and Department Store Union, UFCW, CLC ("the Union") or any other labor organization.

WE WILL NOT discipline you pursuant to any rule that we created or more strictly enforced because employees supported the Union or any other labor organization.

WE WILL NOT discipline, discharge, or otherwise discriminate against you because of your support for the Union or any other labor organization.

WE WILL NOT assign additional and/or more onerous duties to you because of your support for the Union or any other labor organization.

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

WE WILL rescind and cease giving effect to the policy that that we promulgated and posted prohibiting you from being in the break rooms unless clocked out for break, out for lunch, or not on the clock.

WE WILL, within 14 days from the date of this Order, offer Glenda Burton, Ruth Ann Kirk, and Martha Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Glenda Burton, Ruth Ann Kirk, and Martha Smith whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Glenda Burton, Ruth Ann Kirk, and Martha Smith and the unlawful discipline issued to Richard Branham, Glenda Burton, Martha Smith, and Daryle Sweeny, and

WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

K-VA-T Food Stores, Inc. d/b/a Food City

(Employer)

Dated _____ By _____

(Representative) (Title)

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

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.