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

TESCO PLC d/b/a FRESH & EASY NEIGHBORHOOD MARKET, INC.

and **Cases: 31-CA-29913**
31-CA-30021
31-CA-30088

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

John Rubin and *Rudy Fong, Attys*., for the General Counsel.
Molly Eastman, Atty. (Seyfarth Shaw, LLP), of Chicago, Illinois, for the Respondent.
David Rosenfeld, Atty. (Weinberg, Roger, & Rosenfeld), of Alameda, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by United Food and Commercial Workers International Union (Charging Party or the Union), the Regional Director of Region 31 of the National Labor Relations Board (the Board) issued order consolidating cases, consolidated complaint, and notice of hearing (the complaint) on April 29, 2011.[1] The complaint alleges that Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act).[2] This matter was tried in Los Angeles on August 1 and 2, 2011.

[1] All dates herein are 2010 unless otherwise specified.

[2] At the hearing, General Counsel amended the complaint to correct a misdate and misspelling and to add the names of road supervisors Eduardo Dominguez and Eugene Estrada as agents of Respondent within the meaning of Section 2(13) of the Act, which allegation was admitted by Respondent. General Counsel also amended the complaint to omit the date of "June 2010" from subparagraph 6(a) and to replace the words "On various dates in April, May, June and July 2010" in subparagraph 6(c) with the words "In about April 2010." General Counsel further amended the requested remedy to seek a special corporate wide notice posting.

II. Issues

Did Respondent violate Section 8(a)(1) of the Act by the following conduct:

A. Creating an impression among its employees that their union activities were under surveillance.
B. Interrogating an employee regarding the employee's union activities.
C. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from talking about the Union in the store, on the clock, or on the sales floor.
D. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their terms and conditions of employment with other employees.
E. Telling employees to distribute anti-union flyers to customers.

III. JURISDICTION

At all material times, Respondent, a corporation and a subsidiary of Tesco, PLC, with an office and place of business at 4211 Eagle Rock Blvd., Los Angeles, California (the Eagle Rock store) has been engaged in the operation of retail grocery stores in multiple states. During the past calendar year, Respondent, in conducting its business operations at the Eagle Rock Store, derived gross revenues in excess of $500,000, and purchased and received at the Store goods valued in excess of $50,000 directly from points outside the State of California. Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, Charging Party, and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

A. The Eagle Rock Store

Respondent operates a chain of grocery stores in a multiple states; the Eagle Rock store in Los Angeles is the focus of this case. During the relevant period, the Eagle Rock store was entirely self-checkout, i.e., customers rather than store employees scanned, bagged, and paid for their merchandise at eight electronic checkout stations. Customer associates (CAs) assisted customers in checking out, approved purchases of alcoholic beverages, gathered shopping carts, stocked product shelves and displays, and generally assured that customers had successful shopping experiences. Typically two to four customer associates worked at the same time. The customer associates reported to a team lead; generally one but sometimes two team leads worked at the same time. The team leads, in turn, reported to a store manager. On

March 29 Pablo Artica (Artica) assumed management of the Eagle Rock store, a position he retained until May 2011.[3]

At the Eagle Rock store, management daily gathered employees into groups called "huddles" to dispense information about how the store was doing and to give work reminders. Employees were permitted to talk among themselves as they worked about matters unrelated to work so long as their productivity or customer service was not impeded.

Respondent's occasional practice at the Eagle Rock store was to distribute sales coupons to customers to promote repeat shopping. Sales coupons were generally kept at the self checkout stations where they were to be given to customers who completed a purchase with the object of encouraging the maximum number of shoppers to return to the store to utilize the coupon. Respondent directed CAs to place the sales coupons in customer bags or hand them directly to customers. Respondent did not want the coupon fliers to be unrestrictedly available at checkout stations, as customers might take multiple copies, thereby reducing customer outreach.

B. Union Organizing Drive at the Eagle Rock Store

Between March 13–25, 17 employees of the Eagle Rock Store signed a petition (employees' petition) that read:

> I have made an informed choice and want the United Food and Commercial Workers (UFCW) as my bargaining agent. The undersigned constitute a majority of all regular, non-supervisory full-time and part-time employees at the Tesco Fresh & Easy store located at 4211 Eagle Rock Blvd. Los Angeles, California 90065…we hereby call on Tesco Fresh & Easy to immediately recognize our union.

On March 26, union representatives, Brian Iwakiri and Keven Solsman, and two of Respondent's employees, Michael Acuna (Acuna) and Angel Salas (Salas), drove to Respondent's home office in El Segundo, California, where they met with Hugh Cousins (Cousins), Respondent's chief human resources officer. Salas gave Cousins the employees' petition, saying the Eagle Rock store employees wanted to be recognized by the Union. Cousins said the company preferred to go to an election.

C. Alleged Promulgation of Unlawful Rules

In April, according to the testimony of Salas, during a huddle with 4 or 5 employees in the break room, Artica, who appeared to be reading from an email,[4] told the group they could not talk about the Union on the clock; they could only talk about it in the break room on their breaks or outside of the store when off the clock. Salas recalled little else of the meeting. No other witness testified to Artica having made such or similar statements to employees at that or at any other time, and no employee testified that he/she had been restricted from talking about the Union during work, which employees apparently freely did. Artica denied ever telling any employees they could not talk about the Union while working.

In late June-early July at work, Acuna asked a team leader why Artica had not addressed the attendance problems of an employee named Ricardo. The team leader told

[3] Artica was a supervisor and/or an agent of the Respondent within the meaning of Sections 2 (11) and (13) of the Act.

[4] Salas inferred the email had issued from Respondent's district manager.

Acuna it was not his business. On July 5, Artica approached Acuna at work and asked him why he had inquired about another employee's discipline. Artica told Acuna it was none of his business to talk about another employee's discipline if the employee did not want to share the information. Artica warned Acuna he would be disciplined if he did not stop.[5]

D. Alleged Impression of Surveillance and Interrogation

In May, union representatives scheduled a meeting with Respondent's employees to be held a few miles from the Eagle Rock store on May 19, in which employee safety and training issues were to be discussed.[6] Artica was aware of the meeting.[7] Sometime before the meeting, as employee Jose Montiel-Rangel (Montiel-Rangel) walked with Artica to retrieve Montiel-Rangel's bicycle from a storage facility at the store, Artica asked Montiel-Rangel if he was going to the "meeting." When Montiel-Rangel feigned ignorance, Artica said, "You know, the meeting that you guys are having today, you know, your safety meeting."

Montiel-Rangel again disclaimed knowledge of any meeting, and Artica asked if he was going to take notes for him at the meeting. Montiel-Rangel asked who had squealed about the meeting, and Artica said, "It's amazing what you can find on the internet."[8]

E. Alleged Direction to Distribute Antiunion Flyers

Beginning in November, union organizers and employees distributed leaflets (two-sided English and Spanish) near the front entrance of the Eagle Rock store to customers and workers (union leaflet). The leaflets read, in pertinent part:

> Tell Fresh & Easy: Let Your Workers Freely Choose a Union
> Despite repeated requests from workers, Fresh & Easy has never recognized a union of their workers—instead choosing to fight their employees as they try to form a union. Administrative Law Judges in two states have found that Fresh & Easy broke the law by committing unfair labor practices…

[5] Artica did not recall having that specific conversation although he recalled telling several people that individual employees' discipline is their own business. He denied telling any employee he/she could not talk about discipline. I found Acuna to be a reliable witness, and I accept his testimony.

[6] The May meeting was one of a series in which the Union discussed with employees proper lifting techniques, ergonomics, and avoidance of employee injuries.

[7] An otherwise uninvolved employee told Artica of the meeting. Artica testified he was interested in the meeting because he wanted to know how to improve safety at the Eagle Rock store.

[8] Michael Acuna (Acuna) testified to an earlier, very similar May 19 interaction among Artica, Montiel-Rangel, and Acuna, in which Artica asked the two employees if they could "make notations and suggestions as far as the safety meeting" they were going to have and bring it in to him. Montiel-Rangel did not corroborate Acuna's testimony of this conversation. It is difficult to reconcile Acuna and Montiel-Rangel's testimony, particularly as Montiel-Rangel was surprised by Artica's knowledge of the meeting, which he could not have been if the earlier discussion described by Acuna had taken place. I find it unnecessary to resolve the inconsistencies, as Acuna's account, even if accepted, would only add to the existing allegation and not create a different one.

All Fresh & Easy employees deserve the right to form a union, if they choose, free from intimidation and fear.

Some customers became contentious during distribution of the leaflets, and some customers complained to store management about the leafleting.

Sometime in December, Respondent prepared a flyer for distribution to customers that contained a $5 store coupon (Respondent's coupon flyer) and read in pertinent part:

- Sorry for any inconvenience union protesters may have caused you.
- The protesters are not our employees and have been hired by the [Union].
- The [Union] wants fresh & easy to unionize. We've told the [Union] this is a decision only our employees can make. They have not made this choice.
- We offer good pay as well as comprehensive, affordable benefits to all our employees.
- We take pride in being a great place to work

Respondent instructed its CAs to distribute Respondent's coupon flyers to customers.[9] Employee Carlos Juarez (Juarez) observed various CAs putting copies of the coupon flyer in customer's bags or personally handing it to them.

On January 10, 2011, Artica noticed that Juarez was either not giving out the flyers or was just placing them in people's bags. Artica approached Juarez as he was helping a customer at checkout and asked, "Aren't you going to pass those [coupon flyers] out to the customers," adding that Juarez was supposed to do so.

Juarez told Artica he could not do it. When Artica asked if Juarez was refusing to pass out Respondent's coupon flyers, Juarez said Artica could not force him to do something against his will. Artica asked again if Juarez was refusing to pass out the flyers. Juarez said, "Pablo, you've got to respect my rights," saying the Union could be his religion. Artica asked Juarez a third and a fourth time if he were refusing to pass out Respondent's coupon flyers. In response to the fourth enquiry, Juarez said, "Yes, I am refusing to pass all of those flyers out because they're lying to customers." Ortiz walked away.[10]

In early January 2011, Artica directed Montiel-Rangel, who was working at the checkout stations, to ensure that every customer received a coupon flyer. For the next 20 minutes or so, Montiel-Rangel placed a flyer in a shopping bag of each customer upon checkout. Artica approached Montiel-Rangel, saying he had not seen Montiel-Rangel hand Respondent's coupon flyers to customers. Montiel-Rangel said he was placing Respondent's coupon flyers in shopping bags. Artica told Montiel-Rangel to physically hand Respondent's coupon flyers to customers. Montiel-Rangel demurred, saying that as a union supporter, he was not thrilled about having to hand the flyers to customers, but if it was part of his duties, he would do so. Thereafter, Montiel-Rangel handed coupon flyers directly to customers.

[9] Respondent also assigned employees involved in its customer ambassador program to distribute Respondent's coupon flyers at the Eagle Rock and other Fresh & Easy stores where the Union leafleted. The customer ambassador program, in pertinent part, provided program employees with the opportunity to meet and greet customers outside Fresh & Easy stores and share with them information about various public relations matters including the company's position regarding unionization.

[10] This account reflects the testimony of Juarez, which Artica essentially corroborated.

V. Discussion

A. Interrogation and Creating the Impression of Surveillance

The complaint alleges that in June, Store Manager Artica interrogated employees about their union activities and created an impression that their union activities were under surveillance by Respondent.

On May 10, Artica asked an employee, Montiel-Rangel, if he were going to the union meeting scheduled for later that day, disclosing his knowledge of its purpose and asking the employee to take notes for him. The General Counsel argues that by Artica's conduct, Respondent interrogated Montiel-Rangel about his union activities. The General Counsel also argues that Artica's questions created the impression that he was keeping employees' union activities under surveillance.

Respondent contends that Artica learned of the May 19 union meeting through an employee's voluntary, uncoerced disclosure and that his later exchange with employees had the legitimate purpose of seeking information about potential safety problems, which the union meeting was expected to address.

Supervisory questioning of employees about union activity is not a per se violation of Section 8(a)(1) of the Act. The test is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with statutory rights. To support a finding of illegality, the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Rossmore House,* 269 NLRB 1176, 1177–1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). If the questioning meets that test, it may also be found to have created the impression of surveillance. See *Stevens Creek Chrysler Jeep Dodge, Inc.,* 357 NLRB No. 57, slip op. 10 (2011) (interrogation and creation of the impression of surveillance when, following a union meeting, employer asked employees who paid for pizza at the meeting).

Determining if Artica's statements constituted interrogation and/or created an unlawful impression of surveillance requires an objective test of whether, under the circumstances, Artica's conduct was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982)); *Fresh* & *Easy Neighborhood Market Inc.,* 356 NLRB No. 90 fn. 2 (2011), citing *Double D Construction Group, Inc.*, 339 NLRB 303, 303–304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

I find Artica's May 19 statements to employees would reasonably and objectively have had a coercive effect. There is no evidence that knowledge of the union safety meeting was commonplace or inconsequential; indeed Montiel-Rangel's surprised, disclaiming reaction to Artica's questions evinces the contrary. In those circumstances, Artica's benign or even constructive purpose in inquiring about the union meeting is irrelevant. His probing must objectively have tended to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and have thereby violated Section 8(a)(1) of the Act.

B. Promulgation and maintenance of unlawful rules

The complaint alleges that Respondent unlawfully promulgated and maintained a rule prohibiting employees from talking about the Union in the store, on the clock, or on the sales floor. The evidence proffered to support that allegation is Salas' testimony that Artica told employee participants in a huddle that employees could only talk about the Union in the break room on their breaks or outside of the store when off the clock.

Salas did not demonstrate a general recall of what Artica said in the April meeting beyond the specific statements he testified to. Moreover, Salas did not set the statements he did recall in any context, certainly not one sufficient for me to determine whether Salas' testimony showed a clear recollection of what Artica said or whether it reflected inferences he perhaps unwarrantedly drew. General Counsel asserts that Respondent was found in *Fresh & Easy Neighborhood Market Inc.,* 356 NLRB No. 90 slip op. at 6, 7 (2011), to have committed an identical violation at the Spring Valley, California store. The evidence in that case established that in 2009, Paula Agwu, Respondent's corporate human relations manager, told an employee of the Spring Valley store that she could not hand out paperwork or brochures while on the clock or on the sales floor, but essentially conceded that employees could at those times discuss union matters. While Agwu's acknowledgment of employees' rights to discuss the Union during work time did not, in the Board's view, cure a previous violation, it weakens any inference Salas may have drawn that Artica was articulating restrictions from an upper managerial email at the huddle and casts further doubt on his testimony in this regard. In these circumstances, I cannot rely on Salas' testimony of the statements.

The General Counsel bears the burden of proving that Respondent committed allegedly unlawful conduct. As I cannot rely on Salas' testimony, the General Counsel has not met its burden. I shall, therefore, dismiss complaint subparagraph 6(c).

The complaint also alleges at subparagraph (d) that Respondent unlawfully promulgated and maintained a rule prohibiting employees from discussing their terms and conditions of employment with other employees. The evidence adduced in support of the allegation shows that on July 5, Artica told employee Acuna not to talk about other employees' discipline on pain of incurring his own discipline.

Section 7 of the Act gives employees the right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act prohibits interference with, restraint, or coercion of employees in the exercise of those rights.

The Board considers that an employer's maintenance of a work rule violates Section 8(a)(1) if employees would reasonably construe the language of the rule to restrict the exercise of Section 7 rights, applying a standard articulated in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646–647 (2004), and restated in *The NLS Group,* 352 NLRB 744–745 (2008):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

The Board has answered in the affirmative the question of whether employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. See *Desert Palace, Inc., d/b/a Caesar's Palace,* 336 NLRB 271 (2001);[11] see also *Verizon Wireless*, 349 NLRB 640, 658–659 (2007), (prohibiting employee discussion of workplace concerns relating to discipline abridges Section 7 rights). Artica's all-encompassing embargo on employees talking about other employees' discipline explicitly interferes with that right and violates Section 8(a)(1).

C. Directing Employees to Distribute Antiunion Flyers to Customers

The complaint alleges that Respondent violated Section 8(a)(1) when Artica told employees to distribute antiunion flyers to customers. The flyer in question, Respondent's coupon flyer, was directed to customers and distributed in response to customer complaints about lawful prounion activism outside the store. The flyer apologized for customer inconvenience, disclaimed employee involvement in the activism, asserted Respondent's position that employees had not chosen the Union to represent them,[12] and touted Respondent's good pay and affordable benefits.

The Board has held that an employer may not compel employees to express opposition to union representation:

> [A]n employee has a Section 7 right to choose, free from any employer coercion, the degree to which he or she will participate in the debate concerning representation. This includes whether to oppose the union independently of the employer's own efforts, or to oppose representation by, for example, wearing an employer's campaign paraphernalia or, alternatively, by appearing in an employer's campaign videotape...A direct solicitation pressures employees into making an observable choice, and thereby coerces them in the exercise of their Section 7 rights.[13]

[11] Although the Board found in *Caesar's Palace* that an on-going drug investigation justified the employer's conduct, the Board emphasized employees' right to discuss discipline.

[12] Given Respondent's refusal to accede to the Union's majority-supported petition for recognition, insisting instead that employees demonstrate union choice through a Board-conducted election, this assertion was overly simplistic although not explicitly inaccurate.

[13] *The Smithfield Packing Company, Inc., Tar Heel Division,* 344 NLRB 1, 3–4 (2004) (requiring employee to stamp "Vote No" on hogs), quoting from *Allegheny Ludlum Corp.*, 333 NLRB 734, 741 (2001) (solicitation of employees to participate in an antiunion videotape lawful only upon certain assurances), and citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 496 (1995), enfd. in relevant part 97 F.3d 65, 72, 74 (4th Cir. 1996) (directing an employee to wear a "Vote No" T-shirt); *R. L. White Co.*, 262 NLRB 575, 576–577 (1982) (distributing and coercively encouraging employees to wear pro-employer T-shirts); *Florida Steel Corp.*, 224 NLRB 587, 588-589 (1976), enfd. mem. 552 F.2d 368 (5th Cir. 1977) (requiring employees to pose for photographs holding "vote no" signs). The Board found these employers' actions pressured employees into making an observable choice concerning their participation in an election campaign.

The Board also prohibits employers from requiring indirect participation in disseminating an antiunion message. See *Clinton Food 4 Less*, 288 NLRB 597 (1988) (the Board adopted the administrative law judge's decision that an employer who required an employee upon pain of discipline to distribute to each customer checking out at her register a copy of the employer's handbill opposing the Union, thereby conveying its antiunion message, violates Section 8(a)(1) of the Act).

The above cases appear to pose a threshold question that must be answered before it can be determined whether Respondent's conduct in requiring employees to disseminate its coupon flyers was unlawful. That question is whether the coupon flyer can reasonably be viewed as an antiunion communication or as a component of the company's campaign against union representation. In *Allegheny Ludlum*, at 745, the Board restricted its holding to campaign materials that "reasonably tend[ed] to indicate the employee's position on union representation." The Board "perceive[d] no basis for finding that the inclusion of employees' images in a videotape that [did] not convey a message about the employees' views concerning union representation, without more, would violate Section 8(a)(1)." *Ibid.* All cases cited above involve employer-required dissemination of an employer's antiunion or union oppositional position. The Respondent's coupon flyer must, therefore, be reviewed with an eye for the explicit or implicit expression of any antiunion or union oppositional stance.

General Counsel did not address this question directly, arguing, rather, that it is irrelevant whether Respondent's coupon flyer was explicitly antiunion. The pivotal consideration, in General Counsel's view, is that the coupon flyer constituted campaign literature generally because it "reference[d] the Union's organizing campaign, apologize[d] to the public. . . boast[ed] about Respondent's business practices . . . [and] was a counter to the Union's flyer." By instructing Juarez and Montiel-Rangel to hand out its coupon flyer to customers, General Counsel asserts, Respondent coerced them to act as its agents, thereby denying them their right to freely exercise Section 7 rights.

Respondent argues that its coupon flyer articulated neither a pro nor antiunion view. As the coupon flyer was neutral as to unionization, Respondent urges, employee distribution of it could not convey any employee's view of unionization or enable Respondent to assess his/her sympathies.

I am persuaded that Respondent's coupon flyer could in no way be viewed as antiunion campaign material. At most, the flyer was a self serving attempt to conciliate irate customers by justifying the company's lawful refusal to recognize the Union without an election and burnishing its image as a community asset. In neither tactic did Respondent malign or even refer negatively to the Union or to employee unionization. The mere fact that Respondent's coupon flyer was a byproduct of the union organizational drive, cannot convert the flyer into antiunion campaign material.

As Respondent's coupon flyer did not express a position on unionization, it could not have conveyed the union view, pro or con, of any distributing employee. Requiring employees to distribute the Respondent's coupon flyers to customers did not, therefore force employees into making an observable choice concerning their participation in an election campaign or "contravene employees' Section 7 right to choose whether to express an opinion [about unionization] or remain silent." *Allegheny Ludlum*, at 744–745. I shall, therefore, dismiss that allegation of the complaint.

VI. CONCLUSIONS OF LAW

A. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
B. The Union is a labor organization within the meaning of Section 2(5) of the Act.
C. The Respondent violated Section 8(a)(1) of the Act by the following:

1. Creating an impression among its employees that their union activities were under surveillance.
2. Interrogating an employee regarding the employee's union activities.
3. Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their discipline, a term and condition of employment, with other employees.

D. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to post appropriate notices in the manner set forth hereafter.

General Counsel and Charging Party seek a broad notice, asserting that Respondent is a repeat violator of the Act. As the General Counsel points out, two prior Board decisions involving Respondent have recently issued: *Fresh* & *Easy Neighborhood Market, Inc,* 356 NLRB No. 85 (2011), finding that during the Union's organizing drive at Respondent's Las Vegas stores Fresh & Easy, Respondent unlawfully: (1) interrogated employees; (2) created the impression of surveillance; and (3) promulgated and maintained an unlawfully overbroad no-distribution rule; *Fresh* & *Easy Neighborhood Market,* 356 NLRB No. 90 (2011), finding that Respondent at its Spring Valley, California store, unlawfully (1) promulgated and maintained a rule prohibiting employees from talking about the Union while working, (2) prohibited employees from talking about their discipline with other employees while working, and (3) invited employees to quit their employment as a response to their protected activities. Given corporate oversight of the labor relations of individual stores and the repetition of conduct already found unlawful by the Board, I find a broad notice is appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979) (broad order warranted when a respondent is shown to have a proclivity to violate the Act).

General Counsel and Charging Party also seek corporate-wide notice posting because of corporate-wide involvement in the distribution of Respondent's coupon flyer. Charging Party seeks the additional remedy of requiring Respondent to pass out the Board's notice to customers. As I have not found that Respondent violated the Act by requiring employees to distribute its coupon flyer to customers, I find no basis for ordering corporate-wide posting or distribution of the Board's notice to customers.

General Counsel seeks the additional remedy of notice reading to employees. The unlawful conduct found in this case does not constitute such serious, persistent, and widespread unfair labor practices as to require the notice to be read aloud.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent, Tesco PLC d/b/a Fresh & Easy Neighborhood Market, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct:

(a) Creating an impression among its employees that their union activities were under surveillance.

(b) Interrogating an employee regarding the employee's union activities.

(c) Orally promulgating, and thereafter maintaining, a rule prohibiting employees from discussing their discipline, a term and condition of employment, with other employees.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facilities in Los Angeles, California, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 31after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the 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.[16] 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 Respondent at any time since May 2011.

[14] 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.

[15] If this Order is enforced by a Judgment of the 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."

[16] The question of whether Respondent electronically communicates with employees is left to the compliance stage of these proceedings.

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

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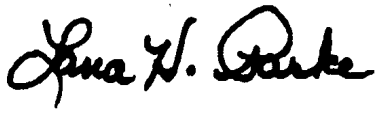
Dated: Washington, D.C. October 18, 2011



Lana H. Parke
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT create an impression that the activities of our employees in support of any union are under surveillance.

WE WILL NOT question employees about their union activities or the union activities of other employees.

WE WILL NOT make and/or maintain any rule preventing employees from discussing their terms and conditions of employment, including discipline, with other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

TESCO PLC d/b/a FRESH & EASY NEIGHBORHOOD MARKET, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

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, (310) 235-7424.