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**Arkema, Inc. and United Steelworkers of America,  
Local 13-227**

**Arkema, Inc. and Greg Schull and United Steelworkers of America, Local 13-227.** Cases 16–CA–26371, 16–CA–26392, and 16–RD–1583

October 31, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On September 17, 2009, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief. Finally, the Union filed a letter adopting the General Counsel’s position in its entirety.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

1. We agree with the judge that the Respondent violated Section 8(a)(1) of the Act on July 22, 2008, by issuing employee Mark Saltibus a written reminder for engaging in the protected activity of urging fellow employee Susan Russell to support the Union in an upcoming

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<sup>1</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the judge’s recommendation to overrule the Union’s Objections 1, 3, 5, 6, 9, 10, 12, 18, 19, 20, and 22. The judge sustained the Union’s Objections 2, 4, 7, and 8 because they were consistent with the unfair labor practices found by the judge. We adopt the judge’s recommendation to sustain these objections as we have affirmed the related unfair labor practices found by the judge.

There are no exceptions to the judge’s denial of the General Counsel’s request to conform the pleadings to include an allegation that the Respondent unlawfully interrogated employee David Pope.

<sup>2</sup> We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010), *enfd.* \_\_\_ F.3d \_\_\_, No. 08-17089, 2011 WL 3796272 (9th Cir. Aug. 29, 2011).

ing decertification election.<sup>3</sup> On July 21, in the course of urging Russell to back the Union, Saltibus told her that, if there were no union, “there’s no support [and] the relationship’s going to change.” Russell told Chief Operator Randy Joy about this conversation, and he reported it to Site Manager Terry Freeman.

The following day, Freeman gave Saltibus a “written reminder” for “Violation of Company Harassment Policy.” The Respondent’s harassment policy prohibits “any unwanted attention or unwanted behavior [that is] engaged in because of a person’s sex, race, color, religion, national origin, age, disability, sexual orientation, or gender identity” and that meets certain additional criteria.<sup>4</sup> The written reminder described Saltibus’ violations as “making intimidating and threatening remarks toward a coworker and creating an offensive working environment.” The written reminder also accused Saltibus of “threatening [Russell’s] job if she continued to pursue her non-union status.” Additionally, the written reminder cited “a separate occasion” on which Saltibus allegedly “made threatening and inappropriate remarks to a laboratory employee concerning her wishes to not join the Union.” The reminder did not provide the name of the laboratory employee, state when the alleged incident occurred, or give any other specifics, and Freeman refused to tell Saltibus anything more about this allegation. The written reminder concluded by stating that these incidents were “wholly unacceptable and [would] not be tolerated” and that Saltibus’ failure to comply with the Respondent’s expectations regarding employee misconduct might “result in the termination of [his] employment.”

Correctly applying the analytical framework of *NLRB v. Burnup & Sims*, 373 U.S. 21 (1964), the judge found, and we agree, that the Respondent did not have an honest belief that Saltibus engaged in misconduct during the protected conversation with Russell. The judge credited Saltibus’ testimony that all he said to Russell was: “if there were no union, there would be no support and that their relationship would change.” Saltibus made no reference to Russell’s sex and did not threaten her on that basis, based on her union sentiments, or in any other manner. According to the credited testimony, he did nothing that could conceivably be considered to have created an offensive working environment. The judge also noted that the Respondent rushed to judgment by issuing the written reminder almost immediately after

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<sup>3</sup> All subsequent dates are in 2008.

<sup>4</sup> Those criteria are: “(1) Involv[ing] a stated or implicit threat to a person’s employment status; (2) [Having] the purpose or effect of interfering with a person’s work performance; or, (3) Creat[ing] an intimidating or offensive work environment.”

Freeman learned of Russell's conversation with Saltibus, in fact, preparing it before company managers met with Saltibus to get his side of the story (even though it stated that Respondent had "completed its investigation"). This procedure was contrary to the Respondent's past practice. Finally, the Respondent included as an additional basis for the warning a stale allegation concerning a laboratory employee, allegedly occurring 9 months earlier, about which Saltibus had never previously been informed. Indeed, the Respondent had never investigated these allegations and Freeman refused to permit Saltibus to address them. The Respondent did not simply decline to permit Saltibus "to debate" the incident, as our dissenting colleague suggests, it refused to identify the alleged victim, to inform Saltibus when the alleged incident took place, or provide any of the ordinary information that would have given him a fair chance to defend himself. In sum, the procedures used in issuing the warning were suspect and inconsistent with the Respondent's own past practice.

The judge also found, and we agree, that even assuming arguendo that the Respondent had an honest belief that Saltibus engaged in misconduct during his protected conversation, there was nevertheless a violation under *Burnup & Sims* because the alleged misconduct did not in fact occur. Although the Respondent issued the written reminder to Saltibus for "Violation of Company Harassment Policy," it failed to even assert that Saltibus' alleged actions related to "sex, race, color, religion," or any of the other classifications covered by the harassment policy. In particular, the written reminder made no mention of harassment based on gender, and, in any case, the judge credited Saltibus' testimony that he never told Russell that he would refuse to help her because she was a woman. Our dissenting colleague's suggestion that the Respondent placed Saltibus' harassment of Russell into the closest category it could find is misplaced because the judge correctly found that there was no harassment as defined in the policy (i.e., the alleged misconduct did not occur), nor harassment of any kind. Finally, an accusation of sexual or racial harassment justifiably carries a peculiar stigma and there is no question here that Saltibus engaged in no misconduct meriting that stigma.

We reject our dissenting colleague's assertion that the Board's decision in *Contempora Fabrics, Inc.*, 344 NLRB 851 (2005), warrants reversing the judge. There, the Board found that an employer, consistent with a pre-existing policy against threatening or abusive language, lawfully disciplined a male employee, Lambert, after a female colleague reported that Lambert told her that she "had better not vote 'no' for the union." *Id.* at 852. Lambert had a prior history of serious misconduct, in-

cluding a domestic violence conviction and threatening another employee. The Board found that Lambert's comment, accentuated by his history of serious misconduct, was an unprotected warning that the female employee would face negative consequences for not supporting the union. In addition, the evidence showed that the employer had previously disciplined 32 other employees under the same policy that it applied to Lambert. Under those circumstances, the Board found that the employer had a good-faith basis for relying on the female employee's report to discipline Lambert.

*Contempora Fabrics* is obviously distinguishable from the instant case. Saltibus was a model employee with no history of misconduct of any kind, much less sexual harassment. The Respondent did not maintain a consistently applied general policy prohibiting abusive or threatening language. Rather, it attempted to shoehorn this incident into its harassment policy, which apparently had not been applied to similar instances in the past. Moreover, while Saltibus did tell Russell "if there were no union, there would be no support and that their relationship would change," the judge, who heard the testimony and credited Saltibus, found that there was no threat or promise of retribution if Russell did not support the Union.<sup>5</sup>

Rather than focus on what Saltibus actually said to Russell, the dissent relies on Saltibus' testimony at the hearing about what he meant by his statement. However, even this does not support our colleague's conclusion. Saltibus testified that he intended to convey to Russell that, if the Union went away, he would not help her do her job as he had in the past and would not "carry her load." The dissent then conflates Saltibus' actual message and his *intended* message as somehow establishing a threat to Russell's job and physical safety. However, Saltibus also credibly testified that he did not intend to suggest he would not help Russell in an emergency or that he would not fully perform his duties when he was the step-up chief. The judge found that no testimony supported the Respondent's claim that Saltibus threatened Russell's job if she did not support the Union. The dissent sets forth no basis for overruling the judge's

<sup>5</sup> This case is also readily distinguishable from other cases on which our dissenting colleague relies. In *BJ's Wholesale Club*, 318 NLRB 684 (1995), the employee who was lawfully disciplined repeatedly interrupted a coworker during her worktime to try to persuade her to sign a union authorization card after she requested that he stop. In *PPG Industries*, 337 NLRB 1247 (2002), the employee, shouting, used vulgar terms to tell a coworker she was being taken advantage of while he solicited her to sign an authorization card. In *Trus Joist MacMillan*, 341 NLRB 369 (2004), an employee lost the protection of the Act when he called a manager a "lying bastard" and a "prostitute" and grabbed his own crotch. By contrast, in the present case, Saltibus engaged in no such behaviors.

credibility findings. The dissent's assertion that "Saltibus admitted threatening Russell with adverse and unpleasant consequences if she failed to support the Union" is thus misguided.

The General Counsel demonstrates that, at most, Saltibus informed Russell that decertification would affect their relationship as coworkers and that, as a result, he would not continue to assist her with what were properly her job duties. The General Counsel thus proved that Saltibus did not engage in the misconduct he was cited for or, in fact, any misconduct at all. Accordingly, we adopt the judge's findings and his conclusion that the Respondent's July 22 discipline of Saltibus violated Section 8(a)(1).<sup>6</sup>

2. We also adopt the judge's finding that the Respondent violated Section 8(a)(1) by issuing a July 23 letter prohibiting harassment and other similar conduct. This letter prohibited employees from being "harassed, intimidated or threatened in any way . . . by anyone, including the union, for refusing to support a strike or certification" and asked that employees contact management if "you feel you have been subjected" to such prohibited conduct. We agree with the judge's determination that this letter was unlawful under the standard established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Under *Lutheran Heritage*, an employer rule that does not explicitly restrict protected activity, may still be found to violate Section 8(a)(1) of the Act if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. Applying this standard, we agree with the judge that the Respondent's letter was unlawful.

First, employees would reasonably interpret the letter's broad prohibition against any prounion "harassment" as including persistent union solicitation protected by Section 7 of the Act.<sup>7</sup> Posted during the critical period, the letter prohibits harassment "in any way" and explains that the Respondent will not tolerate "any activity of this

<sup>6</sup> We find it unnecessary to determine whether the Respondent also violated Sec. 8(a)(3) because such a finding would not affect the remedy. See *Roadway Express, Inc.*, 355 NLRB No. 23, slip op. at 8 (2010).

<sup>7</sup> The Board has long held that an employer's dissemination of a harassment or threat policy, during a union campaign, "has the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organization activities." *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980), quoting *Colony Printing & Labeling, Inc.*, 249 NLRB 223, 225 (1980), *enfd.* 651 F.2d 502 (7th Cir. 1981).

type."<sup>8</sup> In addition to this broad prohibition, the letter also invokes the subjective reactions of employees by inviting them to report conduct simply if they "feel" they have been harassed. Moreover, this letter was not posted in a context free of unfair labor practices.

We affirm the judge's finding that the letter is unlawful also because it was promulgated in response to union activity. As noted above, the letter was issued during the critical period at a time when the Respondent was well aware of the decertification campaign and the efforts by union adherents to oppose it. By its terms, the letter references, and prohibits, only harassment of employees opposed to the Union (i.e., employees "refusing to support a strike or certification"). As such, it is clearly distinguishable from the prohibition against "abusive and profane language" at issue in *Lutheran Heritage*, *supra*, which both predated any union activity and by its terms applied to all conduct of that character—not, as here, only to conduct on the part of prounion employees.

3. Because the Respondent's discipline of Saltibus and its July 23 letter both violate Section 8(a)(1), we also affirm the judge's determination that these critical period violations warrant setting aside the election. See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962) ("[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.") (emphasis in original).

We also adopt the judge's determination that the Respondent violated Section 8(a)(5) and (1) when, after the decertification election, while the Union's objections were still pending and a certification had yet to issue, the Respondent withdrew recognition from the Union, refused to recognize and bargain with the Union, made a host of unilateral changes, and directly dealt with unit employees.

4. Finally, we agree with the judge's application of *Wright Line*<sup>9</sup> to determine that the Respondent violated Section 8(a)(3) and (1) by orally reprimanding employee Fred Shepherd on August 19 and then issuing him a written confirmation letter on September 5.

<sup>8</sup> The dissent, attempting to paint the letter as benign, emphasizes that it prohibits harassment "in any way" by "anyone" but fails to note that this prohibition does not apply to harassment for engaging in prounion activities but only to harassment for *refusing* to engage in prounion activities, i.e., "refusing to support a strike or certification." For this reason, *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007), and *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005), vacated 520 F.3d 192 (2d Cir. 2008), on which the dissent relies, are distinguishable, because in both cases harassment in general, not solely harassment for refusing to engage in prounion activities, was prohibited.

<sup>9</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Contrary to our dissenting colleague, we have no difficulty concluding that the oral reprimand and written warning constitute disciplinary actions sufficient to establish an 8(a)(3) violation. The Board considers a warning to be an adverse disciplinary action if the warning could lay the “foundation for future disciplinary action.” See *Trover Clinic*, 280 NLRB 6, 16 (1986). During Shepherd’s August 19 oral reprimand, the Respondent presented Shepherd with reports of serious alleged misconduct and then warned him not to create a hostile work environment. That warning was then memorialized in writing in a letter the Respondent admits placing in Shepherd’s official personnel file for future reference. The letter states on its face that verified reports of misconduct “could lead to *further* disciplinary action up to and including termination.” As the judge noted, the Respondent’s own witness was unable to explain why he used the phrase “further disciplinary action” if the letter itself was not a form of discipline. We therefore agree with the judge that the Respondent’s August 19 oral reprimand and its September 5 confirmation letter both established a foundation for future disciplinary action based upon protected conduct and violated Section 8(a)(3).

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Arkema, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

Substitute the following for paragraph 2(e).

“(e) Within 14 days after service by the Region, post at its Houston, Texas facility, copies of the attached notice marked “Appendix.”<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 employ-

ees and former employees employed by the Respondent at any time since July 22, 2008.”

Dated, Washington, D.C. October 31, 2011

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

As the Board has previously recognized, and reviewing courts have not hesitated to remind us, employers have a legitimate and substantial interest in protecting employees from violence and intimidation and ensuring a civil, orderly, and respectful workplace.<sup>1</sup> To this end, employers routinely adopt and enforce through disciplinary measures prohibitions against threats, harassment, or other conduct that may contribute to the establishment of a hostile work environment.<sup>2</sup> Our precedent makes clear that such workplace misconduct may be prohibited, even in the context of otherwise protected concerted activity.<sup>3</sup> Thus, unlike my colleagues, I would find that the

<sup>1</sup> See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (agreeing that “employers have a legitimate right to establish a ‘civil and decent work place,’” and to adopt prophylactic rules banning, inter alia, abusive or profane language, to protect themselves from civil liability under state and federal employment laws) (quoting *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19, 25–27 (D.C. Cir. 2001)). In *Adtranz*, the D.C. Circuit refused to enforce the Board’s finding that the maintenance of a rule prohibiting abusive or profane language violated the Act. In so holding, the court chastised the Board for its “remarkabl[e] indifferen[ce] to the concerns and sensitivity which prompt many employers to adopt the sort of rule at issue,” and characterized the Board’s position as “simply preposterous,” noting that “[i]t defies explanation that a law enacted to facilitate collective bargaining and protect employees’ right to organize prohibits employers from seeking to maintain civility in the workplace.” 253 F.3d at 27–28.

<sup>2</sup> See, e.g., *Adtranz*, supra at 27 (“Given [the current] legal environment, any reasonably cautious employer would consider adopting the sort of prophylactic measure contained in the *Adtranz* employee handbook . . . . Under current law, the ‘only reliable protection is a zero-tolerance policy, one which prohibits any statement that, when aggregated with other statements, may lead to a hostile work environment.’”) quoting Eugene Volokh, *What Speech Does ‘Hostile Work Environment’ Harassment Law Restrict?*, 85 Geo. L.J. 627, 638–639 (1997).

<sup>3</sup> See, e.g., *BJ’s Wholesale Club*, 318 NLRB 684, 684 fn. 2 (1995) (employee lawfully disciplined for harassing another employee during the course of soliciting authorization cards); *PPG Industries*, 337 NLRB 1247, 1247 fn. 2 (2002) (male employee lawfully disciplined for sexual harassing a female during the male employee’s solicitation of authorization cards); *Trus Joist MacMillan*, 341 NLRB 369, 370–372 (2004) (employee lost the protection of the Act because of his indefensible and abusive conduct during a meeting with managers).

Respondent's restrained and measured response to reports of threats and harassment during the course of a decertification campaign did not violate the Act. I respectfully dissent.

*A. The Respondent Lawfully Disciplined Saltibus for Threatening a Coworker*

1. Pertinent facts

The Respondent operates a chemical manufacturing plant, where safety and collaboration are of paramount importance. Mark Saltibus, an ardent supporter of the Union, worked as a utility operator, a position in which he substituted for other operators who were on vacation or out sick. Saltibus also served as a "step-up chief," meaning he filled in for the "chief operator" when absent. Though the chief operator is a nonsupervisory bargaining unit position, employees holding that classification direct and assist other operators and are the highest ranking employees at the plant in the absence of the site and operations managers.

Susan Russell worked with Saltibus as a plant operator. As the judge found, there is no dispute that the job of plant operator can be physically demanding, and Russell testified without contradiction that she required physical assistance from male coworkers in order to perform certain essential functions of her job. On July 21, Saltibus approached Russell to discuss the upcoming decertification election and solicit her support for the Union. When Russell was noncommittal in response, Saltibus threatened her. The precise words he used were disputed at the hearing,<sup>4</sup> but the import of them was not. Saltibus admitted that he told Russell that if the Union went away "there's no support . . . the relationship's going to change." Saltibus also admitted that the import of this message was that he would not help her to do her job as he had in the past, and would not "carry her load" in the plant. Russell testified that she feared for her safety and interpreted Saltibus' statement as a threat that if she did not support the Union, her male colleagues would no longer assist her, including in an emergency situation such as a fire. Russell relayed the conversation to Mark Wells, another operator who was training her, and Wells suggested that Russell report the incident to Chief Operator Randy Joy. Joy, in turn, called Site Manager Terry

<sup>4</sup> Dennis Van Wye, Saltibus' and Russell's supervisor, testified that Russell reported that Saltibus made his statement only after Russell told Saltibus that she was voting against the Union. The judge cited this testimony, but did not make a credibility finding. The judge did credit Saltibus' account of the confrontation with Russell, declining to find, as Russell testified, that Saltibus referenced her gender when stating that he would no longer assist her if the Union was voted out.

Freeman, with whom Russell met. Russell later signed a statement prepared by Freeman to document the incident.

The next day, the Respondent met with Saltibus and his union representative to discuss this incident. Saltibus admitted during the investigatory interview that he told Russell that their relationship would change if there were no union. He also confirmed the import of this statement: that Russell needed his help to do her job but that if there was no union Russell would have to "carry her own weight" and that he would no longer do her job for her.<sup>5</sup> He denied that he meant to imply that he would no longer assist Russell when acting as chief operator or that he would abandon her in an emergency. After meeting with Saltibus, the Respondent issued him a "written reminder" stating that Saltibus had made intimidating and threatening remarks towards a coworker that created an offensive working environment in violation of company policy. The reminder characterized his conduct as an unprofessional threat directed at Russell if she continued to pursue her nonunion status. The reminder also referenced an earlier, unspecified incident in which Saltibus allegedly made similar statements to another employee. The Respondent declined to discuss this other incident with Saltibus during the meeting. Finally, the reminder advised Saltibus to reflect on the incident, and cautioned that a failure to comply with the Company's antiharassment policies could result in the termination of his employment.

2. Analysis

As noted by my colleagues, the pertinent standard is *NLRB v. Burnup & Sims*.<sup>6</sup> Under that analytical framework, an employer that disciplines an employee for misconduct arising out of protected activity bears the initial burden of showing that it had an honest belief that the employee engaged in misconduct during the course of the protected activity. *Roadway Express, Inc.*, 355 NLRB No. 23, slip op. at 8 (2010). If the employer meets this burden, the burden then shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Id.* If the General Counsel fails to meet this burden, the employer's discipline does not violate Section 8(a)(1). See *id.*

The Respondent clearly carried its initial burden of proof. Russell testified without contradiction that she could not perform her job without the physical assistance of her male coworkers, and there is no dispute that, prior to the decertification election, her coworkers provided such assistance to her on a regular basis. Further, there is

<sup>5</sup> As noted above, the judge credited Saltibus' version of what transpired during his conversation with Russell.

<sup>6</sup> 379 U.S. 21 (1964).

no dispute, indeed Saltibus admitted it, that he intended to withhold this necessary assistance from Russell in the future if the Union was voted out. Both Russell and the Respondent plainly understood this admitted intention. And while Saltibus qualified at the hearing that he did not mean to imply that he or others would refuse to assist Russell in the event of an emergency, he offered no such explanation to Russell, who testified that she feared for her safety as a result of the conversation and voluntarily relayed the incident to the Respondent's management. In light of the undisputed facts and sequence of events, the Respondent plainly possessed an honest, good-faith belief that Saltibus, as Russell reported, threatened to retaliate against her because of her exercise of Section 7 rights by withholding assistance that could jeopardize both Russell's continued employment and her physical safety within the plant.

The threat at issue is plainly one which, under extant precedent, would cause Saltibus' otherwise protected solicitation of support for the Union to lose the protection of the Act. See, e.g., *Contempora Fabrics, Inc.*, 344 NLRB 851, 852 (2005) (prounion employee's comment to another employee—that she “had better not vote ‘no’ for this union”—was “an implicit warning that unpleasant consequences would flow from a ‘no’ vote” and was sufficient to cause the loss of the Act's protection). Indeed, Saltibus' threat was far more direct and pointed than the “implicit warning” found unprotected in *Contempora Fabrics, Inc.*, and was particularly coercive given his leadman status, the physically demanding nature of the plant operator position, Russell's ongoing need for assistance, and the hazardous work environment in a chemical manufacturing plant. There simply is no Section 7 right to threaten to retaliate against a fellow employee by making his or her job more difficult or dangerous if he or she does not support your position on unionization. Saltibus was in a position to make good on his admonition to Russell, which was objectively threatening and coercive under the circumstances.<sup>7</sup>

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<sup>7</sup> My colleagues suggest that Saltibus did not make a direct threat or promise of retribution if Russell did not support the Union because he told her only that there would be no support and their relationship would change. Presumably, they view this statement as too vague to constitute an actionable threat. As shown above, that view cannot be reconciled with the holding in *Contempora Fabrics*. Moreover, both the Respondent and Russell plainly, and reasonably, understood the statement to mean just what Saltibus later admitted it meant: that he would not help her do her job or “carry her load.” Further, Saltibus made clear at the investigatory interview that he intended to follow through on that intention given the opportunity. Under these circumstances, and consistent with the judge's credibility resolutions in this case, the Respondent was entitled to take Saltibus at his word. The majority, in contrast, offers no persuasive justification for overlooking Saltibus' admitted intentions in their disposition of this case.

The burden therefore shifted to the General Counsel to establish that despite the Respondent's good-faith belief, no misconduct actually occurred. The General Counsel could not carry that burden because Saltibus admitted threatening Russell with adverse and unpleasant consequences if she failed to support the Union. Thus, the misconduct was admitted, it was unprotected, and the discipline against Saltibus was lawfully imposed.

Contrary to the judge and my colleagues, I find nothing inappropriate or unusual in the Respondent's invocation of its antiharassment policy in disciplining Saltibus. That policy prohibits “unlawful harassment” because of an employee's protected characteristics, including, but not necessarily limited to, gender. Among other things, the policy defines “unlawful harassment” to include “a stated or implicit threat to a person's employment status.” Saltibus' threat reasonably could be viewed as implicating the policy because it targeted a female employee who relied on male employees' assistance to perform her job. The threat also obviously qualified as a “threat[s] to a person's employment status,” because Russell could not perform her job without the assistance of male coworkers. The fact that the judge or my colleagues conclude that the policy does not cover the conduct at issue does not mean that the Respondent lacked a good-faith belief that it did. Moreover, it is by no means uncommon for employers in meting out discipline to cite every possible basis therefore. Nor am I surprised that the Respondent declined to engage Saltibus in a debate over the specifics of the prior incident referenced in the written reminder; the focus of the meeting was the threat against Russell. Finally, even if Saltibus' threat was not covered by the specific terms of the antiharassment policy, it was still unprotected and thus a valid basis for discipline.

Equally unpersuasive is the judge's finding, adopted by my colleagues, that the manner in which the Respondent conducted its investigation somehow detracts from the Respondent's good-faith belief that Saltibus engaged in misconduct. The judge characterized the investigation as a “rush to judgment,” citing the fact that the Respondent issued the discipline “almost immediately,” interviewed only Russell before meeting with Saltibus, drafted the written reminder before meeting with Saltibus, and cited a prior incident of reported misconduct which it declined to debate with Saltibus during the investigatory interview. However, prompt investigation and response to reports of workplace threats and harassment are not only typical, they are required by law to protect against civil liability. Moreover, the Respondent interviewed Russell, took her statement, and offered Saltibus every opportunity to rebut Russell's com-

plaint—which he instead effectively admitted. In light of that, and given that there were no witnesses to the confrontation, there was no need for the Respondent to investigate further.<sup>8</sup> Moreover, the fact that the Respondent drafted the written reminder before meeting with Saltibus demonstrates nothing; it was issued to him only after he corroborated the essential elements of Russell’s account, and the Respondent followed the same practice in other investigations.<sup>9</sup> Thus, nothing about the investigation undermines the Respondent’s good faith.

Finally, in support of his conclusion that the Respondent lacked a good-faith belief that Saltibus engaged in misconduct, the judge cited what he perceived to be disparate treatment between the manner in which the Respondent responded to Russell’s report and its investigation of employee Madonna Trevino’s complaint that she felt harassed by antiunion employees who solicited her signature on a decertification petition. In fact, however, the differences between the two situations were marked. Trevino never brought her complaints to management; rather they were relayed second hand by Union President Shepherd. Moreover, unlike Russell, Trevino did not report a threat; she stated only that fellow employees were persistent in asking her to sign the decertification petition, which she did not want to do. That conduct, the mere persistent solicitation of support, unlike a threat of retaliation, is not prohibited by the Respondent’s antiharassment policy, and is protected concerted activity under the Act. Far from undermining the Respondent’s good faith, the purported disparity in treatment reflects the Respondent’s understanding of and adherence to the law. I would dismiss this complaint allegation.

*B. The Respondent Lawfully Cautioned Employees to Behave Appropriately and Report Threats or Harassment*

On July 23, 2 days after Saltibus’ threat to Russell, Plant Manager Wendal Turley issued a letter notifying employees of the decertification election and encouraging them to read an NLRB election pamphlet and soon-to-be posted NLRB election notices, which would provide employees information about their legal rights. The contested portion of this letter stated that employees had “the right to not be harassed, intimidated, or threatened in any way—physically or verbally—by anyone, includ-

ing the union, for refusing to support a strike or certification.” Turley explained that “[a]ny activity of this type will not be tolerated . . .” and that “[i]f you feel you have been subjected to harassment, intimidation or threats,” employees should contact human resources or call the local NLRB office, whose phone number Turley provided. Finally, Turley stated that he did not feel that employees needed a union, but assured them that “the outcome of this election will be your decision” and encouraged them to “utilize the time to decide what is best for you as an individual.”

In *Lutheran Heritage Village-Livonia*, the Board established the standard for determining whether an employer’s maintenance of a work rule reasonably tends to chill employees in the exercise of their Section 7 rights. 343 NLRB 646 (2004). The Board gives a rule a reasonable reading and refrains from reading particular phrases in isolation. *Id.* at 646. As here, where a rule does not explicitly restrict activities protected by Section 7, a “violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647.

Applying these principles, I find, first, that a reasonable employee would not construe Turley’s admonition as prohibiting Section 7 activity. The Respondent’s letter prohibited harassment, intimidation, or threats for refusing to support a strike or certification in “any way” by “anyone,” proclaimed that it would not “tolerate” prohibited activity, and asked that employees report such conduct. Significantly, the Respondent effectively assured employees that they were free to support the Union or not. And, it took the additional step of encouraging employees to be aware of their rights under the Act, even suggesting that they refer to official NLRB materials and directly contact the NLRB to report any prohibited conduct if necessary. The Board has found virtually identical antiharassment rules lawful in *Stanadyne Automotive Corp.*, 345 NLRB 85, 86–87 (2005), vacated 520 F.3d 192 (2d Cir. 2008) (antiharassment rule lawful where employer told employees that “[h]arassment of *any type* is not *tolerated* by this company and will be dealt with,” particularly where the employer assured employees that they could “be for anything you want to,” including the union) (emphasis added) and *River’s Bend Health & Rehabilitation Services*, 350 NLRB 184, 184, 187 (2007) (antiharassment rule lawful where employer told employees that it would “*not tolerate* any . . . employee being harassed or threatened for *any reason*, and ask that you report such conduct,” particularly given the em-

<sup>8</sup> The judge identifies no other relevant witness that should have been interviewed nor offers anything material that the Respondent might have uncovered had it investigated the matter differently.

<sup>9</sup> The judge found the Respondent prepared a similar written reminder prior to an investigatory meeting with employee Fred Shepherd, but decided not to issue the reminder after Shepherd denied in the interview engaging in the conduct in question. Saltibus, by contrast, admitted the misconduct.

ployer's assurance that employees were free to support the union) (emphasis added). As the Board recognized in *Stanadyne*, reasonable employees "would not assume that a statement prohibiting harassment is a restriction on Section 7 activity, particularly where, as here, the Respondent explicitly indicated that employees were free to support the Union or not." 345 NLRB at 87.<sup>10</sup>

Second, the Respondent's letter was not promulgated in response to protected union activity. The judge explicitly discredited Turley's testimony that he issued the letter in response to the Saltibus incident, and instead cited Plant Manager Terry Freeman's testimony that the Respondent began drafting the letter "some time" before Saltibus' lawful discipline. Even if the letter was in response to the Saltibus incident, that conduct was unprotected for the reasons stated above. *River's Bend*, 350 NLRB at 187 (antiharassment rule lawful where it was issued in response to an unprotected threat that an employee "must go on strike 'or else'"). The judge also cited Freeman's testimony that the Respondent issued the letter for reasons unrelated to any protected union activity—i.e., to notify employees about the election and communicate its belief that a union was unnecessary. There is no additional testimony about the development, timing, or reasons behind this letter except, as shown above, that its lawful purpose was to prohibit unprotected harassment.<sup>11</sup>

Third, there is no evidence that the Respondent's July 23 letter was applied to restrict the exercise of Section 7 rights. The judge's mere speculation that the Respondent might unfairly apply this lawful rule is no substitute for evidence of this character.

<sup>10</sup> In finding otherwise, the judge faulted the Respondent's letter as "one-sided," a view my colleagues appear to share. I respectfully disagree. The issue here is whether the letter would have a chilling effect on the exercise by employees of their Sec. 7 rights. Taking into account the entire contents of the letter and the circumstances noted above, a reasonable employee would not assume that the letter, which prohibits only conduct the Act does not protect, also prohibits other conduct not referenced in the letter that is protected by the Act merely because the letter addresses prounion unprotected conduct. Further, under Board law, the Respondent did not have to wait for a report of harassment to issue this lawful letter. See *Lutheran Heritage*, 343 NLRB at 646–649 (Board found lawful an employer's maintenance of a general rule prohibiting harassment, which was not issued in response to reports of harassment, stating that "employees have a right to a workplace free of unlawful harassment, and both employees and employers have a substantial interest in promoting a workplace that is 'civil and decent.'").

<sup>11</sup> The judge broadly concluded that the letter was promulgated in response to union activity, but provided no support or explanation for this conclusion.

For all these reasons, I would reverse the judge and find that the Respondent's July 23 letter did not violate Section 8(a)(1).<sup>12</sup> Because this letter and Saltibus' discipline were both lawful, I would further reverse the judge and certify the election results.<sup>13</sup>

*C. The General Counsel Failed to Establish that the Confirmation Letter Given to Shepherd Laid a Foundation for Future Disciplinary Action*

Finally, I would reverse the judge's determination that the Respondent violated Section 8(a)(3) and (1) by disciplining employee and Union President Fred Shepherd because of his protected union activity.

In July, the Respondent received a report from one of its supervisors that Shepherd told a subordinate not to explain something to another employee because that employee was nonunion. In August, the Respondent received another report from employee Byron Duncan that Shepherd was throwing things around the shop and had told employees that "they were either for him or against him." The Respondent investigated all reports, including interviewing Duncan and taking statements from other employees in Shepherd's department, who could not confirm any misconduct on Shepherd's part. On August 19, the Respondent met with Shepherd to discuss its investigation. Shepherd denied Duncan's allegations of misconduct and offered an explanation for the conversation overheard by the supervisor.

Prior to the August 19 meeting, the Respondent prepared a written reprimand for Shepherd. After hearing his denials and explanation, however, the Respondent decided not to issue this reprimand. Plant Manager Freeman explained that "it became clear that this wasn't

<sup>12</sup> Accordingly, I would also reverse the judge's related finding that the letter threatened employees with unspecified reprisals for engaging in protected activity. See *River's Bend*, 350 NLRB at 187 (where employees would not reasonably construe a rule as requesting reports on protected activities of others, those employees also would not reasonably construe the rule as a threat of unspecified reprisals if they chose to engage in their own protected activities).

<sup>13</sup> If my view of the decertification election's validity were to prevail, it would then be necessary for me to address the holding in *W. A. Krueger Co.*, 299 NLRB 914 (1990), that even when an incumbent union loses a decertification election, an employer violates Sec. 8(a)(5) by failing to maintain the status quo while the union's objections to the election are pending and before the certification of results issues. *Id.* at 915. I have reservations about this precedent but need not reach any conclusions about it in this decision, where the Respondent's obligation to recognize the Union's continuing majority status and to refrain from making unilateral changes turns on my colleagues' determination to sustain the Union's election objections and to direct a second election.

a situation where a disciplinary action was warranted.”<sup>14</sup> Rather, the Respondent simply reminded Shepherd of its antiharassment policy, discussed his role as a leadman, and offered advice on how to best interact with employees to avoid a hostile work environment.

On September 5, the Respondent memorialized this matter by presenting Shepherd a “written confirmation” letter. This letter outlines the “accusations” against Shepherd and confirms the parties’ August discussion of them. It recognizes the “significant discrepancies” between Shepherd’s rebuttal and the allegations, concluding that “[w]hat we’re left with is differing statements . . . .” The letter asks that Shepherd “reflect on your responsibilities” and “work in a way that does not lead to complaints such as those presented here . . . .”

Contrary to the judge and my colleagues, I find no violation under Section 8(a)(3). An employer’s action constitutes discipline only when it lays “a foundation for future disciplinary action against [the employee].” *Trover Clinic*, 280 NLRB 6, 16 (1986). The General Counsel must establish this by showing that the action plays a role in the employer’s disciplinary system. Compare *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004) (coachings constituted discipline where employer took them “into consideration in determining whether further discipline is warranted, and the nature of that discipline, for future infractions”) and *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (“conference report” issued to employee was not discipline where the General Counsel failed to prove it was part of disciplinary system). Here, the General Counsel presented no evidence concerning the extent of the Respondent’s disciplinary system or whether the Respondent’s contested actions play any role in that system. The General Counsel thus has not shown that the Respondent’s actions could “lay the foundation” for discipline. This is particularly so given the Respondent’s stated determination, in the “written confirmation” letter, that it could not verify whether Shepherd had in fact engaged in misconduct, and instead simply reminded him of its company policies and a leadman’s responsibilities.<sup>15</sup> Because the August 19 meeting and subsequent “conference report” were not shown to have affected any term or condition of employment within the meaning of Section 8(a)(3), they cannot form the basis for a violation of that section of the

<sup>14</sup> The judge mistakenly cited that Freeman testified, “this was not the type of situation that warranted *that level* of discipline.”

<sup>15</sup> In contrast, no party disputes the judge’s finding that Saltibus’ “written reminder” was a form of discipline. And, in marked contrast to the “written confirmation” issued to Shepherd, the document issued to Saltibus rightfully states that he had engaged in misconduct—verified by Saltibus himself—that violated company policy.

Act.<sup>16</sup> *Id.* at 403–404. The allegation should be dismissed.

Dated, Washington, D.C. October 31, 2011

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

*Dean Owens, Esq.*, for the General Counsel.

*A. John Harper II, Esq.* and *A. John Harper III, Esq.*, for the Respondent.

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

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Houston, Texas, on February 9 and 10, 2009. This case began on July 17, 2008,<sup>1</sup> when Greg Schrull, an employee of Arkema, Inc., filed the decertification petition in Case 16–RD–1583. Pursuant to a Stipulated Election Agreement, the NLRB’s Regional Director conducted an election by secret ballot on August 11 and 12 among Arkema’s employees in the following stipulated unit:

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

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

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

On August 19, concurrent with the filing of objections, the Union filed the initial unfair labor practice charge in Case 16–CA–26371.<sup>3</sup> The Union filed the charge in Case 16–CA–26392

<sup>16</sup> I thus need not pass on the judge’s application of *Wright Line* in finding an 8(a)(3) violation.

<sup>1</sup> All dates are in 2008, unless otherwise indicated.

<sup>2</sup> The Union’s objections are set forth in App. A. By letter dated December 11, the Board’s Regional Director approved the Union’s withdrawal of Objections 14 through 17 and that portion of Objection 18 alleging Board agent misconduct. The Union withdrew Objection 11 at the hearing and, in its posthearing brief, withdrew Objections 13 and 21.

<sup>3</sup> The Union amended this charge on October 23.

on August 29.<sup>4</sup> On September 5, the Region suspended processing of the Petition based on the filing of the unfair labor practice charges and postponed the hearing on objections. On December 23, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued consolidating the representation case and unfair labor practice cases for hearing on February 9, 2009. An amended consolidated complaint subsequently issued on January 14, 2009. The amended complaint alleges that Arkema, Inc., the Respondent, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) before and after the election.

Specifically, the amended complaint alleges that the Respondent, by e-mail on July 23, requested employees to disclose to the Respondent the union activities of other employees and threatened employees with unspecified reprisals for engaging in protected solicitation; and on August 12, also by e-mail, informed employees that they no longer had a collective-bargaining agreement. This conduct is alleged to violate Section 8(a)(1) of the Act. The amended complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing written discipline to Mark Saltibus on July 22 and by orally reprimanding Fred Shepherd on August 19 and issuing Shepherd written discipline on September 5. Finally, the amended complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union on August 12 based on the results of the disputed election and by dealing directly with unit employees and making unilateral changes in their wages, hours, and other terms and conditions of employment after withdrawing recognition.<sup>5</sup>

The Respondent filed its answer to the amended complaint on January 16. While denying that it committed any of the alleged unfair labor practices, the Respondent admits that it withdrew recognition from the Union on August 12 and further admits conferring with unit employees, after the election, regarding their terms and conditions of employment and making some of the unilateral changes alleged in the complaint. The Respondent asserts that its conduct in this regard was lawful because the Union had lost majority support, as shown by the results of the election. With respect to the other alleged unfair labor practices, the Respondent admits communicating with its employees via the e-mails identified in the complaint but asserts that these communications were protected by Section 8(c) of the Act. The Respondent admits that it issued a "written reminder" to Saltibus and a "written confirmation of the results of an investigation" to Shepherd but denies that this was discipline and further denies that it took this or any other action against these two employees based on union or other protected concerted activity. The Respondent has also raised several affirmative defenses in its answer.

As framed by the pleadings, a key to resolving many of the issues raised in this proceeding is determining whether the elec-

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

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

#### FINDINGS OF FACT

##### I. JURISDICTION

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

##### II. ALLEGED UNFAIR LABOR PRACTICES

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

The Respondent also operates a nonunion facility in Beaumont, Texas. Both the Houston and Beaumont facilities were the responsibility of Plant Manager Wendal Turley, a 28-year employee of the Company. Terry Freeman, the Houston plant's site manager, was responsible for the day-to-day operations of that facility. Freeman reported directly to Turley. Wendy Dupuy was the regional human resources manager, responsible for both plants and also reporting directly to Turley. Other supervisors who played a role in the events involved in this proceeding are Dennis Van Wye, who was the operations superintendent in charge of 22 plant operators, including Saltibus, and Gerald Barnhart, the maintenance superintendent in charge of the instrument and electrical department where Shepherd worked.

The evidence in the record establishes that the decertification drive began sometime in the spring and continued up to the election. Employees on both sides of the issue campaigned

<sup>4</sup> The Union amended this charge on September 9 and on 11.

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

vigorously for their respective position. The first alleged unfair labor practice arose in the course of this campaign and involved Saltibus' efforts to persuade employee Susan Russell to support the Union.

*A. The July 22 "Written Reminder" Issued to Saltibus*

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

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

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

<sup>6</sup> The chief operator is a lead position in the bargaining unit. No one contends this is a statutory supervisory position.

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

this conversation to Mark Wells, another operator who was training her, and he suggested she tell Chief Operator Randy Joy.<sup>8</sup> It was Joy who called Site Manager Freeman to report the conversation. Russell then told Freeman what Saltibus said to her. She later signed a statement prepared by Freeman to document the incident. This statement was generally consistent with her testimony.<sup>9</sup>

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

Saltibus testified further that, in the meeting, after discussing the incident with Russell, Freeman said he appreciated Saltibus' honesty but said that the Respondent had problems with him in the past harassing employees about the Union. Freeman then gave Saltibus an envelope containing a "Written Reminder" for "Violation of Company Harassment Policy." This document, which is dated July 22, purports to confirm the discussion that had just taken place and starts by stating that the Respondent had "completed its investigation into your alleged inappropriate behavior towards your coworkers." The alleged violations were "making intimidating and threatening remarks toward a co-worker and creating an offensive working environment." The letter characterizes Saltibus' conduct toward Russell as unprofessional and accuses him of "threatening her job if she continued to pursue her non-union status." There is no mention of Saltibus' statements suggesting that he would no longer help Russell do her job if she supported the decertification petition. In addition to the Russell incident, the letter refers to "a separate occasion" when Saltibus allegedly "made threatening and inappropriate remarks to a laboratory employee concerning her wishes to not join the Union." No details regarding this incident are contained in the letter. The letter concludes by stating that

<sup>8</sup> There is uncontradicted evidence in the record that Joy was opposed to the Union.

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

these incidents are “wholly unacceptable and will not be tolerated.” Saltibus is then advised to “reflect upon these unfortunate incidents and determine your ability to comply with our expectations regarding employee conduct; however, please understand failure to comply with any of these requirements may result in the termination of your employment.”

Saltibus testified that, after reading the letter, he asked Freeman about the other incident referred to in the “Written Reminder.” Freeman said he didn’t want to discuss it. Saltibus asked Freeman to bring the lab employee in to confront him about the allegation because he didn’t know what it was about, and again Freeman said he did not want to discuss it. Saltibus told Freeman that, because the Respondent no longer included information about the Union in new employee orientation, Saltibus had a right as a union committeeman to approach them and provide this information. At the end of the meeting, Saltibus turned to Dupuy, the HR manager, and asked her how she defined “harassment.” According to Saltibus, Dupuy said that harassment is in the eye of the beholder.

Saltibus testified at the hearing that the only lab employee he had talked to about the Union was Sue Plattner and that the conversation occurred in October 2007, 9 months earlier. According to Saltibus, he approached Plattner because she had just been brought into the unit after having worked for about a year as a contractor, as a result of negotiations between the parties that created a new position and wage rate for her. While in the lab performing part of his job, Saltibus mentioned to Plattner that the Union had negotiated the deal that got her the job and he invited her to be part of the Union. Plattner told Saltibus that she had been in a union before and wanted no part of the Union. Saltibus testified that he asked her why and, after further discussion, the conversation ended.<sup>10</sup> According to Saltibus, no one had mentioned this conversation, nor questioned him about it, before the July 22 meeting.

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

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<sup>10</sup> Plattner did not testify in this proceeding.

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

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

Shepherd and Freeman both testified about an earlier incident in which Shepherd complained to Freeman about perceived harassment of employees by prodecertification employees. Shepherd testified that employee Madonna Trevino approached him in April 2008, shortly after rumors of a decertification effort began, about employees Vance Thomas and Chuck Rayburn repeatedly asking her to sign a decertification petition, even after she told them she was not interested. According to Shepherd, Trevino reported that Thomas and Rayburn promised her better benefits without a union. Trevino told Shepherd that she felt she was being harassed and asked if he could do something to make it stop. Shepherd said he told Freeman about

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

Trevino's concerns shortly after speaking to her and that Freeman said he would look into it. Trevino also testified at the hearing and confirmed that she complained to Shepherd in April about Thomas and Rayburn soliciting her at work to sign the decertification petition and her request that he do something about it. According to Trevino, her supervisor, James Wheeland, did not talk to her about this complaint until about a week before the election, after the July 23 memo (to be discussed later in this decision) came out.

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

In October 2007, the Respondent suspended Mark Wells for 4 days, after he was accused of making negative remarks to another employee based on the employee's race. This was determined to be a violation of the same anti-harassment policy cited in Saltibus' written reminder. Although the Respondent argues that this shows consistent enforcement of the policy, the General Counsel points out that no discipline issued until after the Respondent met with Wells and other witnesses, and after a meeting of management personnel to review the case. Wells was issued the disciplinary letter at a second meeting 2 days later.

Having considered the above evidence and the record as a whole, I conclude that Respondent's issuance of a written reminder to Saltibus on July 22 violated Section 8(a)(1) and (3)

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

of the Act. Initially, I credit Saltibus' version of his conversation with Russell and find that what he told her on July 21, in the course of soliciting her support for the Union in the upcoming election, was that, if there were no union, there would be no support and that their relationship would change. Russell interpreted this as a threat that Saltibus and the union men would no longer help ("support") her when she needed it, even in the event of a fire or safety issue, and that she would be on her own.<sup>13</sup> The gender issue was a mere gloss put on the conversation so that the Respondent could fit the incident under its anti-harassment policy and justify discipline. I credit Saltibus and Shepherd and find that Saltibus never said he would refuse to help her because she was a woman, either in the conversation on July 21 or during the meeting on July 22.<sup>14</sup> In fact, even in the written reminder, there is no mention of any harassment based on Russell's gender. Instead, the letter claims that Saltibus threatened her job if she continued to pursue nonunion status, a claim not supported by any of the testimony. Even the reference to the earlier incident involving the lab employee only mentions union status as the basis of Saltibus' alleged inappropriate remarks and conduct toward other employees. The Respondent's antiharassment policy, as laudable as it may be, simply does not cover harassment based on an employee's union support or non support.<sup>15</sup>

I find further that the written reminder is a form of discipline. There is no dispute that the reminder becomes part of the employee's record and the last line clearly warns of further discipline if the employee continues to engage in the conduct described in the reminder. Even the Respondent seems to have abandoned any claim that the July 22 letter was not discipline when, in its brief, it concedes this point for the purpose of argument. The July 22 "Written Reminder," on its face, is clearly based on Saltibus' union activity and the Respondent's belief that he engaged in misconduct in the course of that activity. Where an employee is disciplined for conduct that is part of the *res gestae* of protected activity, the employer's motivation is not at issue. *Tri-County Mfg. & Assembly, Inc.*, 335 NLRB 210, 218-219 (2001), and cases cited therein. In these cases, discipline is privileged only when an employee's conduct is so flagrant or egregious as to warrant removal of the Act's protection. *Id.* See also *Ogihara America Corp.*, 343 NLRB 809, 813 (2004); *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982), *enfd.* 711 F.2d 1059 (6th Cir. 1983). Even an honest belief that an employee has engaged in misconduct in the course of protected activity is no defense if the misconduct did not in fact occur. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Accord *Keco Industries*, 306 NLRB 15, 17 (1992).

I find that the Respondent's asserted belief that Saltibus engaged in misconduct in the course of his union activities was not an honest one advanced in good faith. It is clear from the

<sup>13</sup> Saltibus clearly explained during the "investigatory interview" on July 22 that this was not what he meant.

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

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

circumstances that the Respondent rushed to judgment by issuing the discipline almost immediately after receiving the report from Randy Joy about Russell's conversation with Saltibus. The only investigation conducted by the Respondent was to take a statement from Russell. Saltibus was not given an opportunity to respond to the allegations against him until after the discipline was drafted. The fact that the Respondent included in the disciplinary letter a 9-months old allegation that had never been investigated, and then refused to discuss it when Saltibus asked for details, shows the Respondent's predetermined intent to discipline Saltibus.

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

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

#### *B. Turley's July 23 Memo to Employees*

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

Your rights include:

- NO HARASSMENT-You have the right to not be harassed, intimidated or threatened in any way-physically or verbally-by anyone, including the union, for refusing to support a strike or certification.
- NO THREAT OF JOB LOSS-The union cannot threaten that you will lose your position by not supporting them in a vote.

- NO PUNISHMENT-The union cannot seek suspension, discharge or other punishment of an employee for not being a member of the union, even if the employee has paid an initiation fee and on going dues.
- NO REFUSAL TO GRIEVE-The union cannot refuse to process a grievance because an employee has criticized union officials or because an employee is not a member of the union.

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

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

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

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

The General Counsel alleges that Turley's e-mail violated the Act in two ways, by soliciting employees to report the protected activities of other employees, and by implicitly threatening employees with unspecified reprisals for engaging in protected activity. While the Board has historically prohibited an employer from making statements that invite or encourage employees to report on protected conduct of their coworkers, the analytical framework for determining when such a violation has occurred has recently changed, with substantial disagreement among Board members. See *River's Bend Health & Rehabilitation Service*, 350 NLRB 184 (2007). In the past, such statements have been found unlawful where the employer's

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

<sup>17</sup> If this was the purpose, it is curious that the letter only mentions harassment by the Union.

statement could reasonably be understood as soliciting reports of conduct that employees might find subjectively offensive yet are protected by the Act. See *Ryder Transportation Services*, 341 NLRB 761, 762 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005); *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988); *Eastern Maine Medical Center*, 277 NLRB 1374 (1985).

In *River's Bend*, *supra*, a majority of the Board applied to this type of allegation a three-part test that the Board had adopted, in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether an employer's maintenance of a work rule is unlawful. In *Lutheran Heritage Village-Livonia*, one of the rules at issue prohibited "harassment." Under this three-part test, if a rule does not *explicitly* restrict protected activities, then a finding of a violation is "dependent upon one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647. In *River's Bend*, *supra*, the majority found that an employer's letter to employees, asking them to report any harassment or threats for choosing not to go on strike so that the employer could ensure a safe working environment, was lawful. The majority relied, in part, on the fact that the letter issued after the employer had received reports that an employee had been threatened.

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

Accordingly, I conclude that the memo violated the Act as alleged in the complaint.

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

### C. The Election and the Respondent's Response

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

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

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

The parties stipulated at the hearing to the following facts:

- On or about September 5, the Respondent removed the plant bulletin boards that had been utilized by the Union.
- On or about September 4, the Respondent transmitted dues to the Union for the last time.
- On or about September 1, the Respondent implemented a new Sickness and Accident Policy without affording the Union an opportunity to bargain with respect to the policy.
- On or about October 1, the Respondent implemented a new Time Off Policy without affording the Un-

ion an opportunity to bargain with respect to the new policy.

- On or about October 20, the Respondent granted wage increases to bargaining unit employees.<sup>18</sup>
- The Respondent did not respond to union grievances, information requests, or requests to bargain on the Sickness and Accident Policy and the Time Off Policy, that were submitted by the Union on and after August 21.

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

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

The Respondent relies on the Board's decision in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), which held that an employer may withdraw recognition where it has objective proof that the union has in fact lost the support of a majority of unit employees. Id. at 725-726. *Levitz* and its progeny would be inapposite to the facts here because, unlike those cases, the Board has already conducted a secret-ballot election and the results of that election have been contested by the unfair labor practice allegations and objections filed by the Union. If those allegations have merit, the "actual loss of majority" demonstrated by the election would be tainted and could not be

<sup>18</sup> Trevino testified, without contradiction, that employees received a 4-1/2-percent increase, which was more than had been provided under the collective-bargaining agreement.

relied upon as the basis for withdrawing recognition. See *Underground Service Alert*, 315 NLRB 958 (1994), a pre-*Levitz* case where the Board found unlawful an employer's withdrawal of recognition based on an employee petition submitted while the parties were awaiting resolution of a decertification election hung up on challenges.

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

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

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

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

#### D. The Alleged Direct Dealing

Having found that the Union was still the exclusive collective-bargaining representative of unit employees pending certification of the results of the August 12 election, it naturally follows that any attempt by the Respondent to bypass the Union and deal directly with unit employees would violate Section 8(a)(5) of the Act. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944); *E. I. du Pont & Co.*, 311 NLRB 893 (1993). See also *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000). There is no dispute that, on August 20 and September 4, Dupuy e-mailed unit employees soliciting volunteers to par-

ticipate on committees to “review, alter if necessary and implement” new sickness and accident and time off policies, respectively, for the Houston plant. Dupuy, Trevino, and employee Chuck Rayburn testified regarding what transpired when these committees met. While Dupuy and Rayburn testified to the effect that that no “negotiations” took place, Trevino’s testimony shows that employees made suggestions, some of which were accepted, before the sickness and accident policy was implemented.<sup>19</sup> I find, as alleged in the complaint, that Dupuy’s communication with employees and her meetings with the two committees aimed at developing new policies which clearly impacted employees’ wages, hours, and terms and conditions of employment, violated Section 8(a)(5) of the Act.

*E. The Respondent’s Discipline of Shepherd*

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

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

this explanation, Freeman and Turley then talked to Shepherd about his role as a lead man and the need to be nonconfrontational. They then counseled Shepherd not to create a hostile work environment within his group.

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

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

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

The September 5 letter described the same three incidents that Freeman and Turley had discussed with Shepherd more than 2 weeks earlier and stated that the Respondent had “completed its investigation into your alleged inappropriate behavior towards your coworkers.” Shepherd testified that he had heard nothing more about these complaints between the August 19 meeting and his receipt of this letter. Freeman admitted that the

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

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

Respondent conducted no additional investigation after the August 19 meeting and received no further complaints about Shepherd. In fact, Freeman testified that he spoke to Duncan, who was the source of all three complaints, in late August, and asked how Duncan was getting along with Shepherd. According to Freeman, Duncan said: “[F]ine.”

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

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

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

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

Freeman and Dupuy also interviewed David Pope on August 18. Pope testified that Freeman asked if Shepherd was creating a hostile work environment. Pope told Freeman and Dupuy that he had never seen anything or had any dealings with Shepherd that led him to believe Shepherd was doing that. Pope was also asked if Shepherd was being fair in handing out the work orders

and Pope said he was. They asked Pope if he had heard Shepherd make derogatory remarks about any employees, union or nonunion, and Pope said he had not. Freeman then asked Pope if he thought the department would be better off without a lead man and Pope said they needed a lead. Pope was asked if Shepherd was fair and Pope said he was. Finally, Freeman asked Pope if he had been approached by anybody trying to sway his vote one way or the other. Pope replied that he had been, a few times, and that he just wanted to be left alone to do his job. Freeman asked who had approached him and Pope identified the three employees involved, i.e., Vance Thomas, Greg Schull, and Mark Wells. Pope recalled that Dupuy took notes during the interview and read them back to him. He was not asked to read or sign a statement. The document that the Respondent offered at the hearing purporting to be the notes of this meeting is not consistent with his testimony. When Pope reviewed the document, which he had not seen before, he said it omitted 75 percent of the meeting. Dupuy testified that the purported statement was a complete record of the meeting but acknowledged that she did not have Pope sign it. Her testimony that he was too busy to sign it is incredible. I found Pope’s testimony at the hearing to be credible and more reliable than Dupuy’s unsigned “notes” from this meeting.

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

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

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

Having found that Shepherd was in fact disciplined on August 19 and September 5, I must next determine whether that discipline was unlawfully motivated by Shepherd's union activities. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth the analytical framework for deciding cases where employer motivation is at issue. See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983), in which the Supreme Court approved the Board's use of this test. Under this analysis, the General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected activity, that the employer had knowledge of that activity and had animus against such activity, and that the activity was a motivating factor in the employer's decision to discipline the employee. *United Rentals, Inc.*, 350 NLRB 951 (2007); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), and cases cited therein. Proof of motive may be based on direct evidence, which is rarely available, or inferred from circumstantial evidence, including elements such as timing, disparate treatment, or inconsistent or shifting reasons for the discipline. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995); *Embassy Vacation Resorts*, 340 NLRB 846 (2003); *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000). Once the General Counsel has established this prima facie case, the burden shifts to the employer to produce evidence to establish that the employer would have taken the same action even in the absence of union activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The Board has said that it is not enough for an employer simply to present a legitimate reason for the discipline. Rather, it must persuade by a preponderance of the evidence that it in fact acted upon that reason. *Wright Line*, supra; *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993); *Manno Electric, Inc.* 321 NLRB 278, 280 fn. 12 (1996). Finally, where the General Counsel establishes that the asserted reason for discipline is pretextual, there is no burden shift because, by definition, the employer has failed to show it would have taken the same action absent the protected activity. *Metropolitan Transportation Services*, 351 NLRB 657, 660 (2007); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The evidence recited above and the record as a whole clearly demonstrates that Shepherd was involved in union activity and that the Respondent was fully aware of this activity. The Respondent's animus toward the Union is established by the unfair labor practices found above, including violations of Section 8(a)(1) occurring before the election, the unlawful discipline issued to Saltibus for engaging in protected solicitation of other employees, and the Respondent's precipitous withdrawal of recognition and abrogation of the collective-bargaining relationship immediately after the close of the election and before the results could be certified. Because of the timing of the discipline, as well as the totality of circumstances surrounding the Respondent's discipline of Shepherd, I find that the General Counsel has met his burden of proving that Shepherd's union activities were a motivating factor in the decision to discipline him on August 19 and September 5. I find further that the Respondent has not met its burden of proving that it would have taken the same action against Shepherd had he not been active

in preserving the Union's status at the plant. Turley admitted that, at the end of the August 19 meeting, he and Freeman had decided that discipline was not warranted based on the complaints the Respondent had received from Duncan. There is no dispute that no further investigation was conducted after August 19 and no further complaints were received regarding Shepherd's conduct between August 19 and September 5. Respondent's witnesses never explained why it chose to issue this letter at that time when it apparently felt most if not all of the allegations against Shepherd had not been substantiated. The obvious conclusion is that the letter was a response to Shepherd's attempts to continue to represent the Union in the face of the Respondent's eagerness to be done with the Union at the Houston plant. Accordingly, I conclude that the Respondent had violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint, by disciplining Shepherd on August 19 and September 5.

#### F. The Alleged Interrogation of Pope

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

### III. THE UNION'S OBJECTIONS

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

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

<sup>23</sup> Decision modified on other grounds at 340 NLRB 1389 (2003).

#### Objections 2–4

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

#### Objection 5–8

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

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

#### Objections 9 and 10

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

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

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

The majority of my 27 years in chemical plants has been in non-union facilities. I know the importance of listening and acting on employees concerns is key to having a safe, successful, and efficient operation.

The Union argues that, in this statement, Turley is promising employees to adjust grievances in exchange for decertifying the Union. The quoted language, containing vague predictions of a better work environment, without any specific promises, is not sufficient to set aside the election. See *Noah’s New York Bagels*, 324 NLRB 266, 267 (1997). Moreover, I find nothing in

the second statement that could be read as a solicitation for employees to have their grievances adjusted by management. Accordingly, I shall recommend that Objections 9 and 10 be overruled.

#### Objections 12 and 18

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

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

#### Objection 19 and 20

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

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

The Union argues that Turley’s e-mail was an overly broad policy that disregarded the Union’s rights under the collective-bargaining agreement to post on its bulletin boards in the plant. I disagree. The evidence establishes that the Respondent did not interfere with the Union’s right to post material on its bulletin boards. The collective-bargaining agreement already contained language requiring that all postings on union bulletin boards be pre-approved by the plant manager. In addition, the evidence shows that Turley’s e-mail was in response to complaints from the Union that prodecertification employees had posted material on the walls in the change house. I find that the Union has

not met its burden of proof and shall recommend that Objections 19 and 20 be overruled.

#### Objections 1 and 22

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

In summary, I have sustained the Union’s Objections 2, 4, 7, and 8, which conform to the unfair labor practice allegations found to be meritorious above. I am recommending that the remainder of the Union’s Objections, to the extent they have not already been withdrawn, be overruled. As discussed above, the sustained objections are sufficient to warrant setting aside the election. Accordingly, I shall recommend that the Board direct a second election, to be held after the unfair labor practices have been remedied, so that employees will have the opportunity to express their desires for or against union representation under circumstances free of interference.

#### CONCLUSIONS OF LAW

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

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

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

4. By withdrawing recognition from and refusing to recognize and bargain with United Steelworkers of America, Local 13-227 since August 12, 2008; by making unilateral changes to unit employees’ wages, hours, and other terms and conditions of employment without affording the Union notice and an opportunity to bargain regarding such changes; and by bypassing the Union and dealing directly with unit employees, the Re-

spondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Sections 2(6) and (7) of the Act.

#### 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. To remedy the unlawful discipline imposed on Saltibus and Shepherd, I shall recommend that Respondent be ordered to rescind Saltibus’ July 22, 2008 “written reminder” and Shepherd’s September 5, 2008 “written confirmation,” remove any references to the discipline from their files, and to notify them that this has been done and that the unlawful discipline will not be used against them in any way. To remedy the 8(a)(5) violations, I shall recommend that the Respondent be ordered to recognize and, upon request, bargain with the Union as the exclusive representative of its unit employees, at least until there is a certification of the results of a valid decertification election, and to cease dealing directly with unit employees regarding their wages, hours, and terms and conditions of employment. I shall also recommend that the Respondent be ordered to restore the Union’s bulletin boards, resume processing grievances, and scheduling arbitrations as necessary, and resume the checkoff and remittance of union dues pursuant to the terms of the collective-bargaining agreement. If the Union so requests, the Respondent shall also be ordered to rescind the unilaterally implemented sickness and accident and time off policies and any wage increases granted since August 12, 2008.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>24</sup>

#### ORDER

The Respondent, Arkema, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to report the protected activities of coworkers, threatening employees with unspecified reprisals for engaging in protected activity, and making statements informing employees that they had no rights under a collective-bargaining agreement that was still in effect.

(b) Issuing written reminders, written confirmations, or otherwise disciplining employees because they join, support or assist the Union or engage in any other concerted activities protected by Section 7 of the Act.

(c) Refusing to recognize and bargain upon request with United Steelworkers of America, Local 13-227 (the Union).

(d) Unilaterally changing the wages, hours, and terms and conditions of employment of employees in the unit represented by the Union.

<sup>24</sup> 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) Bypassing the Union and dealing directly with unit employees regarding their wages, hours, and terms and conditions of employment.

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

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

(a) Within 14 days from the date of the Board's Order, rescind the July 22, 2008 "written reminder" issued to Mark Saltibus and the September 5, 2008 "written confirmation" issued to Fred Shepherd, remove any references to this discipline from their files, and within 3 days thereafter notify them that this has been done and that the unlawful discipline will not be used against them in any way.

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

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

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

(d) If the Union so request, rescind the unilaterally implemented sickness and accident and time off policies and wage increases that were granted since August 12, 2008.

(e) Within 14 days after service by the Region, post at its facility in Houston, Texas, copies of the attached notice marked "Appendix B."<sup>25</sup> Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

<sup>25</sup> 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."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

#### DIRECTION OF SECOND ELECTION

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

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

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

#### APPENDIX A

##### Petitioner's Objections to Conduct of the Election and to Conduct Affecting the Results of the Election

1. The Employer through its agent, Greg Schroll, unlawfully initiated, orchestrated/directed, and supported the filing of the Petition in this proceeding on July 17, 2008.

2. On, or about, July 22, 2008, the Employer unlawfully disciplined an employee, because he engaged in protected concerted and union activities.

3. On July 22, 2008, the Employer created the impression of surveillance of its employees Union activities by informing an employee that he had, on an unspecified date, made threatening

and inappropriate remarks to a laboratory employee concerning her unwillingness to join the Union.

4. On July 22, 2008, the Employer threatened an employee with discharge, if he continued to engage in protected concerted and union activities.

5. On, or about, July 23, 2008, the Employer promulgated, and unilaterally implemented, an anti-union policy, which unlawfully interfered with the Section 7 Rights of the employees.

6. On, or about, July 23, 2008, the Employer unlawfully misled the employees by informing that:

A) “. . . the Notice sent by the NLRB, which will include . . . important information describing how to cast your vote correctly (for example, to vote against the union, you would vote “NO”)", and,

B) “No punishment—the union cannot seek . . . punishment of an employee for not being a member of the union, even if the employee has paid an initiation fee and ongoing union dues.”

7. On, or about, July 23, 2008 the Employer threatened its employees with reprisals, if they engaged in protected concerted activities and union activities.

8. On, or about, July 23, 2006 the Employer solicited complaints against employees, who engaged in protected concerted and union activities.

9. On, or about, July 29, 2008 the Employer promised its employees “. . . an excellent work place and channels of communication *throughout the organization.*” if they voted to decertify the Union. [Emphasis added.]

10. On, or about, July 29, 2008 the Employer promised its employees, that if they voted to decertify the Union, the Employer would “. . . demonstrate that this is a change you will be happy with.”

11. [Withdrawn]

12. On August 11, 2008 the Employer unlawfully designated the Petitioner to serve as the Employer’s observer during the decertification election, that was held on August 11 and 12, 2008.

13. [Withdrawn]

14. [Withdrawn]

15. [Withdrawn]

16. [Withdrawn]

17. [Withdrawn]

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

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

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

21. [Withdrawn]

22. Prior to, and during the critical period, July 17, 2008 through August 12, 2008, the Employer assisted and supported the Petitioner’s efforts to decertify the Union by encouraging

the bargaining unit employees to vote to decertify the Union in violation of the Act.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT solicit you to report the protected activities of coworkers, nor threaten you with unspecified reprisals for engaging in protected activity, nor make statements informing you that you have no rights under a collective-bargaining agreement that is still in effect.

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

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

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

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

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

WE WILL, within 14 days from the date of the Board’s Order, rescind the July 22, 2008 “written reminder” issued to Mark Saltibus and the September 5, 2008 “written confirmation” issued to Fred Shepherd, remove any references to this discipline from their files, and WE WILL, within 3 days thereafter, notify them that this has been done and that the unlawful discipline will not be used against them in any way.

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

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

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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

WE WILL, if the Union so request, rescind the unilaterally implemented sickness and accident and time off policies and wage increases that were granted since August 12, 2008.

ARKEMA, INC.