UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	)	
	)	
FRESH & EASY NEIGHBORHOOD MARKET INC.,	)	Case Nos.
	)	
Respondent,	)	31-CA-29913
	)	31-CA-30021
and	)	31-CA-30088
	)	
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,	)	
	)	
Charging Party.	)	

RESPONDENT'S BRIEF IN SUPPORT OF IT EXCEPTIONS

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent Fresh & Easy ("Fresh & Easy," "Respondent," the "Employer," or the "Company") submits this brief in support of its exceptions to the decision of the Administrative Law Judge Lana H. Parke.[1]

STATEMENT OF THE CASE

Fresh & Easy excepts to the unfair labor practice findings by the ALJ in her Decision in the above-captioned matter dated October 18, 2011, and to her recommended remedy and order, including that a broad notice is appropriate, and that the notice should be posted at any store other than the Eagle Rock Store. More specifically, Fresh & Easy excepts to the ALJ's conclusion that the Company: (i) interrogated an employee regarding the employee's union

[1] Throughout this brief, citations to the record shall be as follows: the ALJ's decision shall be "JD [Page]:[Line]"; the hearing transcript from the portion of the hearing shall be "Tr. [Page]"; the parties' joint exhibits shall be "JTX[Number]"; the General Counsel's exhibits shall be "GCX[Number]"; and Respondent's exhibits shall be "RX [Number]."

activities; (ii) created an impression among its employees that their union activities were under surveillance; and (iii) orally promulgated and thereafter maintained a rule prohibiting employees from discussing their discipline with other employees. For the reasons set forth below, the ALJ's findings, recommended order, and notice should be vacated.

STATEMENT OF FACTS

I. The Company's And Store's Background

A. The Eagle Rock Store And Its Store Manager Pablo Artica

Fresh & Easy operates retail grocery stores in several states, including the "Eagle Rock Store," which is located in Los Angeles, California. (JD 2:39-40) During a standard shift, the Eagle Rock Store is staffed by approximately two to four customer associates ("CAs"), who assist customers using electronic checkout registers, stock shelves and displays, and perform general customer service duties. (JD 2:42-46.) The CAs report to a team lead, who, in turn, reports to a store manager. (JD 2:46-47.) On or about March 29, 2010, Pablo Artica ("Artica") was named the store manager of the Eagle Rock Store. (JD 2:47-3:2.) He was the store manager at all times relevant to the charges at issue. (*Id*.)

At the Eagle Rock Store, managers and supervisors regularly held "team-huddles" where managers and employees discussed issues relevant to the store. (JD 3:5-6.) Moreover, Fresh & Easy's store practice permitted employees to talk among themselves while on duty regarding non-work related matters, so long as their productivity or customer service did not suffer. (JD 3:7-8.)

II. Organizing Efforts At The Eagle Rock Store

On March 26, 2010, several Fresh & Easy employees, along with UFCW representatives, entered the Eagle Rock Store and handed a petition to store management, stating that certain

employees wanted the UFCW to be their representative. (JD 3:21-31.)[2] After presenting the petition to the Eagle Rock Store's managers, Fresh & Easy employees Michael Acuna and Angel Salas traveled to Fresh & Easy's corporate headquarters and presented the petition to Hugh Cousins, Fresh & Easy's Chief Human Resources Officer. (JD 3:30-33.) Cousins informed these individuals that Fresh & Easy would be willing to recognize the Union following a valid election. (JD 3:33-35.) To date, no election has occurred.

III. The ALJ's Conclusions Of Law

On April 21, 2011, the General Counsel consolidated various unfair labor practice charges filed by the Union against Fresh & Easy into a Consolidated Complaint (the Complaint). (GCX1(p).) The Complaint (as amended at the hearing) alleges that Respondent, by Pablo Artica:

a. on or about May 19, 2010, created an impression among its employees that their union activities were under surveillance by Respondent (GCX1(p) at ¶ 6(a); JD 2:7-8);

b. on or about May 19, 2010, interrogated an employee regarding the employee's union activities (GCX1(p) at ¶¶ 6(b); JD 2:9);

c. on or about April 2010, orally promulgated, and since then has maintained, a rule prohibiting employees from talking about the Union in the store, on the clock, or on the sales floor (GCX1(p) at ¶¶ 6(c); JD 2:10-11);

d. on or about July 5, 2010, orally promulgated, and since then has maintained, a rule prohibiting employees from discussing their terms and conditions of employment with other employees (GCX1(p) at ¶¶6(d); JD 2:12-13); and

e. in or about January 2011, told employees to distribute anti-Union flyers to customers. GCX1(p) at ¶¶ 6(e); JD 2:14).

[2] Each employee requesting union representation printed their name plainly on the petition, leaving no doubt as to which employees supported the union. (JTX1.) All of the non-management Fresh & Easy employees who testified at the hearing (Carlos Juarez, Jose Montiel-Rangel, Angel Salas, and Michael Acuna) printed his name and signed the petition, making his union support open and apparent. (JTX1.)

After a trial on the Complaint, the ALJ dismissed the claims in subparagraphs 6(c) and 6(e). (JD 7:28; 9:49-50.) The ALJ, however, found merit in the claims alleged in subparagraphs 6(a), 6(b), and 6(d) of the Complaint. In light of Respondent's exceptions, the facts concerning the claims found in these latter subparagraphs are discussed immediately below.

IV. Facts And Testimony Related To Amended Complaint Subparagraphs 6(a), 6(b), and 6(d)

A. Artica's May 19 Conversation With Jose Montiel-Rangel About Safety Meeting.

On or about May 19, 2010, Artica was informed by a Fresh & Easy employee that a safety meeting put on by the UFCW was taking place that day. (JD 4:9-10, n.8.) This meeting was one of many meetings held by the Union that discussed with employees proper lifting technique, ergonomics, and other methods of injury avoidance. (JD 4 n.6.) Later that day, Artica and Jose Montiel-Rangel, a Customer Assistant ("CA") at the Eagle Rock Store, walked through the store's parking lot to unlock Montiel-Rangel's bike, which had been placed in a storage facility at the store. (JD 4:11-3; Tr. 193-94.)[3] During that walk, Artica casually asked Montiel-Rangel if he was going to the meeting. (JD 4:11-14; Tr. 75.)[4] Montiel-Rangel asked "out of curiosity, who had squealed about the meeting." (JD 4:15-19.) Artica decided not to reveal the name of the employee who told him about the meeting out of concern of retaliation

[3] Artica testified that it was common knowledge who was a union supporter at the Eagle Rock Store. (Tr. 193.) Montiel-Rangel was one such union supporter, whose pro-union viewpoint was open and obvious. Montiel-Rangel's name appeared on the petition given to Fresh & Easy on March 26 (JTX1), and he admitted that he advocated for the union by allowing his picture to appear on flyers passed out by union advocates in front of the Eagle Rock store. (Tr. 74.)

[4] In a sworn affidavit given to the NLRB, Montiel-Rangel characterized this conversation as casual, and he did not state in his affidavit that he was coerced or intimidated. (Tr. 79.)

against that employee, and instead stated to Montiel-Rangel, "It's amazing what you could find on the internet." (JD 4:19; Tr. 56, 195.)

Artica asked about the meeting because he was sincerely interested about the safety topics that would be discussed at the meeting. (JD 4 n.7; Tr. 195, 205.) This legitimate interest in safety issues would have been obvious to Montiel-Rangel because the union supporters, as part of their organizing efforts, had asked for Fresh & Easy to establish a safety committee at the store and met with the union regularly to discuss safety issues. (JD 4 n.6; Tr. 144-45, 159.)[5]

B. Discipline Discussions in July 2010

In or about July 2010, Acuna alleges that he had a private conversation with Team Leader Sal Salvador where he asked whether management was planning on disciplining a store employee named Ricardo who was having attendance issues. (JD 3:48-49; Tr. 150-51.) Salvador responded by stating that this was not any of Acuna's business. (JD: 3:49-4:1.)

On or about July 5, Artica approached Acuna and questioned why Acuna would be asking about whether management had disciplined another employee. (JD 4:1-2; Tr. 151-52.) Acuna stated that Artica told him that "it wasn't [his] business about any other employee's

[5] At the hearing, Michael Acuna, another CA at the Eagle Rock Store, gave conflicting testimony where he claimed that he was either party to this conversation or was involved in a very similar interaction with Artica and Montiel-Rangel earlier that day. (*See* JD 4 n.8.) Acuna stated that as he and Montiel-Rangel were leaving, Artica approached them both and asked them to take notes about the meeting. (*Id.*; Tr. 148.) Montiel-Rangel, however, did not testify that Acuna was present during this conversation -- either at hearing or in his affidavit. (Tr. 56-59.) Moreover, Acuna had previously given the Board an affidavit where he stated that he had merely overheard Artica ask Montiel-Rangel about the meeting, and, consequently, was not a party to the conversation. (Tr. 157.) Artica, for his part, denies having a discussion about this meeting with anyone other than Montiel-Rangel (Tr. 205.) Neither Montiel-Rangel nor Artica testified that anyone else was present or even in the vicinity of the conversation. While the ALJ elected not to resolve the inconsistencies apparent in Acuna's testimony (JD 4 n.8), it is apparent that Acuna's version of events lacks any credibility. Moreover, this fabrication of events further undercuts Acuna's overall credibility as a witness

discipline if that employee didn't want to share it with [him]." (JD 4:4-5; Tr. 160.) The ALJ found that Artica warned Acuna he would be disciplined if he did not stop. (JD 4:5.)

Artica, for his part, stated that he did not remember having any discussion with Acuna about Ricardo's discipline. (JD 4 n.5; Tr. 201.) Artica testified that he has, in the past, stated that he would not share information regarding an employee's discipline with other employees. (JD 4 n.5; Tr. 202.) However, he unequivocally testified that he has never told any employees that they could not speak to each other about discipline. (JD 4 n.5 Tr. 202.)

QUESTIONS PRESENTED

1. Did the Company violate the Act by unlawfully interrogating a Fresh & Easy employee when Pablo Artica asked Jose Montiel-Rangel, an open union-supporter, on May 19, 2010, whether he was going to the safety meeting?

2. Did the Company violate the Act and create an impression of surveillance when Pablo Artica asked Jose Montiel-Rangel, an open union-supporter, on May 19, 2010, whether he was going to the safety meeting?

3. Did the Company violate the Act when Pablo Artica told Acuna on or about July 5, 2010, that "it was none of his business to talk about another employee's discipline if the employee did not want to share the information?"

4. Is a broad order appropriate here in light of the facts and claims alleged?

5. Is a Los Angeles-wide posting of a notice appropriate in light of the facts and claims alleged?

ARGUMENT

I. Fresh & Easy Did Not Unlawfully Interrogate Any Employee Regarding Union Activities On May 19, 2010

The ALJ concluded that Artica improperly interrogated Montiel-Rangel in violation of

the Act when he asked Montiel-Rangel on May 19 whether he was going to a safety meeting. Fresh & Easy respectfully submits that the ALJ erred in reaching this conclusion.

An interrogation is unlawful only if it reasonably tends to restrain, coerce, or interfere with rights guaranteed under the Act. *See, e.g., Rossmore House*, 269 NLRB 1176, 1177 (1984), *aff.* 760 F.2d 1006 (9th Cir. 1985). While the ALJ recognized that *Rossmore House* is controlling, the ALJ did not use the *Rossmore House* analytical framework to make her decision. Instead, she simply concluded:

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

(JD 6:43-49.) However, when the *Rossmore House* factors are applied, a different conclusions is mandated.

The Board analyzes the totality of the circumstances in determining if an employer's statement constitutes unlawful interrogation. *See, e.g., Rossmore House*, 269 NLRB at 1177. Specifically, in determining whether interrogation reasonably tends to coerce employees, the Board considers the following factors: (1) the background involved; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of interrogation; and (5) the truthfulness of the response. *See, e.g., id.* at 1178 n.20. In reaching her decision, the ALJ focused entirely on the second prong of this test. The ALJ concluded that because the meeting was not a matter of common knowledge, any questioning about the meeting must have been coercive.

However, a single question that lacks an intrinsically coercive quality is not violative of the Act. *See, e.g., Pony Express Courier Corp*., 283 NLRB 868, 868 (1987) (no violation where a manager asked an employee if he had been approached by the union because it was unlikely that the employee would have left the conversation feeling coerced). Here, Artica's single, innocuous inquiry whether Montiel-Rangel was going to the meeting lacked an intrinsically threatening quality for the reasons explained below.

A. The background involved does not show that Artica's alleged statements were coercive.

The *Rossmore House* "background" factor requires the Board to evaluate whether there is a history of employer hostility toward unions or discrimination related to union activity. *See, e.g., Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Frye Elec., Inc.*, 352 NLRB 345, 357 (2008). In this case, there is no evidence that Fresh & Easy bore hostility toward the Union or unions generally. At the hearing, various members of Fresh & Easy's management testified that they believe it is the employee's choice to be represented by the Union and that they did not interfere with that choice. (Tr. 45, 99, 141, 201, 210, 215.) Moreover, Artica was a former UFCW member and told his employees it was their right to support the union. (Tr. 189, 201.) Additionally, each pro-union Fresh & Easy employee who testified at the hearing unequivocally stated that they had never been subject to any punishment based on their union support. (Tr. 42, 81, 110, 161.) The ALJ seemingly ignored this factor, which weighs strongly in favor of Fresh & Easy. Given this background, Artica's alleged statements occurred in a non-coercive environment.

B. The nature of the allegedly requested information does not show that Artica's statement was coercive.

The ALJ erred by only considering the nature of the questioning when making her determination that the questioning was coercive. The ALJ concluded that "there is no evidence

that knowledge of the meeting was commonplace or inconsequential. [ ] In those circumstances Artica's benign or even constructive purpose in inquiring about the union meeting is irrelevant." (JD 7:44-47.) When the facts and relevant case law regarding this factor are considered, however, it is evident that the ALJ reached an incorrect conclusion.

As an initial matter, there was ample evidence to demonstrate that knowledge of the meeting *was* commonplace and inconsequential. The ALJ's Decision acknowledges that the meeting at issue "was one of a series of meetings in which the Union discussed with employees various safety issues." (JD 4 n. 6.) It was apparent to Fresh & Easy that such meetings were regularly being held because the union supporters, as part of their organizing efforts, asked for Fresh & Easy to establish a safety committee at the store and met with the union regularly to discuss safety issues. (Tr. 144-45, 159.) Moreover, it was widely known at Fresh & Easy who was a union supporter and who was not. (Tr. 40, 74, 110, 135-37, 160, 191-93, TX1.) Thus, contrary to the ALJ's determination, asking a known union supporter whether he was attending meetings that everyone knew were occurring regularly cannot legitimately be seen as coercive.

Moreover, the ALJ erred in analyzing this factor. The second *Rossmore House* factor requires the Board to determine whether an interrogator sought information on which to base an adverse employment action against an employee, to obtain information about the extent of his or her union activities, or to determine the identity of others who engaged in union activities. *See, e.g.*, *Bourne*, 332 F.2d at 48; *Frye*, 352 NLRB at 357; *Albis Plastics*, 335 NLRB 923, 932 (2001). The record here does not show that Artica's statement related to any of these reasons. First, there is no question that Artica did not take any adverse employment actions against Montiel-Rangel (or any other Fresh & Easy employee who may have attended this meeting). In fact, all the employees who testified readily acknowledged that they were never punished for any

of the their union activities. (Tr. 42, 81, 110, 161.) Second, Artica was not trying to obtain information about the extent of Montiel-Rangel's union activities. Rather, he simply inquired about the safety tips that were discussed at the meeting. Moreover, Montiel-Rangel's testimony made clear that his pro-union activities and support were widely known. Finally, Artica did not seek to learn the identity of others who engaged in union activities. To the contrary, Artica testified he already was well aware of who supported the Union and who did not due to open and public activity by employees. Thus, the second factor also weighs in favor of Fresh & Easy.

C. The identity of the requestor does not show that an alleged request was coercive.

With respect to the third *Rossmore House* factor, contrary to the ALJ's conclusion, Artica clearly did not intimidate Montiel-Rangel. *See, e.g., Albis Plastics*, 335 NLRB at 932. The ALJ found that "Montiel-Rangel's surprised, disclaiming reaction" evinced a coercive effect. (JD 6:45-46.) The ALJ, however, disregarded relevant and critical testimony in reaching this conclusion.

First, the Decision does not consider the relationship that Montiel-Rangel had with Artica. Montiel-Rangel testified that he was friendly and amicable with Artica and often spoke to him about non-work related matters. (Tr. 75.) He was obviously not afraid to raise union issues with Artica and did so on at least one other occasion. (Tr. 61-62.) Montiel-Rangel was never punished by Artica for his open union support. (Tr. 80-81.) It is therefore apparent from the record that Montiel-Rangel was not intimidated by Artica. Consequently, any alleged inquiry by Artica was non-coercive because of Artica's relationship with Montiel-Rangel. *See, e.g., Sunnyvale Med. Ctr., Inc*., 277 NLRB 1217, 1218 (1985) (finding manager's question to employee about why he joined the union to be non-coercive where manager and employee had a friendly and amicable relationship).

Next, the ALJ improperly disregarded express testimony by Montiel-Rangel which undercuts any implication that Artica's questions were coercive. In prior sworn testimony to the NLRB, Montiel-Rangel stated that this conversation was "casual." (Tr. 78-79.) Artica, for his part, consistently stated that he brought this up in a friendly way based on his interest in safety issues. (Tr. 195, 205.)[6] Thus, this third factor also weighs in favor of Fresh & Easy.

D. The location and method of interrogation does not show that Artica's alleged statements were coercive

The conversation at issue occurred in an open area of the Fresh & Easy store and not behind a manager's closed office door. *See, e.g., Albis Plastics*, 335 NLRB at 932. The location of the alleged request was therefore non-coercive. *See, e.g., Lewis Grocer*, 282 NLRB 166, 166-68 (1986) (upholding the ALJ's finding that the interrogation issue was asked in a break room, which was convincing evidence that the conversation did not have a coercive effect). Additionally, Artica made the alleged inquiry only once and then dropped the matter. Artica left Montiel-Rangel after this conversation, and the evidence revealed that Montiel-Rangel's union activities were not dissuaded by this conversation. Indeed, Montiel-Rangel testified that he continued supporting the Union after this conversation and, in fact, increased his participation in organization efforts. The method of alleged interrogation was therefore also non-coercive. Accordingly, the ALJ erred by failing to give any weight to the fourth *Rossmore House* factor, which also weighs in favor of Fresh & Easy.

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[6] At the hearing, Montiel-Rangel stated that the May 19 conversation made him feel "very intimidated, very awkward, very nervous as well." (Tr. 56-57.) This testimony, however, was only adduced through leading questions by the General Counsel. (*Id.*)

E. The truthfulness of the alleged response does not show that Artica's alleged statements were coercive

Under the fifth *Rossmore House* factor, an employee's truthful response is indicative of a non-coercive interrogation. Here, Montiel-Rangel was comfortable enough to begin questioning Artica about how Artica had learned about the meeting. Montiel-Rangel was confident enough to tell Artica that he was not at liberty to discuss the meeting, and he asked Artica "who had squealed about the meeting." (JD 4:18-19; Tr. 56.) Thus, it is clear that the tenor of the conversation was non-coercive under the fifth *Rossmore House* factor.

In sum, when all the *Rossmore House* factors are considered, it is evident that based on the totality of the circumstances Artica's question was non-coercive. Artica and Montiel-Rangel merely had a casual conversation between friends, one of whom was a known and open union supporter. The ALJ therefore erred in determining that the May 19 conversation constituted an unlawful interrogation in violation of Section 8(a)(1).

II. Artica Did Not Create An Unlawful Impression of Surveillance

The ALJ summarily concluded that because Artica's questions were coercive they also constituted unlawful surveillance. (JD 6:24-31 (citing *Stevens Creek Chrysler Jeep Dodge, Inc*., 357 NLRB No. 57, slip op. 10 (2011)). The ALJ's conclusion disregards applicable precedent and is contrary to the facts.

To determine whether an employer has created the impression of surveillance, the Board asks whether, "under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored." *Sam's Club*, 342 NLRB 620, 620 (2004). The Board repeatedly has found that an impression of surveillance is not created where the employer's questions were made to openly pro-union employees, whose pro-union sympathies were a matter of common knowledge. *See, e.g., Lucky Stores, Inc.* (*d/b/a*

Gemco), 279 NLRB 1138, 1143 (1986). The Decision, however, does not acknowledge this precedent. Instead, the ALJ merely concluded that because she found the statements were coercive, they also evinced surveillance.

Durango Boot, 247 NLRB 361 (1980), is instructive here. In *Durango Boot*, a vocal and known union supporter, Perry, had a conversation with a Plant Superintendent, wherein the Plant Superintendent told Perry that he was aware that Perry's union activities and union support "was going to carry a lot of votes" in an upcoming election. *Id*. at 365-66. The ALJ stated that these comments "created in Perry an impression that his union activities were under surveillance." *Id*. at 366. The Board rejected the ALJ's conclusion, stating:

> We do not adopt the Administrative Law Judge's finding that Plant Superintendent Moss' statement regarding Perry's influence with other employees created an impression of surveillance. According to Perry's testimony, he was one of the first employees to join the union organizing committee, his name appeared on the list sent by the Union to Respondent, and he was asked by other employees to represent them at company committee meetings because they believed that he would "stick up for [his] rights." Since Perry's prounion sympathies were a matter of common knowledge and he was aware that his views were known to others, we do not believe that he could have reasonably assumed from Moss' statement that his union activities were under surveillance.

Id. at 361 n.3.

Similarly, in *Aero Corporation*, 237 NLRB 455 (1978), the Board rejected an ALJ's finding that a supervisor created an impression of surveillance when he told a pro-union advocate, "I'm quite sure I know how you're going to vote." The Board found: "Since the employee's union sympathies were a matter of common knowledge and he was aware that his views were known to others, we cannot infer that he assumed from the supervisor's statement that his union activities were under surveillance." *Id*. at 455 n.2 (citing *Schrementi Bros., Inc.*, 179 NLRB 853 (1969)).

Here, for the same reasons, Artica's remarks do not create the impression of surveillance. Montiel-Rangel admitted that his pro-union support was open and apparent. (Tr. 74.) His name was plainly written on a petition advocating Union recognition that employees submitted to Fresh & Easy. (JTX1.) He further allowed a picture of himself to be posted on pro-union flyers distributed outside the store. (Tr. 74.) Montiel-Rangel therefore made it known that he was a union supporter, and it was no secret that he was participating in union organizing and meetings.

Similarly, it was no secret that safety meetings were taking place. Artica testified that he frequently spoke to employees about the Union when they approached him to discuss those matters (Tr. 191-93), and that an employee approached him to tell him that a union safety meeting was taking place on May 19. (Tr. 203-04.) Montiel-Rangel testified that the safety meetings were a frequent occurrence during this period and between eight to twelve employees would attend each meeting. (Tr. 58-59.) Indeed, the union supporters made their safety objectives quite well known, going as far as asking for a safety committee to be established at the store. (Tr. 158-59.)

Based on these facts, Montiel-Rangel could not reasonably have believed he was being surveilled by Artica's mere mention of the safety meeting and Artica's request that Montiel-Rangel provide him with useful information that may be attained at the meeting. The ALJ erred in determining otherwise. Like the employee at issue in *Aero*, "[Montiel-Rangel's] union sympathies were a matter of common knowledge and [Montiel-Rangel] was aware that his views were known to others." Accordingly, the ALJ erred in concluding that solely because the statements were coercive they also constituted unlawful surveillance.

III. Fresh & Easy Never Promulgated A Rule Prohibiting Employees From Speaking With Each Other About Discipline

Finally, the ALJ erred in concluding that that Artica promulgated and maintained a rule prohibiting employees from speaking to each other about discipline. Specifically, Acuna testified that in July 2010, he asked Fresh & Easy Team Lead Sal Salvador whether another employee would be punished for attendance issues. (JD 3:48-49.) Salvador responded that this was not any of Acuna's business. (JD 3:49-4:1.) He did not tell Acuna that he could not talk to other employees about their discipline. (*Id*.) Artica then approached Acuna and asked him why he had inquired about another employee's discipline. (JD 4:1-2.) Acuna testified that Artica said that management would not tell Acuna about other employees' discipline:

> Q, And isn't it true that when [Artica] talked to you, he told you that it wasn't your business about any other employee's discipline if that employee didn't want to share it with you, correct?
>
> A. Yes.

(JD 4:3-5; Tr. 160.) Nonetheless and despite absolutely no testimony or other evidence that Artica prohibited Artica from discussing discipline with employees who wanted to do so, based on these facts, the ALJ concluded that Artica had maintained and promulgated a rule barring employees from talking to each other about discipline. The ALJ's conclusion does not logically follow from the evidence adduced and disregards applicable Board precedent.

First, the ALJ erred in concluding that Artica's statement constituted a rule prohibiting employees from talking to each other about discipline. The ALJ's finding completely disregards the context of Artica's statement to Acuna and does not logically follow from the testimony.. Acuna had asked a member of management about whether management would discipline an employee because of that employee's attendance. Acuna's question therefore had nothing to do with whether employees could speak amongst each themselves about their discipline. Rather,

the entire conversation related to whether management would discuss one employee's discipline with another employee.[7] Artica's response, therefore, had nothing to do with whether employees could speak with each other regarding discipline, but simply related to whether management would inform employees about other employees discipline. He has no Section 7 right to learn such information from management.

Finally, even if Artica had promulgated and maintained such a rule, retail establishments may limit the discussion of discipline on sales floors. *See, e.g., McBride's of Naylor Road,* 229 NLRB 795, 795 (1977) (employer has authority to prohibit certain conduct in the selling areas of a retail store). Thus, the ALJ erred in reaching her conclusion, and this allegation should also be dismissed for this reason.

IV. There Is No Justification For The Remedies Requested In This Case

The ALJ concluded that a broad notice was appropriate here because of Fresh & Easy's "corporate oversight of the labor relations of individual stores and the repetition of conduct already found unlawful by the Board." (JD 10:35-37.) At the outset, no remedy is warranted because Fresh & Easy has not violated the Act for the reasons explained above. Regardless, the alleged violations encompassed by the Complaint are not the type for which a broad order are appropriate. Although the Board has concluded that the Company violated the NLRA in two other situations, *see* 356 NLRB Nos. 85 and 90, both of these decisions and orders currently are being reviewed by the United States Court of Appeals for the District of Columbia Circuit, *see* Appeals Nos. 11-1052 and 11-1053. Thus, until these cases reach a final adjudication they are inappropriate to justify a broad notice.

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[7] Acuna testified that the employee at issue had never given Acuna authority to speak on his behalf about the discipline. (Tr. 160.)

Moreover, the underlying allegations in 356 NLRB Nos. 85 and 90 involved entirely different violations of the Act and/or entirely different stores: a finding of an overly broad distribution policy that was in effect back in early 2009 (which has been revised and clarified to all employees and which was not found to have chilled any distribution or other Section 7 activity), a finding of unlawful interrogation and surveillance at a single Las Vegas store, a finding of an unlawful oral promulgation of a "no talking about the union or discipline" rule at one San Diego store, and a finding of an unlawful invitation to quit at the same San Diego store.

All of these are relatively minor alleged violations, were all contemporaneous in time (*i.e.*, there has been no effort in the face of Board findings to then violate the Act); and, even compounded with those in this case, would not warrant a broad remedial order. *Compare First Legal Support Svcs., LLC*, 342 NLRB No. 29, slip op. at 22 (2004) (described below); *Aqua Cool*, 332 NLRB 95, 97-98 (2000); *Hanover House Indus.*, 233 NLRB 164, 164-65 (described below).

Finally, Los Angeles-wide posting in this case certainly is not necessary because the violations found by the ALJ only happened at a single store, *i.e.*, Eagle Rock, and were the result of the statements and acts of a single manager. None of the found violations affected any other store. In fact, the only allegation that related to multiple stores was the coupon allegation claim found in Paragraph 6(e) of the Complaint. This allegation, of course, was dismissed by the ALJ. The remaining allegations all related to acts and statements made by Artica. No evidence was presented at the hearing which suggested that Fresh & Easy ever endorsed Artica's actions or even knew about any of them. Thus, contrary to the ALJ's decision, the alleged violations here have nothing to due with any centralized control of labor relations by Respondent which would make area-wide posting appropriate. *Cf. J.P. Stevens & Co. v. NLRB*, 3890 F.2d 292, 204 (2nd

1967); *Beverly Health & Rehab Sevs.*, 317 F.3d 316, 326-27 (finding employer's "centralized structure for dealing with labor issues" constituted an "overall corporate policy" that justified imposition of companywide posting requirement). Accordingly, there is simply no need for a Los Angeles-wide notice when the supposed violations occurred only at a single location.

CONCLUSION

For all of the foregoing reasons, Fresh & Easy respectfully requests that the Board grant its exceptions and dismiss the Complaint (as amended at the hearing) in its entirety.

Respectfully submitted,

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Dated: December 6, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2011, I caused copies of the **Respondent's Brief in Support of its Exceptions To The Administrative Law Judge's Recommended Decision And Order** to be served upon the following by the NLRB's e-filing system:

National Labor Relations Board
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I hereby certify that on December 6, 2011, I emailed the foregoing **Respondent's Brief in Support of its Exceptions To The Administrative Law Judge's Recommended Decision And Order** to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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