

**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 ANSWERING BRIEF TO THE UNION’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION**

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 answer in response to Charging Party United Food & Commercial Workers International Union (“Charging Party” or the “Union”)’s Exceptions to the Administrative Law Judge’s (“ALJ’s”) October 18, 2011 Decision in the above referenced matter.¹

STATEMENT OF THE CASE

Charging Party’s exception to the Administrative Law Judge’s October 18, 2011 Decision is limited to three issues. First, the Union claims that Fresh & Easy did in fact promulgate a rule directing employees not to talk about the Union. Contrary to the Union’s

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].”

exceptions, the ALJ correctly decided not to credit Angel Salas' testimony on this issue. Salas was the only individual who testified that such an alleged rule had been promulgated. However, the ALJ correctly found that Salas' testimony was unreliable and totally uncorroborated. Accordingly, the ALJ's ruling should be upheld.

Next, Charging Party offers a number of new arguments suggesting that a coupon distributed by Fresh & Easy employees was "compelled speech" related to employment terms and was actually an anti-union flyer, and, therefore, Fresh & Easy's request that store employees distribute this coupon constituted interference with employees' Section 7 rights. Charging Party further advances the provocative argument that Section 8(c) of the Act is unconstitutional and that Fresh & Easy had no right to distribute the flyer. The ALJ, relying on established Board law, correctly found that the coupon was content neutral, and that its distribution did not implicate any protected rights. Therefore, the ALJ's determination on this charge should be upheld as well.

Finally, the Charging Party contends, without any supporting authority, that the remedy is inadequate. None of the suggested changes have merit because the record shows that the alleged violations related to conduct that occurred at only one store and would be adequately remedied by the Board's traditional remedies.

For the reasons stated herein, the Charging Party's Exceptions should be denied and those portions of the Decision excepted to should be affirmed.

ARGUMENT

I. Fresh & Easy Did Not Unlawfully Promulgate A Rule Prohibiting Employees From Speaking About The Union

The Union first challenges the ALJ's decision that Fresh & Easy did not promulgate a rule prohibiting employees from speaking about the Union while on the clock. The only

evidence offered at the hearing supporting the supposed existence of such a rule was the unsubstantiated and uncorroborated testimony of Angel Salas, who stated that on some unspecified date in April 2010, Eagle Rock Store Manager Pablo Artica called a huddle and, in the presence of numerous other employees, announced a rule that employees could not speak about the Union while they were on duty. The Charging Party now argues that the ALJ's decision should be reversed because the ALJ "cannot discredit" Salas.

The ALJ, however, specifically found that Salas' testimony was unreliable because: (1) Salas did not have a general recall of what was said; and (2) he could not place the statements in any context. (JD 6:19-24.) The record unequivocally supported this determination because Salas' testimony regarding the alleged April 2010 huddle lacked numerous indicia of reliability. First, Salas claimed that at this huddle Artica read from an email Salas believed to be from the Eagle Rock District Manager. (Tr. 101-05.) Salas, however, admitted he never actually read this supposed email and he could not describe its contents. (Tr. 109.) Moreover, neither the General Counsel nor the Union ever submitted this supposed email into evidence or provided any proof of its existence. This is because Artica never received such an e-mail. (Tr. 200.) Most importantly, Salas alleged that numerous other witnesses were in attendance at this meeting. (Tr. 102.) However, none came forward to corroborate Salas' story. There is simply no evidence -- apart from Salas' unsubstantiated and unreliable testimony -- that Artica or Fresh & Easy actually created or enforced the alleged rule.²

² Rather than directly address that the ALJ found Salas' testimony to be unreliable, the Charging Party engages in semantics wherein it argues that Fresh & Easy never established that such a rule was not made. To the contrary, Fresh & Easy offered ample evidence at the hearing that it did not prohibit employees from speaking about the Union while on duty and that neither Artica nor any other manager or supervisor called the alleged meeting where the rule was supposedly

The Charging Party's attempts to except to the ALJ's credibility findings must be rejected because the Union has failed to show that the ALJ's credibility determinations were inconsistent with documentary evidence or otherwise contrary to the relevant evidence. See e.g. Golden Stevedoring Co., Inc., 335 NLRB No. 037 (2001) (Board finds no merit in General Counsel's exceptions to ALJ's dismissal of Section 8(a)(3) allegation because General Counsel failed to show that ALJ's credibility resolutions were inconsistent with documentary evidence or otherwise contrary to the clear preponderance of all the relevant evidence.) As discussed above, the preponderance of the evidence unequivocally shows that there is simply no basis to credit Salas' uncorroborated version of events. In addition, the testimony of other witnesses in the proceeding made clear that there never has been a rule against talking about the Union while on duty at the Fresh & Easy Eagle Rock Store. The ALJ's decision on this claim should therefore be upheld.

II. The ALJ Correctly Found That Fresh & Easy Did Not Violate Section 8(a)(1) By Distributing The Flyer

The Charging Party, relying on inapposite Board authority and irrelevant legal arguments, excepts to the ALJ's finding that distribution by employees of Fresh & Easy's coupon, which apologized to customers for certain employee activity, did not contravene any employee's Section 7 rights because it did not express a "pro" or "anti" union sentiment.

As an initial matter, the ALJ's decision is consistent with both Board law and the facts presented at the hearing. To prove a violation of the Act, the General Counsel was required to show that distributing the coupons had a reasonable tendency "to interfere with, restrain or coerce employees in their exercise of their Section 7 rights in the circumstances of the particular promulgated. In any event, it is the General Counsel's burden to establish such a rule. (Tr. 44, 63, 162-63, 194 200; JTX1.)

case.” Alleghany Ludlum, 333 NLRB 734, 744 (2001). The ALJ thus found that in cases relating to employer-required dissemination of materials, the critical question was whether the materials evidenced any “explicit or implicit expression of any antiunion or union oppositional stance.” (JD 9:17-20; citing Alleghany Ludlum, 333 NLRB at 745; Clinton Food 4 Less, 288 NLRB 597 (1988).

The ALJ correctly concluded that the coupon at issue here did not contain any explicit or implicit expression of an antiunion stance, stating “Respondent’s coupon flyer could in no way be viewed as antiunion campaign material.” (JD 9:36-37.) Accordingly, the ALJ found that:

Requiring employees to distribute the Respondent’s coupon flyers to customers did not, therefore, force employees into making an observable choice concerning their participation in an election campaign or contravene employees’ Section 7 right to choose whether to express an opinion [about unionization] or remain silent.

(JD 9:45-49.) Quite plainly, it is not a violation of the Act to require employees to pass out an innocuous coupon.³

Each of the Union’s arguments in its Brief, including its argument that the coupon relates to terms and conditions of employment, are all premised on the underlying notion that the

³ In any event, Fresh & Easy did not require employees to distribute the flyer. Carlos Juarez testified that on January 10, 2011, while he was working near the assisted checkout machines, Artica approached him and asked him to pass out these coupons to customers. (Tr. 30-32.) Juarez testified that he refused to distribute the coupons. (Tr. 32-33.) In response, Artica walked away and the issue was not brought up again. Jaurez, of course, was not punished for his refusal. (Tr. 42, 198.) Similarly, Artica asked Jose Montiel-Rangel to distribute the coupons and Montiel consented. (Tr. 60-62.) Shortly thereafter, Montiel unilaterally stopped handing these out. (Tr. 80.) Montiel, like Juarez or any other employee who testified, was never punished by Fresh & Easy for not handing out the flyers or for otherwise supporting the Union. (Tr. 42, 81, 110, 161.) Thus, the record establishes that Fresh & Easy never disciplined any employee for refusing to distribute the coupons. Cf. Clinton Food 4 Less, 288 NLRB 597, 612 (1988) (Section 8(a)(1) violation for employer to ask employee to distribute flyer to customers only because the flyer was anti-union and the employer threatened the employee with discipline if she did not distribute the flyer). As such, the Employer has not in any way compelled speech, let alone impinged on its employees’ Section 7 rights.

coupons are not content neutral, but somehow compel speech favorable to Fresh & Easy in manner which implicates Section 7. (See Br. 3:14-16; 5:22.) The ALJ unequivocally found, however, that the coupons “in no way [can] be viewed as antiunion campaign material.” (JD 9:36-37.) A basic reading of the coupon and the evidence adduced at the hearing compel the conclusion that the ALJ reached the correct result. In fact, the ALJ found that Fresh & Easy, through the flyer, “did not malign or even refer negatively to the Union or to employee unionization.” (See JD 9:39-41.) Consequently, by distributing or refusing to distribute the coupons (which, as discussed below, was an employee’s choice), an employee does not express his or her union views (and, therefore, there can be no unlawful interrogation). See, e.g., Robert Orr/Sysco Food Servs., LLC, 343 NLRB 1183, 1192-93 (2004) (mere distribution of anti-union t-shirts is not unlawful because the action does not enable an employer to assess an employee’s union sympathies).

The employee also does not express his or her view on terms and conditions of employment.⁴ Even if he or she did, the Board has never held that a request that an employee distribute materials related to terms and conditions of employment is unlawful under Section 8(a)(1), as the Union readily admits. This is because such a request is not unlawful because it is not coercive and does not otherwise interfere with employees’ Section 7 rights. Thus, the Board should reject Charging Party’s argument that the distribution of the flyers somehow compelled speech.

Further, none of the cases on which Charging Party relies supports its argument that “compulsory speech” that “relates to wages, hours and working conditions ... violates Section

⁴ The Union’s suggestion that the employees at the Eagle Rock store who were asked to distribute the coupon participated in the Ambassador program (or were otherwise subject to it) is directly contravened by the record in this case. (Tr. 82-83, 115-16, 196-99, 220-21.)

8(a)(1).” In Lehnart v. Ferris Faculty, 500 U.S. 507 (1991), the Supreme Court merely held, inter alia, that the state could not compel public employees, who were required to pay union dues even if they were nonmembers, to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation. Id. at 519-520. Similarly, in Davenport v. Wash. Educ. Ass’n, the Supreme Court found that a state does not violate the First Amendment by requiring its public sector unions to receive authorization before spending that nonmember’s agency shop fees for election related purposes. 551 U.S. 177 (2007). Finally, Comm’n Workers of Am. v. Beck likewise held that a union may not expend funds from periodic union dues on activities unrelated to collective bargaining activities, over the dues-paying nonmember employees’ objections. 487 U.S. 735 (1988) Nothing in these cases supports the Charging Party’s argument that Fresh & Easy somehow unlawfully compelled speech about terms and conditions of employment. Critical to the holdings of Lehnart, Comm’n Workers and Davenport was the fact that the unions were spending nonmember employees’ dues and agency fees on political or other activities that were unrelated to advancing the core bargaining and contract administration interests of the employees. Clearly, that is not the case here.

Likewise, contrary to the Charging Party’s assertions, Reeves Rubber, Inc. does not stand for the proposition that “the passing out of pro-company slogan material violates the Act.” Rather, the Board summarily affirmed the ALJ’s findings that the employer violated the Act by prohibiting employees from engaging in activities on behalf of the Union either in working or nonworking areas of the plant while permitting the employees to engage in anti-union activities during working time in working areas. Those facts are distinguishable. The distribution of a coupon, which the ALJ correctly found was content-neutral, is not the same as allowing

employees to wear pro-company insignia while discriminatorily disallowing pro-union buttons while at work.

Equally off-base is Charging Party's suggestion that the distribution of the coupon somehow violated the employees' First Amendment rights or that Section 8(c) is unconstitutional. Charging Party does not cite to any cases that hold Section 8(c) to be unconstitutional because, not surprisingly, the constitutionality of a statutory provision that was specifically enacted *to protect* free speech under the First Amendment has never been challenged. See Hecla Mining Co. v. NLRB, 564 F.2d 309, 313 (9th Cir.1977) ("Congress undertook to design the restraints [on employer speech] in a manner that would encourage free debate and more adequately protect the First Amendment rights of employers and unions."); Boaz Spinning Co. v. NLRB, 439 F.2d 876, 878 (6th Cir.1971) ("As [we have] stated on numerous occasions, the right of free speech in a union organizational campaign is not to be narrowly restricted."). Indeed, Section 8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.REP. NO. 80-105, pt. 2, pp. 23-24 (1947). Thus, Section 8(c) authorizes "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, ... if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Further, the ALJ correctly found that the coupon expressed no ideological message; and, thus, the Charging Party's arguments should be rejected.

Moreover, the employees at all times were permitted to express their viewpoints about the Union and their terms and conditions of employment. In fact, each employee who testified on behalf of Charging Party listed numerous examples of how they participated in protected

Section 7 activity without reprisal. The distribution of the flyers was thus in no way compelled speech or was discriminatory. The ALJ's Decision on this issue should be affirmed.

III. The Charging Party's Request For A Change In The Order Is Without Merit.

Finally, Charging Party argues that the remedy is inadequate. The Union contends (1) corporate wide posting is necessary if the coupon is deemed to be unlawful; (2) the remedy should be read at Union huddles; (3) the remedy should use the term "never" rather than "not;" and (4) the notice should delete the reference to refraining from union activities.

The Board should reject each argument. First, the ALJ specifically rejected the issuance of a corporate wide posting and rejected the argument that reading the Notice was necessary at Fresh & Easy huddles. The alleged violations related to only one store, i.e., the Eagle Rock store, and there is no evidence that reading the posting is necessary to remedy the alleged violations. The Union presents no new argument or authority in support of its contention that these remedies should be altered. Similarly, the Board should reject the Charging Party's suggestion that the term "not" be changed to "never." The Board need not engage in such trivial semantics, and there is no authority for it doing so. Finally, the Notice's statement that federal law gives employees the right to "choose not to engage in any of these protected activities" is completely consistent with federal authority. To delete this statement would create a misimpression amongst employees.

CONCLUSION

For all of the foregoing reasons, Fresh & Easy respectfully requests that the Board affirm the ALJ's Decision on the issues raised by Charging Party's exceptions.

Respectfully submitted,

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Dated: December 20, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2011, I caused copies of the **RESPONDENT'S ANSWERING BRIEF TO THE UNION'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** to be served upon the following by the NLRB's e-filing system:

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I hereby certify that on December 20, 2011, I emailed the foregoing **RESPONDENT'S ANSWERING BRIEF TO THE UNION'S EXCEPTION TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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