

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ALBERTSON’S, LLC

and

Case 28-CA-023387

YVONNE MARTINEZ, an Individual

and

Case 28-CA-023538

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1564**

ACTING GENERAL COUNSEL’S REPLY BRIEF

Pursuant to Section 102.46(h) of the Board’s Rules and Regulations, Counsel for the Acting General Counsel (General Counsel) files this Reply Brief to Respondent’s Answering Brief to General Counsel’s Exceptions to the Decision (ALJD) of Administrative Law Judge William L. Schmidt (ALJ) in the captioned case. In its Answering Brief, Respondent makes disingenuous assertions about the General Counsel’s representations in its Brief in Support of Exceptions (RAB 2, 3), and overstates certain aspects of the ALJ’s decision.¹ Contrary to Respondent’s assertions, the facts and arguments in the General Counsel’s brief are supported by the record and Board law. The facts have not been distorted in an effort to mislead the Board or to shed the General Counsel’s arguments in a more favorable light.

I. Argument

A. **Respondent Inaccurately Asserts that the General Counsel Distorts Facts.**

In footnote 1 of its Answering Brief, Respondent cites one page of the transcript to support its proposition that there were practical differences between the concept of a “picnic”

¹ RAB ___ refers to Respondent’s Answering Brief followed by the page number. General Counsel’s exhibits are shown as GCX. Transcript references are (Tr.___). ALJD__ refers to JD(SF)-25-12 issued by the ALJ on May 24, 2012.

and “stepping out for service.”² (RAB 2) The ALJ properly made a factual finding that employees often chat during intervals between customers, a conclusion supported by testimony from numerous witnesses. (ALJD at 23:39 – 42) As cited in the General Counsel’s briefs, the practice of stepping out was conducive to the employees’ Union organizing efforts because they talked about their organizing efforts when they stepped out. (Tr. 567, 774 – 776, 778, 700 – 03, 1000)

While Respondent contends that the General Counsel’s argument “distorts the record with respect to timing, nature and object” of Store Director Don Merritt (Merritt) disrupting employee conversations, Respondent does not dispute the truth of the General Counsel’s assertion that Merritt never engaged in a practice of breaking up picnics at Store 917 until 2011. (RAB 2) Respondent, therefore, concedes that Merritt saw “picnics” at Store 917 since he arrived in January 2010, yet waited to disrupt employee conversations until *after* a supervisor saw Cashier Talie Perea and other employees pass out union cards at the front end. (GCX 30)

The evidence pertaining to Merritt’s conduct flouts Respondent’s argument that the General Counsel has distorted these facts. Merritt’s own e-mails indicate that he panicked when employees passed out cards in the store despite the disappearance of the Union agents from the store parking lot. Merritt had been closely tracking the presence of the Union agents and their efforts to speak with employees; this is evident in his e-mail reports to corporate management. (GCX 25, 30, 40) Andablo, who was instructed by Merritt to break up “picnics,” knew union organizers were in the parking lot through employee reports to her during March and April 2011. (Tr. 536 - 38) Eight days after Merritt reported the

² Respondent’s attempt to confuse the terms “picnic” and “stepping out” is pure obfuscation. (RAB 2 fn. 1) Merritt admitted that there was no such distinction, as he told Customer Service Manager Cindy Andablo to “break up the picnics and keep everyone at their registers from stepping out.” (Tr. 351-52)

disappearance of the Union agents from the parking lot, he sent an e-mail notifying management that employees were now passing out cards inside the store, indicative that Merritt perceived Perea's unionization efforts as a detriment to the company, particularly since the Union agents had since soliciting employees in the parking lot. (GCX 25, 30)

Perea's testimony further supports the General Counsel's assertion that Merritt's conduct was an immediate response to her organizing efforts in April 2011. During cross examination Perea confirmed her initial testimony that Merritt ended a meeting, wherein she had complained to him about how Andablo treated her regarding shift coverage, by telling her that the "no talking" directive came from him (Tr. 815); the fact that Merritt had singled her out, is shown in the following portion of the transcript:

Q And the only thing you complained to Don about was how she treated you on those days when you were covering. Right?

A Right. And then at the end of that conversation, he told me about talking rule down on the front end, that it came from him. Obviously somebody must have told him that I had an issue with it. That wasn't even brought up [by me].

(Tr. 904)

Moreover, the fact that Respondent failed to cite a single page in the transcript to support its proposition that the practice of breaking up picnics preexisted the organizing drive at Store 917 reveals that the argument lacks any factual underpinning. Instead, a close review of pages 531 – 532 of the transcript support the General Counsel's assertion that Merritt's conduct occurred in May 2011, as Perea testified. When called as a witness by the General Counsel, on August 28, 2011, Merritt explained he had a recent problem with employees talking on the front end of the store; more revealing, he described it as an issue pertaining strictly to the front end of the store, defining "picnics" as being a group of employees at a register. This is evidenced by the following portion of the transcript:

Q Okay. So you *recently* had an issue with something that you termed as picnics on the front end of the store, is that right?

A Yes.

Q Okay. And picnics are something that you call a group of multiple associates hanging out at the front of the store?

A *At a register.*

Q At a register. Okay. So, well, you describe to us – and what is a picnic, Don?

A *That's a term I use, call breaking up the picnic when I have a -- every now and then you have a group of associates all at one register and they're in an area where the customers can't find them.*

(Tr. 351, emphasis added)

The timing of Merritt's "no talking" rule is further supported by Perea's testimony describing that Merritt's intolerance for employee conversations came after she complained to him about her work schedule in May 2011. Answering cross examination questions pertaining to her meeting with Merritt, Perea explained that Merritt and other local management had previously tolerated employee discussions on the front end. (Tr. 906)

When asked if she had been disciplined for talking to others, Perea testified:

A No. I just –we would get told that if we were stepping up to queue, [and] be far from our register, get back to your register [and] stand in front of your register, I mean, whereas before w (sic) were never told that. It wasn't an issue if we walked two feet, ten feet away from our registers.

(Tr. 906; Perea)

Merritt's testimony further supports the General Counsel's position that he enforced the rule against Perea for the purpose of stopping her conversations. In his preliminary testimony, Merritt described breaking up one picnic, where Perea spoke with employees, testifying as follows:

Q Yes. Okay. And about how many picnics have you broken up?

A In the last month or two or overall?

Q In the last month or two.

A I did one awhile back.

Q Okay. And did you break up a picnic with Talie Perea?

A She was there.

...

Q Okay. And so you decided you would break this up and that way they could go back to their registers and stop talking, right?

A Yes.

(Tr. 352-53; Merritt)

Moreover, in addition to stopping employees from talking to one another at the front end, Respondent hosted the employee barbeque in May 2011. Both actions constituted part of Respondent's plan to quash employee organizing efforts, which was reinforced by the anti-union meeting held in April 2011, and Danny Ma's unlawful solicitation of employee grievances. Contrary to Respondent's argument that the ALJ considered the timing of the barbeque, a close reading of the ALJ decision clearly shows the opposite. The ALJ did not assess the timing of the barbeque in relation to employees' renewed efforts to organize (GCX 30). Even so, it is clear that Merritt responded to this renewed Union activity by stopping employees from gathering to talk at the front end and hosting the barbeque, all in violation of Section 8(a)(1) of the Act.

B. Respondent Overstates Facts and Law Trying to Exempt Itself From Failing to Give *Johnnie's Poultry* Assurances to Sebastian Martinez

Respondent's argument that the ALJ found attorney Glenn Beard (Beard) and in-house counsel Danny Ma (Ma) excused from their obligation to review the *Johnnie's Poultry* assurance during the September and November 2011 interviews with Sebastian Martinez (S. Martinez) rests on facts that are not dispositive to the analysis. Footnote 2 of the Respondent's Answering Brief is an overstatement of the ALJ's decision. (RAB 13) The ALJ did not make a finding that unusual and special circumstances exist in this case.

The Board generally adheres to a strict application of *Johnnie's Poultry* safeguards unless the employer proves "unusual and special circumstances" exist. *Le Bus*, 324 NLRB 588 (1997). In *Honda of Hayward*, 307 NLRB 340, 350 (1992), the Board found an "unusual setting" where an employee was called to the office and told to tell the truth in court. Unlike that case, here, Respondent failed to prove the exception exists. Because Respondent held a series of interviews with S. Martinez from May through November 2011, and reviewed substantive matters with him, it failed to establish an "unusual setting."

Furthermore, the six factors Respondent offers to support its argument that the Board should affirm the ALJ's dismissal are unconvincing. (RAB 13) The second and third factors presume that all four interviews were similar and close in time so as to excuse Respondent's obligation to review the assurances with S. Martinez. The fact that four months had passed between the second and third interview significantly undermines Respondent's argument; similarly, the November interview was held six months after the second interview, so that Beard was required to again review the assurances. While Respondent argues the September and November interviews were "refresher courses," it concedes that the subject matter of the November interview differed from that of all prior interviews, making its third argument (that the meetings were all "refresher courses") contradictory and pointless.

By asking S. Martinez questions pertaining to the Union organizer, Beard entered a subject pertaining to the heart of employee Section 7 rights. The questions Beard asked S. Martinez about the Union organizer are similar to the questions the defense attorney asked the employee in *Avondale Indus., Inc.*, 329 NLRB 1064 (1999), where the Board held the employer violated the Act by failing to review the *Johnnie's Poultry* assurances with the interviewee. As the attorney in *Avondale* violated the Act, so did Beard; he asked S.

Martinez questions about the Union organizer soliciting employees, which implicated his section 7 rights, and the rights of other employees. This is true regardless of whether S. Martinez was involved in the solicitation, or agreed with the solicitation. In reversing the administrative law judge, the Board in *Avondale* held the following:

The judge noted that the Respondent's attorney did not give Arabie the *Johnnie's Poultry* notice and assurances before questioning him, but he found no safeguards were required because the attorney did not ask about Arabie's union or protected concerted activities or the protected concerted activities of other employees. We disagree. Clearly, the Respondent's questions about the distribution of union election campaign propaganda among the Respondent's employees involved those employees' protected concerted activities, regardless of whether there was any implication that Arabie himself was engaged in distribution, or that the Respondent believed he was. *Id.* at 1064.

Unlike what Respondent argues in the first and sixth factors of its brief, S. Martinez's identity as a company ally, and his subjective state of mind, are not grounds for proving that an exception to reviewing the *Johnnie's Poultry* assurances exist. Respondent's proposition entirely ignores the holding in *Le Bus* where the Board found that an employee's identity as a company ally will not excuse the employer from its obligations to secure voluntary participation. *Le Bus*, 324 NLRB 588 (1997) As previously argued in the General Counsel's briefs, it is well settled that the employee's state of mind is not dispositive in finding a violation. *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995), citing *American Freightways Corp.*, 124 NLRB 146, 147 (1959) (holding the employees' subjective understanding of a patently coercive interview is irrelevant).

Finally, Respondent also overstates the record to support factors four and five of its argument. It is disingenuous for Respondent to argue that S. Martinez "voluntarily and repeatedly agreed" to testify for Respondent in light of other testimony that he participated against his will, a fact which the ALJ overlooked in his analysis. (Tr. 1179) Respondent

cites page 1291 of the transcript for the proposition that S. Martinez understood throughout all of the interviews and encounters with Merritt that there would be no reprisals (RAB 13); a reading of this page, however, serves to establish that S. Martinez's participation was clearly involuntary because Respondent ignored his desires to refrain from participating. This is evidenced by the following testimony:

Q When you had the later meetings with the attorneys at the law office, did you still understand that you could refuse to talk to them, that there would be no adverse consequences?

A I thought that was still a policy. That's why I explained to our store director, Don Merritt, that I didn't want to proceed with that, because I needed to be at the store.

(Tr. 1219; Sebastian Martinez)

Next, the cases cited by Respondent are factually distinct to this case, and not dispositive to the issues at hand. Respondent begins its legal argument on this topic by omitting language that was operative to the dismissal of the *Johnnie's Poultry* allegations in *Delta Gas, Inc.*, 282 NLRB 1315, 1325 (1987). In that case, the administrative law judge dismissed the allegation finding “**the interview covers only work performance and** does not touch on any protected activities, the *Johnny's Poultry* rule does not apply.” *Id.* at 1325. (emphasis added) Respondent omitted that the ALJ dismissed the allegation because the topic of the interview only related to work performance, whereas, here, in the September and November interviews, Ma's and Beard's questions exceeded work performance topics. In the September interview, Ma and Beard asked questions about Respondent's April 2011 anti-union meetings, and in the November meeting Beard asked questions about a Union organizer in Store 917, a subject never previously reviewed with S. Martinez.

Interviews held by employers in an environment hostile towards the union can violate the Act, even if the employer did not ask employees questions pertaining to employee

Section 7 rights under the “totality of circumstances” test. The Board, in *Observer & Eccentric Newspapers, Inc.*, 340 NLRB 124 (2003) aff’d *Observer & Eccentric Newspapers, Inc. v. NLRB*, 136 Fed. Appx. 720 (2005), adopted a totality of circumstances test, evaluating factors such as, the employer’s prior hostility toward the collective efforts of its employees, the questioner’s identities within the company, and the information sought. See also *Wisconsin Porcelain, Co.*, 349 NLRB 151, 153 fn 11 (2007); *In re EPI Constr.*, 336 NLRB 234, 241 (2001) (applying a totality of circumstance test the Board found a violation without deciding if the *Johnnie’s Poultry* assurances applied).

Here, a consideration of all the circumstances required Respondent to review the *Johnnie’s Poultry* assurances with S. Martinez during the September 2011 interview, and again during the November 2011, something Beard admits not having done. In September 2011, Merritt’s aggressive instructions that S. Martinez report to the defense attorney’s law office in downtown Albuquerque set the tone that Respondent disregarded S. Martinez’s decision to rescind his participation in Respondent’s defense. *Palagonia Bakery Co., Inc.*, 339 NLRB 515, 526 - 527 (2003) (absent exceptions, Board adopts ALJ’s finding of a violation, notwithstanding the fact an attorney provided *Johnnie’s Poultry* assurances, because prior to that a supervisor told employees that they had to testify, without any qualification) Compelling S. Martinez to attend an interview at a place, such as Respondent’s attorney’s law office, would tend to inhibit him from exercising his right to freely rescind his participation. Such is certainly the case here, where S. Martinez went to the offices despite having told Merritt he wanted to stay at the store. When S. Martinez arrived at the law offices, the interview was conducted by Respondent’s highest ranking labor relations official, Danny Ma, who had overtly exhibited animus towards the employees’

organizing efforts. *Automotive Warehouse Distrib., Inc.*, 171 NLRB 683 (1968) (recognizing the presence of management suggests coercion). Given that Ma asked about his own words at the anti-union meetings in April 2011, it would be reasonable for S. Martinez to conclude that Respondent expected certain answers, particularly when Ma disregarded S. Martinez's desire to return to the store prior to the start of the interview. The place of the November 2011 interview, the questions about the Union organizer's solicitation inside Store 917, and Beard's involvement, absent any assurances, also violated the Act. It was also not clear to S. Martinez that his participation in the November 2011 interview was strictly voluntary because Beard did not review the assurances with him, and was involved in the prior interview where S. Martinez's attempt to rescind his participation was utterly rejected.

II. Conclusion

Respondent's Answering Brief to General Counsel's Exceptions, as discussed above and in the General Counsel Brief in Support of Exceptions, lacks merit and is not supported by the facts or the law. It is respectfully submitted that the Board grant the General Counsel's exceptions, and otherwise affirm the decision of the ALJ.

Dated at Albuquerque, New Mexico this 19th day of July 2012.

/s/ Sophia J. Alonso

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in ALBERTSON'S, LLC, Cases 28-CA-023387 et al. was served by E-Gov, E-Filing, E-Mail, and overnight delivery service on this 19th day of July 2012, on the following:

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