

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**BOB'S DISCOUNT FURNITURE OF
NEW YORK, LLC**

and

**Case Nos. 29-CA-070362
29-CA-072325
29-CA-074994**

**LOCAL 888, UNITED FOODS &
COMMERCIAL WORKERS
INTERNATIONAL UNION**

*Emily Cabrera, Esq. and David
Stolzberg, Esq., Counsel for the
General Counsel
Steven H. Kern, Esq., Counsel for
the Union
Thomas R. Gibbons, Esq., Counsel for
the Respondent*

DECISION

Raymond P. Green, Administrative Law Judge. I heard this case in Brooklyn, New York on June 25, 26 and 27, 2012. The charges and amended charges were filed on December 6 and 8, 2011 and January 11, 12, February 21, 23, and March 29 and 30, 2012. On April 25, 2012, the Regional Director issued a Consolidated Complaint that alleged as follows:

1. That in connection with an organizing drive commencing in August or September 2011, the Union filed petitions for elections at six of the Respondent's stores on October 3, 11 and 17, 2011.

2. That the elections at these stores were held on November 14, 21 and December 9, 2011, pursuant to which the Union was certified as the representative of sales associates at the Respondent's stores located in Freeport, Glendale, Farmingdale and North Plainfield. The Certification dates respectively were November 25, December 2 and December 19, 2011. The Union was not certified at the Nanuet store.

3. That in or about October, 2011, the Respondent by its Sales Manager, Rajandra Sirgjoo, a/k/a Kevin, at the Glendale facility, (a) interrogated employees about their union sympathies and (b) created the impression that the employees' union activities were under surveillance.

4. That in or about September or October 2011, the Respondent by Keith Green, its General Manager at its Glendale store, (a) interrogated employees about their union sympathies and (b) created that impression that the employees' union activities were under surveillance.

5. That on or about October 23, 2011, the Respondent, for discriminatory reasons, changed its commission policy relating to the sale of a program called "Goof Proof Insurance"

by increasing the commission for the sale of such insurance for all sales representatives at its stores other than the stores where the Union was certified.

5 6. That on or about November 14, 2011, the Respondent by Keith Green, at the Glendale store, (a) interrogated employees about their union sympathies and (b) threatened employees with unspecified reprisal including more stringent application of its rules and discipline.

10 7. That in early November, 2011, the Respondent by Keith Green and Beny Fin, a Sales Manager, at the Glendale store, interrogated employees about their union sympathies.

15 8. That on or about November 17, the Respondent by Rajandra Sirgjo and Benny Fin, at the Glendale store, for discriminatory reasons, (a) promulgated and enforced a rule requiring unit employees to clock in and out and inform a manager each time they left the facility; and (b) promulgated a rule prohibiting unit employees from using cell phones on the sales floor.

9. That the above rules were promulgated unilaterally and without notice to the Union.

20 10. That in furtherance of the rules described above, and for discriminatory reasons, the Respondent suspended Adam Jackson on November 26, 2011 and discharged him on December 1, 2011.

25 11. That notwithstanding the Union request to bargain, the Respondent, since November 28 and December 8, 2011, has refused to discuss the suspension and discharge of Jackson in violation of Section 8(a)(5) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

30 **Findings and Conclusions**

I. Jurisdiction

35 There is no dispute and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The alleged unfair labor practices

40 **(a) The Goof Proof Commission Change**

45 The Respondent is a retail furniture enterprise with 42 stores in the Eastern United States. The stores involved in the present case are all within its New York Region. The Glendale store has about 45 sales employees and about 20 other employees. This store was opened in 2010 and the initial store manager was a person named Nussbaum. In or about September 2011, he and the bookkeeper were transferred and the new interim store manager was Keith Green. Under him were two sales managers, Beni Fin and Rajandra Sirgjo, also known as Kevin. The store also has an office manager. Cindy Beauchard is the New York region Human Resource Director and Bob Dawley is the Vice President of Human Resources.

50 Sales employees of the Company are essentially paid on a commission basis. As explained more fully below, although they have a nominal hourly pay rate of pay \$12, it would

be extremely unusual for an employee to actually be paid at that rate. Indeed, the testimony reveals that sales employees, at least at the Glendale store, typically have earnings far in excess of \$12 per hour.

5 The sales employees receive commissions on three items. One is based on the cost of the furniture sold. The second is a commission on the delivery charge. And the third is a commission on a kind of furniture insurance that is called “Goof Proof.” The commission rates are determined by the Company’s central office and except as described herein, are uniform at all of its stores.

10 In 2010, the Company decided to change its commission rate for sales of Goof Proof insurance, which had previously been at the single rate of 20%. Instead, it decided to have a three tiered system whereby commissions for the sales of “Goof Proof” were given at the rates of 20% to 15% to 10% depending on the amount of sales for this product. Thus, an employee
15 who was in the top category of sales got a 20% commission on monthly sales, whereas an employee in the lower categories got either a 15% or a 10% commission on monthly sales.

20 In the spring or summer of 2011, according to Dawley, the Company decided to change the system for determining the commission rates for the sale of Goof Proof insurance. This change was finalized in October 2011. Under the new system, the three tiered system was changed to a two tiered system and although the commission rate for the top remained at 20% the commission rate for the bottom was raised to 15%. The upshot of this was that at least
25 some of the sales employees would earn more money because the lowest group who had previously gotten only a 10% commission would now be getting a 15% commission.

30 By letter dated October 23, 2011, (after the petitions in these cases were filed), (but after some Connecticut stores had been unionized via Board elections), the Respondent issued a memorandum to the store managers at those of its stores which were either unionized or where election petitions had been filed. This stated *inter alia*,

35 If your store has voted for union representation or if your store has an upcoming election... it is extremely important that you as a manager do not put yourself in a situation that compromises either yourself or the company. As a manager, you want to provide all of the information possible to your associate’s. However, making statements that appear as promises or threats is strictly prohibited. If
40 your store has not yet had the election, doing so could result in the union petitioning the NLRB to void the election and mandate the union in place with no vote. If your store has already had the election, you could have to answer an unfair labor practice charge at the NLRB.

45 This weekend, we are making a change in the goof commission structure in 33 of our 42 stores. We are prohibited by law from doing so in the other 9 stores. You as manager of a petitioned or unionized store will undoubtedly be asked about this. Almost all of the questions can be answered simply by the following
50 statement; “I understand your disappointment, however, we are legally prohibited from making any change.” ...

55 One question you may get, (especially in the stores with pending elections) is; “Will we get this too if we vote down the Union?” The correct response to that question is also; “We are legally prohibited from making any change, and we legally cannot make promises either.” There can be absolutely no hint, or
60 promise that if the five petitioned stores vote no that they will then get this. Such

a promise or hint could allow the union in without an election even if we win at the poll.

5 If someone in the four union represented stores asks if they will get the same deal in negotiations or if in negotiations they will be receiving the payment retroactively, etc. the correct response is; “No one knows what will or what will not be negotiated.”

10 Finally, if you don’t know what the answer is, the best response is; “That is a very good question, let me find out the answer and get back to you.” Then partner with their Regional or Bob Dawley in Human Resources...

15 The upshot was that the change in the Goof Proof insurance commission rates were changed uniformly throughout the Company’s stores, *except* for those stores where a union had recently won an election or where elections were pending. Since the change provided at least some sales employees with an effective increase in pay, the General Counsel argues that failure to put this change into effect at the other stores was a discriminatory withholding of a benefit to employees who worked at stores where employees were seeking unionization. I agree.

20 It is unlawful for an employer to either grant or withhold employee benefits if the decision to do so is motivated by its employees’ union activity. Further, even in the absence of direct evidence of illegal motivation, an employer, during the period between the filing of an election petition and the holding of an election, may be precluded from changing the status quo ante with respect to wages, benefits and other terms and conditions of employment. This means that a company can neither grant new benefits to its employees nor withhold benefits that its employees would otherwise have received. Thus, in *NLRB v. Aluminum Casting & Engraving Co.*, 230 F.3d 286, (7th Cir. 2000), the Court affirmed the Board’s finding that an employer violated the act by failing to give annual across-the-board increases during an organizational campaign.

30 In *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000), a Board majority held that an employer violated Section 8(a)(1) & (3) by withholding health benefits only at the store involved in an election during the critical period preceding that election. Citing *Llampi, LLC*, 322 NLRB 502 (1996) and quoting from *United Airlines, Services Corp.*, 290 NLRB 954 (1988), the Board stated:

40 It is well established that the mere grant of benefits during the critical period is not, per se, grounds for setting aside an election. Rather, the critical inquiry is whether the benefits were granted for the purpose of influencing the employees’ vote in the election and were of a type reasonably calculated to have that effect. As a general rule, an employer’s legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election for the timing of the grant or announcement of such benefits.

50 In *Noah’s Bay Area Bagels*, the Board went on to say that although an employer is not allowed to inform employees that it is withholding benefits because of a pending election, “it may, in order to avoid creating the appearance of interfering with the election, tell employees

that implementation of expected benefits will be *deferred* until after the election – regardless of the outcome.” The Board further concluded that:

5 [T]he respondent unlawfully withheld restoration of the Prudential plan at the Telegraph store while at the same time lawfully restoring it at all of its other stores, without providing the Telegraph store employees with assurances that the withholding of the Prudential plan at that store was only temporary and that it would be restored retroactively to them following the election, regardless of its outcome.

10 We also do not agree with our colleague that if the Respondent had restored the Prudential plan to the Telegraph store at the same time it was restoring it to all of other locations it would have run afoul of precedent holding that it is unlawful for an employer to grant benefits while an election is pending unless the employer can establish that the benefit had been planned prior to the union’s arrival on the scene, or that the grant of the benefit was part of an established past practice.

15 In my opinion, the Respondent would have a valid point if the change in the commission rates was consistent with a past practice whereby the determination of the commission rates was made on an individual store basis. But that is not the case here. The evidence shows that the Goof Proof rates have been centrally determined by the Company and have been uniformly applied to all of its stores. Thus, in the absence of the Union’s election petition having been filed, the employees at these stores would also have been the beneficiaries of the change.

20 In my opinion, the Respondent would have a valid point if the change in the commission rates was consistent with a past practice whereby the determination of the commission rates was made on an individual store basis. But that is not the case here. The evidence shows that the Goof Proof rates have been centrally determined by the Company and have been uniformly applied to all of its stores. Thus, in the absence of the Union’s election petition having been filed, the employees at these stores would also have been the beneficiaries of the change.

25 The Respondent relies on *Shell Oil Co.*, 77 NLRB 1306, 1309, (1948) and later cases where the Board has stated that an employer is not required to afford represented and unrepresented employees the same wages and benefits unless it has been shown by the General Counsel that the withheld wage or benefit was discriminatorily motivated. But in *Arc Bridges, Inc.*, 355 NLRB 1222, 1223-1224 (2010), the Board found that an employer violated the Act when it withheld annual wage reviews and increases from newly unionized employees while continuing them for nonunion employees at the same facility because it was shown that this benefit was an established condition of employee for both sets of employees. In distinguishing *Arc Bridges* from *Shell Oil Co.*, the Board stated:

30 By contrast, where an employer withholds from its represented employees an existing benefit (i.e. an established condition of employment), the proper analytical framework is found in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In those circumstances, the Board will find that the unilateral withholding of an established condition of employment from only the represented employees is “inherently destructive” of their Section 7 rights, even absent proof of antiunion motivation... The key question, is therefore, whether the June-July wage review process was, as the judge found, an established condition of employment for all of the Respondent’s employees, including those represented by the Union.

35 By contrast, where an employer withholds from its represented employees an existing benefit (i.e. an established condition of employment), the proper analytical framework is found in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In those circumstances, the Board will find that the unilateral withholding of an established condition of employment from only the represented employees is “inherently destructive” of their Section 7 rights, even absent proof of antiunion motivation... The key question, is therefore, whether the June-July wage review process was, as the judge found, an established condition of employment for all of the Respondent’s employees, including those represented by the Union.

40 In view of the foregoing, it is my opinion that by withholding the commission rate change from the sales employees of those stores where election petitions were pending, the Respondent has violated Section 8(a)(1) & (3) of the Act.

45 In view of the foregoing, it is my opinion that by withholding the commission rate change from the sales employees of those stores where election petitions were pending, the Respondent has violated Section 8(a)(1) & (3) of the Act.

50

(b) The discharge of Adam Jackson

Apart from the commission change, the other main allegation in this case involves the alleged discriminatory discharge of Adam Jackson.

5

The General Counsel contends that Jackson was suspended and thereafter discharged because the Respondent sought to retaliate against employees for selecting the Union as their bargaining representative. The election which the Union won, took place on November 14, 2012 and Jackson was suspended on November 26, 2012, ostensibly for violating a company rule requiring employees to clock out when they leave the store to go on breaks. The General Counsel contends that no other employee had previously been disciplined for violating this rule and therefore the timing of this action could only have been motivated by the fact that the employees had chosen to be represented by the Union. Alternatively, the General Counsel contends that the Respondent promulgated this rule on November 17, 2012 for discriminatory reasons and therefore its application to Jackson was a violation of the Act even if the Respondent did not pick on Jackson because of his particular union activities, which by the way, were minimal.

The Respondent showed that the rule in question was in place even before the store was even opened. It contends that the employees had been reminded of this rule even before the Union filed any petitions for elections. Moreover, the Respondent asserts that Jackson had a checkered history of disciplinary warnings, including a past warning about this very rule. There is no dispute that on November 19, 2011, Jackson and another employee left the store for a lunch break; that they both were away for at least an hour and that Jackson had failed to clock out for the break. The Company explains that Jackson was suspended and ultimately fired because of this infraction in light of his past record, whereas the other employee, Bessim Sehou, received a lesser discipline because although he overextended his break, he did not fail to punch out and did not have the same record of past warnings.

The Union's organizational campaign began in September 2011 and was directed at a number of the Respondent's stores located in the greater New York metropolitan area.

Petitions were filed at the Freeport and Glendale stores on October 3. Petitions were filed at the Farmingdale and Nanuet stores on October 11. And a petition was filed at the North Plainfield, New Jersey store on October 17. Elections were respectively held on November 14 and 21 and on December 9, 2011. Of these, the Union was certified as the bargaining representative at Freeport and Glendale on November 25 and Farmingdale and North Plainfield respectively on December 2 and December 19. The Respondent won the election at the Nanuet store. Since the certifications, the parties have been engaged in bargaining and there is no contention that the Respondent is bargaining in bad faith.

Jackson signed a card for the Union and attended some union meetings. Otherwise, he was not involved as an employee organizer and as discussed below, was insistent when speaking to managers that he was "in the middle" as far as the Union was concerned. Union agent Ajay Borzoni testified that he didn't recall Jackson being active in the Union's organizing campaign.

Jackson was hired in 2010 at the Glendale store before it opened. During his employment, he received a number of warnings prior to his discharge. On December 12, 2010, he received a verbal warning for incorrectly writing up an order. On February 5, 2011, he received a written warning for making a mistake on another order. On February 14, 2011, he received a written warning for yelling on the sales floor. On October 3, 2011, (the day the

election petition was filed), he received a final warning for making a mistake regarding a delivery fee.¹ On October 24, 2011 Jackson, although *not* receiving a warning, was spoken to by Keith Green and Sam Vardanian about punching in and out. A log entry made by “Sam V” dated October 24, 2011, states: “He continues to miss punches regularly. He was given examples
5 from the past 30 days, he had 8 missed punches. He understands that he must punch in and out regularly. As per conversation with Cindy B (HR), with this note to file and his final warning for policy and procedures, we can terminate for next policy and procedure issues.”

10 According to Jackson, he attended a union meeting with other employees in October 2011. (As noted, the petition for the Glendale store was filed on October 3, 2011). He testified that a few days after this meeting, store manager Green asked him how the meeting went. Jackson states that he replied that he was impartial about the Union. According to Jackson, when Green asked him how he felt about the union situation, he responded that the employees
15 would not need a union if the Company listened to the employees’ complaints. Jackson testified that he told Green that he was “not 100% for the Union; that he was right in the middle,” and that other employees needed to think before making a final decision. According to Jackson, Green agreed and told Jackson that he should tell his coworkers that they should think before making any final decision. Jackson also testified that during this conversation, Green told him
20 that if the Union got in, the Company was not going to be able to let employees “get away with the stuff you get away with now” and that the Company would have to enforce all the rules instead of letting them slide.

25 According to Jackson, about a week after his conversation with Green, he was approached by Rajandra (Kevin) Sirjoo, a sales manager, who asked him how he was voting. He states that he replied that was in the middle.

30 Jackson reported still another conversation with Sirjoo who asked him if he was on the Union’s side. Jackson testified that Sirjoo said that had been told that Jackson had already made up his mind to which he responded by saying that this was not true

35 Jackson further testified that immediately after the election, (on November 14), Keith Green called him aside and asked him how he voted. According to Jackson, he told Green that he had voted for the Union whereupon Green expressed surprise and stated; “I thought we were cool.” Jackson testified that he said they were still cool and Green responded that they were not cool. According to Jackson, Green told him that he could have fired Jackson a long time ago and that from now on he was not going to let anything slide.

40 Employee Edward Oliveres² testified that about four weeks before the election, at a Sunday staff meeting, Green told employees that the Company was going to monitor lunch breaks more closely and that if the Union came in, management would be “a little stricter.” According to Oliveres, Green told the employees that they would have to make sure that they clocked in and out and that they no longer would be allowed to leave early on a slow day and that their break times were going to be treated like they were supposed to be treated. Oliveres
45 testified that John Grimaldi also spoke at this meeting and stated in substance that bringing in a union was like gambling with your jobs; that it was like rolling the dice and that the employees should remember that the house always wins.

50 ¹ There is no contention that this warning was motivated by any union activity.

² At the time of the hearing, Oliveres was employed by the Respondent.

No other witnesses corroborated Oliveres' testimony regarding this meeting. And as noted above, it is the Company's position that in September 2010, and before the Union filed its election petition, it told employees at this store that it was going to enforce its already existing rules regarding the employees correctly registering their times in the computer system.

5

Althera Green, another sales employee,³ testified that several weeks before the election, she had a meeting with Beni Fin and Keith Green to discuss a work related matter. She testified that the conversation turned somewhat confrontational because she felt that she was being talked down to. According to Althera Green, after the tension subsided, Keith Green asked her what the consensus was about the Union and how she felt that employees would vote. She testified that he said that she didn't have to answer if she didn't want to. She states that she did not answer the question although she did mention that the employees were angry because they were not being taken seriously. According to Althera Green, Keith Green said that the Company couldn't change things if the employees didn't tell them what they wanted. She states that he again asked her how she thought that the employees would vote and that she replied that if he really wanted to know, he should remove himself from management and ask the employees directly.

10

15

20

The Respondent's witnesses deny the above statements that are alleged by Jackson, Oliveres and Althera Green. They also deny the allegation that at a meeting in October, the employees were told that because of the Union, the Company was going to enforce rules that it had not previously enforced.

25

At the time that Jackson and the other initial employees were hired before the Glendale Store was opened, he and the other employees received a three week training course which included a line by line recitation of the Company's Floor Rules. These rules are contained in a binder that was distributed to all of employees during the initial training period. They are also distributed to new employees who were hired after the store opened. Among the rules are the following:

30

The Use of Cell phones is not allowed on the sales floor

All associates are to punch out every time they leave the building unless specified by a Store Manager.

35

The Employer produced evidence that Cindy Beauchard, its regional Human Resource Director, in the summer of 2011, went around to various of the New York stores and noticed that at some, including the one at Glendale, the respective office managers were spending too much time reconciling employee time keeping records because employees were not uniformly entering their arrival and leaving times into the computer system. This therefore required that their time records be changed based on written paperwork filled out by employees when they forgot to "punch" in or out. According to Beauchard, she held a conference call with about 10 store managers in September 2011 and reminded them that they should remind the employees that they were required to punch in and out whenever they left the premises. There are, however, no writings memorializing this conference call. Keith Green and Kevin testified that in September, they reminded employees that they should be clocking in and out, including on lunch breaks. They also testified that they also put copies of the rules in the employees' mail boxes.

40

45

50

³ At the time of the hearing, Althera Green was also employed by the Respondent.

In my opinion, the Company correctly asserts that it promulgated rules regarding the use of cell phones and the requirement that employees punch in and out when they enter or leave the premises, even before the Glendale store was opened.

5 The evidence shows that the “time clock” rule was not really enforced before October 2011 and this is shown by the testimony of Beauchard who states that she had to conduct a conference call with the managers of ten stores to remind them that this should be enforced. There are two questions relating to this matter; (a) did this all take place in September before the election petitions were filed or did it take place in October after the election petitions were
10 filed; and (b) were employees told by management that the enforcement of this rule was because it was a State mandated wage and hour requirement or that it was because of the union’s organizational campaign? Unfortunately for me, there is no contemporaneous documentation by the Company as to exactly when these events occurred and what was said. Correspondingly, there was no corroboration of Oliveres’ testimony regarding the rule
15 enforcement announcement by any other employee who attended the meeting that he says took place in October.⁴

20 The General Counsel produced evidence showing that even though the Glendale store managers, announced that they were going to enforce the time clock rules, the employment records show that up until the election, numerous sales employees failed to clock in or out for lunch breaks and that no one, until Jackson, was ever disciplined for this infraction. In effect, the General Counsel demonstrated that despite the announcement, the status quo actually remained the same with a rule being re-announced to employees but still not being enforced. I am not sure if this helps or hurts the General Counsel’s case.

25 As noted above, the election was held on November 14 and the Union was certified on November 24, 2011. The Company’s witnesses testified that immediately after the election, they got together and expressed their disappointment to each other. It therefore seems to me that Jackson’s testimony about his post election conversation with Keith Green is plausible and
30 credible. As noted above, he testified that he told Green that he had voted for the Union whereupon Green expressed surprise and stated: “I thought we were cool.”

35 On the evening of November 19, 2011, Jackson who works on the evening shift, and another employee named Bessim Sehou, left the store at around 8:30 p.m. for a meal break. Whereas the other employee did punch out, Jackson failed to do so. Instead of taking the allotted time, they extended their break to more than hour and returned to the store shortly before closing time. Upon his return, Kevin Sirjoo asked Jackson why he was out so long and Jackson essentially ignored him by stating that he didn’t know. He then told Sirjoo that he wanted to leave and that he was told; “Sure you can go home.”

40 Probably on the following day, November 20, 2011, Kevin Sirjoo reported this incident to Keith Green who in turn called Beauchard. Keith Green recommended that Jackson be terminated and Beauchard asked that he send a memo.

45 On November 21, 2011, Keith Green e-mailed a memo that described the incident as it was related to him by Sirjoo. This stated *inter alia*, that Jackson and other store employees had been told on numerous occasions to punch in and out when they left the store. In this

50 ⁴ The first documentation that was made regarding the alleged September 2011 meeting where the rules were allegedly reiterated, is contained in memoranda written by employer witnesses in late November in relation to the Jackson termination.

regard, Green related a number of recent meetings, including a meeting on September 16, where he reminded employees of these rules. The memorandum also cites a meeting that he had with Jackson on October 24 wherein he reminded Jackson of the rule.

5 On November 22, 2011, Beauchard sent an e-mail to Bob Dawley which stated: “Requesting your approval to administer.” From the memo itself, this might imply that a decision to discharge Jackson had already been made or it could mean to simply administer company termination procedures which includes an investigation.

10 In the interim, Jackson was in Virginia on vacation. He was asked to attend a meeting upon his return and according to Jackson, he asked if he needed to have union representation. He states that Green’s response was that “he was sick of people bringing up the union,” and that he “didn’t care about the Union.

15 The meeting took place on November 26 and Jackson was asked by Sirjoo and Green to explain what happened on November 19. Jackson initially stated that he had punched out. However, Jackson soon admitted that he hadn’t punched out but that he thought he had. At the conclusion of the meeting, Jackson was told that he was being suspended until further notice.

20 After the meeting was over, Sirjoo sent a memorandum to Beauchard that stated in part:

25 When questioned about the night Adam said that “he thought he punched out for lunch at 8:34 pm” When I reminded him of asking me to take a 15 minute break that night he said “O yeah I forgot I asked you” and he remembered (all of a sudden) not punching out for lunch. I asked him in front of Keith Green why, when I asked him he was returning from his 15 minute break he did not acknowledge the question I asked him, he explained that he was just joking around with me. Adam at first did not see any wrong in him being clocked in on company time while he was out of the building shopping. Keith Green explained the importance to Adam of using Paychex.⁵

30

Keith Green also wrote a memorandum to Beauchard on November 26 that basically reiterated what was stated by Sirjoo. Neither memorandum, makes any mention of the Union or the election.

35 On November 28, 2011, Beauchard called Jackson in order to get his side of the story. There is no real dispute as what was said in this conversation and her own memorandum dated December 5, is probably an accurate account of the phone call. In that memorandum she states that she would review his concerns and follow up with him on Wednesday. Beauchard states that Jackson claimed that he had taken extended breaks in the past without any criticism and claimed that the managers were all of sudden enforcing rules because the employees had voted in the union. In the memorandum, she states that she told Jackson that the New York region managers were told in September before the petitions, to enforce these rules.

40

45 On November 30, 201, Dawley sent an e-mail to Beauchard that stated:

Do we have info on the other guy? It shows in TLO that Adam punched in on 11/19 at 12:31 then went to lunch at 3:56 p.m. but punched back in at 4:01 pm and then out for the day at 9:49 pm. I am waiting for payroll to help me

50

⁵ Paychex is the computer system that is used to record employee hours of work.

because it shows that the record was modified but I don't know why or by who? I am not sure why he would have punched only for 5 minutes unless he went to go to lunch, got a customer and punched back in. If that was the case then he may have been entitled to lunch so we need to dig further.

5

Later that same day, Beauchard responded to Dawley's e-mail in which she stated as follows:

10

The other associate Besim Sehou left and returned the same time as Adam. They went out together. Keith [Green] states in his notes that Adam asked to leave the building on his 15 minute break and Keith informed him he needed to clock out. Adam requested off that week. His usual scheduled days off are Tuesday and Wednesday. Adam should've been paid personal time for 11/21, 11/24 and 11/25. I've confirmed with Keith and they will need to make

15

corrections.

Also on November 30, 2011, Dawley by e-mail to Beauchard asked her if she had the disciplines in the file and if she was ready to discuss this.

20

Either on November 30 or December 1, 2011, Beauchard telephoned Jackson and told him that he was discharged.

25

One argument made by the General Counsel and the Charging Party is that the infraction of not punching in or out is not consequential and therefore not meriting a discharge because the sales employees are essentially paid on a commission basis and therefore their actual hours of work are irrelevant to how much money the Company pays them.

30

The store's sales employees are paid on a draw against a commission basis. That is, the standard draw is set at \$12 per hour and the employees get paid each week by calculating the number of hours worked times that rate. If an employee works 40 hours, his or her draw would therefore be 40 times 12 or \$480.00 per week. However, the real rate of pay, except for vacations and allowed sick days, is based solely on commissions. In this regard, employees get commissions on a percentage of (a) the price of goods sold, (b) the price of delivery and (c) the price of a repair service policy that is called "Goof Proof" insurance. Accordingly, at the end of

each month, the total amount of each employee's commissions from all three sources are totaled and compared to the weekly draw that had been received. If the commissions are higher than the draw, the employee gets the difference. In the rare and perhaps hypothetical instance where the total commissions are less than the draw, then the difference is added to the employee's draw for the next month. This effectively would mean that the employee would owe the difference to the employer. According to all the witnesses, the latter situation almost never occurs and they all seem to agree that the Glendale store is pretty busy. Dawley testified that the sales employees average around \$40,000 per year.

35

40

45

Because the actual earnings of the sales employees are based almost completely on commissions, their actual work time at the store is not relevant in terms of their pay. That is, whether they work 30, 40 or 50 hours per week, this is not going to change their earnings as these are based on commissions. However, Dawley testified that the reason they are required to clock in and out is that this is mandated by New York and also because it is necessary for the

50

store's management to know where his employees are and not have a situation where customers come in and there is no one present to take care of them.⁶

5 The Company utilizes a computer based system whereby employees can enter when they come in and leave the store. In the event that an employee forgets to “punch” in, he or she can enter the time, on a sheet of paper that is kept at the premises and which is used by the bookkeeper to enter the corrected times for any employee who forgot to punch in or out. The employees are entitled to a lunch break of 30 minutes and another 15 minute break during their work shift. In this regard, there was testimony that some employees eat in the store while others go out to eat and may take more than 30 minutes. The evidence suggests that despite the instructions in the Floor Rules and their reiteration in the Fall of 2011, many employees neglected to punch in and out for lunch and did not receive any kinds of warnings or discipline for this.

15 The Respondent contends that the person who decided to discharge Jackson was Cindy Beauchard and since there was no showing that she had any knowledge of Jackson's union activities, the Respondent cannot be held to have violated the Act. The Respondent asserts that she conducted an independent investigation and made her own decision on objective grounds, based on the facts that Jackson had violated a company rule; had tried to deny that he had done so; and that he had received numerous past disciplinary warnings.

25 On the other hand, if the General Counsel can show that Keith Green's recommendation for Jackson's discharge was motivated by union related reasons, then Beauchard's personal motivation would not be relevant. In *Goldens Foundry & Machine Co.*, 340 NLRB No. 140 (2007), the Board held that unlawful animus and motivation must be imputed to the Human Resource Manager who made the discharge decision because were it not for the fact that the supervisor brought the employee's purported misconduct to his attention, he would not have been discharged.

30 The facts in this case do not convince me that the Respondent created a new rule requiring employees to register their time on the computer system when they took their breaks. However, the record shows that before the incident that occurred on November 19, 2011, no one other than Jackson had ever received a warning or discipline for failing to clock out for lunch or for overextending his or her lunch break. In my opinion this rule was simply not enforced at the Glendale store and the only time it was ever imposed *through a disciplinary action* was a few days after the Union won the election.⁷ Indeed, it does not appear that the rule has been subsequently enforced by way of employee discipline. Instead it looks to me that this was a one off action and that the “rule” was applied only to Jackson and only after the Union won the election.

45 I am going to credit the testimony of the employee witnesses, including Jackson, who testified that they were told by the store's managers that they were going to more strictly enforce company rules because of the union's campaign. Both Althera Green and Edward Oliveres struck me, on demeanor grounds, to be honest witnesses trying to give an accurate account of the events that the testified about. Moreover, at the time of the hearing, they both were

⁶ In its Brief, the Respondent, citing to www.labor.ny.gov, states that inside commissioned sales employees are not exempt from New York's minimum wage and hour law.

50 ⁷ As noted above, the Respondent did offer evidence that on October 23, 2011, Jackson was spoken to by a manager about punching in and out. However, he was not issued a warning on that occasion.

currently employed by the Respondent. I therefore conclude that in respect, the Respondent violated Section 8(a)(1) of the Act by threatening employees with more strict enforcement of rules because of their union activity.

5 It is clear that the precipitating event that caused Jackson's suspension and discharge was his failure to clock out for his break on November 19, 2011. It also is clear that he had a history of past disciplines. The evidence showed that Jackson was not an active union supporter and that not until after the election, did he ever express to management any desire for unionization.

10 However, I am persuaded that the local managers at the Glendale store, in a fit of pique at having just lost the election, recommended Jackson's discharge as way to retaliate for the loss of the election and then picked on the first vulnerable person who presented himself. It is my opinion that they sought to impose sanctions for a rule violation that had never been carried out before. And therefore, as I conclude that the discharge recommendation by Green to
15 Beauchard was tainted by a retaliatory motive, I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act. In this regard, even though the Respondent may have had reason to conclude that Jackson violated an existing company rule, I find that pursuant to the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied
20 455 U.S. 989 (1982), that the Respondent has not met its burden of showing that it would have discharged Jackson for legitimate and nondiscriminatory reasons.

(c) The alleged refusal to bargain over Jackson's discharge

25 The Union was certified as the bargaining agent on November 24 and Jackson was discharged on or about December 1, 2011. As such the duty to bargain was in existence at the time of Jackson's discharge and the Employer was obligated to discuss and bargain about this issue upon the Union's request.

30 As there is no other allegation of bad faith bargaining, I shall assume that after November 24 the Union and the Employer have met on some schedule to bargain for a contract.⁸ The contents of those negotiations were not placed before me and I therefore have no idea what issues were discussed. But I also note that there was nothing to prevent the parties from raising and discussing Jackson's discharge during contract negotiations.

35 Borzoni, the Union's field director, sent a letter dated December 8, 2011 asking the Company to discuss Jackson's discharge. The letter was addressed to a Mrs. Bishard and was sent to the Glendale store where she does not have an office. The evidence is not so clear as to whether this letter was actually forwarded to Cindy Beauchard. If she did receive it, she did not
40 respond and Borzoni made no further efforts to bring up this issue until March 2012 when he sent an e-mail to Bob Dawley. (There is no indication that the Union brought up Jackson's discharge during contract negotiations).

45 Pursuant to a mutually agreed upon date, Borzoni and Dawley had a phone conversation on March 21, 2012. During this call, Borzoni asked for Jackson's reinstatement and Dawley said that he would look into the matter and call him back. Thereafter, Dawley called Borzoni and told him that had looked into the case and that the Company's position was unchanged. There were no further communications between the Company and the Union regarding this issue. In the absence of an agreed upon reinstatement, the Union continued to
50

⁸ Between the Certification and the hearing in this case, the parties had met ten times for bargaining.

pursue its unfair labor practice charge previously filed on December 6, 2011 wherein it alleged that Jackson was illegally discharged.

5 The testimony of Borzoni was that during the conversations that he had with Dawley he simply asked the Company to reinstate Jackson and that this was the extent of the conversation.

10 Given the limited nature of Borzoni's requests, I am not sure what else the Company could have done, except to capitulate, to satisfy its obligation to bargain over Jackson's discharge. The evidence shows that Dawley was willing to discuss this issue with Borzoni and that he agreed to and did review the case. The Company was not legally obligated to change its position and it did not. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In my opinion, the General Counsel has not shown that the Respondent has failed to bargain over Jackson's discharge and I shall therefore dismiss this allegation of the Complaint.

15

(d) Promulgation of Rules as Alleged Violations of the Act

20 The Complaint alleges that on or about November 17, the Respondent at the Glendale store, for discriminatory reasons and without notice to the Union, **(a)** promulgated and enforced a rule requiring unit employees to clock in and out and inform a manager each time they left the facility; and **(b)** promulgated a rule prohibiting unit employees from using cell phones on the sales floor.

25 As noted above, these two rules were in existence even before the Glendale store opened and the employees who were hired for this store were notified of these rules during their training. It is also true that these rules were not enforced by way of disciplinary actions before the election was held.

30 In the case of the time clock rule, I think that is incorrect to say either that a new rule was promulgated in November 2011, or that the rule was re-promulgated at that time. In fact, the evidence shows that the existing rule, which hadn't been previously enforced, was enforced on a one off basis as to Jackson after the Union had won the election on November 14.

35 Similarly, the cell phone rule was one that was in the "book" but was not enforced before the Union's campaign. There was some evidence that a couple of employees were spoken to about using cell phones on the sales floor but no one was burdened with any disciplinary action. Indeed, according the testimony of Althera Green, after the election, employees resumed using their cell phones on the floor without any sanctions, just the same as they did before the election
40 campaign. Thus, according to her testimony nothing really changed.

45 Based on the above, I think that the evidence does not establish that the Respondent promulgated new rules. As such I shall recommend that these allegations of the Complaint be dismissed. (I do note, however, that there is nothing to prevent the Union from asking to bargain about these or any other work rules and that the Respondent would be obligated to bargain over the subject).

(e) Miscellaneous Allegations

50

Based on the credited testimony of employee witnesses, I conclude that the Respondent by Rajandra Sirjoo and Keith Green interrogated employees about their union activities and the

union activities of other employees. In light of the other violations that I have found, I conclude that these interrogations violate Section 8(a)(1) of the Act. Similarly I conclude that by asking Jackson how a union meeting went, the Respondent gave the impression that its employees' union activities were under surveillance.

5

Conclusions of Law

1. By discharging Adam Jackson in retaliation for the union activity of its employees, the Respondent violated Section 8(a)(1) and (3) of the Act.

10

2. By withholding benefits to employees at the Glendale and other stores because they were seeking union representation, the Respondent has violated Section 8(a)(1) and (3) of the Act.

15

3. By interrogating employees about their union activities and the union activities of other employees, and by giving employees the impression of surveillance, the Respondent has violated Section 8(a)(1) of the Act.

20

4. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

25

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.

30

The Respondent having discriminatorily discharged Adam Jackson, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

35

Also having determined that the Respondent has discriminatorily withheld improvements in commissions for its Goof Proof policy, it must make whole those employees adversely affected by paying them the difference in the commissions that they earned and the commissions that they would have earned. The amounts are to be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

45

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended ⁹

50

⁹ 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.

ORDER

5 The Respondent, Bob's Discount Furniture Of New York, LLC, its officers, agents and assigns, shall

1. Cease and desist from

10 (a) Discharging employees because of their activities on behalf of or support for union.

(b) Withholding benefits because of their activities on behalf of or support for union.

15 (c) Interrogating employees about their union activities and the union activities of other employees.

(d) Giving employees the impression that their union activities are under surveillance.

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

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

25 (a) Within 14 days from the date of this Order, offer Adam Jackson full reinstatement to his former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

30 (b) Make Adam Jackson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this Decision

35 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Adam Jackson and within three days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Make whole in the manner set forth in the Remedy section of this Decision, employees who have been denied commission rates granted company-wide because of union activity and election petitions having been filed at the stores where they are employed.

40 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this

45 Order.

(f) Within 14 days after service by the Region, post at its New York facilities in Glendale, Freeport, Farmingdale and at its facility in North Plainfield, New Jersey, copies of the attached

50

notice marked “Appendix”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 29, 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 employees and former employees employed by the Respondent at any time since October 1, 2011.

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

Dated, Washington, D.C. October 12, 2012

Raymond P. Green
Administrative Law Judge

¹⁰ 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.”

Appendix

NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of their union activity or to discourage employees from engaging in union or protected concerted activity.

WE WILL NOT withhold benefits from employees because of their activities on behalf of or support for Local 888, United Food and Commercial Workers International Union or any other union.

WE WILL NOT interrogate employees about their union activities and the union activities of other employees.

WE WILL NOT give employees the impression that their union activities are under surveillance.

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

WE WILL make whole Adam Jackson for the loss of earnings he suffered as a result of the discrimination against him.

WE WILL reinstate Adam Jackson to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful discharge of Adam Jackson notify him, in writing, that this has been done and that these actions will not be used against him in any way.

WE WILL make whole employees who have been denied commission rates granted company-wide because of their union activity and/or election petitions having been filed at the stores where they are employed.

Bob's Discount Furniture of New York, LLC

(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

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

One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.