

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

PHILLIPS 66 (Sweeny Refinery)

Respondent

**Cases 16-CA-087373,
16-CA-089036
and 16-CA-089250**

and

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
UNION NO. 564**

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

This Answering Brief responds to Phillips 66, herein Respondent, exceptions to the Administrative Law Judge, herein the Judge, Decision and Recommended Order, (JD(NY)-15-13) that issued on April 9, 2013. The Judge found that Respondent committed three unfair labor practice violations immediately preceding a Board election which was conducted on October 4 and 5, 2012.¹ The Judge found that Respondent violated Section 8(a)(1) of the Act by: (1) threatening an employee with loss of benefits should they vote for the Union; (2) interrogating an employee about his union sympathies; and (3) discriminatorily denying the Union access to a local fire department for conducting an organizational event.

¹ Unless otherwise stated, all dates referenced below are in the year 2012.

Respondent takes exception to 8(a)(1) violations found by the Judge. Respondent's brief in support of its exceptions challenges the Judge's findings of fact and conclusions of law. Counsel for the Acting General Counsel submits that the Judge's findings of fact and conclusions of law are correct, properly supported by a preponderance of the evidence, and are firmly grounded in Board law.

II. FACTS

1. Respondent and its Employees.

Respondent, Phillips 66, is a Delaware energy corporation with a place of business in Old Ocean, Texas, where it operates a petrochemical refinery (herein referred to as Sweeny Refinery). (GC Exh. 2). Approximately 900 employees and contractors work at the refinery. (Tr. 18, 144). The International Union of Operating Engineers, Local Union No. 564, herein the Union, started organizing the production operators at the Sweeny Refinery in August 2012. On August 17, the Union filed a petition with the Board seeking to represent the approximately 340 operators. (GC Exh. 2 at 1; Tr. 19). On August 27, a pre-election hearing was conducted before a hearing officer of the NLRB to determine the appropriateness of the petitioned-for unit. (GC Exh. 2 at 1). On September 6, the Acting Regional Director issued a Decision and Direction of Election finding that an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act included "[a]ll operators and terminal operators employed by the Employer at its Sweeny Refinery in Old Ocean, Texas." (GC Exh. 2 at 19). The Board election was conducted on October 4 and 5, and the Union lost by a substantial margin. (Tr. 36).

2. The August 14 incident between Schroller and Bennett.

The first issue raised in the complaint occurred on August 14, three days prior to the Union filing its petition with the Regional Office. The alleged unlawful conduct transpired during a one-on-one meeting between Training Supervisor Tynes Schroller² and operator Ed Bennett. Schroller is the Team Leader for Training, a division of Respondent's Human Resources Department. (JD slip op. at 2; Tr. 130; GC Exh. 2 at 3). He is the highest ranking manager in the training department and reports directly to HR Director Saiz. (Tr. 69). Schroller oversees all corporate training standards at the refinery and manages the six training analysts in his department. (Tr. 131). Bennett is a 33-year employee and a lead operator in one of Respondent's production units. (Tr. 65). Bennett supports the Union and served as the Union's election observer in a prior election which was held in 2011. Although Bennett believes people identify him as a Union supporter, he did not discuss the Union with managers at the refinery.

On August 14, Bennett appeared at the computer room in the administration building to draft revised operating procedures for his unit. (Tr. 68-69). Bennett was working on the computer when Schroller walked into the room. Schroller walked up to Bennett, greeted him, and then asked about the Union. (Tr. 70, 78). Bennett recalled, "[h]e walked up to me and I think said hello or something like that... [a]nd he said, [w]hat's going on with the [U]nion?" (Tr. 70). Bennett did not want to have a conversation about the Union, so he did not make any comment. (Tr. 78, LL. 22-23). Bennett simply shrugged his shoulders. (JD slip op. at 2, LL. 30-31; Tr. 71, 78). Schroller then stated, "[y]ou know, if we go union that the odds are that they were going to make lead operator jobs salary." (JD slip op. at 2, LL. 31-32; Tr. 71). Bennett replied that he did

² Tynes Schroller has worked for Phillips for 27 years. (Tr. 130). He worked as an operator for most of his career and about three years ago was promoted to Training Team Leader. (Tr. 130).

not want to be salaried and would rather bump back to a regular operator job. Schroller then proceeded to tell Bennett a story about Plant Manager Fields having recently visited the main control room. (Tr. 71-72). Schroller told Bennett that Fields asked the Board Operators questions about their work and none could answer the questions without referencing the control panel. Schroller said that “basically nobody could answer him right away what the charge was.” (Tr. 72). Then, Schroller commented that “possibly they were thinking about maybe even making the board men salary.” Bennett offered no response to Schroller’s comments and the conversation ended. (Tr. 72). According to Bennett, the entire conversation lasted only 5-7 minutes. (Tr. 72, 78). This was the only instance that Bennett was engaged in a conversation with a manager about the Union. (Tr. 73). Bennett later told his coworkers about Schroller’s comments. (Tr. 80).³

3. The September 11 incident between Cromwell and Bush.

The interrogation raised in the complaint occurred on September 11, during a one-on-one meeting between Team Leader Desiree Cromwell⁴ and employee Winston Bush. For the past three years, Cromwell has been the Utilities Team Leader at the refinery. (Tr. 113). Bush is an operator in the raw water treatment area of the Utilities Unit. (Tr. 91-92). The Utilities Unit monitors environmental concerns pertaining to the water treatment and reservoirs.” (JD slip op. at 3, LL. 1-2; Tr. 93). Accordingly, Bush routinely makes rounds checking and monitoring the reservoirs within the refinery.

³ Following leading testimony from Respondent’s counsel, Schroller suggested that he was discussing the pros and cons of unionization, and what might happen in bargaining. (Tr. 136-137). It is illogical that Schroller would approach Bennett prior to the petition being filed to discuss the nuts and bolts of contract negotiations, particularly when they had never had a conversation about unionization. Bennett’s testimony presented the most credible explanation of what transpired during the meeting. Moreover, Schroller’s testimony was contradicted by Bennett’s version of events which was credited by the Judge. (JD slip op. at 5, LL. 7-8)

⁴ Cromwell has worked for Phillips 66 for 11 years and has been at the Sweeny Refinery for about four-and-a-half years. (Tr. 113).

On September 7, Bush sent Cromwell an e-mail reporting abnormal vegetation growth in one of the water canals. (JD slip op. at 3, LL. 4-5; Tr. 100; GC Exh. 16). Four days later, while making rounds in the company truck, Bush received a call from Lead Operator Charlie Willbanks instructing him to return to the unit because Team Leader Cromwell was there to see him. (JD slip op. at 3, LL 6-7; Tr. 92, 94). Bush drove back to the department control room where Cromwell was standing outside waiting for him. (Tr. 94). Bush rolled down the window, greeted Cromwell, and started pointing out vegetation in the water. (Tr. 95). Bush offered to drive Cromwell to where the majority of the vegetation was located and Cromwell entered the passenger side of the vehicle. (Tr. 95). As Bush started driving to the lake area, Cromwell raised the subject of the Union. Bush recalled Cromwell stating, "let me ask you something, what's your opinion on the union thing." (JD slip op. at 2, LL 9-10; Tr. 95). Bush did not want to discuss the Union with Cromwell, so he told her he really did not have an opinion. (Tr. 96).

Cromwell proceeded to talk about the Union and how great the refinery was. She said the Sweeny refinery was one of the better places she had worked because they were so close knit and family oriented. (JD slip op. at 3, LL. 11-13). At one point, Bush stopped and showed Cromwell vegetation building up in the area where the water entered the plant. When they got back into the truck, Cromwell resumed her talk about how good the refinery was without a union. (Tr. 96). When asked how he responded, Bush testified, "I kept as close-mouthed as I possibly could...I was uncomfortable with the conversation and I didn't want to have it." (JD slip op. at 3, LL 10-11; Tr. 96, LL. 20-22). Cromwell continued to talk about what a good thing they had and talked about having worked in several union plants on the east coast. Cromwell said it was hectic working in a unionized environment. She told Bush she had worked in a plant on the west coast that had almost 900 cases that went from arbitration to HR where they remained unresolved. (Tr.

97). The drive around the lake lasted about ten minutes and they talked very little about work. (Tr. 97).

Upon leaving the raw water area, Bush drove Cromwell to the Cogeneration building where her office was located. Bush backed into a parking spot and left the truck running, thinking that Cromwell would promptly exit the vehicle. (Tr. 97). However, Cromwell continued talking another 10 to 15 minutes about how the Union was not beneficial to the employees. (JD slip op. at 3, LL 16-17; Tr. 98, LL. 5-6). Bush asked Cromwell what was the worst part about having union representation if that was what they wanted. Cromwell said that they already had representation in the employee review board and she “hammered [the] point” that they had an open door policy for employees that had problems. (Tr. 98). At some point, Bush asked Cromwell if he was her husband or brother, would she be having the same conversation. (Tr. 107). She answered affirmatively. Before she got out of the truck, Cromwell handed Bush a flyer containing campaign information. (JD slip op. at 3, LL 21-22).

The meeting between Bush and Cromwell lasted approximately 25 minutes. (Tr. 97, 98). Bush estimates that they spent two percent of that time talking about the vegetation in the canal, the remainder of the time consisted of Cromwell discussing union issues. (Tr. 109). Bush did not feel that the conversation with Cromwell was consensual and her comments made him uncomfortable. (Tr. 96, 99). This was the only conversation Bush had with any manager concerning the Union. (Tr. 99). However, it was not the only conversation Cromwell had with employees about labor unions. Although she was evasive on this topic, Cromwell conceded that she probably approached other employees and initiated one-on-one conversations about the Union. (Tr. 126).

4. Interference with the Union's Organizing Event.

The Old Ocean Volunteer Fire Department (herein referred to as the "Fire Department") is located directly across the street from the refinery. (JD slip op. at 3, LL 44-45; Tr. 20; GC Exh. 14). The Fire Department is located on a 44 acre tract of land owned by Phillips Petroleum Company. (Tr. 143-144; GC 14). In September 1980, the Phillips Petroleum Company leased one third of an acre, from the larger tract, to the Fire Department for the purpose of building and operating a fire station. (Tr. 45; GC Exh. 13). The term of the lease was five years and then year-to-year thereafter. The Fire Station consists of an approximately 60' x 40' metal structure that has four bays and an additional office room connected to the side. (GC Exh. 15; GC Exh. 13). The building is connected to the street by a large approximately 60' x 100' concrete driveway. (GC Exh. 15; GC Exh. 13). There is open space around the Fire Station that includes a ball field and large parking area. For several years, the various labor unions representing the five existing bargaining units at the plant have used the Fire Station to conduct business meetings.⁵ (JD slip op. at 3, LL 50-51; Tr. 46).

After filing its petition on August 17, the Union planned an organizing event to give employees a chance to meet union organizers and union officials from other facilities. (Tr. 17, 25). The Union considered having the event at the Old Ocean Voluntary Fire Department due to its close proximity to the refinery. (Tr. 25, 85). At the time, Union officials were unaware that the Fire Department leased the property. (Tr. 39). In mid-August, Business Agent Charlie Singletary called Chief Peterson⁶ to obtain permission to use the Fire Department. (JD slip op. at

⁵ Fire Chief Craig Peterson testified that he had no problem with the unions using the Fire Department for their meetings. (Tr. 46).

⁶ Craig Peterson has been the chief of the Fire Department for 28 years. (Tr. 44).

4, LL 7-9; Tr. 26). Singletary called Peterson on the telephone and proposed the Union having an event at the Fire Department in connection with the organizing drive. (Tr. 26-27). Singletary explained that they would have food, but the Union was undecided on the details of the event. Singletary also asked if Peterson could pull the fire trucks out of the station for the event and Peterson said he would pull the trucks out if he was in the area at that time. (Tr. 26, 60). Singletary told Peterson that they would bring everything they needed including tents, and that they would probably set up outside. (JD slip op. at 4, LL 14-15; TR. 27). Peterson told Singletary that he was okay with their plan to use the Fire Department. (JD slip op. at 4, LL 9-10) , 27-28). Singletary said he would get back to Peterson with more details of the event Tr. 27).

Approximately one or two weeks after first talking to Peterson, Singletary called the fire chief a second time and confirmed that the Union would use the fire station on September 13. (Tr. 27). Singletary also informed Peterson that the Union would be having a barbeque. (JD slip op. at 4, LL 15-17; Tr. 27). Singletary recalled Peterson saying, “[h]e didn’t have a problem with anything... [h]e said, go right ahead.” (Tr. 28). However, Peterson told Singletary he would not be available to move the fire trucks. (Tr. 33). Accordingly, the Union planned to conduct their barbeque in the grassy area to the side and back of the fire-station. (Tr. 88).

Peterson demonstrated a general recollection of his conversations with the Union. With respect to the first telephone conversation, Peterson could not recall the name of the person he spoke to or the name of the union. (Tr. 47). He recalled that the union person informed him that his union was conducting an organizing drive with refinery employees and asked if they could use the Fire Department. (Tr. 46-48). Peterson believed these to be organizational meetings. (Tr. 47). Peterson said he granted the Union permission to use the Fire Department. (Tr. 46). Peterson cannot recall the specifics of his second telephone conversation with the union representative.

(Tr. 49). Nevertheless, he testified that he told the Union they could use the Fire Department to conduct their event. (Tr. 50).

On September 11, 2013, Peterson received a call from Respondent's HR Director Mike Saiz.⁷ (Tr. 51). Peterson was not acquainted with Saiz. (Tr. 51). After introductions, Saiz asked Peterson if he were aware that the Union was having a barbeque at the fire station and Peterson answered affirmatively. (Tr. 52). Peterson recalled Saiz then asking him to move the event:

And he asked me if I was aware that our station sat on Phillips property, and I said, yes, sir. And he said, [w]ell, the unions really are not supposed to have things on our property. And I said, Okay. And I told him -- he asked me if I would call and talk to the people and get them to move it, and I said, sure. (JD slip op. at 4, LL 15-17; 28-33; Tr. 52).

Peterson said that he and Saiz discussed the fact the barbeque was an organizing event. (Tr. 63, LL. 4-6). Saiz told him that the reason they did not want the barbeque there was that Phillips owned the property and they did not want it on their property. (id., Tr. 62, LL. 16-17). Peterson then asked Saiz if there was a problem that he had allowed other unions to have their meetings at the Fire Department. (Tr. 52-53). Saiz told Peterson he did not have a problem with the "in-house unions meetings at the fire station." (JD slip op. at 4, LL 33-35; Tr. 52, LL 19-20). Peterson then informed Saiz that he did not have a telephone number to contact the Union. Saiz said he would call Peterson back with a telephone number and he did so shortly thereafter. (Tr. 53).

⁷ Peterson did not recall the date, but he said the call was not long before the Union's scheduled barbecue. He further testified that he called the Union that same day. Eric Wells testified that he received the telephone call from Peterson on September 11, 2012. (Tr. 84-85).

That same day Peterson called the Union and spoke to Union Organizer Eric Wells. (Tr. 54, 84-85). Peterson told Wells that he had been contacted by Saiz who told him that their barbeque would not take place at the Fire Department. (JD slip op. at 4, LL 36-38; Tr. 86). Peterson told Wells “they were going to have to move it.” (Tr. 54). Peterson was apologetic and told Wells there was nothing he could do about it. (Tr. 86). The date of the event could not be changed given the short notice. (Tr. 31). The Union conducted its barbeque at the Veterans of Foreign Wars (VFW) post in West Columbia, Texas, four miles from the refinery. (Tr. 87, 31). The Union advertised the relocation of its barbecue by distributing flyers to employees. (Tr. 89; R Exh. 1). However, the turnout was less than expected. (Tr. 31).

III. ANALYSIS AND DISCUSSION

1. Supervisor Schroller unlawfully threatened employee Bennett.

Statements made by an employer’s supervisors or agents violate Section 8(a)(1) of the Act where the remark(s) may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act. *NLRB v. Link-Belt Company*, 311 U.S. 584, 588, 598-599 (1941). It is well established that the test of whether statements violate Section 8(a)(1) of the Act is objective, not subjective. *Id.* at 588; *Queen City Coach Co.*, 172 NLRB 470, 481 (1968). Therefore, when evaluating potential threats the question is whether or not the communications would be reasonably taken as a threat of reprisal for engaging in protected conduct. *Feldkamp Enterprises, Inc.* 323 NLRB 1193, 1198 (1997).

The Judge correctly found that, on August 14, Respondent violated Section 8(a)(1) of the Act when Tynes Schroller threatened employee Ed Bennett with reprisals if the Union was elected. (JD slip op. at 6, LL. 1-2). On that date, Schroller approached Bennett and raised the

subject of the Union by asking “what is going on with the [U]nion.” Although Schroller was not Bennett’s immediate supervisor, as a Team Leader he was a high ranking manager who reported directly to the HR Director for the refinery. When Bennett did not reply to Schroller’s question, Schroller told Bennett, “[y]ou know, if we go union that the odds are that they were going to make lead operator jobs salary.” Schroller subsequently expanded this prediction of adverse consequences to include board operators. The Judge correctly concluded that Schroller’s statement constituted a coercive threat of reprisal in response to employee’s union activities.

Respondent suggests that Schroller’s statement was not coercive because Bennett and Schroller were close friends engaged in a friendly conversation. (R. Br. 10). Respondent mischaracterizes the nature of their relationship. Although Schroller and Bennett had been close friends when both were rank-and-file operators,⁸ the nature of their relationship had changed in recent years. Bennett testified that their personal relationship had changed and they did not talk like they used to and both men said they had not socialized outside of work in many years.⁹ The change in their relationship generally coincided with Schroller’s promotion to management. Bennett testified that they did not have a close relationship since the Union began organizing in 2011. (Tr. 82). Bennett speculated that the Union campaigns may have caused a rift in their relationship. Looking at the overall circumstances, the meeting between Schroller and Bennett was not a casual conversation between friends and Schroller’s past experience as a rank-and-file employee does not insulate him from committing unfair labor practices.

⁸ There was a period of about ten years where both Bennett and Schroller worked together as rank and file employees and Bennett had considered him a friend. (Tr. 75).

⁹ Bennett and Schroller used to play golf together, but they had not engaged in that activity since the union organizing of 2011. (Tr. 82-83). Schroller testified that he had not played golf with Bennett in the past five years and had not been to Bennett’s home in 20 years. (Tr. 141).

Respondent also contends that Schroller's statements to Bennett were a reasonable prediction based upon objective facts since "some" of its operators at other plants are, in fact, salaried.¹⁰ (R. Br. 10-11). Essentially, Respondent's position is that since some lead operator employees in its corporate network are salaried, it is privileged to tell lead operator employees that Respondent will make them salaried if they elect the Union. However, the context of Schroller's remark did not suggest a legitimate purpose. Schroller's prediction did not arise while discussing the salaried status of employees from other plants, nor was he predicting the outcome of good faith collective bargaining. Schroller's statements were not carefully phrased and were in fact a concise and direct prediction of what the Employer would do should Bennett and the other employees elect the Union. Absent the necessary objective facts, employer predictions of adverse consequences arising from unionization are not protected by Section 8(c), rather they constitute threats that violate Section 8(a)(1). *Homer Bronson Co.*, 349 NLRB 512 (2007). The Judge correctly found that Schroller's statements were "no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion..." *Gissel Packing Co. v. NLRB*, 395 US 575, 618 (1969). (JD slip op. at 5, LL. 50-53)

Respondent finally argues that Schroller's statement contained no actual threat of discipline and was not inherently threatening. (R. Br. 11-12). However, an unlawful threat need not include the threat of discipline.¹¹ An employer may violate Section 8(A)(1) by threatening its employees with loss of benefits should they elect a union. See *PPG Aerospace Industries, Inc.* 355 NLRB 103, 111 (2010) (employer unlawfully threatened employees with loss of benefits by

¹⁰ Respondent states that there was undisputed evidence that lead operators at other refineries are in fact salaried. There was also undisputed evidence that lead operators at other refineries were not salaried.

¹¹ In support of this argument, Respondent also contends that the prediction was not threatening based on Schroller's subjective opinion, offered at hearing, that converting lead operators to salaried position had a neutral effect on these employees. Schroller's subjective opinion is irrelevant. Nevertheless, the only reasonable basis for Schroller making the comments was that he was implying a negative consequence of electing the Union.

telling employees that they would probably lose their “Salary Continuance” benefit if employees voted to elect the union); *Presidential Riverboat Casinos*, 329 NLRB 77 (1999) (statement that wages might possibly be decreased if the union were elected would reasonably be understood as a threat that employer might retaliate by reducing wages); *Orbit Lightspeed Courier Systems, Inc.* 323 NLRB 380, 391 (1997) (statements that employees might lose benefits if the union won the election constitutes an unlawful threat). In this case, converting lead operators to salaried positions could constitute a significant and detrimental change in benefits for operators since being made salaried is that employees could be worked unlimited hours without the benefit of overtime pay. Bennett clearly finds this an adverse condition. He told Schroller that he would abandon his lead position if he were made salaried.

Finally, *Ohmite Mfg. Co.*, 217 NLRB 435 (1975), as cited in Respondent’s brief, is inapposite to the current case. (R. Br. 12). There, a manager offered his opinion that electing the union would not benefit the employees. There were no predictions of adverse consequence, or suggested retaliation, from the company should employees elect the union. This contrasts sharply with Schroller’s statement of how Respondent would react to employee’s protected conduct. As the Judge correctly concluded, Schroller’s prediction that Respondent would make operator positions salaried constituted a threat of reprisal that would reasonably tend to interfere with Section 7 activity in violation of Section 8(a)(1) of the Act.

2. Supervisor Cromwell unlawfully interrogated employee Bush.

The Board finds interrogations unlawful where under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. As reiterated in *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006

(9th Cir. 1985), the Board considers the totality of circumstances, including specific factors that have come to be known as “the *Bourne* factors” because they were first enunciated by the court of appeals decision in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). These factors are the employer’s background, the nature of the information sought, the identity of the questioner in terms of how high they are in the company hierarchy, the place and method of the interrogation, and the truthfulness of the reply. *Toma Metals, Inc.*, 342 NLRB 787, 789 (2004); also see *NLRB v. Camco, Inc.*, 340 F.2d 803 (5th Cir. 1965) (the Fifth Circuit adopted and augmented the so-called “*Bourne*” standards enunciated by the Second Circuit). However, the Board has stressed that these factors are not mechanically applied, rather they provide the starting point for assessing the totality of the circumstances. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board will determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that they would feel restrained from exercising their Section 7 rights. *Coastal Sunbelt Produce, Inc.* 358 NLRB No. 135, slip op. at 28 (2012).

The Judge found that, on about September 11, Respondent violated Section 8(a)(1) of the Act when Desiree Cromwell interrogated employee Winston Bush about his union sympathies. (JD slip op. at 6, LL. 11-12). Significantly, the Judge found Cromwell to be an unreliable witness and discredited her testimony where in conflict with that of Bush. (JD slip op. at 5, LL. 8-9). That date, Cromwell appeared at the Utilities unit and asked to meet with Bush. Although the stated purpose of the meeting was work related, evidence adduced at the hearing demonstrated that Cromwell’s purpose in meeting with Bush was to campaign against the Union. As soon as Cromwell had Bush alone in the truck, she initiated a conversation about the Union by asking Bush “let me ask you something, what’s your opinion on the union thing.” (Tr. 95). This was

followed by an approximately 25-minute captive campaign speech that ended when Cromwell handed Bush a flyer containing campaign propaganda.

Considering the relevant *Bourne* factors and other surrounding circumstances, Cromwell's interrogation of Bush violated Section 8(a)(1). Cromwell is a high level manager who questioned a rank-and-file employee about his union sympathies. Cromwell clearly asked a question and sought a response, and she gave no assurances that Bush would suffer no retaliation for his responses. Bush was not an open union supporter and he did nothing to invite the discussion of the Union.¹² The interrogation occurred in a captive one-on-one setting within the confines of a company vehicle. Cromwell subjected Bush to a protracted speech aimed at drawing out Bush's opinions about the Union. The truthfulness of the reply is irrelevant. In fact, Bush avoided replying to any of Cromwell's comments suggesting his level of discomfort with the interrogation. Cromwell's conduct, including her arrival at the meeting with campaign literature in hand, suggests that her need to inspect the lake was a pretext for isolating Bush, gauging his union interest, and suggesting that he vote against the Union. In these circumstances, the initial questions, as well as the subsequent campaign speech, constituted a protracted interrogation into Bush's union sympathies that would reasonably tend to coerce employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act.

Respondent argues that the Judge erred in finding that Cromwell and Bush were not on a friendly basis and by considering Bush's level of discomfort. (R. Br. 13-14). The Judge correctly observed that, in considering the lawfulness of interrogations, the Board has looked to whether the supervisor and the questioned employee had a friendly relationship and whether the

¹² Bush testified that he was aware of the union organizing in the summer of this year, but was not an active organizer. (Tr. 93).

employee was reluctant to respond. *Gelita, USA, Inc.*, 351 NLRB 406 (2008). In this regard, the Judge's observation that Cromwell and Bush were not "on a friendly basis" was not indicative that they disliked one another; rather that their relationship did not extend beyond a professional working relationship. Additionally, the Judge's consideration that Bush attempted to remain as "close-mouthed" as possible, which revealed a high level of discomfort, is relevant for establishing the context in which the statements were made and the nature the relationship. Moreover, these were only two of many factors examined by the Judge for establishing that Cromwell's conduct would reasonably tend to restrain employees from exercising their Section 7 rights.

Respondent contends that several other factors suggest that Bush did not feel uncomfortable with Cromwell's conversation. These factors include Bush saying Cromwell is a fine supervisor; the absence of threats or yelling; Bush not exiting the vehicle; Bush asking Cromwell a personal question; and Bush inviting Cromwell to lunch. (R. Br. 13). The Acting General Counsel submits that these factors have extremely low relevance or low mitigation value and in some instances distort the record. Bush's opinion that Cromwell was a fine supervisor does not make her comments more or less coercive. Similarly, the pitch of her voice is largely irrelevant. Even assuming she spoke nicely to Bush, her manner of speech would not effectively mitigate the effect of her protracted interrogation and speech. Additionally, Bush's failure to exit the vehicle is completely irrelevant. Bush did not have an opportunity to exit the vehicle since Cromwell initiated her interrogation in a moving vehicle as Bush drove around the storage reservoir. Even after Bush drove Cromwell to her office building, he could not return to his operation unit until she exited the vehicle.

Respondent also argues that Bush's level of comfort is demonstrated by him asking a personal question. Near the end of Cromwell's protracted interrogation, Bush asked "[i]f I was your husband or brother or cousin, would you be having the same conversation." (Tr. 107). Respondent stated that "[t]his is not the type of question asked by an employee who feels threatened or coerced." (R. Br. 13). The Acting General Counsel could not disagree more. This is precisely the type of statement that would be made by an uncomfortable and coerced employee. Bush's question essentially states his belief that Cromwell would not subject her family to the same type of pressure. His remark clearly challenges the appropriateness of Cromwell's conduct and would be patently out of place in a truly congenial conversation. Finally, Respondent asserts that Bush ask Cromwell to lunch the day after the interrogation. (R. Br. 5). This is a distortion of the record. Cromwell evidently appeared in the work unit the following day and had lunch with several employees. However, Bush testified that someone invited her to the unit to eat, but that he did not believe it was him. (Tr. 107-108).

3. Respondent unlawfully interfered with the Union's organizational activities.

The Judge appropriately found that the Respondent violated Section 8(a)(1) of the Act by denying the Union use of the Old Ocean Fire Department to conduct an organizing event. (JD slip op. at 6, LL. 48-51). The evidence adduced at the hearing shows that the Fire Department leased property from Phillips Petroleum Company for more than thirty years. For many years, without objection from Respondent, the Fire Department has granted Respondent's in-house unions permission to conduct meetings on its premises. The Union obtained permission from Fire Chief Craig Peterson to hold an organizing event at the Fire Department on September 13. Two days prior to the event, Respondent's HR Director Mike Saiz called Fire Chief Peterson and instructed him to tell the Union it could not have its event at the Fire Department. Saiz told

Peterson that Respondent did not want a new union conducting an organizing event on its property. Peterson complied and the Union was forced to relocate its event to a less convenient venue four miles away.

The general rule under the Supreme Court's *Lechmere* decision is that non-employee organizers are not entitled to engage in Section 7 organizing activity on the private property of others. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). However, this rule does not protect an employer who discriminates by permitting access to other groups but not to a union. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court held that an employer could not preclude access to non-employee union organizers from its parking lot if the employer allows other non-employees to distribute items in the parking lot. The Judge cited to cases where the Board found that employers violated the Act by denying access to unions while permitting access to other groups. See *Davis Supermarkets*, 306 NLRB 426 (1992); *Columbia University*, 225 NLRB 185 (1976); and *Dow Jones and Company*, 318 NLRB 574 (1995). Also see *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 28 (2011) (access policy disparately and discriminatorily enforced against the union); *Lincoln Center for the Performing Arts*, 340 NLRB 1100, 1109-1112 (2003) (violation where the employer prohibited union leafleting along a sidewalk within its control when it had permitted other groups to leaflet on the same sidewalk).

Respondent argues that the decision to deny the use of the firehouse was based on legitimate reasons that had nothing to do with the nature of the activity or discriminatory intent. (R. Br. 15). Respondent's counsel suggests the size of the event, limited facilities, and alcohol were all sufficient justification for denying use of the firehouse. These purported reasons are contrived. There is NO evidence that these factors actually concerned Respondent, nor is there a shred of evidence to show that these factors motivated Saiz to contact Peterson. Respondent

failed to present HR Director Saiz or any other official to testify about its motive in prohibiting the event. See *Douglas Aircraft Co.*, 308 NLRB 1217 (1992) (failure to call a witness “who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge”). In finding discriminatory conduct, the Judge appropriately relied upon evidence of disparate treatment and Peterson’s testimony. (JD slip op. at 6, LL. 45-49).

Respondent further contends there is no evidence to support the conclusion that Respondent prohibited the union from using the fire station because it was attempting to organize Respondent’s employees. (R. Br. 14-15). Since Respondent did not present HR Director Saiz to testify at hearing, the Judge’s relied upon testimony from Fire Chief Peterson. Peterson testified that he had never spoken to Saiz before receiving his telephone call. Peterson recalled Saiz asking him to move the event:

And he asked me if I was aware that our station sat on Phillips property, and I said, yes, sir. And he said, [w]ell, the unions really are not supposed to have things on our property. And I said, Okay. And I told him -- he asked me if I would call and talk to the people and get them to move it, and I said, sure. (Tr. 52).

Peterson and Saiz discussed the fact that the barbeque was an organizing event, and Saiz told Peterson that the reason Respondent did not want the barbeque at the Fire Department was that Phillips owned the property and they did not want it on their property. (Tr. 63, LL. 4-6; Tr. 62, LL. 16-17). Peterson asked Saiz if there was a problem that he had allowed other unions to have their meetings at the Fire Department. (Tr. 52-53). Saiz told Peterson he did not have a problem with the “in-house unions meetings at the fire station.” (Tr. 52, LL 19-20).

There is substantial evidence of disparate treatment. This first and only occasion that Respondent denied a union use of the fire station was on September 11, when Saiz contacted Peterson and instructed him to tell the Union to move their organizing event because Respondent did not want the organizing event on its property. However, for many years Respondent has allowed in-house unions to conduct meetings at the Fire Department and Saiz told Peterson that those meetings could continue. The Judge appropriately concluded that there was no other reason for this prohibition other than the fact that, in this situation, the Union was attempting to organize the Respondent's employees. *Whitesell Corporation*, 352 NLRB 1196 (2008). Respondent's obvious disparate treatment of the Union violates Section 8(a)(1) of the Act.

IV. CONCLUSION

It is respectfully submitted that based upon the foregoing and the record evidence adduced in the hearing, that the Judge correctly found that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint. The Board should adopt the decision of the Judge and enter an Order requiring Respondent to take the appropriate remedial actions.

Dated at Houston, Texas, this the 21st day of May, 2013.

Respectfully submitted,



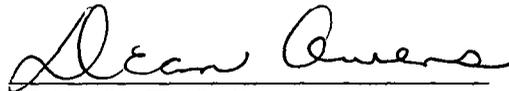
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CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing *Counsel for the General Counsel's Answering Brief to Respondent's Exceptions* has been filed electronically and a copy served upon each of the following via electronic-mail, this 21st day of May, 2013:

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