JD(SF)–31–15
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GRILL CONCEPTS, INC.
d/b/a THE DAILY GRILL

and

Cases 31–CA–126475
31–CA–132845
31–CA–135061

UNITE HERE, LOCAL 11

Nicole M. Pereira, Esq.,
Marissa Dagdagan, Esq.,
for the General Counsel.
Karl Terrell, Esq.,
Arch Stokes, Esq.,
Patricia O'Rourke, Esq.,
Stokes, Wagner, Hunt, Maretz, and Terrell,
for the Respondent.
Jeremy Blasi, Esq.,
for the Charging Party.

Table of Contents

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Los Angeles, California, on April 13–15, 2015. Unite Here, Local 11, (the Charging Party or Union) filed charges and amended charges in the above-captioned cases on various dates between April 11, 2014, and November 20, 2014.[1] The General Counsel consolidated the charges and issued on January 30, 2015. Grill Concepts, Inc. (the Respondent or Company) filed a timely answer on February 13, 2015, denying all material allegations and setting forth affirmative defenses. On March 27, 2015, the General Counsel amended the complaint. The Respondent filed a timely answer admitting the amended allegation and incorporating its prior affirmative defenses.

The amended complaint (complaint) alleges that the Respondent violated the National Labor Relations Act (the Act or NLRA) by promulgating, maintaining, and enforcing unlawful rules, threatening employees, soliciting complaints and grievances from employees, interrogating employees, creating the impression that employees' union and other protected concerted activities were under surveillance, making promises to employees to discourage support for the Union, and granting employees benefits to discourage support for the Union. Some allegations allege violation of Section 8(a)(1), and others allege violation of Section 8(a)(3) and (1) of the Act, as detailed below.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Los Angeles, California, is engaged in the nationwide operation of restaurants. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. STATEMENT OF FACTS

A. Background and the Respondent's Operations

Grill Concepts is comprised of 33 restaurants throughout the country. Its corporate offices are in Woodland Hills, California. Robert Spivak is Grill Concepts' founder, president and CEO. Tom Kachani is the vice president of operations, and Chris Gehrke is the vice president of human resources. Kachani and Gehrke report to Spivak. Area directors oversee

[1] All dates are in 2014 unless otherwise indicated.

groups of restaurants. Each restaurant has a general manager who reports to the area manager. The shift supervisors at each restaurant report to the restaurant's general manager.

When Spivak began his first restaurant in 1984, his vision was to create "a traditional American grill where the answer is yes, what is the question, and the guest is always right." (Tr. 263–264, 268.)[2] Grill Concepts' mission statement is "Take care of the guests, respect the Team Member, and the rest will take care of itself." (GC Exh. 2, p.2; Tr. 277–278, 318, 325.)

The restaurant primarily at issue in the instant complaint is the Daily Grill on Century Boulevard (Century Daily Grill), which is located in the Westin Hotel adjacent to Los Angeles International Airport (LAX). Grill Concepts leases space from the Westin, but the two are separate entities. The Century Daily Grill opened in April 2010, and serves breakfast, lunch, and dinner. It employs roughly 80 hourly employees.

During the relevant time period, Michael Burnett and Will White served as consecutive general managers at the Century Daily Grill.[3] (Tr. 280.) They reported to Robert Robertson, who was the area director of four restaurants, including Century Daily Grill.[4] Shift supervisors Grace Troung and Kevin O'Daniel, admitted agents of the Respondent, also worked at the Century daily Grill during the relevant time period. (Tr. 29.)

The Century Daily Grill serves as the training restaurant for new managers. The general manager oversees the training, which includes the technical aspects of the job as well as exporting the Company's culture to the other restaurants. (Tr. 323.)

The Respondent conducts regular surveys in order to gauge employee satisfaction in a number of areas, including benefits. The surveys indicated a decline in employee satisfaction on a company-wide basis from 2010–2014. (R Exh. 1; Tr. 412).

B. The Union

Individuals from the Union approached Madcadel[5] Goytia and a coworker in September 2013. Goytia and about 8 other employees were part of an organizing committee that worked under organizer Alex Sandoval. (Tr. 93).

---

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for the Respondent's exhibit; "GC Exh." for the General Counsel's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief, and "CP Br" for the Charging Party's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

[3] At the time of the hearing, Burnett was area director with oversight of 4 restaurants, including the Century Daily Grill.

[4] The parties have stipulated that Robert Robertson, Michael Burnett, Thomas Kachani, Bob Spivak, and Will White are agents of Respondent as defined in Section 213 of the Act and supervisors of Respondent within the meaning of Section 211 of the Act. (Tr. 29.)

[5] Madcadel Goytia is often referred to by his nickname, "Mad."

Late in the afternoon on February 18, 2014, a group of employees including Goytia, Salvador Tello, Alfredo Jimenez, Alfredo Mejia, Marcel Escobar, Albert Lazaro, Ramin Azad, Danielle Sanchez, and Sandra Diaz, approached Will White in the restaurant's office. He and the group moved to the restaurant's side entrance. Goytia said he was representing the workers and they wanted to unionize. White said nothing and returned to his office. (Tr. 48–49; 131–132.) The employees were informed that Kachani was in the restaurant and was willing to see them.

The group of employees, along with some community members, proceeded to the dining room where Kachani and another man were seated. Some of the individuals wore union buttons.[6] Azad stated that he was very displeased his hours had been cut for the purpose of making him ineligible for healthcare benefits. He expressed his belief that he had become a number rather than a person. Diaz introduced herself and said she worked for the Company as a busser. She said she was very worried for her insurance, and expressed that employees were doing more work in fewer hours. Danielle Sanchez spoke next. She introduced herself and expressed her perception that she had unfairly received discipline. Tello said he did not feel like he had the right to speak and complained that his hours had been cut. Lazaro introduced himself and said he wanted health insurance for his coworkers and himself. Goytia introduced himself, and said he had been punished, he works hard for the Company, and the Company wanted to take away his voice. He said the Company had done well the previous year, yet it was the worst year for the employees. Goytia complained that the Company cut working hours, took away health benefits, failed to respect breaks, and overworked the employees. Mejia spoke next, stating he has been working in a hostile environment. Some community members also spoke. (R Exh. 12.) At the end of the meeting, Goytia asked for assurance there was not going to be any intimidation or retaliation for employees trying to unionize. Kachani said there would not be. (Tr. 50–51.)

Spivak and Burnett were informed of the encounter. (Tr. 292, 330–331.) Burnett informed Robertson about it, and this was the first Robertson had heard of activity involving a union at the Century Boulevard Daily Grill. (Tr. 361.) No other similar events occurred in the Respondent's other restaurants during this time period.

Kachani contacted Gehrke and informed him of the encounter. (Tr. 348.) On February 18 at 5:19 p.m., White sent Gehrke an email, cc'd to Burnett and Kachani, identifying the employees who confronted Kachani and indicating when they next worked. (CP Exh. 7.) At 7:13 p.m., White sent another email to Gehrke, cc'd to Burnett, Kachani, and Robertson, stating he would send the schedule when it was finished so that Gehrke could talk with the staff the following week. White also stated that Azad had mentioned to him that "they" intended to get media coverage, the incident that day was only the beginning, and they had signed up a few more employees for this "movement." White suggested that Gehrke speak to Azad the following day, and advised human resources to talk to the entire staff to get a sense of how many employees were involved in this movement. (CP Exh. 9.) At 9:05 p.m., Gehrke responded to White's 5:19 p.m. email, stating he would talk with some of the employees the following day, and schedule the remainder for the following week. (CP Exh. 7.)

[6] It is unclear whether any of these individuals were Daily Grill employees.

On February 20, 2014, Gehrke sent Kachini a link to the Union's Facebook posting of the video of the group's February 18 interaction with Kachani. (CP Exh. 6.)

Robertson was concerned that the employees were unhappy. He met with the Company's lawyers to determine what he could and could not do. He was instructed to follow the "no SPIT" rule, meaning he should not spy, promise, interrogate, or threaten. Robertson had one-on-one meetings with every hourly employee and a couple of group meetings. The one-on-one meetings were to determine why the employees were frustrated and to ensure team members understood the unionization process. (Tr. 363–365.)

On February 24, Gehrke distributed a document called "Team Member Talking Points—Daily Grill on Century" to Kachani, Robertson, and Burnett, with copies to Spivak and some other individuals. He informed the recipients that the document represented the talking points regarding the union organizing attempt at Century, and said it could be used as a reference for the one-on-one conversations that would be taking place with each of the hourly team members. Gehrke instructed the recipients to ensure every management member understood the talking points. Gehrke also referenced information sheets about health insurance. (CP Exh. 1.)

The talking points set forth the Company's position that it does not want a union coming to the restaurant. The document discusses the Company's position that the Union is a waste of money and time. It instructs to inform employees they have a right to have their complaints heard, and emphasizes that the Company will do its best to respond. The talking points hit on employee benefits, and discuss how the Affordable Care Act is the law, whether or not there is a union. The talking points note that the employer can always say no at the bargaining table, and the union might hold out for a provision that would force the Respondent to fire any employee who failed to pay dues each month. The document accurately reflects the Respondent's views on unionization. (CP Exh. 2; Tr. 304–306.)

C. The Uniform and Union Buttons

Grill Concepts servers and bussers wear uniforms consistent with the Company's uniform policies. Servers wear a white button-down long-sleeved dress shirt, black shoes, black pants, a brown vest, and a black apron. The Company provides the vest and the apron. The server purchases the other pieces of the uniform based on specifications the Company provides. (Tr. 183, 267.)

According to the uniform standards, the shirt must be pressed and cannot be patterned or have a flared collar.[7] The uniform standards suggest dry cleaning the shirt with heavy starch on the collar. The vest the Company provides must fit properly and be clean, well-maintained, and buttoned. The servers at hotel properties, including the Century Daily Grill must wear dress slacks which cannot be denim.[8] Any belts must be black with no patterns. The shoes must be rubber-soled and slip resistant, with no shiny buckles or non-black colors. Black socks must be long enough to cover any skin. The Company-provided apron must be clean and well-

[7] Burnett said the white shirt was a non-button oxford style shirt with no buttons at the collar. (Tr. 321.)

[8] Servers at the Respondent's "Public School" restaurants wear dark blue non-faded denim.

maintained, and must cover the server's waistline and belt, if worn. Server order books are to be placed between the apron and belt, and not between the pants and the body. Aprons are to be cross-tied in the back with a knot in the front and tucked under the apron so it is not visible. The trainers must carry a wine tool, Company-provided crumber, and up to 4 black pens. Any trainer pins are to be worn on the left collar. (GC Exh. 3.) The servers do not wear name tags or any other buttons or insignia.

Bussers wear a black shirt, a black jacket, black pants, black socks, and black shoes (GC Exh. 3; Tr. 245). Respondent only provides bussers with the black jacket. (Tr. 339.)

There are specific personal appearance standards for men and women addressing things such as hair, jewelry, and tattoos. Employees are instructed to consult with their managers if they have questions, and informed that managers have authority of what is considered appropriate for their restaurants based on guest satisfaction, dress code requirements, and safety/health concerns. (GC Exh. 3.)

Spivak's reason for adherence to the uniform policy is that the servers' job is "to provide service to deliver food and not to make any statements of any kind, other than supporting our restaurant." (Tr. 267.) He elaborated:

> There's an old standard and I guess I qualify as an old restaurant person, that servers are to be seen and not heard. We don't -- we don't allow our servers to fraternize with our guests. We really want them to be seamless and we're there because of the food and the service that we provide and we're pretty rigid on that."

(Tr. 268.)

Burnett stated that the uniform needs to be "clean, correct and complete," which means "[t]here's nothing missing that should be there and there's nothing additional that shouldn't be there." (Tr. 320.) The uniform is in line with the Company's philosophy that before the customers come through the door, they know what they'll get in terms of food, service, and atmosphere.

Burnett enforces the uniform standards at the Century Daily Grill. (Tr. 322.) Prior to the beginning of service, the employees engage in a practice called "huddle up" where they discuss the specials of the day, the soup of the day, and the expected volume in the restaurant. During this time, management looks at the personal appearance of the team. (Tr. 329.) Burnett points out both positive and negative compliance.

Goytia has worked for the Daily Grill since 2003, and at the Century Daily Grill since it opened in April 2010.[9] He has purchased several pairs of pants to wear to work, but wears two pair most often: Louis Raphael pants made of polyester and Dockers pants made of cotton. The Louie Raphael pants are glossier than the Dockers pants.

[9] Goytia has been on medical leave since the last week of January 2015.

Server Ramin Azad has worked for the Company for about 8 years, and has been at the Century Daily Grill since it opened. He has seven white shirts he wears to work. They are different brands. Some have pockets and others do not. (Tr. 209–210.)

Busser Salvador Tello has worked for the Company since 2008 and at the Century Daily Grill since it opened. He wears six pairs of pants, made of different materials, to work.

On March 24, Tello was scheduled to work from 5:30–11:30 a.m. He wore a round white pin on the pocket of his shirt. The pin was about an inch in diameter and said, "UNITE HERE! LOCAL 11" in red and black lettering. (GC Exh. 4; Tr. 135–136.) At about 9:30, Robertson approached him and told him he could not wear the button. Tello called the union office and spoke to Sandoval, who informed Tello he had the right to wear the button. Robertson again approached Tello about the button, and Tello reiterated that he had the right to wear it. Robertson told Tello he needed to "decide if I continue with the Union or I continue with the Grill." Robertson said he needed to call his lawyer. About 20 minutes later, Robertson told Tello he had to take the pin off or go home. (Tr. 137–139, 327.) Tello clocked out at about 10:00. (Tr. 140.) He was only paid for the hours he worked, and did not receive tips.

Busser Sandra Diaz worked 5:30–11:30 a.m. on March 25. She wore the same union button on the corner of her jacket pocket. She believed the shift supervisor "Mary" saw the pin because everyone greets each other in the mornings and the place is very small. (Tr. 249–250.)

On March 25, Tello worked 10:45 a.m. to 4:45 p.m. He wore an anniversary pin he had received a couple of months before. The pin was roughly an inch wide, and indicated 5 years of service. (GC Exh. 8.) Burnett approached Tello and said, "Here you go again with your union pin." (Tr. 144.) Tello said it was not the union pin, but was the anniversary pin Burnett had given him. At around 11:30, Tello put on his union button and continued to wear his anniversary pin. At about noon, White approached him and told him he had to take the union button off. Tello told White he had a right to wear the union button. White went back to the office, and Burnett came out and told Tello he had to take off the union button, and it was better if he took off both pins. Burnett sent Tello home, and Tello asked for documentation to show he was being sent home. Burnett asked if he was sure, stating he did not want to write Tello up. Tello worked for another 15–20 minutes, when Burnett called him to his office and presented him with a written warning for declining to remove an unauthorized pin from his uniform. Tello declined to sign the warning, and clocked out at around 12:30. (GC Exh. 5; Tr. 145–151.) He was paid only for the hours he worked and did not receive tips.

Sanchez came to work at noon on March 25. She was scheduled to work until 4:00 p.m. She saw Tello leaving work, and he informed her that he was being sent home for wearing the button. Sanchez said she would wear hers to see what happened. (Tr. 189.) She put on the button, and when Burnett passed her in the hallway of the beverage station, she turned toward him. He told her that she needed to take off the button or she would be sent home. When Sanchez informed Burnett she would not take off her button, he told her to clock out and go home. Sanchez was paid only for the 20 minutes she worked, and did not receive tips. (Tr. 190–191.)

Burnett said he saw the button during "huddle up" and asked Diaz to remove it. Diaz said she had a right to wear it, and Burnett agreed, but stated that right did not extend to the restaurant floor during service. He offered her the choice of removing the button or going home.[10] (Tr. 329.)

Diaz wore her union button again on March 26. At about 8:30 a.m., Supervisor Truong told her to come to her office. Truong told Diaz she could not work if she was wearing the union button because Company policy did not allow pins. Diaz asked under what circumstances she could wear a pin, and Truong responded that employees could wear anniversary pins. Diaz asked for something in writing if she was being sent home. Truong told Diaz she was going to speak to Robertson to be sure she was sending her home. Diaz returned to work wearing her button. Truong approached her again and told her she would receive a written warning if she wore the button the next day. Diaz was scheduled to work until 11:30 but she punched out at about 8:45. She was paid for the hours she worked. (Tr. 250–253.)

On March 28, server Alfredo Mejia was scheduled to work the dinner shift. He wore the same union pin Sanchez and Tello had previously worn. White approached Mejia at about 5:15, and told him to remove the pin because it was not part of his uniform. Mejia said he would not remove the pin, and White sent him home. Mejia showed White a poster explaining rights under the NLRA, including the right to wear a union pin. Mejia was paid only for the time he worked, and he received tips. (Tr. 221–224.)

At 12:52 a.m. on March 29, White sent Gehrke an email telling him that he sent Mejia home and explaining the poster Mejia had shown him. He asked for advice regarding team members wearing pins. Gehrke responded that the poster was struck down by the courts, including the provision about the pins. (CP Exh. 8.)

Mejia sent White an email at 7:29 p.m. on March 29 requesting, in relevant part, to be compensated for the loss of income from being sent home the previous day. On April 2, White responded and informed Mejia that he would not be compensated for the time he was sent home for being out of uniform. White noted that the uniform policy is very specific, prohibiting employees from wearing buttons or pins in front of guests. He informed Mejia that he could wear a pin or button when he was on a break or otherwise not in front of guests, and attached a copy of the Respondent's personal appearance standards. (GC Exh. 10.)

On March 30, Goytia wore a union button like the one Tello had previously worn. He placed it over his vest in his chest area. At around noon, O'Daniel told Goytia he was not permitted to wear the pin. Goytia said he would not remove the pin willingly, and at Goytia's suggestion, O'Daniel sent Goytia home. Goytia asked for documentation to show he was being sent home, and O'Daniel handed him a piece of paper with the phone number of Melinda Sharan, a human resources representative. Goytia transitioned his tables to another server. As he was leaving, O'Daniel told him he had nothing against him personally. Goytia was only paid for the time he worked and he did not receive tips. (Tr. 52–55.)

[10] The slight discrepancy of when Burnett told Sanchez to remove the button is not material to my findings in this decision. I credit Sanchez' version, however, because she provided specific and unrefuted testimony that she was paid for working 20 minutes.

In 2013, Goytia had worn 5-year and 10-year anniversary pins bearing the Grill Concepts logo to work. The pins were roughly an inch wide. (Tr. 57–60; GC Exhs. 7–8.) Other servers wore anniversary pins. He was not aware of a rule or policy prohibiting pins.

Busser Sandra Diaz wore a gold angel pin measuring just over ½ inch on her on the left corner pocket of her uniform. (Tr. 246–247.) Burnett denied seeing the pin. He would have asked that it be removed because there are no overt expressions of religion allowed. (Tr. 334.) Diaz recalled seeing Burnett wear a clover pin for St. Patrick's Day; Burnett denied wearing a St. Patrick's Day pin. (Tr. 248, 396.)

Westin hotel employees have a similar uniform, but the vest is darker. The Westin employees are frequently in the restaurant retrieving bread or room order items. Hotel employees wear Unite Here buttons inside the restaurant. (Tr. 84–85.)

Servers who are training other servers wear pins identifying them as trainers. Some servers also possibly wore lobster pins when promoting a menu item. (Tr. 288–290.) Burnett never saw a trainer pin at the Century Daily Grill. (Tr. 329.)

D. Conversations in Early April

In early April, Robertson approached Mejia and asked him to follow him to the boardroom, which is a private dining room. He told Mejia how much the Union would cost him and the Company. Mejia responded that he knew the costs because he was already a union member.[11] Robertson continued to talk about the Union, and Mejia told him he was on the clock so he did not want to discuss the Union. Robertson asked why Mejia wanted the Union at the Daily Grill, and Mejia responded that he wanted to be protected from retaliation and also stated there were some issues in his past. Robertson said he would stop all the retaliation practices. The conversation continued into the dining room, and Robertson asked Mejia what he could do to keep the Union from coming. Mejia reminded Robertson he had called for a meeting the following week, so he would have the perfect forum to speak up, but the union movement was very strong. Mejia also told Robertson that the Company had cut employees' hours in response to the Affordable Care Act (ACA) and if they think the Union is going to be expensive, they had the chance to provide insurance for all employees and failed to do so. (Tr. 226–229.)

In April, Robertson told Tello to clock out and meet him in the boardroom. Gehrke was also present. Robertson said he had seen Tello in the video and he was surprised because he thought Tello was happy with his job. Tello said he had his reasons and he had not done anything illegal. Robertson asked Tello if he knew how the union worked, and told him their relationship would change because others would be making decisions for the employees. He also asked if employees were signing cards. Tello responded that he was not going to say anything that would jeopardize his coworkers. (Tr. 153–154.)

[11] Mejia has been a member of Unite Here, Local 11 for 18 years through his employment at Paramount Studios. (Tr. 236.)

On April 13, Robertson sent an email to Gehrke stating that "they," a group of hotel maids along with Mad, Ramin, Alfredo, and Sal, marched and chanted for about 45 minutes until they were ejected from the hotel. They did not come into the restaurant. (CP Exh. 5.)

On April 18, a group of 16 individuals was seated at the restaurant. After being served bread and water, they stood up, revealed Unite Here t-shirts, chanted in Spanish, and marched out of the restaurant. The chanting lasted about 90 seconds. (Tr. 397; R Exh. 8.)

E. Local Ordinance and Class Action Lawsuit

The cluster of hotels surrounding LAX, including the Westin Hotel where the Century Daily Grill is housed, is commonly referred to as the Century Boulevard Corridor (Corridor). Employers in the hotels in the Corridor are subject to the Airport Hospitality Enhancement Zone Ordinance (Ordinance), codified as Los Angeles Municipal Code Section 104.101 et seq. The Ordinance provides for a minimum wages and other employment standards for hotel workers.[12] (ALJ Exhs. 5, 6.) The Company made an error in calculating wages when the Ordinance went into effect and underpaid employees for about 6 months. (Tr. 247.) The employees at the Century Daily Grill filed a class action lawsuit against the Company for failing to adhere to the minimum wage set forth in the Ordinance. (Tr. 72, 211, 459.) The employees ultimately received retroactive wage increases, but it took longer than the Company had anticipated for this to occur. (Tr. 111.)

F. Mandatory Meetings

Employees attend mandatory meetings about once a year to where management talks about restaurant operations and events. In late March or early April,[13] Robertson, Kachani, and Burnett held mandatory meetings for all employees. They were on consecutive days, and each employee attended one meeting or the other. Robertson announced that employees would be able to request days off on a first-come first-serve basis. This had been manner in which time off had been requested when he was the general manager, and he was unaware that this practice had changed until he heard complaints from employees during his one-on-one meetings. Robertson also said they could use flex-time before vacation time, which was a benefit because flex-time is not payable when the employee leaves the Company, and vacation time is. (Tr. 367–371.)

Robertson announced that hours had been cut because of the upcoming changes associated with the Affordable Care Act (ACA), but now with the restaurant's financial improvement, they could offer full-time work to some employees. Robertson said he and Burnett planned to sit down with the employees and discuss their preferences regarding days, hours, and shifts. Robertson also informed employees that they would be paid time and a half for working holidays.[14] In addition, Robertson told employees that the employee discount at the restaurant

[12] It is undisputed that the ordinance applies to the servers and bussers employed at the Century Daily Grill.

[13] Robertson recalled the dates as March 24–25. Goytia, Tello, and Mejia recalled it was in April. The precise date does not impact my findings.

[14] The Respondent's unionized restaurant in Chicago already had this benefit. Restaurants not located within hotels are closed on Thanksgiving and Christmas.

would increase from 30 percent to 50 percent and the previous restrictions on certain menu items would be lifted. This was implemented company-wide. (Tr. 371–372; R Exh. 2, p. 9.)

Goytia asked if these changes were permanent and asked about the meaning of at-will employment. He then read the at-will rule. Kachani said there would be a legal representative at the restaurant tomorrow and Goytia could set up a meeting with him to answer any questions. (Tr. 69–70, 97.) Mejia asked Robertson to explain to everybody that there would not be retaliation. Robertson said he would discuss any problems with employees one-on-one. (Tr. 231–232.) Several other employees also asked questions. Goytia and Diaz wore union buttons during the meeting. (Tr. 98.)

On May 2, Phil Kastel[15] sent an email to Gehrke, Kachani, and Spivak, among others, notifying them that Ramin Azad was passing out a flyer on his day off.

In May, Spivak conducted a meeting with employees to explain what had happened with regard to their wages not being fully paid in accordance with the ordinance. He told the employees they would receive checks for the wages they had been shorted in a couple of weeks. (Tr. 275.)

The Respondent's healthcare benefits broker is Bob Hoskins, a senior account executive at Wells Fargo Bank. On June 3, Gehrke sent Hoskins an email asking if a specified benefit contribution model could be used at the Century location. Gehrke asked Hoskins if there would be an issue under ERISA [Employee Retirement Income Security Act]. Hoskins forwarded the message to Daniel Kopti, asking if the proposed model would be discriminatory. Kopti replied that under the Affordable Care Act, insured plans are prohibited from discriminating in favor of highly compensated employees. He saw nothing in the Company's plan that would be a problem under the nondiscrimination standard. (R Exh. 3.)

Spivak conducted another mandatory meeting on July 9 in the Westin conference room. Burnett, Gaeta, White, and Human Resources Representative Melinda Sharan also attended on management's behalf. Spivak apologized for losing his composure at the prior meeting regarding the class action wage-and-hour lawsuit. He also apologized for how long it took employees to receive their checks from the settlement of the lawsuit. He thanked everyone for attending, and said the employees would receive $100 worth of gift cards. Spivak announced that the company would start providing healthcare coverage for employees who worked at least 10 hours per week, and the copayment would be $10.00. He passed out pamphlets describing the different plan options.[16] (Goytia 71–73, 206–208, 233; GC Exh. 11.)

This was the first time gift cards were passed out at a mandatory meeting. In the past, employees received gift cards based on certain performance incentives and competitions. (Tr. 213.)

[15] Kastel's job title was not identified.

[16] The rates and plans were discussed in June. (R Exhs. 4–7.)

G. The Rules

The Respondent maintains various rules and policies. All restaurants share the same policies. The specific rules the General Counsel contends violate the Act are set forth and discussed in the analysis section below.

Many of the rules are contained within the most recent version of the Restaurant Team Member Handbook (employee handbook), dated June 14. (GC Exh. 2.) The handbook is distributed to new employees during orientation. According to Burnett, the updated handbook was distributed to existing employees as they came to work, and they were asked to sign a receipt stating they had received it. The employees could decline to sign, and when this occurred, Burnett just noted the employee declined to sign. If employees had questions, Burnett would answer them or contact human resources if he did not know the answer. (Tr. 341–343.)

Goytia requested a copy of July 2014 the handbook from White. They met in White's office, and White told Goytia he would need to sign the acknowledgement of receipt. Goytia said he did not understand the provision about arbitration and White said it was simply a receipt. Goytia did not sign the receipt and he retained a copy of the handbook. (Tr. 79–80) Azad received a copy of the employee handbook from O'Daniel in August 2014. He did not sign in receipt of the handbook. (Tr. 214.)

Failure to abide by the policies set forth in the employee handbook will lead to disciplinary action, up to and including termination. (GC Exh. 2, p. 37.)

III. Decision and Analysis

A. Credibility Legal Standards

While many of the issues in this case do not concern witness credibility, some of them do. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op at 7 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The Board has agreed that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006). Moreover, an adverse inference is warranted by the unexpected failure of a witness to testify regarding a factual issue upon which the witness would likely have knowledge. See *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify);

Flexsteel Industries, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact).

Testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972).

Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis below.

B. Union Buttons

Paragraph 8 of the complaint alleges that the Respondent has promulgated and maintained a rule prohibiting employees from wearing union buttons or insignia on their uniforms while working. The complaint more specifically alleges that, in violation of Section 8(a)(3) and (1):

- On about March 26, 2014, Grace Truong sent Sandra Diaz home for wearing a union button on her uniform;
- On about March 30, 2014, Kevin O'Donnell sent Madcadel Goytia home for wearing a union button on his uniform;
- In late March 2014, Will White sent Alfredo Mejia home for wearing a union button on his uniform;
- On about March 31, 2014, Robert Robertson sent Salvador Tello home for wearing a union button on his uniform;
- On about April 1, 2014, Michael Burnett sent Salvador Tello home and issued him written discipline for wearing a union button on his uniform;
- In early April 2014, Michael Burnett sent Danielle Sanchez home for wearing a union button on her uniform.

1. Section 8(a)(1)

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed by the Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472, (1994); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992), citing *American Freightways Co*., 124 NLRB 146, 147(1959).

In *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 801–803 (1945), the Supreme Court held that employees have a protected right to wear union buttons and other insignia at work. This right is balanced against the employer's right to maintain order, productivity, and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where the employer proves that "special circumstances" exist. Id. at 797–798; see also *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015); *Sam's Club*, 349 NLRB 1007, 1010 (2007); *Control Services*, 303 NLRB 481 (1991). Special circumstances may justify restrictions on union insignia "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp*., 342 NLRB 649, 650 (2004); see also *United Parcel Service, Inc*., 195 NLRB 441 (1972).

The special circumstances exception is narrow and "a rule that curtails an employee's right to wear union insignia at work is presumptively invalid." *E & L Transport Co*., 331 NLRB 640 fn. 3 (2000). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004). Any rule impinging on the employees' Section 7 right to wear union insignia must be narrowly tailored to the special circumstances justifying its maintenance. Mere employee contact with customers does not, by itself, justify employer prohibition of union buttons or insignia. *Virginia Electric & Power Co.*, 260 NLRB 408 (1982), citing *Floridan Hotel of Tampa, Inc*., 137 NLRB 1484 (1962), enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963).

Special circumstances are found "when the prohibition against union insignia or apparel . . . 'unreasonably interfere[s] with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.' *Nordstrom, Inc*., 264 NLRB 698, 700 (1982)." *Smithfield Packing Co*., 344 NLRB 1, fn 20 (2004); see also *Bell-Atlantic-Pennsylvania, Inc.,* 339 NLRB 1084, 1086 (2003). The Board has held that "An employer's concern about the 'public image' presented by the apparel of its employees is . . . a legitimate component of the 'special circumstances' standard." *W San Diego*, 348 NLRB 372, 380 (2006).

I find the Respondent has met its burden to show special circumstances. First, the evidence is undisputed that the prohibition on wearing the union pin only was enforced when the servers were going to interface with guests. Employees were permitted to wear union buttons at employee meetings and while on breaks or otherwise not serving guests. Though interfacing with guests is not enough for the Respondent to meet its burden, I find the prohibition was required for the Respondent to maintain an ambience consistent with its established business model. To this end, I found the testimony of the Respondent's founder and CEO, Robert Spivak, particularly compelling.

In addition to discussing the uniform standards and personal appearance standards, Spivak testified about his vision in creating Grill Concepts. His philosophy, detailed in the statement of facts above, was clearly to provide a place customers could come to get predictable, reliable, customer-focused service and forget about everything else. To that end, he testified about creating a restaurant where the servers were "seen and not heard" and they stayed focused on their job to "provide service to deliver food and not to make any statements of any kind, other

than supporting our restaurant." The only message Spivak wants to impart to the guests is that "the server's job is clearly to provide service."

The focus on atmosphere is very similar to *W San Diego*, where the Board found a restriction on union insignia was in line with the hotel's desire to create a "wonderland" experience, where it described its guest services as "whatever whenever," and its employees as "talent" or "cast members." This is similar to Spivak's vision of the "traditional American grill where the answer is yes, what is the question, and the guest is always right" and Grill Concepts' mission statement, "Take care of the guests, respect the Team Member, and the rest will take care of itself." It is clear from the testimony of both Spivak and Burnett that a consistent, customer-driven experience is at the core of the Respondent's business model, and the uniform and professional appearance of its servers is part of that model.[17]

The General Counsel and the Charging Party point to some inconsistencies in the uniforms and some lapses in enforcement. The fact that employees wear pants and shirts made from different materials, however, does not meaningfully detract from the fact that the uniforms are essentially the same for the servers and bussers, respectively. The evidence also shows that there has been some inconsistency in enforcing the rule, with certain pins sometimes being permitted (such as the anniversary pins) and the Respondent's potential occasional use of pins for promotional restaurant items. I do not find these materially detract from the Respondent's defense under existing Board law. See *Hertz Corp*., 305 NLRB 487 (1991) (on remand from Sixth Circuit, *NLRB v. Hertz Corp*., 920 F.2d 933 (6th Cir. 1990)) (ban on union insignia by employees who interfaced with the public lawful despite occasional lapses in enforcement). Moreover, the union pins at issue were more conspicuous than the anniversary buttons or the angel pin Diaz wore. The union pins were white, with black and red lettering, contrasted against the employees' dark vests or jackets. The Board has upheld a prohibition on wearing a white button with red lettering, *United Parcel Service*, 195 NLRB 441 (1972), as well as a "day-glow" button with black lettering. C*on-Way Central Express*, 333 NLRB 1073 (2001).

The General Counsel and Charging Party also assert that the hotel employees, who wore union insignia, were also in the restaurant retrieving items for room service delivery. These employees, however, were hotel employees, whose jobs did not entail interacting with the restaurant guests, and who were not under the Respondent's control.[18]

The General Counsel further argues that the rule prohibiting union buttons was promulgated in response to protected activity and is therefore unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), discussed below. Any employer directive to remove union insignia is going to be in response to the employees' activity of displaying it.[19] I

[17] The General Counsel and Charging Party both point out that the employer in *W San Diego* purchased the uniforms at considerable expense. The relative expense of the uniforms in that case compared to the expense of the vests and jackets in the instant case, particularly compared against respective operating budgets, is not a matter of record.

[18] The Charging Party's assertion that the uniforms were similar to the hotel employees' uniforms is not persuasive, particularly considering the uniforms are the same for all the restaurants (except the Public School restaurants) regardless of whether they are housed in hotels.

[19] The General Counsel points to White's confusion over the pin policy as an indication that it did not exist prior to the employees' wearing union buttons. It is clear, however, that White only requested

find, therefore, that the *Republic Aviation* framework is better suited to the instant factual scenario. Similarly, the General Counsel asserts that had the prohibition of buttons been part of the Respondent's business plan, this would have been reflected in the uniform standards. I find, however, the uniform and personal appearance standards convey the image the Respondent wants to project, consistent with its business plan. The omission of buttons (among a plethora of other potential adornments), does not establish that the Respondent regularly permitted servers and bussers to wear conspicuous non-uniform pins prior to March 2014.

2. Section 8(a)(3) and (1)

Section 8(a)(3) prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Any violation of Section 8(a)(3) is also a violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Neither the General Counsel nor the Charging party asserts that the mixed-motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), applies, and the Respondent does not assert a *Wright Line* defense. Instead, the General Counsel argues there was no mixed motive because the very conduct for which the employees were sent home was protected by Section 7. *Felix Industries*, 331 NLRB 144, 146; (2000); *Nor-Cal Beverage Co*., 330 NLRB 610, 611-612 (2000). Because I have found the Respondent has established special circumstances, however, I find it was justified in conditioning employees' continued work serving guests on removing the buttons. The employees chose to go home rather than removing their buttons and continuing to work. With regard to the written discipline issued to Tello, this was issued because Tello requested documentation that he was being sent home for refusing to remove his union button.

Based on the foregoing, I recommend dismissal of complaint paragraph 8.

C. Alleged Threats

In specifically assessing whether a remark constitutes a threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat." *Smithers Tire*, 308 NLRB 72 (1992). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

1. Sandra Diaz

Paragraph 8(c)(ii) of the complaint alleges that, on March 26, 2014, Grace Truong, threatened Diaz with discipline for wearing a union button on his or her uniform while working.

---

clarification after Mejia showed him the poster.

Because I have found the Respondent has established special circumstances permitting it to bar its employees from wearing a union button while working in uniform with the public, as set forth fully above, I find there was no unlawful threat. I therefore recommend dismissal of this allegation.

2. Salvador Tello

Complaint paragraph 9(a) alleges that about March 31, 2014, the Respondent threatened an employee with an implied threat of job loss unless the employee ceased supporting the Union. More specifically, the evidence shows that on March 24, Robertson told Tello he had to decide whether he was going to "go with the Union or go with the grill."

Tello's testimony on this point is unrefuted, and I credit it. As a current employee testifying against his own pecuniary interest I find his testimony to be particularly reliable. See *Gold Standard Enterprises*, supra. I also draw an adverse inference based on Robertson's failure to testify about this allegation. *Martin Luther King, Sr., Nursing Center*, supra; *Flexsteel Industries,* supra.

The statement conveyed to Tello was that he needed to choose the Union or the Company, and I find it is an implied threat of job loss. See *Shen Automotive Dealership Group*, 321 NLRB 586, 591 (1996) (statement from supervisor to employee that he should "really try to decide whether he was going to work with him or not" coercive among other unlawful conduct). In the context present here, where Robertson was meeting with employees directly in response to learning about the employees' (including Tello) encounter with Kachani in February, I find this statement was coercive. I therefore find the General Counsel has met its burden to prove this complaint allegation.

D. Alleged Interrogations, Surveillance, Solicitation of Grievances and Promises

1. Salvador Tello

Complaint subparagraphs 9(c) and (e) allege that the Respondent, in April 2014, interrogated its employee about the union sympathies of employees and created the impression that his union activities were under surveillance.[20] Because these allegations stem from the same conversation, they are discussed together.

As detailed in the statement of facts, sometime in mid-April, Robertson told Tello to clock out and meet him in the boardroom, where Gehrke was also present. Robertson said he had seen Tello in the video and expressed his surprise. Robertson asked Tello if he knew how the union worked, told him that their relationship would change because others would be making decisions for them, and asked if employees were signing cards.

[20] The Respondent contends that the meetings with employees, including Tello and Mejia, took place in March. There are no documents establishing the date, and the witness testimony conflicts. Whether the meetings occurred in March or April has no bearing on my conclusions.

a. Interrogation

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 fn. 1 (2003), affd. mem. 121 Fed. Appx. 720 (9th Cir. 2005).

The Board also considers the timing of the interrogation and whether the interrogated employees are open and active union supporters. See, e.g., *Gardner Engineering*, 313 NLRB 755, 755 (1994), enfd. as modified on other grounds 115 F.3d 636 (9th Cir. 1997); *Blue Flash Express*, 109 NLRB 591 (1954). Another factor is whether adequate assurances were provided. See *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1223-1224 (2002). These factors "are not to be mechanically applied," they represent "some areas of inquiry" for consideration in evaluating an interrogation's legality. *Rossmore House*, supra, fn. 20. The Board has held that interrogations that constitute "a pointed attempt to ascertain the extent of the employees' union activities" are unlawful. *SAIA Motor Freight, Inc.*, 334 NLRB 979, 980 (2001).

With regard to the alleged interrogation, I find the totality of the circumstances compels a finding that Tello was interrogated. The nature of the information sought went to the heart of Tello's and other employees' union activity.[21] The interrogator was the area director, a high ranking management official, who was accompanied by the highest ranking corporate human resources officer and the questioning took place behind closed doors. No assurances were provided. As to the truthfulness of the reply, Tello did not answer because he did not want to jeopardize his coworkers.

The Respondent contends that even if Robertson asked this question, it was in the manner of an introductory statement of fact, used as a platform for communicating how the Union worked. Though it is true Robertson asked Tello if he knew how unions worked, this does not save the inquiry about whether employees were signing cards from constituting an interrogation, based on the factors analyzed above.

The Respondent also contends that Robertson's remarks were protected by Section 8(c) of the Act. The employer's freedom under Section 8(c) to express views, arguments, or opinion about the union stops when the comments threaten employees or otherwise impinge upon Section 7 rights. See *Children's Center for Behavioral Development*, 347 NLRB 35 (2006). Because I have found the question about whether employees were signing cards to be an unlawful impingement on Tello's Section 7 rights, the Respondent's contention fails.

[21] Though Robertson denied attempting to discover information about who was supporting the Union during his employee interviews (Tr. 365), he did not deny asking whether employees were signing cards.

b. Impression of Surveillance

The test for determining whether an employer engages in unlawful surveillance or whether it creates the impression of surveillance is an objective one and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act. See *Broadway*, 267 NLRB 385, 400 (1983) (citing *United States Steel Corp. v. NLRB,* 682 F.2d 98 (3d Cir. 1982)).

The Board has consistently held that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. See *Fred'k Wallace & Son, Inc*., 331 NLRB 914, 915 (2000). For example, in *Metal Industries*, 251 NLRB 1523, 1523 (1980), the Board found no unlawful surveillance of employees where the employer had a longstanding practice of going to the employee parking lot to say goodbye to its departing employees at the end of the workday. The employer's observance of the employees' Section 7 activity was inseparable from its regular and noncoercive practice. See also *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003).

Employers may not, however, "do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003); See also *Partylite Worldwide, Inc*., 344 NLRB 1342 (2005); *Arrow Automotive Industries,* 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982); *Sprain Brook Manor Nursing Home*, 351 NLRB 1190 (2007). The Board's analysis thus focuses on whether the observations were ordinary or represented unusual behavior. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005), rev. denied 515 F.3d 942 (9th Cir. 2008).

The employees' complaints to Kachani took place in the restaurant and were filmed by the Union. Obviously, the managers who observed this interaction were not engaged in surveillance. Robertson, however, did not observe the activity when it occurred, nor is it clear how he knew the Union had posted it on its Facebook page.[22] He did not mention where he had obtained the video, and expressed his surprise to see Tello taking part in the February 18 confrontation. Though Tello was presumably aware the incident was being filmed, there is no evidence he had any role in disseminating any footage or informing anyone where they could view it. Given the context, described above, I find the Respondent "did something out of the ordinary" by taking the affirmative steps to go on the Union's Facebook page to view the protected activity, and then informing Tello it had done so.

Based on the foregoing, I find the General Counsel has proved complaint allegations 9(c) and (e).

2. Alfredo Mejia

Complaint allegation 9(b) alleges that, around early April 2014, the Respondent solicited employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment to discourage employee support for the Union. Complaint

[22] Robertson was not in the restaurant on February 18. (Tr. 361.)

subparagraphs 9(d) and (f) allege that the Respondent, in April 2014, interrogated an employee about the union sympathies of other employees, and promised the employee that the Respondent would no longer retaliate against its employees. Because these allegations stem from the same conversation, they are discussed together.

As detailed in the statement of facts, in early April, Robertson asked Mejia to accompany him to the boardroom. Robertson told him how much the Union would cost the Company. Robertson asked why Mejia wanted the Union at the Daily Grill, and Mejia said he wanted protection from retaliation. Robertson replied that he would stop the retaliation practice, and he asked Mejia what he could do to keep the Union from coming. Mejia reminded Robertson that he had called for a meeting the following week, the union movement was very strong, and the Company had cut employees' hours in response to the Affordable Care Act.

a. Solicitation of Grievances

Employer solicitation of employee grievances or complaints during an organizing campaign may be considered as an implied promise to resolve complaints elicited favorably for the employees. See *Alamo Rent-A-Car*, 336 NLRB 1155 (2001). In *Majestic Star Casino, LLC*, 335 NLRB 407, 407–408 (2001), the Board, quoting *Maple Grove Health Care Center*, 330 NLRB 775 (2000), stated:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . .[I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is [sic] rebuttable one.

An employer with a past practice of soliciting employee grievances may continue to do so during an organizing campaign as long as the practice remains essentially the same. *Longview Fibre Paper & Packaging, Inc*., 356 NLRB No. 108 (2011).

The Respondent argues, at some length, that there was no organizing drive. This argument is wholly unavailing. Management was aware of the employees approaching Kachani. They knew the Union was involved, as Goytia told White he represented the employees and they wanted to unionize, and Gehrke identified and shared the video of the incident from the Union's Facebook page.[23] Robertson met with the Company's attorneys to find out what he could and could not do, and he met with the employees to explain the unionization process. The Team Member Conversation Points "regarding the union organizing attempt" underscore that the

[23] White did not testify, and I therefore infer he would have corroborated Goytia's testimony on this point. *Roosevelt Memorial Medical Center*, supra.

Respondent was aware of organizational activity, as do several emails described in statement of facts above.

There is no history of soliciting employee grievances by having managers approach employees in the manner Robertson approached Mejia. By Robertson's question to Mejia regarding what the Company could do to keep the Union from coming in, the Respondent violated Section 8(a)(1) as alleged. See *J & C Towing Co., Inc*., 307 NLRB 198, 199, 205 (1992).

In addition, in response Robertson asking why Mejia wanted the Union and Mejia responding that he wanted the Union to be protected from retaliation, Robertson promised to stop the retaliation. This amounts to a solicitation of grievances and a promise of a remedy, also in violation of Section 8(a)(1).

b. Interrogation

The standards for interrogation, set forth above in relation to employee Tello above, apply here. For the same reasons as above, I find Robertson's questions to Mejia constituted an unlawful interrogation. Mejia, in a one-on-one meeting with the Area Manager Robertson, was asked why he wanted a Union, after Robertson had told him the Union would be costly to the Company. Applying the totality of the circumstances test, and considering the context, I find this was coercive. See *Association of Community Orgs. for Reform Now*, 338 NLRB 886 (2003).

The Respondent contends that I should discredit Mejia, contending that he is the only witness who testified about being asked such questions and he is knowledgeable about union relationships. Robertson, however, did not deny making the comments attributed to him. Moreover, there was nothing in Mejia's demeanor when testifying to indicate he was not being truthful, and his testimony was not otherwise impeached.[24]

The Respondent further asserts that Mejia was not pressed to answer any questions and was not threatened or coerced. As noted above, I have found the interrogation was coercive based on the applicable legal standards, which do not require a threat.

E. Alleged Promise/Grant of Benefits

1. Meeting in late March or early April

Complaint allegation 9(g) alleges that, in mid-April 2014, the Respondent promised and/or granted employees the following benefits to discourage their support for the Union: (1) time-and a-half pay for employees working a holiday; (2) new protocol for employees to more easily request a day off; (3) a bigger employee discount for food at the restaurant; and (4) a reconsideration of the cutback of employees' hours. These allegations regarding the meeting with employees are detailed in the statement of facts.

[24] As a current employee testifying against his pecuniary interest, Mejia's testimony is considered particularly reliable, as discussed in the credibility section of this decision.

The Supreme Court, in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), stated that the "action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination." As the Court explained in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964):

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

(Footnote omitted.) It held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. It is well-settled that the *Exchange Parts* principles apply to promises and/or granting of wage increases or other benefits, if they are made in response to union organizational activity, regardless of whether a representation petition has been filed. *Network Dynamics*, 351 NLRB 1423, 1424 (2007); *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006).

Unlike most 8(a)(1) allegations, analysis of a claim that benefits were promised, announced, or granted to coerce employees in their choice of bargaining representative is motive-based. *Network Dynamics Cabling, Inc*., 351 NLRB 1423, 1424 (2007). The granting of benefits to employees during union organizational activity "is not per se unlawful" where the employer can show that its actions were governed by other factors. *American Sunroof Corp*., 248 NLRB 748, 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc*., 319 NLRB 916 (1995). If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. One way to do this is to show the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra; see also *Real Foods Co*., 350 NLRB 309, 310 (2007); *Holly Farms Corp*., 311 NLRB 273, 274 (1993), enfd. 48 F.3d 1362 (4th Cir. 1995), affd. 517 U.S. 392 (1996); *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087–1090 (2004).

I find the employees would reasonably view the grant of benefits as an attempt to discourage support for the Union. The employee meetings occurred in the wake of and admittedly in response to the February 18 presentation to Kachini and shortly after employees wore buttons in support of the Union. The meeting occurred after one-on-one meetings with employees to determine why they were unhappy, and, as discussed below, addressed some of the grievances the employees aired. Under these circumstances, I find employees would reasonably view the grant of benefits as an attempt to discourage support for the Union.

With regard to the change in how time off was requested, Robertson stated that this was implemented because the manner of scheduling time off was one of the top complaints he heard during his meetings with employees, and it was merely a reversion to how time off was

requested back when he was general manager. These meetings, however, occurred in response to employees' union activity. Robertson admitted that the meetings were in part to determine if employees understood the unionization process. In addition, White suggested speaking to all of the employees to get a sense of how many were involved in the "movement." Because the meetings occurred in response to union activity, and the change to the manner in which time off was requested occurred as a result of the meetings, there is no legitimate explanation for the timing of this change.

With regard to restoration of hours, cutting back employees' hours was raised as a complaint during the employees' presentation to Kachani on February 18. The Respondent explains the timing by asserting that the decision to let employees return to 8-hour shifts was tied to the Affordable Care Act. Specifically, the Respondent contends that it had implemented a policy of permitting employees to work no more than 30 hours per week, in response to the ACA. Robertson said employees were not happy with this, so the Company decided in 2013 to end this practice. (Tr. 374.) There is no evidence, however, that this was communicated to the employees at the time, and it is clear from employees' statements to Kachani on February 18, that the cutbacks to employees' hours had not yet been restored. During the all-employee meetings, Robertson said he and Burnett planned to sit down with the employees and discuss their preferences regarding days, hours, and shifts. The fact that the Respondent found it necessary to inform employees of this if it had ostensibly occurred more than a year prior is curious. If the decision had been made in 2013, the timing of both communicating the benefit to employees and implementing it does not make sense.

The changes to holiday pay and the employee discount for food at the Respondent's restaurants were company-wide. With regard to holiday pay, this change impacts only the restaurants in hotels, as the other restaurants are not open on the days when employees would receive time-and-a-half pay. Both changes were announced in Grill Concepts' management newsletter on April 4, 2014. (R Exh. 2, p. 9.) Standing alone, I would not find that announcement of these two benefits coercive. I find, however, the timing of the meetings, coupled with the other promises that I have found were intended to discourage support for the Union, establishes the General Counsel's burden.[25]

The Respondent relies on the employee surveys to justify the timing of the benefits, contending that the Company had been attempting to improve employee morale before any union activity occurred. This does not square, however, with Robertson's apparently newly discovered concern that the employees at the Century Daily Grill were unhappy based on the events of February 18, prompting him to conduct one-on-one meetings with every employee. These meetings would have been superfluous had the surveys already formed the source of the Company's response.

The Respondent further contends there is no evidence that the Union has organized stand-alone restaurants. This is of no moment. The Respondent's actions are evaluated in the same manner whether or not the Union has organized stand-alone restaurants in the past.

[25] As noted above, it is unclear whether the all-employee meetings were in March or April but either way the timing leads me to the same conclusion.

Based on the foregoing, I find the General Counsel established complaint allegation 9(g).

2. Meeting on July 9

Complaint paragraph 10 alleges that the Respondent, in a meeting Spivak conducted on July 9, 2014, announced to employees that they could to sign up for a health care plan and distributed $100 gift cards to discourage support for the Union.

The legal framework set forth above for the March/April meetings applies here. For the same reasons, I find the General Counsel has established that employees would reasonably view the grant of benefits as coercive.

With regard to the health benefits, the Respondent asserts that changes to the health plan were made in accordance with the ACA, and that the Century Daily Grill was used as a test case to see how many employees would enroll. The ACA's employer mandate, which requires employers with more than 50 employees to provide healthcare coverage to their employees, was initially to take effect in 2014. On July 2, 2013, the Treasury Department announced the employer mandate would not take effect until 2015.[26] Email exchanges about implementation at the Century Daily Grill started in early June 2014. Give the Respondent's rationale for using the Century Daily Grill as a test case, it is curious a similar test case implementation plan was not discussed and documented in or around June of 2013, prior to the time the Respondent (or anyone) knew there would be a 1-year delay. The fact that there were no emails produced discussing the topic prior to June 2014, is telling.

The Respondent's asserted reason for the unique choice of the Century Daily Grill as the venue to test the healthcare benefit likewise does not withstand scrutiny. The Respondent contends that it chose the Century Daily Grill because it the Airport Hospitality Enhancement Zone Ordinance served to alleviate concerns under ERISA. Specifically, the Respondent contends that because the hourly employees at the Century Daily Grill were paid more under the Ordinance, offering this benefit only to them insulated them from a discrimination complaint under ERISA.

During the hearing, I instructed the Respondent to identify what provisions of ERISA it relied upon and to make those provisions part of the record. (Tr. 423.) Nonetheless, the Respondent did not, at the hearing or in closing brief, identify what provisions of ERISA the Company was relying upon or how the Ordinance would exempt the Century location from ERISA's discrimination provisions.

The only type discrimination tying the provision of healthcare benefits to wages is, by no coincidence, the same type of discrimination Gehrke discussed with Hoskins, the Respondent's healthcare broker.[27] Specifically, 26 USC § 105(h), prohibits an employer from offering a self-

[26] See http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. I take judicial notice of these dates, which are not subject to reasonable dispute. Federal Rule of Evidence 201.

[27] Under Section 501 of ERISA, it is unlawful for "any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the

insured medical reimbursement plan in a manner that discriminates in favor of highly compensated employees. This prohibition was explained to Gehrke in an email. The Respondent has pointed to nothing that would justify its choice of the Century Daily Grill as a test case based on ERISA discrimination concerns, and it simply makes no sense.[28] Importantly, it is clear from the email exchanges between Gehrke and Hoskins that the Century Daily Grill was chosen as the implementation site prior to the request for advice regarding discrimination.

The Respondent contends that health benefits were offered when the union activity was a "somewhat distant memory," asserting that the indication employees were interested in unionizing was on March 30. (R Br. 24.) The employees were told on July 9 about the benefits, which had been in the works since at least early June. On April 13 Burnett forwarded Robertson and Robertson forwarded to Gehrke an email about union activity. On April 18, Burnett informed higher management of employees with Unite Here T-shirts coming marching in the restaurant. On May 2, Kastel had sent an email to a few top management officials about Azad passing out flyers. Any timing argument does not withstand even minimal scrutiny.

Based on the foregoing, I find the granting of healthcare benefits violated Section 8(a)(1) as alleged.

With regard to the gift cards, I find the Respondent has met its burden to establish a legitimate reason for the timing of this benefit. The gift cards were presented as an apology from Spivak for the delay in paying the back wages employees were owed.[29] This is a legitimate explanation and, as the Respondent notes, the Company regularly gives gift cards. Though they are not routinely handed out at all-employee meetings, the context here makes sense—the Respondent was providing compensation to apologize for having shorted the hourly employees' compensation. Accordingly, I recommend dismissal of this complaint allegation.

F. The Rules

As detailed below, the complaint alleges that various employer rules violate Section 8(a)(1) of the Act. The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Hills & Dales General Hospital*, supra, slip op. at 5.

---

attainment of any right to which such participant may become entitled under the plan." This provision has nothing to do with discrimination in providing healthcare plans to employees. It is also unlawful to discriminate on the basis of health status. 29 U.S.C. §§ 1140, 1182.

[28] The only concern about discrimination mentioned in the email exchange between Gehrke and Hoskins involved moving the overall plan to a self-insured contract. There is nothing whatsoever tying the Ordinance to the discrimination provisions. (R Exh. 3.)

[29] There is no allegation that the granting of the gift cards was in response to the protected activity of the class action lawsuit employees filed. The General Counsel in fact objected to questions about the lawsuit on relevance grounds.

Under the test enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), if the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union or other protected activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. Id. The question of whether a rule or policy is on its face a violation of the Act requires a balancing between an employer's right to implement certain legitimate rules of conduct in order to maintain a level of productivity and discipline at work, with the right of employees to engage in Section 7 activity. *Firestone Tire & Rubber*, 238 NLRB 1323, 1324 (1978).

The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, supra at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage,* supra at 646.

1. Team Member Relations/Positive Culture

Paragraph 6(a) of the complaint alleges that the Respondent's "Team Member Relations/Positive Culture" rule violates the Act. The rule states, in relevant part:

> Grill Concepts, Inc. believes that the working conditions, wages, and benefits offered to Team Members are competitive with those offered by other employers in this area and in this industry. If Team Members have concerns about working conditions, wages or benefits, they are encourage[d] to voice these concerns openly, respectfully and directly to their General Managers or if necessary, the Regional/Area Director or with the People Department.
>
> When Team Members deal openly, respectfully and directly with managers, the work environment will be more enjoyable, communication will be clearer, and attitudes can be positive. We believe that Grill Concepts, Inc. strives to demonstrate its commitment to Team members by responding effectively to their concerns and creating an atmosphere of fun and excitement through teamwork.
>
> We aim to strive for a culture in the restaurant that is "people friendly." All our managers know the importance of treating all Team members and peers like the professional adults that you are.
>
> In this regard, everyone is to be treated with courtesy and respect at all times, under all situations. Yelling, threatening, meanness, sarcasm, intolerance, impatience, belittling and any other form of harassment is not tolerated at any time by the management staff or by hourly Team Members.

> We need YOU, the Team Member to keep this culture alive and well. No one is perfect. We are a busy restaurant and sometimes we feel under pressure to satisfy all our Guests. We would NEVER lose our temper with a guest and we will not take our anger out on each other either.

(GC Exh. 2, p.12.)

The General Counsel and the Charging Party argue the requirement to maintain a positive culture expressly restricts Section 7 activity. They assert that the first paragraph specifically addresses the protected activity of discussing working conditions, wages, and benefits with management, and the subsequent paragraphs broaden into a general admonition in favor of positive dealings. As such, they contend that this juxtaposition is an explicit restriction on Section 7 rights because employees must express their concerns about working conditions without yelling, sarcasm, intolerance, impatience, and other negative conduct.

The Respondent asserts that the rule does not expressly restrict Section 7 activity nor would it reasonably be construed to do so, it was not promulgated in response to Section 7 activity, and it has not been applied to restrict Section activity.

I find the rule does not expressly restrict Section 7 activity. I find, however, that employees would construe the requirement to voice concerns about wages, hours, and working conditions to management "respectfully" as a restriction on their Section 7 rights under current Board law. Though the language in the first paragraph is phrased in terms of encouraging rather than requiring employees to voice their concerns to management in a respectful manner, the subsequent paragraphs are phrased in terms of a requirement. In *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014), the Board majority stated, when discussing the phrase "insubordination or other disrespectful conduct":

> In the typical workplace, where traditional managerial prerogatives and supervisory hierarchies are maintained, employees would reasonably understand this phrase as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority--in other words, as referring to something less than actual insubordination. For example, the act of concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme-- all core Section 7 activities--would reasonably be viewed by employees as ""disrespectful" in and of themselves, regardless of their manner and means, and thus as violating the rule.

See also *First Transit, Inc*., 360 NLRB No. 72, slip op. at 2-3 (2014); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011); *Claremont Resort & Spa*, 344 NLRB 832 (2005). I find, therefore, the portion of the rule requiring employees to voice concerns about wages and other working conditions "respectfully" is overly broad under extant caselaw.

Moreover, there is no exception carved out for Section 7 activity with regard to the requirement to refrain from the conduct set forth in the fourth paragraph of the rule, whether that conduct is directed at management or is among coworkers. The Supreme Court has noted that protected concerted speech may include "intemperate, abusive and inaccurate statements." *Linn*

v. United Plant Guards, 383 U.S. 53 (1966). The Board has distinguished between prohibitions that would not generally implicate Section 7 protections, and those that would not. See *Palms Hotel & Casino* 344 NLRB 1363, 1367-1368 (2005). When read in context, the proscription on "threatening, meanness, sarcasm, intolerance, . . . belittling and any other form of harassment" in the instant rule falls into the former category and is not problematic. It is clear the provision's intent is to foster mutual respect among coworkers. On the other hand, "yelling" and "impatience" commonly arise in a multitude of protected activities. A ban on these behaviors, without limiting language, is overly broad. Employers can require employees to be respectful and professional to each other and to customers, but any such rule must make clear it does not encompass Section 7 activity. No such clarification is present in the instant rule.

The Respondent cites to *Fiesta Hotel Corporation*, 344 NLRB 1363, 1367 (2005), which involved a rule forbidding employees from engaging in "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." The Board, however, has distinguished between rules prohibiting protected concerted criticism of the employer and rules requiring employees to be respectful and professional to coworkers or customers.[30] The rule in *Fiesta Hotel* does not regulate conduct toward the employer, and is therefore distinguishable.

The Respondent also points to *Copper River of Boiling Springs*, 360 NLRB No. 60 (2014). Much of the discussion in *Copper River,* including the portions on which the Respondent relies, concerned rules regarding behavior toward coworkers and guests. As discussed below, I do not find certain aspects of the instant rule to be overly broad in terms of treatment of guests and coworkers during the course of serving the Restaurant's patrons. The rule in *Copper River* regarding conduct toward management prohibited "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests." Id at fn. 2. The only proscribed conduct toward management in that rule was insubordination. In *Casino San Pablo*, slip op. at 4, the Board distinguished rules prohibiting insubordinate conduct toward management from rules prohibiting what would reasonably be construed as conduct broader than insubordination, including proscriptions on "disrespectful" conduct. The rule in the instant case is not limited to insubordination toward management. As such, *Copper River* is also distinguishable.[31]

To the extent the General Counsel and the Charging Party assert that the language in the final paragraph regarding maintenance of a positive culture and not losing one's temper or taking anger out on coworkers or guests is overly broad, I find that it is not. The final paragraph, unlike the preceding ones, clearly refers to the treatment of guests and coworkers during the course of serving the Respondent's patrons. No reasonable reading of this paragraph, even when considered with the other parts of the rule, is a restriction on Section 7 protected activity.[32]

Based on the foregoing, I find the General Counsel has met its burden to prove the Team Member Relations/Positive Culture rule violates Section 8(a)(1).

---

[30] General Counsel Memorandum 15–04 (March 28, 2015) discusses this distinction in the Board's caselaw.

[31] The Respondent also cites to some ALJ decisions which are not precedential and not as directly on point as the Board caselaw upon which I have relied.

[32] The Respondent may not lawfully interpret this part of the rule to prohibit protected activity, and there is no evidence it has done so.

2. The Timekeeping rule

Paragraph 6(b) of the complaint alleges that the Respondent's timekeeping rule violates Section 8(a)(1). The rule states:

> Accurate recording of time worked is the responsibility of every non-exempt Team Member. Grill Concepts, Inc. is required by law to keep accurate records of time worked. Time worked is the time actually spent on the job performing assigned duties. You are NOT permitted to work while not punched in.
>
> Non-exempt Team Members are required to record accurately the time they begin and end their work, as well as the beginning and ending time of each meal period (in those states that require such.) They also must record the beginning and ending time of any split shift or departure from work for personal reasons. Overtime work always must be approved in advance by the manager.
>
> Please DO NOT loiter on restaurant property when not working. While off the clock and waiting to punch in, Team Members should not be in the restaurant earlier than 15 minutes prior to their scheduled starting time nor should they remain more than 15 minutes after they clock out.
>
> If an adjustment to the time record in Aloha or MenuLink is needed due to a Team Member neglecting to clock-in or clock-out properly, etc., the adjustment must be made by a Manager and ONLY with the signed consent of the affected Team Member. Hourly Managers or other Hourly Team Members will not change their own time under any circumstance.
>
> Altering, falsifying or tampering with time records, or recording time on another Team Member's time record or having someone else record your time is strictly prohibited. Violation of these timekeeping rules is a serious policy violation and will result in disciplinary action, up to and including termination.

(GC Exh. 2, p. 17, emphasis in original.)

The General Counsel and the Charging Party argue that the provisions in the third paragraph not to loiter on the restaurant property when not working and to avoid being in the restaurant more than 15 minutes before punching in and after punching out violate Section 8(a)(1).

Employers may maintain rules and policies tailored to legitimate business concerns, but may not "maintain overbroad no-loitering rules that reasonably tend to chill the exercise of Section 7 rights." *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694 (2008). In *Lutheran Heritage Village-Livonia*, the Board found that a rule prohibiting "[l]oitering on company property (the premises) without permission from the Administrator" violated Section 8(a)(1) of the Act because it would reasonably chill employees in the exercise of their Section 7 rights. Id. at 655. In so finding, the Board explained that employees reasonably would interpret the rule "to

prohibit them from lingering on the [r]espondent's premises after the end of a shift in order to engage in Sec[tion] 7 activities, such as the discussion of workplace concerns." Id. at 649 fn. 16. I find this reasoning applies to the instant case, and the rule would likewise be reasonably interpreted as prohibiting employees from gathering before and after their shifts to engage in Section 7 activities.

The Respondent contends it is clear that the rule's purpose is to ensure accurate timekeeping and prevent employees from working off the clock. (R Exh. 2, p. 6.) This contention is undermined, however, by the fact that accurate timekeeping and avoiding off the clock work are addressed in the first paragraph. The third paragraph is superfluous if it is meant to convey nothing different. Moreover, the admonition not to loiter makes clear this provision's scope is broader.

The Respondent further argues that, when read the Company's policies regarding employee meals, employees would reasonably construe that they should not come in early or stay late in order to avoid working off the clock, but they may come to the property any other time. The policy with regard to team member meal discounts for hourly non-exempt employee's however, appears to apply to team members who are working a scheduled shift at their own restaurant, and to employees "visiting other restaurants" when not working. (GC Exh. 2, p. 39.) In any event, the plain language of the provision, even in context, is reasonably read as a restriction on employees meeting together on the restaurant property before or after their shifts, in both work and non-work areas, to engage in protected activity.

Finally, the Respondent argues that the Board's test in *Tri-County Medical Center*, 222 NLRB 1089 (1976), does not apply because the rule at issue does not ban all access. Even assuming it did, the Respondent argues the rule is lawful. In *Tri-County Medical Center*, the Board held that an employer's rule barring off-duty employees access to their employer's facility is valid only if it: (1) limits access solely to the interior of the facility, (2) is clearly disseminated to the employees, and (3) applies to off-duty access for all purposes, not just for union activity. Here, the rule, embodied in the handbook, was disseminated to all employees and applies to off-duty access during the 15 minutes before and after work for any purpose. The rule does not limit access solely to the interior of the facility. The Respondent argues, however, that the employees know the Westin owns the property and the Company leases only the restaurant space. The term "restaurant property" is not defined in the handbook and the rule is not limited to interior working areas. Considering that ambiguities must be construed against the rule's drafter, in this case the Respondent, I find that even if the rule is evaluated under *Tri-County Medical Center*, it violates Section 8(a)(1). See *Lafayette Park Hotel,* supra at 828; *Murphy Oil*, supra, slip op. at 26.

3. Code of Ethics: Relationships with Outside Parties

Paragraph 6(c) of the complaint alleges the Respondent's "Code of Ethics: Relationships with Outside Parties" rule violates the Act. The rule states, in relevant part:

> Federal, state and local government departments and agencies have regulations concerning acceptance by their employees of entertainment, meals and gifts from firms and personnel with whom the departments and agencies do business or over whom they

> have regulatory authority. You may not give any entertainment, meals or gifts to such government employees or union officials unless they are of minimal value and are clearly appropriate under the given circumstances. If you question what is deemed an appropriate circumstance or what is a minimal value please seek advice from a supervisor. You may entertain socially any relatives of friends employed by or representing government agencies or trade unions. However, it should be clear, that the entertainment is not related to the business or union affairs of GCI. No expenditure for such social entertainment is reimbursable by GCI to a Team Member.

(GC Exh. 2, p. 21.)

The General Counsel and the Charging Party contend that this rule on its face prohibits Section 7 activity of employees discussing union matters when entertaining union officials. I agree.

The Respondent contends that the plain meaning of the language makes it clear the rule addresses Section 302 of the Labor Management Relations Act (LMRA). Perhaps it is clear to one trained in labor law, but the rule nowhere mentions the LMRA or how the rule purports to comply with it. From the employees' perspective, no such clarity is apparent. Nor could it be, given the patent disconnect between the non-referenced LMRA and the rule. The Respondent contends that the rule merely restricts conduct proscribed by the LMRA, 29 USC § 186, which prohibits employers from paying, lending, or delivering money or gifts to labor unions and their representatives. That provision of the LMRA, however, applies to an "employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer. . . ." Id. The instant rule restricts the actions of employees. The rationale therefore does not comport with the rule's plain language. There is not "one potential interpretation" that infringes on employee rights, as the Respondent contends. It is instead an express prohibition, and I find the General Counsel has proved this allegation.

4. Team Member Conduct While Representing the Restaurant

Paragraph 6(d) of the complaint alleges the Respondent's "Team Member Conduct While Representing the Restaurant" rule violate Section 8(a)(1). The pertinent part of the rule states:

> Team Members must refrain from any negative behaviors (as listed in this manual) off the property while representing the Restaurant. The Restaurant reserves the right to counsel any Team Member who jeopardizes the welfare and/or reputation of the Restaurant up to and including termination of employment.
>
> Representing the company includes: All behaviors while wearing Grill Concepts, Inc. uniform, or any other insignia or logo apparel that represents Grill Concepts, Inc. or any of its affiliates. Driving of company vehicles or running errands for Grill Concepts, Inc. business; Usage of business cards with any Grill Concepts, Inc. logo or other Grill Concepts, Inc. materials, letterhead, envelopes, etc.; Representation or recognition on a public online social media website; Sales activities, social events in which you are recognized as an official Grill Concepts, Inc. Team Member or other events in which identity as a Grill Concepts, Inc. Team Member is recognized or assumed.

(GC Exh. 2, p. 26.)

The General Counsel and the Charging Party argue that the rule is overly broad for a couple of reasons. First, the rule threatens discharge of employees who jeopardize the welfare and/or reputation of the restaurant. Both parties cite to *Costco Wholesale Corp*., 358 NLRB No. 106, slip op. at 1–2 (2012), where the Board found a policy prohibiting employees from making statements "that damage the Company, defame any individual or damage a person's reputation" to be unlawful because the rule had no "accompanying language that would tend to restrict its application" to legitimate business concerns. This decision was subsequently invalidated by the Supreme Court's decision in *NLRB v. Noel Canning*, *a Division of the Noel Corp.*, 134 S.Ct. 2550 (2014), and I do not rely on it to support my findings. The same holds true for *Karl Knauz Motors, Inc*., 358 NLRB No. 104 (2012).[33]

The Respondent contends that this provision is similar to the rules *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), and *Lafayette Park Hotel*, supra, which the Board found lawful. The rule *Flamingo Hilton-Laughlin* prohibited "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel." Id. at 288. The rule in *Lafayette Park Hotel* prohibited "[u]nlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community." The Board, in both cases, found that no reasonable reading of these provisions suggested they were aimed at curtailing protected activity. I agree with the Respondent that, under current valid Board caselaw, the rule's provision admonishing any Team Member who jeopardizes the welfare and/or reputation of the Restaurant, standing alone, does not violate the Act.

This does not end the inquiry, however. The rule prohibits "any negative behaviors" while representing the restaurant. The Board has found that rules prohibiting "negative" speech and behavior are unlawful. For example, in *Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011), the Board found a rule prohibiting "any type of 'negative energy or attitudes" to be unlawful. In *Hills & Dales General Hospital*, supra, the Board found a rule prohibiting "negative comments about fellow team members," "engag[ing] in or listen[ing] to negativity, and requiring employees to "represent [the Respondent] in the community in a positive and professional manner" was overly broad. On the other hand, the Board has found rules to be lawful when the conduct they aim to prohibit clearly falls outside the Act's protection, such as conduct that is abusive, injurious, threatening, intimidating, coercing, and/or profane. See, e.g. *Lutheran Heritage*, supra; *Palms Hotel and Casino*, supra. Here, the term "negative behaviors" is broad and vague, and easily interpreted to include protected concerted activities protesting working conditions. As the Charging Party and General Counsel point out, the rule would reasonably be interpreted to apply to attendance at a union event when the employee identifies himself or herself as an employee and complains about working conditions.

[33] The General Counsel also references *Dish Network Corp.*, 359 NLRB No. 108, which cites to *Karl Knauz*. No exceptions to the ALJ's finding in *Dish Network* that the rule violated the Act were filed, however.

Moreover, the instant prohibition on "negative behaviors" is expressly broadened in a manner that could not have been contemplated by the Board in 1998 and 1999, when *Flamingo Hilton-Laughlin* and *Lafayette Park Hotel* were decided. Specifically, the prohibition includes "[r]epresentation or recognition on a public online social media website." Thus, an employee who is merely recognized as working for the Company on a public online social media website and makes disparaging comments protected by Section 7 is covered by this rule. Clearly, such comments would fall within the vague definition of negative behavior. See *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 7 (2014).

The Respondent claims that the handbook outlines the negative behaviors are prohibited while on the property and includes behaviors that are not protected under Section 7. Though the provision at issue states, in parentheses, that the negative behaviors are listed in the manual, the rule does not contain or provide reference to such a list. This distinguishes the instant rule from a rule providing specific examples of the sort of behavior it purports to prohibit. See, e.g., *Tradesmen International*, 338 NLRB 460, 462-463 (2002).

5. Progressive Discipline: Gross Misconduct

Complaint paragraph 6(e) alleges that the Respondent's "Progressive Discipline: Gross Misconduct" rule violates Section 8(a)(1). The part of the rule at issue states:

> A Team Member may be terminated for cause without prior warning for committing any conduct issues as listed as Gross Misconduct. Gross Misconduct issues include: intentionally punching another Team Member's time record, or having another Team Member punch a time record; falsifying any records or negotiable (including time records, expense reports, or Team Member purchases); failure to participate in or intentional falsification of a statement during a formal company investigation; deliberate falsification of company hiring documents; proven or admitted theft of company property, another Team Members property, or unauthorized removal of company property; possession, sale or consumption of alcohol (sale of alcohol that is not part of our business or in violation of law), illegal drugs, or prescription drugs that impact work performance; possession of weapons or firearms on company premises (does not apply to locked vehicles in TX and OK); intentionally and/or illegally intimidating or harassing (sexual or any other nature) Team Members, supervisors, or Guests; fighting, or attempting to provoke a fight on company premises or on company time; malicious or careless actions resulting in injury to individuals or the destruction or loss of company property or another Team Members personal property; physical assault of a supervisor or Team Member; leaving the restaurant without notifying a member of the management team; absence from work without properly notifying management for 2 or more days within a rolling 12 month period (no call, no show); unauthorized disclosure of confidential or privileged information concerning company or Team Members; unauthorized markdowns (or failure to charge properly), intentional unauthorized manipulation of the POS or any other company owned or managed computer system, or use of a supervisors password without authorization. This is not a complete list of infractions or is it intended to outline all infractions that may result in disciplinary action, up to and including termination.

(GC Exh. 2, p. 31.)

The General Counsel and the Charging Party assert that the provision regarding participation in investigations and the confidentiality provisions in this rule are overly broad.

Turning first to the confidentiality provision, in addition to the current rule, the employee handbook defines confidential information to include "all non-public information that might be of use to competitors or may be harmful to our guests. It also includes information that suppliers and guests have entrusted to you." (GC Exh. 2, p. 22.) It further defines confidential information as including "guests/visitors/patrons names; guest/vendor activities in the Restaurant; Team Member/Manager activities; Financial information regarding the Restaurant; Recipes." (GC Exh. 2, p. 28.) In addition, the handbook acknowledgment form states:

> I am aware that during the course of my employment confidential information will be made to me, i.e. Guest lists, pricing policies, recipes, and other related information. I understand that this information is critical to the success of Grill Concepts, Inc. and must not be disseminated or used outside of Grill Concepts premises. In the event of termination of employment, whether voluntary or involuntary, I hereby agree not to utilize or exploit this information with any other individual or company.

(GC Exh. 2, p. 76.)

The rule itself prohibits unauthorized disclosure of confidential or privileged information concerning coworkers. Because there is no provision exempting discussions about wages, hours and other working conditions, I find the rule is overly broad. See *U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 3 (2013). The rule does not explicitly reference wage or salary information. The provision, however, still prohibits employees from disclosing confidential information about other employees and is therefore overly broad. See *Flamingo Hilton-Laughlin*, supra, at 291–292.

The Respondent points to *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), to assert that a reasonable reading of the rule here does not prohibit Section 7 activity. The rule in *Mediaone* stated:

> **Proprietary Information**
>
> You're responsible for the appropriate use and protection of company and third party proprietary information, including *information assets* and *intellectual property.* Information is any form (printed, electronic or inherent knowledge) of company or third party proprietary information. Intellectual property includes, but is not limited to:
>
> • business plans
> • technological research and development
> • product documentation, marketing plans and pricing information
> • copyrighted works such as music, written documents (magazines, trade journals, newspapers, etc.), audiovisual productions, brand names and the legal rights to protect such property (for example, patents, trademarks, copyrights)

> • trade secrets and non-public information
> • customer and employee information, including organizational charts and databases
> • financial information
> • patents, copyrights, trademarks, service marks, trade names and goodwill.
>
> While it's not improper for you to use proprietary information in the general course of doing business, you must safeguard it against loss, damage, misuse, theft, fraud, sale, disclosure or improper disposal. Always store proprietary information in a safe place.
>
> You may not use or access the proprietary information of the company or others for personal purposes or disclose non-public information outside the company. Doing so could hurt the company, competitively or financially….

(Bold and italics in original.) The context in *Mediaone* was obviously much more specific than the many types of "gross misconduct" the instant rule outlines.

The Respondent also cites to *Lafayette Park Hotel,* supra, where a majority of the Board upheld a standard of conduct prohibiting employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The term "Hotel private" was not defined in the rule, but the Board found it would not be reasonably read to include employee wage discussions. Here, unlike in *Lafayette Park Hotel*, the rule prohibits "unauthorized disclosure of confidential or privileged information *concerning company or Team Members.*" (emphasis added). Because of this, the substance of the rule implicates information about employee wages and other working conditions in a manner that the rule in *Lafayette Park Hotel* did not. The same distinction holds true for *K-Mart,* 330 NLRB 263 (1999), where the rule prohibited disclosure of "company and business documents."[34]

With regard to the provision about investigations, the Charging Party asserts that an employer "may not require an employee to participate in a formal company investigation into allegations against it, including unfair labor practice charge allegations."[35] (CP Br. 26.) The Charging Party points to *Beverly Health & Rehab. Servs., Inc*., 332 NLRB 347, 356 (2000), where the Board found a rule compelling employees to cooperate, at the risk of discipline, in the investigation of "any … violation of … laws, or government regulations" clearly applied to unfair labor practice charges. The current rule provides that a "Team Member may be terminated for cause without prior warning for" . . . failure to participate in . . . a formal company investigation." The plain language of the rule requires cooperation in company investigations, without limitation. This includes investigations related to Board charges and employees' union

[34] The Respondent also cites to *Community Hospitals of Central California v. N.L.R.B*, 335 F.3d 1079 (D.C. Cir. 2003), which denied enforcement to the Board's order relating to, *inter alia*, a confidentiality provision. I note that I am bound to follow the Board unless the Supreme Court dictates otherwise. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); *see also Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied.").

[35] The General Counsel highlights this provision when setting forth the rule, but does not provide argument regarding investigations. (GC Br. 44–45.)

sympathies, and the rule does not include any safeguards required by *Johnnie's Poultry Co*., 146 NLRB 770 (1964).

The Respondent argues that the rule should not be read to presume that the Respondent will violate the law. This position does not square with Board caselaw that the mere maintenance of an overly broad rule under *Lutheran Heritage*, regardless of whether it is enforced in a manner that violates the Act, is unlawful. *Beverly Health & Rehab. Servs.*, supra. There is no presumption either way. The rule, as reasonably read, includes investigation into Board charges and union sympathies. As it does not contain safeguards or limiting language, it violates Section 8(a)(1).

6. Use of Your Likeness

Paragraph 6(f) of the complaint alleges the Respondent's "Use of Your Likeness (Name, Voice, Photo)" rule violates the Act. The rule states:

> At times, the company may use your likeness for the purpose of training and development, Team Member programs, company recruiting materials, etc. Your continued employment is consent for us to use your likeness for these purposes. If we use your likeness in our marketing or advertising programs we will ask you for additional consent.

(GC Exh. 2, p. 35.)

The General Counsel and the Charging Party, citing to citing to *Armstrong Machine Co., Inc*., 343 NLRB 1149, 1172 (2004), and *In Re Allegheny Ludlum Corp*., 333 NLRB 734 (2001), argue that this rule violates Section 8(a)(1) because an employer may not use an employee's image or likeness in an antiunion campaign without the employee's voluntary consent.

The Respondent asserts that the purposes for which it may use an employee's likeness may is set forth in the rule, i.e. training and development, Team Member programs, company recruiting materials, and the like. I agree that the context of this rule is clear, and find a reasonable reading of the rule would not lead employees to believe they are required permit the Respondent to use their likeness in antiunion material. While it is true that the Respondent may not interpret the policy to require employees to permit their likeness to be used in antiunion material, the policy, as reasonably read, does not impinge on Section 7 rights. See *Lutheran Heritage Village-Livonia,* supra at 646-647 (2004). I therefore recommend dismissal of this complaint allegation.

7. Online Communications

The complaint, at paragraph 6(g), alleges the Respondent's "Online Communications" rule violates Section 8(a)(1). The rule states, in relevant part:

> Grill Concepts, Inc. (GCI) recognizes that online communication tools such as weblogs ("blogs") and other online channels (social media, chat rooms, etc.) increasingly serve as channels for direct interaction with Guests, the media and other GCI stakeholders. The

company's commitment to being direct supports open communications by Team Members and other GCI representatives, providing such communications are transparent, ethical and accurate.

All online communication by GCI Team Members or company representatives on behalf of GCI is subject to GCI's Code of Conduct and applicable electronic communication policies, laws and regulations. GCI's Code of Conduct sets forth a standard of personal responsibility for Team Members both inside and in some cases, outside the workplace. GCI's Online Communication Policy adopts the same standard.

1. Any GCI Team Member or representative engaging in online, electronic dialogue as a delegate of the company is required to meet a standard that mandates: Transparency of Origin. GCI requires that Team Members and other company representatives disclose their employment or association with GCI (e.g., First Name.Last Name@grillconcepts.com) in all communications with Guests, the media or other GCI stakeholders when speaking on behalf of GCI. GCI requires that Team Members and other company representatives provide contact information on request.

2. Accurate Information. GCI Team Members and other company representatives may not knowingly communicate information that is untrue or deceptive. Communications should be based on current, accurate, complete and relevant data. GCI will take all reasonable steps to assure the validity of information communicated via any channel but it is the Team Member's or other company representative's responsibility to assure accuracy in the first instance. Anecdotes and opinions will be identified as such.

3. Ethical Conduct. GCI Team Members and other company representatives will not conduct activities that are illegal or contrary to GCI's Code of Conduct, Privacy Policy, Harassment Policy, and related policies.

4. Protection of Confidential and Proprietary Information. GCI Team Members and other company representatives must maintain the confidentiality of information considered GCI confidential, including company data, Guest data, partner and/or supplier data, personal Team Member data, and any information not generally available to the public. GCI Team Members or company representatives who fail to comply with this policy will be subject to discipline, up to and including termination of employment from GCI. In addition, depending on the nature of the policy violation or the online channel content, participants may also be subject to civil and/or criminal penalties.

(GC Exh. 2, p. 28.)

I find this rule is overly-broad in a couple of respects. First, as the Supreme Court has noted, protected concerted conversations can become contentious, yet they remain protected even if the conversations include "intemperate, abusive and inaccurate statements." *Linn v. United Plant Guards*, 383 U.S. 53 (1966). The Board has held that the maintenance of a rule banning false or misleading statements violates the Act. See *Grandview Health Care Center*, 332 NLRB 347, 348 (2000)) enfd. 297 F.3d 468, 476-479 (6th Cir. 2002); *Lafayette Park Hotel*, supra, at 828.

In addition, the rule prohibits Board has protection of confidential and proprietary information, including "personal Team Member data." This would reasonably be read to include data about wages and other working conditions. See *Three D, LLC*, 361 NLRB No. 31 (2014).

The Respondent asserts that the rule limits the prohibitions to employees who are speaking on behalf of the Company.[36] I disagree, and find a reasonable reading is at best ambiguous. The second non-numbered paragraph discusses a code of conduct that applies to anyone speaking on the Company's behalf. The first numbered paragraph again refers to standards for employees who engage in electronic dialogue "as a delegate of the company . . ." The next paragraphs, however, contain no such limiting language. If the language limiting the restrictions to employees speaking on the Company's behalf in the second non-numbered paragraph was intended to be global, the language in the first numbered paragraph containing a similar limitation is redundant. Considering that ambiguities must be construed against the rule's drafter, in this case the Respondent, I find that that it violates Section 8(a)(1). See *Lafayette Park Hotel,* supra at 828; *Murphy Oil*, supra, slip op. at 26.

8. Solicitation Rule

Complaint paragraph 6(h) alleges the Respondent's solicitation rule violates Section 8(a)(1). The provisions at issue state:

> In an effort to ensure a productive and harmonious work environment, outside persons may not solicit or distribute literature in the workplace at any time for any purpose. If you observe a non-Team Member distributing literature in the workplace, please contact a manager immediately. Grill Concepts, Inc. recognizes that Team Members may have interests in events and organizations outside the workplace. However, Team Members may not solicit or distribute literature concerning outside activities or merchandise while in their work area or while on-duty.

(GC Exh. 2, p. 34.)

The General Counsel and the Charging Party assert that the rule unlawfully prohibits employees who are not working from engaging in solicitation in work areas.

An employer has a right to impose some restrictions on employees' statutory right to engage in solicitation at the workplace. Solicitations involve approaching an employee or group of employees to talk about the union, and often involve the organizers asking employees if they want to sign a union card. This can involve a back-and-forth, with questions and answers, and, as such, the employer can require that this occur only when all involved in the discussion are off the clock. The Supreme Court has agreed with the Board, however, that as long as the employees are not on the clock, solicitations may occur anywhere, including in work areas. *Republic Aviation Corp. v. NLRB*, supra at 802–803 (1945); *Our Way, Inc*., 268 NLRB 394 (1983); *Food Services of America*, 360 NLRB No. 123, slip op. at 7 (2014).

[36] The Respondent also cites to *Dresser-Rand Company*, 358 NLRB No. 34 (2012). This decision was subsequently invalidated by the Supreme Court's decision in *NLRB v. Noel Canning,* supra.

The Respondent cites to several cases standing for the correct proposition that employers can prohibit solicitation in working areas during working time. The rule at issue here, however, clearly states that employee cannot solicit in their work area or while on duty. Simple elimination of the word "or" would change the result, but the rule can only be read and interpreted as written. The rule necessary includes solicitation in employee work areas while they are not on duty, and it therefore violates Section 8(a)(1).

G. Dispute Resolution Program

Paragraph 7 of the complaint alleges the Respondent's dispute resolution agreement, acknowledgement of receipt of the agreement, and opt-out provision, which have been contained in its employee handbook since about July 2014, violate Section 8(a)(1).[37] The Dispute Resolution Arbitration Agreement (DRAA) states:

> In consideration for my employment and the continuation of my employment with Grill Concepts (the "Grill"), and unless I choose to opt out of this Agreement as set forth below, both the Grill and I agree to submit for binding arbitration by a neutral arbitrator any employment-related disputes (whether brought by me or the Grill) which are not resolved through the Grill's employee appeal procedure or another informal means. (I understand that the Grill's employee appeal procedure is not a required step before I may choose to bring my claim in arbitration.) Employment-related disputes are any actual or alleged events, claims or disputes between me and the Grill in connection with or concerning or arising out of my employment, or the administration or termination of my employment, including those based upon alleged violations of federal and/or state laws, including, but not limited to Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, with the exception of claims for workers' compensation benefits, unemployment compensation benefits, claims under any of the Grill's employee welfare benefit and pension plans, and any other claims prohibited by law from being resolved by arbitration. The Grill and I agree that any such matter, claim, dispute or grievance will be subject to this arbitration provision regardless of whether or not said matter, claim, dispute, or grievance is with or against the Grill or an affiliate of the Grill.
>
> To the extent permitted by law, the Grill and I waive our rights to have any employment-related disputes submitted as part of a class or collective action in court or in arbitration. This waiver shall not affect or diminish the substantive remedies that may be awarded by an arbitrator.
>
> I understand that my decision to accept or continue employment with the Grill constitutes my agreement to be bound by this Dispute Resolution Arbitration Agreement.
>
> I understand that my decision to accept or continue employment with the Grill constitutes my agreement to be bound by this Dispute Resolution Arbitration Agreement unless I

[37] The complaint was amended to separate the opt-out notification from the acknowledgement of receipt.

> choose to opt out of this Dispute Resolution Arbitration Agreement by signing the attached Opt Out Notification and delivering it to my General Manager within thirty (30) days of my signature on this Agreement. If I decide to opt out of the Dispute Resolution Arbitration Agreement, I understand that I will be permitted to continue my employment.
>
> . . .
>
> BY SIGNING THIS AGREEMENT, THE PARTIES ARE WAIVING THEIR RIGHT TO A JURY TRIAL OR A COURT TRIAL OF ANY EMPLOYMENT-RELATED DISPUTE, AS DEFINED ABOVE.

(GC Exh. 2, pp. 69–71.)

The acknowledgement of receipt form contains the following pertinent provisions:

> I have received a copy of the Grill Concepts, Inc. Dispute Resolution Arbitration Agreement located in the Appendix of this handbook and understand its contents. I understand that I may opt out of the Arbitration Agreement by signing the Opt Out Notification and delivering it to my General Manager within 30 days of signing the Dispute Resolution Arbitration Agreement.

The opt-out provision states:

> I am notifying the Grill of my decision to opt out of the Dispute Resolution Arbitration Agreement. To be effective, I understand that this Opt Out Notification must be signed and delivered to my General Manager within thirty (30) days from the execution of my Dispute Resolution Arbitration Agreement. I also understand that I may not opt out of my Dispute Resolution Arbitration Agreement while I have any legal claim pending which arose prior to my execution of this form or which has been or could have been submitted to arbitration at the time the claim arose.
>
> I understand that by opting out of the Dispute Resolution Arbitration Agreement I will not be entitled to (None) (consideration), which is provided to Grill employees for participating in the Grill Dispute Resolution Arbitration program.

(GC Exh. 2, p. 93.)

1. Alleged prohibition of class and collective actions

Concerted legal action addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil*, 361 NLRB No. 72 (2014); *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013):[38] *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd.

[38] The Board in *Murphy Oil* reexamined *D.R. Horton*, and determined that its reasoning and results were correct.

206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978).

Applied to other legislation, resolution of a dispute through class action in court as opposed to an individual arbitration is a matter of procedure; the substantive rights can be vindicated in either forum. Under the NLRA, the act of employees choosing a collective forum, i.e. the procedure for bringing forward collective or class claim regarding wages, hours, or other working conditions, is among the core substantive conduct the statute protects. Put more simply, the choice of procedure is the substance of the right. The Board, accordingly, has held that agreements requiring employees to waive their right to participate in class or collective legal action violates the Act because they "extinguish" a substantive right protected by Section 7. *Murphy Oil*, supra, at 11; see also *D. R. Horton,* supra.

This case is different from *Murphy Oil* and *D.R. Horton* because the DRAA permits employees to opt out of arbitration and pursue claims in court on a collective or class basis. The Respondent argues that this case presents the "more difficult question" of "whether . . . an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court." *Dr. Horton,* supra at fn. 28. Simply put, does the Act permit such waiver? This boils down to whether employees may be forced to choose whether or not to prospectively and irrevocably waive their substantive right to band together and bring a class or collective lawsuit against their employer in an attempt to better their wages, hours, or other working conditions.

The Respondent asserts that the strong federal policy in favor of arbitration, along with the voluntary nature of the DRAA, and the findings of various courts and administrative law judges compels a conclusion that the DRAA is lawful.

The General Counsel and Charging Party assert that the DRAA is unlawful because it is not truly voluntary, it constitutes an irrevocable waiver of prospective Section 7 rights, it requires employees to self-identify as choosing to preserve their Section 7 rights, it is inconsistent with Board precedent finding unlawful and unenforceable employee separation agreements that waive or "trade away" the employee's right to engage in future concerted activity, it interferes with the rights of individuals who have opted out to act concertedly with employees who have not, and it permits employers to obviate employees' rights under the Act through private contracts. The Charging Party further asserts that the DRAA is not voluntary for employees with pending claims.

As a threshold issue, I must determine whether the DRAA is a condition of employment. With regard to new employees with any claim pending during the of the opt-out period, I find the DRAA is a condition of employment. The DRAA states, "I also understand that I may not opt out of my Dispute Resolution Arbitration Agreement while I have any legal claim pending which arose prior to my execution of this form or which has been *or* could have been submitted to arbitration at the time the claim arose." (GC Ex. 2, p. 93, emphasis added.) For these

individuals, the DRAA is "consideration for [their] employment and the continuation of [their] employment with Grill Concepts" and therefore a condition of employment.

For employees without pending claims, I find the DRAA it is not a condition of employment. The opt-out provision is mentioned in the first sentence of the DRAA. Toward the end of the DRAA it states, "If I decide to opt out of the Dispute Resolution Arbitration Agreement, I understand that I will be able to continue my employment." The acknowledgment and receipt again mention the opt-out provision. The Charging Party asserts that the opt-out provision is not attached to the DRAA and is buried deep within the handbook. While the opt-out provision ideally would be attached to the DRAA, I find it is sufficiently referenced with the DRAA and it is contained within the same appendix to the handbook. While ideally it would be attached to the DRAA, if the Respondent was attempting to conceal the existence of the opt-out provision, it did a poor job of it.

In addition, the evidence shows that current employees were not required to sign the DRAA or sign in receipt of the handbook and thus be bound by the DRAA.[39] Neither Goytia nor Azad signed the DRAA or the acknowledgment and receipt of the employee handbook, and no negative consequences ensued. Moreover, Burnett provided unrefuted testimony that employees could decline to sign, and when this occurred, Burnett just noted the employee declined to sign. These facts lead to the conclusion that continued employment with the Respondent was not conditioned upon signing the DRAA.[40]

As noted in footnote 28 of *D.R. Horton*, the Board has not decided whether an "employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court." *Murphy Oil* and *D.R. Horton* make clear that the Board will find unlawful any policy that "extinguishes" an employee's right to engage in such litigation. This leaves open the question of whether an opt-out provision like the current one, which does not eradicate the employees' rights, nonetheless interferes with or coerces employees in this right.

Turning to the Act itself, under Section 8(a)(1), an employer may not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 states, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other

[39] This evidence pertains only to employees who were already working when the new employee handbook containing the DRAA went into effect.

[40] My finding, based in part on stipulation, that the DRAA is not, in blanket form, a condition of employment, does not in any way preclude individual claims that, under specified sets of facts not presented here, it operated as one. It also does not equate with a finding that the DRAA was voluntary no matter the set of facts under which an employee failed to opt out of it. Certainly, employees are not foreclosed from claiming they were coerced or hoodwinked into believing they needed to sign the agreement to retain their employment.

> mutual aid or protection, *and shall also have the right to refrain from any or all of such activities*.

(emphasis added.) The right to forego collective or class action litigation belongs to the employee, so long as such right is voluntary and free of coercion. Clearly, an employee cannot be forced to engage in any particular concerted activity, including being party to a collective lawsuit.

The more difficult question is under what conditions, if any, an employee can prospectively and irrevocably waive his or her statutory right to engage in protected concerted activity. Abundant caselaw has developed on the issue of when a union may, through collective bargaining, waive employees' statutory rights. In the context of collective bargaining, "in order to establish a waiver of a statutory right, there must be a clear and unmistakable relinquishment of that right." *Gem City Ready Mix Co*., 270 NLRB 1260, 1260–1261 (1984); see also *In re Tide Water Assoc. Oil Co*., 85 NLRB 1096, 1098 (1949) (establishing the "clear and unmistakable" standard for waivers of statutorily protected rights)*; Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'. More succinctly, the waiver must be clear and unmistakable"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009).

With regard to individual employees who are not party to a collective-bargaining agreement, the Board in *Murphy Oil* shed some light on this question. Though the arbitration agreement at issue in *Murphy Oil* was mandatory, to support its decision, the Board relied on *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), where the Supreme Court found the employer could not contract with individual employees to relinquish their rights under the Act. In *National Licorice*, a committee of three employees negotiated a contract with the employer providing for a wage increase, overtime, holiday pay, and vacation time. The contracts as executed were between the employer and the individual employees who signed them. Employees who signed the contract relinquished their rights to strike, demand a closed shop, or sign an agreement with any union. Employees who did not sign the contract did not reap its benefits.

The focus in *National Licorice* was the employment contracts themselves, not whether they were conditions of continued employment; they were not. Because the contracts discouraged membership in a labor organization, and constituted "yellow dog" agreements, they were found to be invalid. The right to engage in concerted activity is just as protected as the right to engage in union activity. The agreement, whether it is a condition of employment or not, extracts a promise to refrain from activity protected by Section 7, and is therefore invalid under the reasoning set forth in *National Licorice* and like cases. See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944) (contracts utilized as a means of interfering with rights guaranteed by the Act invalid); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (employment contract requiring employees to attempt to resolve employment disputes individually with employer is per se violation even if "entered into without coercion" and not all employees signed because it was a "restraint upon collective action"); *Jahn & Oilier Engraving Co*., 24 NLRB 893, 900–901, 906–907 (1940), enfd. in relevant part, 123 F.2d 589, 593 (7th Cir. 1941).

That collective or class litigation is but one category of protected activity under the Act does not matter. Compare the substantive right to freedom from religious discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. One of the many manifestations of this right is the freedom to seek religious accommodation from the employer to permit the employee to observe his religion while retaining his job. It is difficult to imagine an employment contract requiring employees to agree they will not seek religious accommodation, with a 30-day opt-out provision, would pass muster. An agreement to forego the protected concerted activity of class or collective litigation, with a 30-day opt out provision, is a similar prospective waiver of substantive rights that should be accorded no less protection. An obvious distinction is that the Title VII example does not implicate the FAA because the right to engage in collective or class litigation has nothing to do with the substance of the right to be free from discrimination based on religion.[41] It is a distinction without a difference, however, as the Board has addressed the interplay between the FAA and the NLRA at length, and has determined that substantive rights under the NLRA are protected, in no relative sense, despite the strong federal policy in favor of arbitration. *Murphy Oil*, supra, *D.R. Horton*, supra.[42]

In *Johnmohammadi v. Bloomingdale's, Inc*., 755 F.3d 1072 (2014), on which the Respondent relies, the Court of Appeals for the Ninth Circuit rejected arguments based on the reasoning of *National Licorice* and *J.I. Croson*. *Bloomingdale's* involved an arbitration agreement with a 30-day opt-out provision similar to the one in the instant case.[43] The court held that to prevail on a claim under *National Licorice* and its progeny, the plaintiff employee was required to show that the arbitration agreement was "'conduct immediately favorable to employees,'" which Bloomingdale's undertook with the express purpose of impinging upon its employees' "'freedom of choice'" in deciding whether to waive or retain their right to participate in class litigation." 755 F.3d at 1076, quoting *NLRB v. Exch. Parts Co*., 375 U.S. 405, 409 (1964). The Supreme Court has found that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011). It therefore confers a benefit upon employees.[44] Moreover, the employer's intent to impinge on employee rights is not a required element of a Section 8(a)(1) violation, so the employer's purpose is not material.[45]

[41] Though conditioning the ability of employees to arbitrate employment claims on an agreement to waive their right to seek reasonable accommodation of their religious beliefs is no less offensive.

[42] I also find the General Counsel's arguments about the coercive effect of requiring employees to self-identify persuasive, but I need not rely on this argument to support my conclusion herein that prospective waiver of substantive statutory rights violates the Act.

[43] The opt-out provision in *Bloomingdale's* had some safeguards not present here.

[44] The irony of asserting the Court's finding that arbitration is a benefit for employees while arguing they should not be bound to arbitrate their claims is not lost on me. I am not in a position to stray from the Supreme Court's findings in *Concepcion*, however. I note, nonetheless, my skepticism that a collective or class action would achieve less "streamlined proceedings and expeditious results" than, say, 1,000+ employees at the same company concertedly deciding to simultaneously demand individual arbitration of their separate (yet essentially the same) claims under the Fair Labor Standards Act (FLSA). The familiar adage "Be careful what you wish for" comes to mind.

I further note that, while it may be argued arbitration is mutually beneficial, and therefore not an inducement, many employment terms deemed to be inducements, such as vacation time for employees, confer benefits both on the employee and the employer.

[45] Though framed as impinging on the employees' choice of whether to waive rights, the contract itself, regardless of its voluntariness, is unlawful under *National Licorice.*

The *Bloomingdale's* decision also addressed an argument, under *J.I Croson*, that regardless of inducement, an employee may never waive the right to participate in class or collective litigation by negotiating an individual contract with her employer. The Ninth Circuit found *J.I. Croson* was limited to the finding that an employer "may not negotiate individual contracts with employees and then refuse to engage in collective bargaining with the employees' designated union representatives on the ground that doing so would violate the terms of the individual contracts." Id. at 1076–1077. The Ninth Circuit relied on the Supreme Court's statement that "nothing prevents an employee from making an individual contract with her employer, 'provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.'" Id at 1077, quoting *J.I. Croson*, 321 U.S. at 339. Since the court determined the agreement was not an unfair labor practice, it found the arbitration agreement was valid. My different conclusion about the applicability of *National Licorice*, in line with the Board's reasoning in *Murphy Oil*, leads me to the opposite conclusion when applying *J.I. Croson*.[46]

When discussing the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304 (2013), issued after *D.R. Horton*, the Board in *Murphy Oil* also indicated that a contract prospectively waiving substantive rights under the Act is unlawful in and of itself, regardless of how it is applied. The Board noted that the Supreme Court, in *Italian Colors*, explained "the Federal policy favoring arbitration, however liberal, does have limits. It does not permit a 'prospective waiver of a party's right to pursue statutory remedies,' such as a 'provision in an arbitration agreement forbidding the assertion of certain statutory rights.'" *Murphy Oil*, supra, slip op. at 11, quoting *Italian Colors*, supra, 133 S.Ct. at 2310 (internal quotation omitted).

The so-called "effective vindication" exception to the FAA, "finds its origin in the desire to prevent 'prospective waiver of a party's right to pursue statutory remedies.'" *Italian Colors* at 2310; quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc*., 473 U.S. 614, 637, fn. 19 (1985). In creating the "effective vindication" exception to the FAA, the Supreme Court held that, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors*, supra at 637. In *Mitsubishi Motors*, the Court was clearly discussing the federal statute underlying the cause of action, which in that case was the Sherman Act, 15 U.S.C. § 1 et seq. There was no reason for the Court to discuss whether the FAA must yield to another federal statute that was substantively implicated by the statute giving rise to the underlying cause of action.

It is axiomatic that many of the NLRA's protections necessarily implicate other federal employment statutes, and specifically the right to pursue claims under them.[47] The question not raised in *Mitsubishi Motors* is whether the effective vindication exception applies to waivers of

[46] For these same reasons I am not persuaded by the reasoning of *Valley Health System, LLC*, 2015 WL 1254854 (March 18, 2015), or *Bloomingdales, Inc*., 2013 WL 3225945 (June 25, 2013), to which the Respondent also cites.

[47] As numerous cases illustrate, the FLSA is the underlying statute for many of the class and collective claims giving rise to litigation about arbitration agreements.

federal statutory rights necessary and attendant to the underlying claim, but not available as a remedy to the underlying cause of action. In other words, does the rationale underlying the effective vindication exception change if the vindication is through the act of litigating itself, not from the remedy resulting from such litigation?[48] The Board in *Murphy Oil* applied the reasoning of *Mitsubishi Motors*, signaling that it does. The Board's reasoning rationally extends to the circumstance here, where the question is whether to "permit" employees to prospectively waive their rights, not whether a waiver may be required as a condition of employment.[49]

The Respondent argues that the strong federal policy in favor of arbitration, as affirmed by the Supreme Court in *Concepcion*, supra, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn.4 (2012), compels a finding that the agreement here is lawful. In reaching its decisions in *Murphy Oil* and *D.R. Horton*, the Board recognized the strong federal policy in favor of arbitration and discussed it at length, distinguishing the above Supreme Court precedents. The Respondent also notes that numerous decisions have permitted parties to agree to this type of contract. I am bound, however, by the Board precedent, which I find contrary to permitting an agreement like the one at issue here.

2. Alleged interference with Board procedures

The General Counsel argues that the DRAA violates Section 8(a)(1) because it interferes with employees' access to the Board's procedures.

The agreement states that "employment-related disputes" are subject to arbitration. This is broadly defined to include "disputes between me and the Grill in connection with or concerning or arising out of my employment, or the administration or termination of my employment." It also explicitly includes claims based on "alleged violations of federal and/or state laws, including, but not limited to Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act, [and] the Fair Labor Standards Act." It specifically excludes "workers' compensation benefits, unemployment compensation benefits, claims under any of the Grill's employee welfare benefit and pension plans, and any other claims prohibited by law from being resolved by arbitration."

[48] The statutory remedy flowing from the right to bring class or collective actions under the Act is an order stating that the employer will not interfere with the Section 7 rights of employees to bring such claims, a notice posting, and rescission of the unlawful arbitration agreement.

[49] Though I do not find the nature of the opt-out provision relevant given my finding that individual employees may not waive substantive rights under the Act, I agree with my colleagues who have found opt-out provisions such as the one here, where the employee gives up rights by doing nothing, are coercive and interfere with Section 7 rights. See *24 Hour Fitness USA, Inc*. , 2012 WL 5495007 (NLRB Div. of Judges, Nov. 6, 2012); *Mastec Services Company, Inc*., 2013 WL 2409181 (NLRB Div. of Judges, June 3, 2013); *Securitas Security Services USA*, *Inc.*, 2013 WL 5984335 (NLRB Div. of Judges, November 8, 2013); *Kmart Corporation*, 2013 WL 6115697 (NLRB Div. of Judges, November 19, 2013); *Dominos Pizza*, 2014 WL 1267122 (NLRB Div. of Judges, March 27, 2014); *RPM Pizza*, 2014 WL 3401751 (NLRB Division of Judges, July 11, 2014); *Kenai Drilling*, 2015 WL 1647909 (NLRB Div. of Judges, April 13, 2015); *AT&T Mobility Services*, 2015 WL 3955133 (NLRB Div. of Judges, June 25, 2015); *U.S. Express Enterprises*, Case 10–CA–141407 (NLRB Div. of Judges, July 16, 2015).

Certainly many of the included claims could also describe unfair labor practice claims. In addition, claims under the Act are not specified in the excluded claims section. A reasonable employee reading this in the context of the rest of the document is not going to know that the phrase "any other claims prohibited by law" would excuse disputes resulting in NLRB charges from arbitration. See *2 Sisters Food Group, Inc*., 357 NLRB No. 168, slip op. at 7 (2011).

Considering that ambiguities must be construed against the employer, I find the DRAA violates Section 8(a)(1) because employees would reasonably believe it encompasses Board charges. See *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995).

CONCLUSIONS OF LAW

1. By making implied threats of job loss, soliciting employee complaints and grievances, interrogating employees about their union activities and the union activities of other employees, creating the impression that employees' union activity was under surveillance, promising employees the Company will no longer retaliate against them, promising employees reconsideration of cutbacks to their hours, promising employees a new way to request time off in order to discourage support for the union, implementing time-and-a-half pay for holidays and a greater employee discount for food at its restaurants in order to discourage support for the union, announcing the opportunity for employees to sign up for healthcare benefits in order to discourage support for the union, promulgating and maintaining overly broad rules, and promulgating and maintaining an unlawful dispute resolution arbitration agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the conduct described above, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having made an implied threat of job loss to an employee, the Respondent will be ordered to cease and desist from this action.

Having interrogated employees about union activities, the Respondent will be ordered to cease and desist from these actions.

Having created the impression that employees' protected activities were under surveillance, the Respondent will be ordered to cease and desist from this action.

Having promised employees they will no longer retaliate against them to discourage support for the Union, the Respondent will be ordered to cease and desist from this action.

Having promised its employees reconsideration of the cutbacks to employees' hours to discourage support for the Union, the Respondent will be ordered to cease and desist from this action.

Having promised employees a new way to request time off to discourage support for the Union, the Respondent will be ordered to cease and desist from this action.

Having implemented a new policy granting time-and-a-half pay for employees who work certain holidays in order to discourage support for the Union, the Respondent will be ordered to cease and desist from this action.

Having granted employees a greater employee discount for food at its restaurants in order to discourage support for the union, the Respondent will be ordered to cease and desist from this action.

Having maintained the following overly-broad rules:

- Team Member Relations/Positive Culture
- Timekeeping
- Code of Ethics/Relationships with Outside Parties
- Team Member Conduct While Representing the Restaurant
- Progressive Discipline: Gross Misconduct
- Online Communications
- Solicitations

the Respondent will be ordered to revise or rescind these rules, and advise its employees in writing that said rules have been so revised or rescinded.

Having maintained an unlawful dispute resolution arbitration agreement and acknowledgement of receipt of the agreement, the Respondent will be ordered to revise or rescind this agreement and acknowledgment of receipt, and advise its employees in writing that these documents have been so revised or rescinded.

The Respondent shall be required to post a notice informing employees of its violations of the Act.

The General Counsel, at complaint paragraph 13, has requested that the notice be read aloud, in English and Spanish, by the Respondent's representatives in the presence of a Board agent at meetings scheduled during working time. Alternatively, the General Counsel suggests the notice be read in the same manner by a Board agent in the presence of the individuals listed in complaint paragraph 5.

The Board has required that notices be read aloud by high-ranking officials or a Board agent when numerous serious unfair labor practices have been committed by a high-ranking management official. *Allied Medical Transport, Inc*., supra at 6, fn. 9 (2014). When unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondent and its managers are bound by the requirements of the Act."

Federated Logistics & Operations, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007). Though I have found numerous violations, I do not find they were widespread enough or sufficiently egregious to warrant this enhanced remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[50]

ORDER

The Respondent, Grill Concepts, Inc., d/b/a The Daily Grill, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making implied threats of job loss

(b) Soliciting employee complaints and grievances in order to dissuade employee support for the Union

(c) Coercively interrogating employees about their union activities and the union activities of other employees

(d) Creating the impression that employees' union activity is under surveillance

(e) Promising employees the Company will no longer retaliate against them in order to discourage employee support for the Union

(f) Promising employees reconsideration of cutbacks to their hours in order to discourage employee support for the Union

(g) Promising employees a new way to request time off in order to discourage employee support for the Union

(h) Implementing time-and-a-half pay for holidays and a greater employee discount for food at its restaurants in order to discourage employee support for the union

(i) Announcing the opportunity for employees to sign up for healthcare benefits in order to discourage support for the union

(j) Promulgating and maintaining the following overly broad rules:

- Team Member Relations/Positive Culture

[50] 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.

- Timekeeping
- Code of Ethics/Relationships with Outside Parties
- Team Member Conduct While Representing the Restaurant
- Progressive Discipline: Gross Misconduct
- Online Communications
- Solicitations

(k) Promulgating and maintaining an unlawful dispute resolution arbitration agreement and acknowledgement of receipt.

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

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

(a) Rescind the dispute resolution arbitration agreement and acknowledgment of receipt or revise these documents in a manner that makes it clear employees will not prospectively waive their protected rights to bring class and/or collective lawsuits if they do not affirmatively opt out of the agreement.

(b) Advise its employees in writing that these documents have been so revised or rescinded.

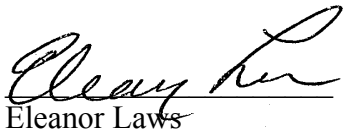
(c) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the attached notice marked "Appendix in both English and Spanish."[51] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized 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, the 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 March 31, 2014.

(d) 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.

51 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."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 6, 2015



Eleanor Laws
Administrative Law Judge

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT make implied threats of job loss if you choose to support the union.

WE WILL NOT solicit employee complaints and grievances to discourage you from supporting the union.

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

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT promise we will no longer retaliate against employees in order to discourage support for the union

WE WILL NOT promise reconsideration of cutbacks to your hours in order to discourage support for the union.

WE WILL NOT promise you a new way to request time off in order to discourage support for the union.

WE WILL NOT implement time-and-a-half pay for holidays and a greater employee discount for food at its restaurants in order to discourage support for the union.

WE WILL NOT announce the opportunity for employees to sign up for healthcare benefits in order to discourage support for the union.

WE WILL NOT promulgate or maintain the following overly broad rules:

- Team Member Relations/Positive Culture
- Timekeeping
- Code of Ethics/Relationships with Outside Parties
- Team Member Conduct While Representing the Restaurant
- Progressive Discipline: Gross Misconduct
- Online Communications
- Solicitations

WE WILL NOT promulgate or maintain an unlawful dispute resolution arbitration agreement and acknowledgment of receipt.

WE WILL rescind or revise the following overly broad rules:

- Team Member Relations/Positive Culture
- Timekeeping
- Code of Ethics/Relationships with Outside Parties
- Team Member Conduct While Representing the Restaurant
- Progressive Discipline: Gross Misconduct
- Online Communications
- Solicitations

and notify you that these rules have been rescinded or revised.

WE WILL rescind the dispute resolution arbitration agreement and acknowledgment of receipt or revise these documents in a manner that makes it clear employees will not prospectively waive their protected rights to bring class and/or collective lawsuits if they do not affirmatively opt out of the agreement.

WE WILL advise you in writing that these documents have been so revised or rescinded

GRILL CONCEPTS, INC.
(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.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824
(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-126475 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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, (310) 235-7424.