



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD

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November 14, 2016

Hon. Joel P. Biblowitz  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
26 Federal Plaza, Suite 1703  
New York, New York 10278

Re: Brooks Brothers, A Division of Retail  
Brand Alliance,  
Case Nos. 02-CA-063650 & 02-CA-156504

Dear Judge Biblowitz:

Enclosed please find Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge in the above-referenced case.

Thank you for your attention in this matter.

Very truly yours,

A handwritten signature in black ink that reads "Rachel F. Feinberg".

Rachel F. Feinberg  
Counsel for the General Counsel

Enclosures

cc: Theo Gould  
Thomas Murray

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

**BROOKS BROTHERS, A DIVISION OF RETAIL  
BRAND ALLIANCE, INC.,**

**Respondent,**

**and**

**Cases 02-CA-063650  
02-CA-156504**

**NEW YORK NEW JERSEY REGIONAL JOINT  
BOARD AND ITS LOCAL AFFILIATES LOCAL  
340 AND LOCAL 25,**

**Charging Party.**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO  
THE ADMINISTRATIVE LAW JUDGE**

Dated at New York, New York  
This 14<sup>nd</sup> of November 2016

Rachel F. Feinberg  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, New York 10278

## I. STATEMENT OF THE CASE

Pursuant to charges 02-CA-063650 and 02-CA-156504, filed by New York New Jersey Regional Joint Board, Local 340 and Local 25, herein collectively called the Union and separately called Local 340 and Local 25, against Brooks Brothers, A Division of Retail Brand Alliance, Inc., herein called Respondent, on August 30, 2011<sup>1</sup> and July 21, 2015, respectively, the Regional Director issued a Consolidated Complaint and Notice of Hearing, herein the Complaint, against Respondent on August 31, 2016. GC Exhs. 1(a)-(h). The Complaint alleges that Respondent violated the National Labor Relations Act, herein the Act, by refusing to provide information timely to the Union regarding employees covered by Respondent's collective bargaining agreements with the Union who worked at Respondent's unrepresented 1180 Madison Avenue store, herein 1180, during its first months of operation and by interrogating employees at 1180 regarding their Union activity.

Respondent filed an Answer to the Complaint, denying most of the material allegations therein including the agency and/or supervisory status of the Employer's Director of Labor and Associate Relations Mel Walls and General Manager Jill Washington. GC Exh. 1(i). However, at the outset of the hearing, the parties reached a Partial Stipulation of Facts, herein the Partial Stipulation, which included the admission that General Manager Washington was a supervisor under 2(11) of the Act and that Director of Labor Relations Walls was an agent of Respondent in regard to contract negotiations and grievance arbitration under 2(13) of the Act. Joint Exh. 1 para. 9-10.

The case was litigated before Administrative Law Judge Raymond P. Green on October 19, 2016.

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<sup>1</sup> The charge in 02-CA-063650 was subsequently amended on October 12, 2011, and served on Respondent on October 24, 2016. GC Exh. 1 (c) & (d)

## **II. ISSUES PRESENTED**

1. Whether Respondent failed to provide an adequate and timely response to the Union's May 27, 2011 request for information, including payroll records and work schedules of employees from Union-represented store locations who worked temporarily at 1180 and were covered by the collective bargaining agreements then in effect between the Union and Respondent, in violation of Section 8(a)(5) and (1) of the Act?
2. Whether Respondent violated Section 8(a)(1) of the Act by questioning employee Camille Borbouse, in or about April 2015, in a dressing room at 1180 about whether she signed a Union card and her reason for doing so?

## **III. FACTS**

Respondent is a Delaware corporation engaged in the retail sale of clothing at various locations throughout the United States and around the world. The Union represents various classifications of employees at about 16 stores in the New York City area: Local 340 represents Respondent's sales, support, and visual employees at those stores, and Local 25 represents the tailoring employees. Respondent's flagship store, whose employees are represented by the Union, is located at 346 Madison Avenue in Manhattan where Respondent's also maintains corporate offices. Joint Exh. 1 para. 4. Respondent's Director of Labor and Associate Relations is Mel Walls, and the Human Resources Manager for the New York area is Catherine Highton. Tr. at 30:6-12 (Washington); Joint Exhibit 1, para. 9. Respondent derives gross revenues in excess of \$500,000 annually, and, in the course and conduct of its business operations, has sold and shipped from its 346 Madison Avenue facility products, goods and materials valued in excess of \$5,000 to points outside the states of New York and Delaware. Joint Exh. 1 paras. 4 through 6. Moreover, it is undisputed that the Union has, as all material times, been a labor

organization within the meaning of Section 2(5) of the Act.

On or about February 26, 2011, Respondent opened a new store at 1180 Madison Avenue in Manhattan, hereafter 1180. At that time, Local 340 and Respondent had a collective bargaining agreement in effect that covered sales, support, and visual employees at specified store locations, with an expiration date of March 31, 2013, herein the Local 340 Agreement<sup>2</sup>, and Local 25 and Respondent had a collective bargaining agreement in effect that covered tailoring employees at specified store locations, with an expiration date of November 30, 2012, herein called the Local 25 Agreement<sup>3</sup> Joint Exh. 1, paras. 11 & 12; Joint Exhs. 2 & 3. During 1180's

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<sup>2</sup>The Recognition clause of the Local 340 Agreement contains an "accretion clause" as well as a provision in regard to producing information as follows:

SECTION A: The Employer recognizes the Union as the sole and exclusive collective bargaining agent of all: (i) selling personnel and expeditors, housekeeping, shipping, receiving, floor cashier, call desk, on-floor stock, concierge, door greeter, off-floor stock, visual personnel, fitter-tailors (Stamford store only), cash office personnel and mailroom personnel, excluding all selling and support supervisory personnel, at its retail stores at Madison Avenue, Liberty Plaza, Broadway, Bleeker Street and Rockefeller Center, New York City, Northern Boulevard, Manhasset, L.I., West Post Road, Eastchester, N.Y., The Westchester, White Plains, N.Y., Roosevelt Field, L.I., Huntington, L.I., Southampton, L.I., West Nyack, N.Y., Stamford, Conn., and any other retail store(s) opened during the term of this Agreement operated by the Employer under the name "Brooks Brothers" in the City of New York and in the Counties of Nassau, Suffolk, Rockland and Westchester only; and (ii) housekeeping, shipping and receiving, and van drivers at its facility currently located at 39-25 Skilman Ave., Long Island City, N.Y.

SECTION C: The Employer agrees to make available to the Union such bargaining unit payroll and other bargaining unit records as the Union may reasonably require as the collective bargaining agent for such bargaining unit employees. Nothing in this Section shall be construed as restricting or enlarging the rights of the parties with respect to non-bargaining unit data or records. Disputes over such non-bargaining unit information shall be settled in the appropriate federal forum.

<sup>3</sup> The Recognition clause of the Local 25 Agreement also contains an "accretion clause" as follows:

Should any new retail store(s) open during the term of this Agreement in the City of New York and in the Counties of Nassau, Suffolk, Rockland, and Westchester, and be operated by the Company under the name "Brooks Brothers," the Company shall agree to recognize the Union as set forth in Article I, Recognition. The Agreement shall not apply at all to any stores opened by the Company that are operated as factory outlet stores.

first several weeks of operation, in addition to several new permanent hires, a total of sixteen employees from Union-represented store locations worked at the store. Respondent applied the terms of the collective bargaining agreements then in effect between Respondent and the Union to all employees in the units defined therein who worked temporarily at 1180 during their time there. Joint Exh. 1, para. 13; Tr. at 60:17-61:19; 62:2-21; see also Respondent Exh. 1 at 5<sup>4</sup> Otherwise, Respondent did not apply its collective bargaining agreements with the Union at 1180. Id.

In or about March 2014, Jill Washington became the General Manager, also called the Store CEO, at 1180. Tr. at 26:5-11 (Washington). Washington conceded that, in that position, she was the highest level of authority at 1180 and made all decisions in connection with the store, including hiring and disciplining employees. Tr. at 26:22-27:2; 30:1-5; 171:7-9 (Washington); Joint Exh. 1 at para. 10. All of the Associates at 1180, including sales, stock and visual employees, and the Assistant Managers report to Ms. Washington. Tr. at 29:17-21 (Washington).<sup>5</sup> Sales Associates have monthly, documented “touch-base” meetings with Ms. Washington to evaluate their sales performance and are paid on a commission draw basis. Tr. at

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<sup>4</sup>Respondent Exhibit 1 is the Regional Director’s unit clarification decision in 02-UC-062745. General Counsel asks your Honor to take administrative notice of the Board’s Order, issued September 21, 2015, denying the Union’s request for review and adopting the unit clarification decision in its entirety and of the record in the unit clarification proceeding. See *Louisville Gas & Electric Co.*, 268 NLRB No. 149 (Feb. 17, 1984), *enfd.* 760 F.2d 99 (6<sup>th</sup> Cir. 1985); see also *Reno Hilton Resorts Corp.*, 319 NLRB 1154 fn. 16 (1995)(administrative notice taken of tally of ballots and certification of results of election, noting that “the Board need not await the motion by a party to take administrative notice of its own documents”). General Counsel will cite to the findings of fact made in the unit clarification decision where it is helpful in providing background to the events at issue here. See Board Rule & Regulations 102.67(f) (“Denial of a request for review shall constitute an affirmance of the regional director’s action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.”)

<sup>5</sup>Washington testified that there are a total of 14 Associates working at 1180. Tr. at 29:24-25.

34:4-17; 35:2-8 (Washington); see also Respondent's Exh. 1 at 12. In contrast, non-sales Associates, such as Stock Associates—who spend only 50 percent of their time on the sales floor and the remainder of their time in the basement where store merchandise is kept—do not have regular monthly “touch-base” meetings and are paid hourly. Tr. at 72:19-24; 73:22-74:2; 75:7-12 (Borbose); Tr. at 180:11-19 (Washington); see also Respondent Exh. 1 at 12. Washington testified that while it is desirable to have “touch-base” meetings quarterly with the non-sales Associates, “[i]t's not necessarily enforceable.” Tr. at 34:4-35:20. Stock Associate Camille Borbose, who transferred to 1180 in or about August 2014 and worked there until July 2015, testified that she was not familiar with the term “touch-base” but that she recalled meeting with Ms. Washington about every six months to discuss her performance. Tr. at 73:22-74:2; 75:7-12 (Borbose).<sup>6</sup>

General Manager Washington testified that her responsibilities at 1180 often require her to be on the sales floor. Tr. at 164:13-14 (Washington). In addition, there is a manager's office in the basement at 1180 where there is a computer that Ms. Washington uses for checking sales information and in going over performance reviews with employees. Tr. at 31:24-32:13; 33:1-24 (Washington); 74:3-12 (Borbose).<sup>7</sup> Employee disciplinary meetings are also conducted in the basement office. Tr. at 74:24-75:1 (Borbose). Stock Associate Borbose testified that she also spoke with Ms. Washington in the basement office about exploring more highly compensated job opportunities at Respondent on at least two occasions. Tr. at 76:3-9

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<sup>6</sup>Although General Manager Washington conceded that “touch-base” meetings were documented, Tr. at 35:21-24, Respondent counsel did not seek to introduce into evidence any documentation indicating that Ms. Borbose had ever had such a meeting with Ms. Washington. It is unclear from the record whether the performance reviews described by Ms. Borbose are the same as or different from the “touch base” meetings described by Washington.

<sup>7</sup>Ms. Washington testified that there are also computers associated with the cash registers at 1180, but she did not recall whether personnel files could be accessed at those computers. Tr. at 36:18-37:8 (Washington).

(Borbose); see also Tr. at 175:12-176:2 (Washington). Although Ms. Washington testified that such conversations “could be on the sales floor if there’s nobody around,” she did not testify about any particular conversation with Ms. Borbose on the sales floor. Tr. at 175:21-176:2 (Washington). Indeed, apart from the location of the April 2015 conversation with Ms. Borbose that is the subject of the interrogation allegation here, the only conversation with Ms. Borbose as to which Ms. Washington recalled the location was one that occurred in the basement office. Tr. at 173:4-16; cf. 174:1-5; 175:12-176:6 (Washington).

From the time General Manager Washington came to 1180 until February 2016, she reported to Respondent’s then-District Manager Michael O’Reilly. Tr. at 29: 4-7 (Washington). According to Ms. Washington, she sent District Manager O’Reilly “recaps” of the business at the store via email on a daily basis and spoke with him by telephone approximately once a week. Tr. at 31:1-7 (Washington). Ms. Washington testified that she also communicated with Human Resources Manager Highton if a Human Resources issue arose but that their contact was “pretty rare.” Tr. at 30:16-17; 31:8-11; see also 39:17-40:9 (Washington). According to Ms. Washington, her communication with Director of Labor and Associate Relations Walls was likewise “very infrequent[.]” and at his initiation. Tr. at 31:14-21; see also 40:12-21; 44:14-46:15 (Washington).

***Information Requested:***

On May 27, 2011, Union Secretary-Treasurer Fred Kaplan sent a letter to Respondent Director of Labor Relations and Associate Relations Melvin Walls initiating a grievance against Respondent under the Recognition provision of the Local 340 Agreement for failing to apply its collective bargaining agreements with the Union at 1180. The letter also requested information from Respondent, pursuant to Section C of the Recognition clause of the Local 340 Agreement,

as follows: “[A]ll payroll records, schedules, and any other documents that show that an employee employed in any other store covered under the [collective bargaining agreement] worked at the 1180 Madison Avenue location.” Joint Exh. 4; see also Joint Exh. 1 at para. 16. In an email dated August 11, 2011, Secretary-Treasurer Kaplan reiterated the Union’s information request, attaching the May 27, 2011 letter. Joint Exh. 5; see also Joint Exh. 1 at para. 16. The following day, on August 12, 2011, Respondent filed a unit clarification petition (02-UC-062745) seeking to exclude the 1180 employees from the units covered by its collective bargaining agreements with the Union. Joint Exh., 1 at para. 19. Having received none of the information requested in the May 27, 2011 letter, the Union thereafter filed charge 02-CA-063650, on August 30, 2011, alleging *inter alia* that Respondent refused to provide requested information, refused to apply the collective bargaining agreement with Local 340 at 1180<sup>8</sup>, and both refused to transfer Union-represented employees to 1180 and transferred Union-represented employees out of 1180 because of their Union membership. GC Exh. 1 (a); see also Joint Exh. 1 at para. 18.<sup>9</sup>

On December 8, 2011, Respondent counsel Theo Gould sent an email to Union Secretary-Treasurer Kaplan in response to the Union’s May 27, 2011 information request. The

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<sup>8</sup>As noted *supra*, the charge was subsequently amended to include Respondent’s failure to apply the collective bargaining agreement with Local 25 at 1180. Complaint issued only in regard to the information request allegation. GC Exh. 1(c).

<sup>9</sup>As found by the Regional Director in the unit clarification decision, Union Secretary-Treasurer Kaplan spoke to Respondent Director of Labor and Associate Relations Walls, at some point prior to sending the May 27, 2011 information request and prior to the filing of the charge in 02-CA-063650, and asked why the Respondent has not recognized the Union at 1180 “when there were more Union members working there than non-members.” Respondent Exh. 1 at 4-5 & fn. 3. Based on Kaplan’s conversation with Walls and the subsequent unfair labor practice charge, it may be inferred that Kaplan believed that the Union might argue that it had majority support at 1180 as a result of the number of Union-represented employees working there and that Respondent was thus obligated to recognize the Union there pursuant to the “accretion clause” of the Union’s collective bargaining agreements with Respondent and Board laws.

only document attached to the email was a summary of the names, dates and total hours worked weekly of Union-represented employees who worked at 1180 from the store's opening through May 2011. Joint Exh. 1 at para. 17 & 18; Joint Exh 6. It is undisputed that none of the documents requested in the Union's May 27, 2011 letter were provided at this time. Indeed, the documents requested were not provided until the unit clarification proceeding in 02-UC-062745, in October 2012, pursuant to subpoena. Joint Exh. 1 at para. 19; see also Joint Exhibit 7(a) through (d).<sup>10</sup>

***Interrogation of 1180 Employee:***

It is undisputed that in or about the beginning of 2015, the Union began to actively organize the employees at 1180. Stock Associate Borbouse, who had transferred to 1180 in August 2014 from a Union-represented store location, testified that she heard her coworkers talking about unionizing at 1180 towards the end of 2014 and that she was invited by co-workers to attend several Union meetings at the end of 2014 and the beginning of 2015. Tr. at 76:13-77:11 (Borbouse). General Manager Washington testified that she learned about the organizing activity at 1180 in or about March 2015, when she returned to the store from jury duty and was approached by an Associate who complained that (s)he was being pressured to "sign for the Union." Tr. at 39:7-23 (Washington). Ms. Washington further testified that on April 7, 2015<sup>11</sup>,

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<sup>10</sup>The chart summary in Joint Exh. 7(a) is similar to the summary sent by Respondent counsel Gould to Union Secretary Treasurer Kaplan on December 8, 2011. It appears that some additional hours were added in the section covering the tailoring employees but that the content of the document is otherwise identical with the December 8, 2011 summary.

<sup>11</sup>Counsel for the General Counsel notes that Ms. Washington's ability to recall the precise date of the complaint by an Associate at the flagship store is in striking contrast with the vagueness of her testimony regarding conversations with Ms. Borbouse that occurred in about the same time period. Indeed, in regard to the conversation with Ms. Borbouse that is the subject of the interrogation allegation of the Complaint, Ms. Washington could not recall the exact date and was inconsistent in her testimony about where the conversation occurred, who initiated it and whether anyone else was present. Tr. at 162:11-15; 164:9-23; 165:1-8; 165:23-25; 166:5-12; 167:24-16 (Washington (direct)); cf. Tr. at 178:4-23

she was contacted by another Associate from Respondent's flagship store, who informed her that (s)he was being pressured to sign a petition in support of unionization at 1180. Tr. at 190:3-22 (Washington). It is undisputed that Ms. Borbouse at no point approached Ms. Washington in regard to the Union organizing at 1180 and did not in any manner openly manifest her views in regard to the union organizing effort at 1180. Tr. at 77:16-24 (Borbouse); 170:1-4; 179:13-180:2 (Washington).

General Manager Washington admits that she immediately reported the complaints in regard to the organizing effort at 1180 Madison Avenue to District Manager O'Reilly and Human Resources Manager Highton, who asked her to keep them informed about the situation. Tr. at 39:24-40:11 (Washington). It is undisputed that on April 2, 2015, the Union Secretary-Treasurer Kaplan sent a letter to Director of Labor and Associate Relations Walls informing him that the Union had obtained a showing of majority support at 1180. General Counsel Exh. 2; see also Tr. at 41:13-20. Ms. Washington admits that Mr. Walls called her at some point to inform her that the Union had collected authorization cards from a majority of the Associates at 1180. Tr. at 40:12-19; 42:14-18 (Washington).

Ms. Borbouse testified that in spring of 2015, she observed several Associates going to meet with General Manager Washington in a dressing room off the sales floor and received a "heads up" from a coworker that Ms. Washington was "calling in the other associates one by one." Tr. at 80:1-7; see also 142:14-23 (Borbouse). Unlike the basement office, the dressing room has a door. Tr. at 121:21-122:1-14 (Borbouse). The evidence indicates that Ms.

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(Washington (cross)). Moreover, Ms. Washington's explanation that she recalled the date of the complaint by the Associate from the flagship store because "I sent an email directly to Michael [O'Reilly] and Catherine [Highton] and the date is on the email, so I believe it was April 7th" only casts further doubt on Ms. Washington's credibility, as it impugns the truthfulness of Ms. Washington's testimony on 611 (c) that the only document she recalled reviewing in connection with the hearing was her affidavit. Tr. at 25:12-26:4 (Washington).

Washington initiated such a meeting with Ms. Borbouse in April 2015, while Ms. Borbouse was on work time. Tr. at 79:1-5;120:2-14 (Borbouse); see also Tr. at 162:11-14; 165:1-25; but cf. 178:4-20 (Washington)<sup>12</sup> According to Ms. Borbouse's uncontroverted testimony, she had never previously met with Ms. Washington in a dressing room for any reason. Tr. at 79:6-8 (Borbouse).

Both Stock Associate Borbouse and General Manager Washington testified that the conversation began with Ms. Washington explaining that she was just "checking in" and that there was nothing unusual about Ms. Washington checking in with Ms. Borbouse to see how she was doing. Tr. at 121:21-122:6 (Borbouse); Tr. at 166:3-6 (Washington). Ms. Borbouse testified that those kinds of conversations might occur at various places within the store but that the April 2015 conversation was unusual in that it occurred in the "closed-door" setting of a dressing room. Tr. at 118:23-119:4; 122:1-6 (Borbouse).<sup>13</sup> Ms. Washington testified that on at least four occasions prior to the April 2015 conversation, she had met with Ms. Borbouse to answer questions about health insurance, to discuss how she was transitioning to the new location, and to discuss more highly-compensated opportunities at Respondent. Tr. at 149:2-8;

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<sup>12</sup> Ms. Washington's testimony on direct examination about an April 2015 conversation is consistent with Ms. Borbouse's own testimony regarding a conversation initiated by Ms. Washington in the dressing room in spring of 2015. Counsel for the General Counsel notes, however, that when Ms. Washington was questioned on cross examination, she testified inconsistently about who initiated the conversation and could no longer recall the location or whether anyone else was present. Tr. at 79:1-5; 120:2-14 (Borbouse); see also Tr. at 162:11-14; 165:1-25; but cf. 178:4-20 (Washington). Nevertheless, the evidence as a whole suggests that both witnesses were testifying about the same conversation.

<sup>13</sup> Ms. Washington testified that she chose this location for the April 2015 meeting "because it was just off the sales floor it was easy to go over there instead of go all the way down to the basement and plus I wanted to make sure it was confidential" because "when you're talking about medical issues if someone wants a medical doctor or whatever, it's – it's – we have FMLA with the company where those things are confidential." Tr. at 168:1-7 (Washington). However, there is no indication based on her testimony regarding what was said during the conversation that medical issues were discussed.

152:1-8; 155:23-156:3; 156:10-16; 157:12-159:3; 160:1-6 (Washington).<sup>14</sup> Ms. Washington did not recall where those conversations occurred but she did not contradict Ms. Borbouse's testimony that she had never previously met with Ms. Borbouse in a dressing room.<sup>15</sup>

As to what was said during the April 2015 conversation, Ms. Borbouse's testimony and Ms. Washington's testimony diverge significantly. Ms. Borbouse testified consistently on both direct and cross examination that Ms. Washington told her that there were some people at the store who were trying to unionize and others who didn't want a union. According to Ms. Borbouse, Ms. Washington then asked if she had signed a Union card or form, and Ms. Borbouse responded that she had done so. Ms. Borbouse testified that Ms. Washington seemed surprised and commented that she thought Ms. Borbouse was happy at 1180. Ms. Borbouse told Ms. Washington that if the majority of the employees wanted to unionize, she didn't want to hold up

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<sup>14</sup>By leading question during the direct examination of Ms. Washington, Respondent counsel repeatedly characterized each of these conversations as centered on the differences between Union and non-Union store locations. Tr. at 148:17-149:8; 150:7-10; 151:21-152:1; 155:19-156:16; 157:25-160:21. This characterization is not consistent either with General Manager Washington's testimony regarding the content of the conversations or with Mr. Borbouse's testimony regarding her concerns. Thus, it is undisputed that Ms. Borbouse requested a transfer, regardless of location, as a result of a personal situation. Although Ms. Borbouse admitted that she was made aware that 1180 was a non-Union store and that her benefits would change by both her Union Representative and various Human Resources managers prior to her transfer, she testified that she herself was not particularly concerned about the differences in her terms and conditions of employment following from the move to an unrepresented location. Tr. at 106:1-7; 108:9-14 (Borbouse); see also Tr. at 146:6-9; 147:8-24; 174:10-22 (Washington). Although Ms. Washington testified to several conversations with Ms. Borbouse about the changes in her health benefits as a result of her transfer, Ms. Washington admitted that, when Ms. Borbouse spoke with her about other job opportunities at Respondent, her primary interest was in obtaining a more lucrative position. Tr. at 160:1-11 (Washington); see also Tr. at 116:12-117:10 (Borbouse). Indeed, it appears undisputed that, apart from signaling a general interest in working at the corporate office or in sales, Ms. Borbouse did not at any point discuss particular job opening at specific store locations with Ms. Washington. Tr. at 117:11-25 (Borbouse); Tr. at 162:11-23; 164:10-12; 165:1-8; 168:8-16; 176:12-25; 177:24-178:3; 178:24-179:5; 183:15-184:9, 22-25 (Washington).

<sup>15</sup>Ms. Washington did testify generally that sometime in or about May or June 2015, District Manager O'Reilly and Human Resources Manager Highton used the dressing room to meet with employees at 1180. It is unclear to what extent, if at all, Ms. Washington was present at those meetings. Tr. at 181:15-182:5; 183:2 (Washington).

the process. Ms. Washington then asked her to “keep this conversation between her and I [sic],” and Ms. Borbouse thereafter returned to work. Ms. Borbouse testified that she could not recall Ms. Washington ever previously having asked that she keep a conversation between them confidential. Tr. at 79:10-25;80:12-17; 121:21-132:13.<sup>16</sup>

In contrast, General Manager Washington testified on direct examination that the April 2015 conversation was a follow-up to a conversation initiated by Stock Associate Borbouse in early 2015, about Ms. Borbouse’s interest in obtaining more highly-compensated work with Respondent, possibly in the corporate offices. Ms. Washington testified that she inquired whether Ms. Borbouse had decided what position “she was going to go for” and that Ms. Borbouse indicated that she had not. Tr. at 165:1-8. According to Ms. Washington, she then asked “[d]o you prefer Union or non-Union” and stated that “[i]t’s up to you, but whatever choice you make you want to make sure.” Tr. at 166:5-12. Ms. Washington testified that she asked about Ms. Borbouse’s preference as between Union and non-Union positions “because she had come from Union before” and “I just wanted to make sure that if we guided her, she was going in the right direction.” Tr. at 166:15-17. Ms. Washington admitted that she did not at any point before or during the April 2015 conversation discuss specific positions at specific store locations with Ms. Borbouse and that, at the time she initiated the April 2015 conversation, she had no knowledge whether Ms. Borbouse had applied for any other positions. Tr. at 176:12-177:25; 178:14-179:5; 183:12-184:25. Ms. Washington denied saying anything about a “Union

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<sup>16</sup>Ms. Borbouse’s demeanor on the stand was truthful and her testimony was forthright. In addition to her manifest veracity on the stand, it must be noted that Ms. Borbouse no longer works for Respondent, and left her job at 1180 on good terms to pursue another employment opportunity. See, e.g., *Pacesetter Corporation*, 307 NLRB 514, 514 &517-518 (1992)(adopting judge’s conclusion that training manager who initiated one-on-one discussion with an employee who was not an open union supporter about his union sentiments acted unlawfully, crediting testimony of employee in part because he no longer worked for the employer).

card” or using the word “card” at all during the conversation or discussing in any manner the Union status of 1180. Tr. at 168:21-169:5.

According to Stock Associate Borbouse’s uncontroverted testimony, she mentioned her conversation with General Manager Washington to only one other employee, a Sales Associate named Thurman (last name unknown), a few days after it occurred. Thurman asked Ms. Borbouse if she would mind being contacted by a Union Organizer regarding the conversation, and Ms. Borbouse indicated that she would not. Thereafter, at Union Organizer Derik Harrison’s request, Ms. Borbouse met with him in a café near the workplace and described her conversation with Ms. Washington. Tr. at 80:8-11, 22-24; 81:1-23; 141:20-25.

It is undisputed that Stock Associate Borbouse left her employment with Respondent in July 2015, a couple of months after her conversation in the dressing room with General Manager Washington, to pursue another job opportunity. Ms. Washington admitted that Ms. Borbouse left on good terms and expressed no animosity or hostility towards her personally or towards Respondent. Tr. at 80:5-9 (Borbouse); Tr. at 202:3-11 (Washington).

#### **IV. ARGUMENT**

##### **A. Respondent Failed to Provide Requested Information Timely:**

Pursuant to Section 8(a)(5) of the Act, an employer has an obligation to provide requested information needed by the collective bargaining representative of its employees in order to effectively perform the duties and responsibilities incumbent upon it as the collective bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). That obligation includes the duty to supply information necessary to the negotiation of a collective-bargaining agreement as well as to the administration of a collective-bargaining agreement currently in effect. *Id.*; *Montgomery Ward & Co., Inc.*, 234 NLRB 588, 589 (1978). Thus,

where requested information relates to an existing contract provision it will be deemed demonstrably necessary to the union in the performance of its duty to enforce the agreement. *A.S. Abell Co.*, 230 NLRB 1112, 1113 (1977). Moreover, where information requested is of potential relevance to a pending or contemplated grievance, the information must be provided regardless whether the grievance is ultimately found to have merit and regardless whether the grievance ultimately proceeds to arbitration. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437-338; *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989) (the Board does not consider merits of union's claim that employer has breach collective bargaining agreement in deciding relevance), *enfd. mem.* 899 F.2d 1222 (6th Cir. 1990). Finally, an employer's unreasonable delay in furnishing relevant information is as much a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Valley Inventory Service, Inc.*, 295 NLRB 1163, 1166 (1989)(citing cases).

The standard of relevancy for requested information is a "liberal, discovery-type standard." *Loral Electronic Systems*, 253 NLRB 851, 853 (1980). Thus, requested information need not necessarily be dispositive of a particular issue between the parties but rather will be deemed relevant so long as it has some bearing on it. *Ormet Aluminum Mill Products*, 335 NLRB 788, 801 (2001). Generally, the burden of establishing the relevancy of requested information lies with the party making the request. *Pence Construction Corp.*, 281 NLRB 322, 324 (1986); *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984); *Ohio Power Co.*, 216 NLRB 987 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). However, where the requested information concerns employees within the bargaining unit, this information is presumed relevant and the burden is on the party refusing to provide the information to demonstrate its lack of relevance. *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), *enfd.* 347 F.2d 61, 69 (3d Cir. 1965). In either

case, once the initial threshold showing of relevancy is satisfied, the party refusing to provide the information must either prove its lack of relevance or provide an adequate reason why the information cannot, in good faith, be provided. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977), affg. 220 NLRB 1226 (1975); *United States Postal Service*, 350 NLRB 441 fn. 2 & 484 (2007).

**1. The Union's May 27, 2011 Letter Sought Presumptively Relevant Information and Demonstrably Relevant to Union's Grievance**

It is undisputed that, on May 27, 2011, the Union notified Respondent that it was grieving Respondent's failure to apply the collective bargaining agreement at 1180 and requested information from Respondent related to the grievance. The letter referenced the "accretion clause" of the collective bargaining agreement between Local 340 and Respondent, and also requested, pursuant to a subparagraph of the Recognition clause regarding provision of information, payroll records, work schedules, and other documents showing Union-represented employees who worked at 1180 for any length of time and the hours worked by each. It is undisputed that the employees in regard to whom the information was sought were Union-represented and that they continued to be covered by the Union's collective bargaining agreements with Respondent during the entire time that they worked at 1180.

Based on the undisputed evidence, Counsel for the General Counsel contends that the information requested by the Union is clearly presumptively relevant to the Union's role in enforcing and administering the collective bargaining agreement. See, e.g., *Montgomery Ward & Co., Inc.*, 234 NLRB at 589 (wage and time records and work schedules of employer's union-represented employees presumptively relevant). The fact that the information requested covered a period during which the Union-represented employees in regard to whom the information was

sought worked at a non-Union store cannot undermine this conclusion given the temporary nature of the assignment. Cf., e.g., *Grinnell Fire Protection Systems Co.*, 332 NLRB 1257 (2000), enf. denied in part 272 F.3d 1028 (8<sup>th</sup> Cir. 2001), rehearing denied (2002)(information regarding strike replacements presumptively relevant, based on the possibility that they may become part of bargaining unit if their employment continues after strike). Indeed, given that the employees referenced in the Union's information request were on temporary assignment to 1180 from Union-represented store locations and continued to be covered by the collective bargaining agreements between the Union and Respondent during the length of that assignment, the presumptively relevant character of information concerning their terms and conditions of employment is yet more compelling than would be the case for strike replacements, whose represented status is a mere probability.

In any case, it is clear that the information requested by the Union was demonstrably relevant in that it was requested in connection with the Union's grievance regarding Respondent's failure to apply the collective bargaining agreement at 1180. The grievance letter made clear that the information was sought in connection with the application of the "accretion clause" of the Local 340 Agreement at 1180. Given that the application of such clauses is lawful only to the extent it is supported by some indicator of majority support, the relevance of the requested information is clear. See, e.g., *Houston Div. of the Kroger Co.*, 219 NLRB 388, 388 (1975); see also *W.C. DuComb West*, 239 NLRB 964, 965-66 (1978), *review denied sub nom. Willenbrink v. NLRB*, 612 F.2d 1088 (8th Cir. 1980) (accretion analysis performed on new facility; employer not obligated to recognize union per contract's after-acquired clause because union had no proof of majority support). Indeed, Secretary-Treasurer Kaplan as much as explained the relevance of the information subsequently sought when, in a conversation with

Director of Labor and Associate Relations Walls prior to filing the grievance, he inquired how Respondent could not apply the collective bargaining agreements to 1180 given that a majority of the employees working at the store were Union-represented. See *Contract Flooring Systems, Inc.*, 344 NLRB 925 (2005)(citing *Corson & Gruman Co.*, 278 NLRB 329, 334 (1986), *enfd.* 811 F.2d 1504 (4<sup>th</sup> Cir. 1987), for the proposition that, in regard to non-presumptively relevant information sought by union, it is sufficient to establish relevance that the union indicated the reason for the request to the employer and that it had a reasonable factual basis for the request)<sup>17</sup> Here, in order to evaluate whether it could achieve an enforceable outcome in arbitration consistent with Board law, the Union sought information tending to support the conclusion that a majority of employees working at 1180 from the store opening to the time of the request were in fact Union-represented, as Kaplan informed Walls that the Union believed.<sup>18</sup> There can be no doubt that such information was relevant to the Union's grievance seeking to enforce the "accretion clause" of its collective bargaining agreements with the Union, referenced in the May 27, 2011 letter.

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<sup>17</sup> That the Union had a reasonable factual basis for suspecting that Union-represented employees were working at 1180 during the initial months of operation is evidenced by the Regional Director's finding, in the unit clarification decision, that a Union Organizer, Elba Liz, visited 1180 on two occasions after the store opened and observed employees from Respondent's 346 Madison Avenue store, which is Union-represented, working there. Respondent Exh. 1 at fn. 5. Under Board law, a union is not obligated to share its factual basis for a request with the employer but only the reason for the request in order to meet the requirements of relevance. *Corson & Gruman Co.*, 278 NLRB at 334.

<sup>18</sup>The fact that the Union did not attempt to argue before the Arbitrator that it had an actual majority at 1180 based on the number of unit employees working there does not undercut the demonstration of relevance here. Indeed, the Union's failure to make such an argument is almost certainly attributable to the fact that, at the time of the arbitration proceeding in April 2012, Respondent had failed to provide the underlying documents sought by the Union in its May 27, 2011 information request that might have supported it. See Union Exh. 1. Counsel for the General Counsel notes that the fact that the underlying documents ultimately failed to support the majority status argument does not in any sense undercut the relevance of those documents to the Union's evaluation of the merits of its grievance and its preparation for arbitration.

Given the clear relevance of the information sought by the Union in its May 27, 2011 letter, General Counsel submits that Respondent had a duty to provide the information timely or to explain why the information cannot be provided. Cf. *Samaritan Medical Center*, 319 NLRB 392, 392 & 398 (1995)(adopting administrative law judge's conclusion that employer failed to meet obligation to provide relevant information timely where employer at no point informed union that documents were unavailable or unduly burdensome to produce or otherwise explained three month delay); see also *Tubari, Ltd., Inc.*, 299 NLRB 1223, 1223 & 228 (1990)(adopting administrative law judge's conclusion that employer failed to meet obligation to provide relevant information timely where it failed to provide any explanation of 5 month delay); *Valley Inventory Service*, 295 NLRB 1163 (1989). As discussed below, Respondent did neither.

## **2. Respondent's Response to Information Request Was Inadequate and Untimely**

It is undisputed that, although the Union reiterated its May 27, 2011 information request in an August 11, 2011 email to Director of Labor and Associate Relations Walls, no response of any kind was made to the request until December 8, 2011. On that date, Respondent counsel Theo Gould sent an email to Secretary-Treasurer Kaplan attaching a summary of the names of employees from Union-represented stores who worked at 1180, as well as the hours they worked weekly from store opening through mid-May 2011. It is undisputed that the underlying documents requested by the Union, specifically payroll records for those employees and their weekly work schedules at 1180, were not provided until the commencement of the unit clarification proceeding in October 2012, nearly a year and a half after the initial request.

As an initial matter, it is clear that Respondent's December 8, 2011 response to the Union's information request was inadequate in that it did not attach or otherwise make available the underlying documents from which the summary was prepared and did not offer any

explanation for Respondent's failure to provide those documents. See *id.* It is clear that the summary was not a document kept by Respondent in the ordinary course of business but rather was prepared by Respondent specifically in response to the Union's information request, presumably with reference to payroll records and weekly work schedules from 1180, the very documents requested by the Union. Thus, there can be no conceivable argument that the underlying documents were unavailable on or before December 8, 2011, nor did Respondent at any point so indicate. See *McGuire Steel Erection, Inc.*, 324 NLRB 221, 223-224 (employer-created summary of time sheets and payroll records insufficient to satisfy obligation to provide relevant information where it is self-evident that summary was prepared from the requested documents); *New Jersey Bell Telephone Co.*, 289 NLRB 318, 330 n. 9 (1988), *enfd.* 872 F.2d 413 (3d Cir. 1989)(employer summaries of employee absentee records insufficient where documents requested were relevant to pending grievance and employer failed to make underlying documents available).

In Counsel for the General Counsel's view, even had the requested underlying documents sought in the Union's May 27, 2011, been produced on December 8, 2011, rather than almost a year later, the response would not have satisfied Respondent's obligation to furnish the requested information to the Union. In determining whether an employer has unlawfully delayed in responding to an information request, the Board considers the totality of circumstances rather than setting an absolute, per-se time frame. See *Allegheny Power*, 339 NLRB 585, 587 (2003). The Board will consider "the complexity and extent of information sought, its availability and the difficulty in retrieving the information" in making this determination. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). Here, it is undisputed that the payroll records and weekly schedules requested were for a single store, covered only a two-and-a-half month period, and

concerned only 16 Union-represented employees. Respondent at no point contended that the requested information was unduly burdensome or difficult to access; indeed, as noted, Respondent must have reviewed the documents in preparing its December 8, 2011 summary.

Moreover, Respondent offered no explanation at all for waiting over almost a year and a half to provide the responsive documents, let alone for the over six-month delay in providing a summary of the documents. Where information requested is neither unduly burdensome nor inaccessible, the Board has found delays of substantially less than the six month period that elapsed between the Union's initial request and Respondent's initial response to be inconsistent with an employer's obligation to provide relevant information timely. See, e.g., *Valley Inventory Service, Inc.*, 295 NLRB at 1163, 1166 (presumptively relevant information regarding bargaining unit employees, provided four months after request untimely); *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 24-25 (2011) (finding unreasonable employer's 3-month delay in responding to request for relevant grievance information), enfd. 677 F.3d 1241 (D.C. Cir. 2012); *Beverly California Corp.*, 326 NLRB 153, 157 (1998), enfd. in pertinent part 227 F.3d 817 (7th Cir. 2000) (finding 2-month delay unreasonable regardless absence of evidence of prejudice to union); *American Signature, Inc.*, 334 NLRB 880, (2001)(unexplained two-month delay in providing information concerning bargaining unit employees unlawful).

### **3. Mootness Effects Remedy, Not Finding of Violation**

To the extent Respondent may contend that no remedy is appropriate here because the information request is moot, that argument must be rejected. Even assuming that the request is moot in light of the completion of arbitration process pursuant to which it was made, that fact would go solely to the particulars of the remedy ordered and cannot assuage the violation. *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)(where employer demonstrated that

union had no on-going need for relevant information requested pursuant to a grievance that has since been resolved, the Board will not order production although it will find the violation). The fact that Respondent ultimately provided the documents relevant to the Union's May 27, 2011 in October 2012, five months after the arbitration of the grievance pursuant to which it was requested and over a month after the Union's unfair labor practice charge alleging refusal to provide the requested information, is clearly beside the point. *Beverly California Corp.*, 326 NLRB at 157 (belated compliance by an employer, after an unfair labor practice charge is filed, does not retroactively cure the unlawful refusal to supply the information (citing cases)). Here, the obvious untimeliness of Respondent's response is in no way vitiated by the fact that the information was ultimately produced, regardless whether the information ultimately would have altered the outcome of the grievance and arbitration process. See *Safeway Stores*, 236 NLRB 1126 n. 1 (1978)("[B]efore a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all.")

Thus, Counsel for the General Counsel contends that Respondent's illegal conduct requires a remedial order requiring Respondent to timely provide relevant information requested by the Union, even assuming no production remedy is appropriate here.

#### **B. Respondent Unlawfully Interrogated Employees**

The Board has held that it is unlawful for an employer to ask an employee who is not an open union supporter whether that individual has signed a union authorization card. See, e.g., *Skyline Transport*, 228 NLRB 352 (1977)(citing *Falcon Tank Corp.*, 194 NLRB 333 (1971), for the proposition that an employer who questions employees about whether they signed a union card without assurances against reprisals violates Sec. 8(a)(1)); see also *Sagapo Restaurant, Inc.*,

257 NLRB 1212, 1213 & 1219 (1981). Such a question is not, however, a per se violation of Section 8(a)(1); rather, it rises to the level of unlawful interrogation if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 187 (1993). This is an objective, not a subjective inquiry. See, e.g., *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112 fn. 9 (1999)(citing *American Freightways Co.*, 124 NLRB 146, 147 (1959) for the proposition that “[i]t is well settled that the question of whether an employer's actions reasonably tend to interfere with, restrain, or coerce employees in the exercise of Sec. 7 rights is an objective one, and does not turn on whether the employer's coercion succeeded or failed”); see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines not whether the employer intended, or the employee perceived, any coercive effect but whether the employer's actions would tend to coerce a reasonable employee).

Under the Board's "totality of circumstances" approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Here, it is undisputed that Ms. Borbouse had never in any fashion volunteered or in any manner signaled her views regarding the Union to Ms. Washington. Cf. *id.* at 1217 (employer did not act unlawfully in asking an employee who came voluntarily to her manager's office to deliver her dues check off authorization form why she supported the union). Moreover, it is undisputed that Ms. Washington was the highest level of managerial authority at 1180, with authority to hire, discipline and evaluate employees. Cf. *Emery Worldwide*, 309 NLRB 185, 186-187

(1992)(employer did not act unlawfully when low-level supervisor asked employee generally and in manner that the employee characterized as “casual” how she felt about the union). Although there is no evidence that Ms. Washington threatened Ms. Borbouse in any manner and their relationship was amicable, nevertheless it is clear that Ms. Washington, by the pointedness of her questioning (i.e., whether Ms. Borbouse had signed a Union card) and her surprised reply (i.e., that she thought Ms. Borbouse was happy at 1180), conveyed that management’s perception of Ms. Borbouse was altered by this manifestation of support for the Union. In short, the nature of the questioning, the identity of the questioner, and the complete absence of any outward manifestation by Ms. Borbouse of her Union views strongly support the conclusion that Respondent violated Section 8(a)(1). See, e.g., *BJ’s Wholesale Club*, 319 NLRB 483, 483-484 (1995)(supervisor’s questioning of an employee about her support for the union violated Section 8(a)(1) in spite of the friendly relationship between them, the absence of any threat, and employee’s honest reply, where the questioning occurred in the middle of the work day, at the supervisor’s initiation, and in absence of any open manifestation of by employed regarding her union views); *Pacesetter Corporation*, 307 NLRB 514, 514 & 517-518 (1992)(training manager who initiated one-on-one discussion in his office with an employee who was not an open union supporter about the employee’s union sentiments violated Section 8(a)(1)).

In addition, the timing, location and circumstances of the April 2015 conversation further support the conclusion that it constituted an unlawful interrogation. Thus, it is undisputed that Ms. Washington initiated the discussion with Ms. Borbouse in the middle of her work day. Cf. *BJ’s Wholesale Club*, 319 NLRB at 483-484. Moreover, the unaccustomed, “closed door” setting as well as Ms. Washington’s request that Ms. Borbouse keep the conversation confidential signaled the exceptional and serious nature of the discussion. See *Teletech*

*Holdings, Inc.*, 342 NLRB 924, 924 & 926 (2004)(supervisor's one-on-one questioning of employees regarding support for union, in context that signaled that the conversation was of a serious nature, violated Section 8(a)(1) in spite of absence of threatening tone to questioning). In short, the totality of circumstances here strongly support a finding of unlawful interrogation. *Id.*; see also *Pacesetter Corporation*, 307 NLRB at 514 & 517-518 (adopting administrative law judge's conclusion that supervisor's questioning of employee about his union views violation Section 8(a)(1) in that the circumstances belied any contention that the questions were "a natural outgrowth of some casual conversation").

Counsel for the General Counsel further notes that the April 2015 conversation occurred in the context of a union organizing campaign at 1180 of which Ms. Washington was well aware. Indeed, the evidence indicates that on April 2, 2015, the Union sent a letter to Director of Labor and Associate Relations Walls informing him that the Union had collected authorization cards from a majority of the 1180 employees, and Ms. Washington admits that Mr. Walls informed her of the situation. As discussed above, the organizing effort itself took place against the back-drop of an on-going dispute between the parties regarding the representational status of 1180 which began in the first few months of the store's operations. It is impossible to view this as a neutral context devoid of hostility toward the Union; on the contrary, as argued above, Respondent demonstrated its hostility by refusing to timely provide relevant information needed by the Union in order to evaluate the merits of its grievance seeking the application of its collective bargaining agreements with Respondent at 1180. See *Emery Worldwide*, 309 NLRB at 186 & n. 11 (absence of other unfair labor practices one factor in determining whether an alleged interrogation is coercive).

This context also enhances the credibility of Stock Associate Borbouse's account of the April 2015 conversation. See, e.g., *El Rancho Market*, 235 NLRB 468 (1978)(factors other than demeanor of witnesses may bear on credibility determinations, including the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole). That is because it makes clear that Respondent's highest levels of management were aware of and concerned about the Union organizing effort at 1180. Indeed, General Manager Washington admitted that, when she first reported employee complaints about the union organizing to District Manager O'Reilly and Human Resources Manager Highton, they specifically asked that she keep them apprised of further organizing activity. Moreover, Ms. Borbouse's testimony is uncontroverted that, at about the time of her own interview with Ms. Washington, she had observed other Associates going to meet one-on-one with Ms. Washington in the dressing room and had heard from coworkers that these one-on-one meetings concerned the Union activity at 1180. Although the Complaint does not allege that Respondent was engaged in unlawful polling of employees and the evidence is insufficient to warrant that conclusion, nevertheless this context tends to make more probable Ms. Borbouse's testimony that Ms. Washington asked her during the April 2015 meeting whether she had signed a Union card and the reason for her doing so.

In contrast, General Manager Washington's testimony regarding her April 2015 conversation strains credulity on several counts. First, Ms. Washington testified that she initiated the conversation to follow up an earlier discussion, initiated by Ms. Borbouse, in which Ms. Borbouse had expressed an interest in seeking a more highly-compensated position with Respondent. However, she admitted that she and Ms. Borbouse had not discussed specific opportunities at that time and that she had no knowledge whether Ms. Borbouse had applied for

any particular job opportunities since that time. It is difficult to believe that Ms. Washington would have pulled Ms. Borbouse off the floor while she was on work time without some more concrete reason for doing so. Moreover, Ms. Washington's description of the conversation lacks coherence. Thus, although she admitted that there was no discussion of particular positions in specified store locations, either Union or non-Union, she nevertheless testified that she asked Ms. Borbouse whether she "prefer[ed] Union or non-Union." Tr. at 166:3-12 (Washington). Ms. Washington failed to provide a credible explanation for her apparent preoccupation with Ms. Borbouse's Union or non-Union preference, particularly given that it is undisputed that no specific positions were discussed.

Any attempt to characterize General Manager Washington's April 2015 meeting with Stock Associate Borbouse as either a routine "touch base" meeting or a casual, friendly conversation must likewise fail based on Ms. Washington's own testimony. If the latter, Ms. Washington entirely failed to explain why she chose to have the conversation in a dressing room behind a closed door rather than on the sales floor or in a less secluded location. Indeed, the only explanation offered by Ms. Washington on direct examination was the desirability of keeping conversations regarding "medical issues" confidential. However, as noted, Ms. Washington's own description of the April 2015 conversation supplies no basis to conclude that any "medical issues" were discussed let alone that this was the purpose of the meeting. As to any claim that the April 2015 meeting was a routine "touch base," that contention is equally unavailing. Indeed, in light of Ms. Washington's testimony that "touch base" meetings were documented, any such characterization is belied by the Respondent's failure to introduce documentation in that regard. See *Galesburg Construction*, 267 NLRB 551, 552 (1983) (approving the judge's adverse inference from employer's failure to produce documents in its control).

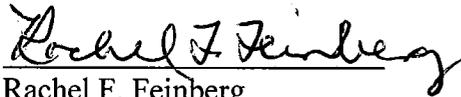
For the reasons described above, Counsel for the General Counsel submits that Stock Associate Borbouse's testimony that General Manager Washington called her into a confidential, closed-door meeting during her work time and pointedly asked her whether she had signed a Union card, should be credited over Ms. Washington's denials in this regard. Moreover, as the questioning occurred in the context of an active Union organizing campaign at 1180, a store the representational status of which was a matter of long-running dispute between the parties, and against a background of other unfair labor practices, Counsel for the General Counsel contends that the conversation constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.

#### **V. CONCLUSION**

For the reasons discussed above, Counsel for the General Counsel urges that the Administrative Law Judge find that the summary provided by Respondent on December 8, 2011, was an inadequate and untimely response to the Union's May 27, 2011 request for relevant information in connection with the Union's grievance concerning 1180, and that Respondent's subsequent provision of the requested documents in October 2012, at the commencement of the unit clarification proceeding concerning the representational status of 1180, was likewise untimely. Furthermore, Counsel for the General Counsel urges that the Administrative Law Judge find that the Respondent thereafter interrogated employee Camille Borbouse regarding her union views in the context of renewed organizing activity at 1180. Based upon the record and the arguments advanced herein, General Counsel therefore respectfully asks the Administrative Law Judge to find that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged. General Counsel further, respectfully requests that the Judge provide the relief requested herein and other remedy which may be just and proper.

Dated: November 14, 2016  
New York, New York

Respectfully submitted,

A handwritten signature in cursive script that reads "Rachel F. Feinberg". The signature is written in black ink and is positioned above a horizontal line.

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**BROOKS BROTHERS, A DIVISION OF RETAIL  
BRAND ALLIANCE, INC.,**

**Respondent,**

**and**

**Cases 02-CA-063650  
02-CA-156504**

**NEW YORK NEW JERSEY REGIONAL JOINT  
BOARD AND ITS LOCAL AFFILIATES LOCAL  
340 AND LOCAL 25,**

**Charging Party.**

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S POST-  
HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn and deposed, say that on the date indicated below, I served the above-entitled document **by electronic mail** upon the following persons, addressed to them at the following addresses:

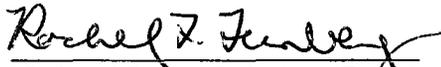
Hon. Joel P. Biblowitz  
Associate Chief Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
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Subscribed and Sworn to this:  
14th day of November, 2016

Designated Agent: -

  
National Labor Relations Board