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Pacific Coast Sightseeing Tours & Charters, Inc., a wholly owned subsidiary of Coach USA, Inc., and Megabus West, LLC, an indirectly owned subsidiary of Coach USA, Inc. and International Association of Sheet Metal, Air, Rail and Transportation Workers—Transportation Division.
Cases 21–CA–168811 and 21–RC–167379

September 18, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On March 17, 2017, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pacific Coast Sightseeing Tours & Charters, Inc., a wholly owned subsidiary of Coach, USA, Inc., and Megabus West, LLC, an indirectly owned subsidiary of Coach USA, Inc., Anaheim, Bakersfield, and Van Nuys, California, its officers, agents, successors, and assigned, shall take the action set forth in the Order as modified.

1. Substitute the following for the final paragraph.

¹ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge cited *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011). We note that the Board subsequently reaffirmed the relevant finding in that case in *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 3 fn. 4 (2016), following the court’s remand in *Medco Health Solutions of Las Vegas, Inc. v. NLRB*, 701 F.3d 710 (D.C. Cir. 2012).

“IT IS FURTHER ORDERED that the election held on February 4 and 5, 2016, in Case 21–RC–167379 is set aside and that case is severed and remanded to the Regional Director for Region 21 to conduct a second election.”

Dated, Washington, D.C. September 18, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Mathew J. Sollett, Esq., for the General Counsel.
Jonathan A. Siegel, Esq. and *Kymiya St. Pierre, Esq.* (*Jackson Lewis P.C.*) for the Respondent/Employer.
Susannah Bender, Esq. (*SMART-TD*), for the Union/Petitioner.

DECISION AND RECOMMENDED ORDER ON
OBJECTIONS TO THE ELECTION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Pacific Coast Sightseeing Tours & Charters, Inc., a wholly owned subsidiary of Coach, USA, Inc., and Megabus West, LLC, an indirectly owned subsidiary of Coach USA, Inc. (Respondent or Employer), committed certain unfair labor practices in violation of Sec. 8(a)(1) of the Act, and whether such conduct and other alleged conduct amounted to objectionable preelection conduct.

On April 25, 2016, based on a charge filed by International Association of Sheet Metal, Air, Rail, and Transportation Workers-Transportation Division (SMART-TD) (Union or Petitioner), the Regional Director for Region 21 of the Board issued a complaint and notice of hearing in Case 21–CA–168811, alleging that Respondent had violated Sec. 8(a)(1) of the Act by engaging in certain conduct in December 2015 and January 2016.

Thereafter, on April 28, 2016, the Regional Director issued a report on objections and order consolidating cases, consolidating for hearing the above-referenced unfair labor practice case with objections to the election filed by the Union in Case 21–RC–167379. I presided over this case over 8 days in Los Angeles, California, on June 27–30, August 24–26, and September 12, 2016.

Because some of the conduct alleged in the objections in Case 21–RC–167379 is also covered by the unfair labor prac-

tices alleged in the complaint in Case 21–CA–168811, I will first address the allegations of the complaint.¹

I. THE ALLEGATIONS OF THE COMPLAINT

A. Findings of Fact

1. Jurisdiction and labor organization status

Respondent admits, and I find, that it is a Florida corporation with its principal place of business and office located in Anaheim, California, where it is engaged in providing public transportation services, including intrastate and interstate transportation of passengers. In conducting its business operations during the 12-month period ending on January 31, 2016, Respondent performed services valued in excess of \$50,000 outside the State of California. Accordingly, Respondent further admits, and I find, that from at least January 30, 2015, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.²

Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.³

2. Respondent’s operations and other background facts

As briefly described above, Respondent transports passengers by bus to and from various destinations throughout California. It operates its fleet of buses from hubs or yards located in Anaheim and Van Nuys in the Los Angeles metropolitan area and Bakersfield in the San Joaquin valley, with bus drivers and other employees based at these three locations. Kirstin Martinez is Respondent’s general manager, and Hanev Hana is its safety manager, and both are admitted supervisors and agents of Respondent. Both are based at the Anaheim facility, although Martinez also oversees the Van Nuys and Bakersfield facilities from her office at Anaheim.

On November 25, 2015, the Union filed a petition in case 21–RC–164957 seeking to represent certain of Respondent’s employees at the Anaheim facility. This petition was withdrawn shortly thereafter, as approved by the Regional Director on December 3, 2015 (Jt. Exh. 5.) On January 8, 2016, the Union again filed a representation petition in Case 21–RC–167379, this time seeking to represent certain of Respondent’s employees at all three facilities, Anaheim, Van Nuys and Bakersfield. As discussed further below with regard to the objections, an election was held at all three facilities on February 4, 2016 and again at Anaheim on February 5, 2016. It is the alleged conduct by Respondent in the wake of the filing of the petitions that is the subject of the instant complaint, as well as the subject of the objections to the election which will be discussed further below.

3. Respondent’s alleged conduct in December 2015

Paragraph 6(a) of the complaint alleges that about December 19, 2015, Safety Manager Hanev Hana threatened employees

with job loss by telling them that they should quit if they did not like their working conditions. Paragraph 6(b) of the complaint alleges that about December 21, 2015, Hana impliedly threatened employees with discipline if they selected the Union.

In support of the allegation in paragraph 6(a), as described above, the General Counsel proffered the testimony of employee Juventino Santos. Santos testified that he has worked as a bus driver out of the Anaheim facility for about 2 years. On December 19, 2015, he attended a mandatory meeting at Anaheim, attended by some 10 other drivers, and conducted by General Manager Kristin Martinez and Hana from about 10 a.m. to 12 noon. According to Santos, Martinez began the meeting by making a brief announcement that the Union had withdrawn its petition (in Case 21–RC–164957), but did not recall if Martinez said anything else. She then turned the meeting over to Hana, who spoke for the rest of the meeting. At some point, another driver said something about other companies paying their drivers more, at which point Hana replied “if other companies are paying more, all of you can leave.” Santos additionally testified that out of the 2 hours that the meeting lasted, Hana spoke about safety issues for only 30 minutes. (Tr. 129–130, 132, 135–139, 166, 174–175.) During cross-examination, Santos admitted that Hana had discussed various safety-related topics, including driver fatigue, material safety data sheets, inspection list procedures, heat illness and spill procedures, drug and alcohol policy and procedures, the American with Disabilities Act and procedures regarding disabled passengers, and limitations on driving hours. He also admitted that safety-related materials were either presented or distributed to drivers, although he could not recall if a slide or “Power Point” presentation had been made at this meeting. (Tr. 166–172.)⁴

In support of the allegation in paragraph 6(b) of the complaint, as described above, the General Counsel proffered the testimony of employee Fernando Torres, a bus driver for about 2 years based in Anaheim. Torres initially testified that he attended a safety-related training session conducted by Martinez and Hana on December 21, 2015, also attended by four other drivers. According to Torres, Martinez began the meeting by thanking them for being present, and then said that she wanted to say a few words about the Union. She said that employees had the right to form a Union, but would advise against it because it was not in their best interest. Martinez then turned the meeting over to Hana, who spoke “at length” about the downfall of joining a Union, which Hana said would take their money but not do anything for them. Hana then said that (if the Union came in) there would be rules the Union has which he would have to enforce. If they were late, for example, he would have to “write them up.” Hana also said that if the Union failed (in its effort to come in), there would be some “housekeeping” done.⁵ According to Torres, the entire meeting

¹ As discussed further below in the Objections portion of this decision, the alleged conduct by Respondent on January 18 and 25, 2016, as described in pars 6(c), (d), and (e), as well as par. 7 of the complaint, is arguably covered by Objection 1, as described in the Regional Director’s Report on Objections.

² GC Exh. 1(o); Jt. Exh. 7.

³ Jt. Exh. 7.

⁴ Santos admitted that a voluminous document introduced as R. Exh. 3(a) & (b) was distributed at this meeting. As discussed below, other testimony established that this document (R. Exh 3(a)&(b)) is a “hard copy” of a PowerPoint presentation made during the course of this meeting by Hana.

⁵ Additionally, Torres testified, Hana said that if the Union came in, they would have to have a union representative present any time they

lasted about 30 minutes, 20 of which were devoted to the topic of the Union, and the remaining 10 minutes to safety topics. (Tr. 199–203; 203–209; 211–216). During cross-examination, however, after being shown a sign-in attendance sheet for a meeting dated December 17, 2015 (R. Exh. 10), Torres changed his testimony and stated that everything he had testified had occurred at the aforementioned December 21 meeting had actually occurred instead on December 17. (Tr. 351, 355.)⁶

In response to the above-described testimony by Santos and Torres, Respondent proffered the testimony of Martinez and Hana, as well as several rank-and-file employees. Martinez testified that Respondent holds yearly mandatory safety meetings during “safety week,” an event normally held in July. Because of a new contract they had been awarded during the summer of 2015, and the addition of new drivers, they postponed the safety training until December that year. The safety meetings were held from December 14 through 20, following the same format.⁷ Martinez would thus make some quick introductory remarks about the company and recent events, and then turned the meeting over to Hana, who would then conduct a safety presentation using a “Power Point” projector. On December 17, she began the meeting by announcing that the Union had withdrawn its petition, something that took about 2–3 minutes, and then turned the meeting over to Hana, who did not talk about the Union at all. Hana immediately turned to the Power Point safety presentation, the “hard copy” of which she identified as contained in Respondent’s Exhibit 3(a) and (b). She testified that every single slide depicted in that exhibit was shown at each of the safety meetings, including December 17 and 19, a presentation that takes about 2 hours—the amount of time depicted in the timesheets signed by employees who attended the meetings on those dates (R. Exhs. 7, 18). She also testified that she was present for the entirety of each of these safety meetings. Exactly the same format was repeated during the meeting of December 19, with Martinez making a quick announcement about the Union having withdrawn the petition, followed by Hana launching into his safety discussion with the Power Point presentation, which lasted close to 2 hours. Martinez repeatedly denied that Hana made any comments about the Union during these safety meetings, and pointedly and specifically denied that Hana made any of the statements attributed to him by Santos and Torres. She also specifically denied that

met with employees, and added that he had been there (at the company) for a long time, and that he would not allow the Union to come in and ruin it. I would note that these two last statements are not alleged as part of the complaint.

⁶ Notably, despite this change in Torres’ testimony, the General Counsel never moved to amend the complaint to conform the pleadings (in paragraph 6(b)) to the testimony of its only witness, and thus the allegation still pleads that “about” December 21 Respondent impliedly threatened employees. Testimony by Respondent’s witnesses, as discussed below, later firmly established that no meetings took place on December 21, but rather on December 17, as admitted by Torres. This failure to amend the pleadings despite the evidence suggests a cavalier attitude by the General Counsel regarding its need to be precise in its pleadings, which in my view raises due process issues.

⁷ She testified that no meetings were held after December 20, testimony that was corroborated by Hana. (Tr. 1070; 1195.)

she made any comments about the Union other than announcing that it had withdrawn the petition. Both she and Hana, as described below, also specifically denied that any literature regarding the Union was distributed to employees during these safety meetings in December. (Tr. 1055–1056, 1058–1064, 1071–1075, 1160–1161, 1163–1165, 1198.)

Hana confirmed Martinez’ testimony that Respondent holds annual safety training meetings, which it calls “safety week,” usually around July but delayed in 2015 until December due to operational reasons. He testified that during the safety meetings held from December 14 to the 20th in 2015, he showed the entire “Power Point” slide presentation, slide by slide, as depicted in the “hardcopy” version contained in (R. Exh. 3(a) & (b)). According to Hana, during the meetings on December 17 and 19, 2015, Martinez opened the meeting by giving a short introduction as to what was going on during the company. During this introduction, he testified, Martinez announced that the Union had withdrawn its petition, after which she turned the meeting over to him—and stayed for the duration. Hana then dimmed the lights and begun his PowerPoint presentation about safety matters, which took about 2 hours. He testified that although most of the topics of the safety presentation were the same as had been presented in previous years, there was always some new material, and that he did not skim or rush through any topics, in light of their importance—and the fact that discussion of these topics was mandated by laws or regulations. Hana specifically denied making the statements on December 17th attributed to him by Torres,⁸ or the statements on December 19th attributed to him by Santos. Thus, he specifically denied that on December 17, he stated that there would be a “housecleaning” if the Union lost, or that he would enforce the rules more strictly or that he would “write up” employees for coming in late if the Union won. Indeed, Hana pointed out that as safety manager, drivers do not report to him, and that it is not therefore within his purview to give warnings for arriving late.⁹ He also specifically denied that during the December 19 meeting, he told employees that if other companies were paying more they could leave. Hana testified that there was no reason at this point (in December) to talk about the Union, since the Union had withdrawn its petition. (Tr. 1690–1695; 1697–1704; 1737–1738; 1740–1742.)

In addition to Martinez and Hana, Respondent also proffered the testimony of several rank-and-file employees in support of its side of the story regarding the alleged December 2015 events. In his testimony, Donnat Gardener, a bus driver based in Anaheim, confirmed that Respondent holds yearly safety meetings, as well as some quarterly meetings, which he typically attends. He attended the safety meeting on December 19, 2015, as confirmed by the sign-in sheet he signed (R. Exh. 18). He testified that Hana conducted the meeting, making a “Power Point” projector presentation about safety, and that the meeting lasted 2 hours, from 10 a.m. to noon. Martinez, who Gardener

⁸ Alleged in the complaint as having occurred on December 21, as discussed above.

⁹ Hana testified that he is only involved in disciplinary actions if the conduct involves an accident or safety violation, and is not involved in any other aspect of discipline. (Tr. 1744–1745).

recalled came in about 10–15 minutes after the meeting started, spoke briefly about the Union, stating that they had withdrawn their petition, which the Union could re-file. She also said, in response to employee questions, that everyone would have to wait and see what happened next with regard to the Union. Gardener also specifically denied that Hana, during the course of this meeting, had said that employees who did not like it could quit. (Tr. 1273–1275, 1277–1279, 1287–1292, 1296, 1303–1304.) Ardie Wilson, an Anaheim bus driver for about 17 years, testified that he attended the December 19, 2015 safety meeting, as confirmed by the sign-up sheet. (R. Exh. 18.) According to Wilson, Hana gave a “Power Point” slide presentation on safety, and that the meeting lasted about 2 hours. He testified that Martinez was there at the beginning, for about 10–20 minutes, and said something about the Union, followed by Hana’s presentation.¹⁰ Wilson specifically denied that Hana said that employees could leave if other employers were paying better. (Tr. 1452, 1467–1472; 1473–1482.) Brandon Battle, an Anaheim driver for 17 years, testified he also attended the December 19 safety meeting, which lasted about 2 hours, as confirmed by the sign-in sheet. According to Battle, Martinez opened the meeting announcing that the Union had withdrawn its petition, and when asked why, she said she did not know. Battle testified that Hana then started his safety presentation, and that there was no further talk about the Union, only about safety-related matters, and confirmed that Martinez was present for the duration of the meeting. He specifically denied that Hana said that if other companies were paying more that employees could leave, or saying that if employees didn’t like things the way they were, they could quit.¹¹ (Tr. 1630, 1632–1635, 1636–1639.)

With regard to the December 17 meeting—which Torres initially testified had occurred on December 21—Anaheim bus driver Dennis Aqui testified that he attended the meeting, as confirmed by the attendance sign-in sheet (R. Exh. 10). According to Aqui, this meeting was part of the annual safety training, which Hana conducted, giving a presentation on an overhead projector.¹² Aqui testified that he did not recall Hana speaking about the Union, and specifically denied that Hana had said that there would be a “housecleaning.” He also specifically denied that Hana said that he would write employees up or discipline them if the Union came in. (Tr. 1672–1675.)

Credibility Resolutions

As can be discerned from the testimony of the witnesses described above, there is a clear conflict between the version of

¹⁰ Wilson did not recall Martinez stating that the Union had withdrawn the petition, and in fact said that a vote was coming up and that they should vote. Moreover, he identified GC Exh. 2, a copy of the Union’s constitution and by-laws, as a document distributed at this meeting—which other testimony and evidence shows to be incorrect, as discussed further below. (Tr. 1483–1485.)

¹¹ Indeed, Battle testified that if Hana had said that, he would have “chewed out” Hana, because “no one says that stuff to me.” (Tr. 1634–1635.) Battle also confirmed that the annual safety meetings (during “safety week”) are usually held during the summer, but that in the summer of 2015, the company was really busy. (Tr. 1645.)

¹² Aqui testified that Hana went through the entire presentation of the materials depicted in R. Exh. 3(a) &(b). (Tr. 1677.)

events testified to by the General Counsel’s witnesses (Santos and Torres) and those called by Respondent (Martinez, Hana, Gardener, Wilson, Battle, and Aqui) regarding the events of December 17 and 19, 2015. In assessing credibility, I must look to a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed Appx. 516 (D.C. Cir. 2003). Moreover, 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 (2nd Cir. 1950). In the present case, I have also taken into account the effects of the passage of time on memory, given that the testimony in this case took place some 6 to 9 months after the events in question, as well as the fact that numerous meetings were held during December 2015 and January 2016 (as further discussed below), resulting in the possible conflation of events in the minds of some witnesses.¹³

Taking these factors into account, as well as the overall record, I have concluded that I cannot credit the testimony of either Santos or Torres as to the events of December 17 and 19, respectively, for the following reasons: For example, Torres described the December 17 meeting as being relatively short, lasting 20 to 30 minutes, with most of the discussion centered around the Union, with the remainder being dedicated to the topic of safety, almost as an afterthought. Yet, the clear preponderance of the evidence establishes that the meetings in December were part of “safety week,” an annual series of meetings during which voluminous safety-related materials were discussed, using a “Power Point” presentation. According to the testimony of not only Martinez and Hana, but of five employee witnesses—including Santos—these meetings lasted about 2 hours.¹⁴ Second, contrary to the testimony of Santos and Torres, the preponderance of the credibility of the evidence indicates that Martinez was the one who briefly mentioned the Union, only to announce that it had withdrawn its petition. She

¹³ I must point out that much time during the trial, and consequently a significant portion of the transcript, was consumed by objections and arguments related to these objections, primarily although not exclusively triggered by the use of leading questions during direct examination. While to some degree all the parties were guilty of this, one side was clearly the worst offender. I believe this unfortunate pattern was the result of either inexperience and/or impatience with witnesses’ incomplete recollection, often resulting in a failure to properly exhaust the witnesses’ recollection before resorting to the use of suggestive questions. This kept occurring despite my repeated admonishments and even my attempts to guide counsel through the proper steps to exhaust witnesses’ recollection before refreshing it. Proper direct examination is an art, perhaps as much as cross examination, and it must be properly learned by those who must rely on it to satisfy their burden of proof. The use of leading questions during direct examination, even if it escapes the attention of the opposite counsel, will dilute or diminish the credibility of a witness, which may prove fatal to the questioner’s case—because it will ultimately not escape the judge’s attention.

¹⁴ This fact is also corroborated by the attendance sheets that these employees signed.

then turned the meeting over to Hana to give his safety presentation. The testimony of four employee witnesses corroborate the testimony of Martinez and Hana in that regard, while no other witness corroborated either Santos or Torres, despite evidence that numerous other employees attended those meetings. Thus, in order to credit Santos and Torres, I would have to discredit the testimony of four other employees in addition to Martinez and Hana, and nothing in the demeanor of these witnesses or in the over-all record would support my doing so.¹⁵ Finally, in light of the circumstances, I find it highly implausible that Martinez or Hana would devote much time to talking about the Union at this particular point in time, in the wake of the Union having withdrawn its petition. It simply makes no sense that Respondent would skip over or short-shrift important safety-related presentations in order to threaten employees regarding a Union that, at least for the moment, was no longer the picture. In its posthearing brief, the General Counsel suggests that Respondent did so in the hopes of turning the Union's withdrawal of its petition "into a complete defeat for the Union." This argument implies that Respondent, rather than conduct required safety-related meetings, engaged in an irrational, ritualistic beating of a dead horse for no apparent purpose other than gloating. I conclude that this is far-fetched, and not the way this employer—or any rational employer, for that matter—would likely act under the circumstances. A far more credible scenario is that Respondent, as it asserts, devoted the December meetings to discuss necessary and much-delayed safety matters, with no discussion of the Union other than to inform employees that it had withdrawn its petition.

In light of the above, I credit the testimony of Martinez, Hana, Gardener, Wilson, Battle, and Aqui, over the testimony of Santos and Torres. In doing so, I note that I have not concluded that Santos or Torres are inherently unreliable witnesses or that they fabricated their stories. As I pointed out earlier, the record shows that numerous meetings, perhaps as many as 100 or more, were held by Respondent in the months of December 2015 and January 2016. In such circumstances, it is possible that topics that were discussed and statements made during the course of these many meetings may have converged or conflated in the memories of witnesses, who testified many months after the events, and who had no particular reason to remember certain dates.

Accordingly, I find that Hana, in December 2015, did not make the statements alleged in paragraphs 6(a) and 6(b) of the complaint.

4. Respondent's alleged conduct in January 2016

A. Background

In order to put the events of January 2016 into perspective, it is useful to provide background information to place these

¹⁵ To be sure, there were some minor inconsistencies in the testimony of the four employee witnesses called by Respondent, but they corroborated Martinez and Hana in the most salient points, to wit, that the meetings lasted about 2 hours; that Martinez spoke briefly about the Union; that Hana spent the long remainder of the meetings discussing safety topics.

events into context.¹⁶ It is not disputed, for example, that on January 8, 2016, more than a month after it had withdrawn its petition in case 21–RC–164957, the Union filed a new petition in case 21–RC–167379. In this petition, the Union sought to represent not only the employees in Anaheim (as in the prior petition), but also the employees at the Van Nuys and Bakersfield facilities. It is also undisputed that in response to the filing of this petition, Respondent conducted numerous employee meetings, beginning in mid-January, during which it discussed with employees its views as to why they should not support the Union.¹⁷ Finally, it is also generally undisputed that during these meetings, Respondent distributed voluminous amounts of literature, as part of its campaign to persuade its employees not to support the Union.¹⁸ It is during the course of these meetings in January that the General Counsel alleges in its complaint that Respondent made unlawful statements.

B. The Alleged Statements at the January 18 Meeting

In support of the allegation in paragraph 6(c) of the complaint, which alleges that on January 18, Hana made an implied threat of discipline if employees selected the Union, the General Counsel proffered the testimony of employees Juventino Santos and Demetris Washington. Santos testified that he attended a meeting conducted by Martinez and Hana at the Anaheim facility about 5:30 p.m., with about 10 other employees. According to Santos, Hana told the employees at the meeting that (if the Union came in) it would not protect them from getting fired, and also said "if you are late 30 seconds, I'll write you up" (Tr. 143–144).¹⁹ Washington testified that he attended a meeting conducted by Martinez and Hana on the morning of January 18, with about 20 other employees, although he did not recall the exact time.²⁰ According to Washington, during the course of the meeting Hana said: "Right now you don't have the Union. And if the Union would come in, things will change. It won't be the same. It will be—you'll have more requirements . . . Right now things are lenient . . . and then the Union come in, it will be like triangles, the tiers, it will be the Company, Union, then employees. It won't be the open-door policy venue. You'll have to be in uniform. You'll have

¹⁶ All references to January hereinafter shall refer to January 2016.

¹⁷ Indeed, Martinez testified that Respondent held about 100 meetings during January to discuss the Union (Tr. 1185–1186; 1199).

¹⁸ This fact was established not only by Respondent's witnesses, but corroborated by the General Counsel's and the Union's witnesses, as well as numerous exhibits in the record.

¹⁹ Santos also testified as to additional statements Hana made at this meeting, discussed below. He also testified that certain documents, such as a copy of the Union's constitution and by-laws (GC Exh. 2) and a flyer discussing the dues the Union would charge its members (GC Exh. 3) were distributed by Martinez and Hana at this meeting (Tr. 154–156; 178). During cross-examination, Santos admitted that during the meeting, either Martinez or Hana also said that employees should make an informed decision, not based on emotions or false promises; that the company would bargain in good faith in negotiations, which could result in employees getting more, getting less, or staying the same; and that Martinez said that there would be no retaliation regardless of the outcome of the election (Tr. 180–181; 183).

²⁰ Initially, Washington was not certain of the date of this meeting (Tr. 514), but later testified that it occurred on January 18 (Tr. 536).

to be on time to work. You'll have to be more responsible" (Tr. 513–514.) Washington later clarified that Hana stated that employees would be disciplined if they did not come in on time or did not wear their uniforms. (Tr. 520–522.)

In support of the allegation in paragraph 6(d) of the complaint, which alleges that on January 18 Hana told employees that it would be futile for them to select the Union because nothing would change, the General Counsel proffered the testimony of employees Santos, Fernando Torres, and Sylvia Lopez. Santos testified that at this meeting, Hana said: "The Union is not going to change the way the company operate [sic]. And we are not going to pay more money." (Tr. 142.) Santos additionally testified that Hana also stated that the Union wasn't going to protect employees from getting fired (Tr. 143). Torres testified that he and 3–4 other employees attended an employee meeting conducted by Martinez and Hana about 7 a.m. on January 18. According to Torres, Hana stated during this meeting that if the Union came in, "nothing would change, business as usual." (Tr. 219.) During cross-examination, however, Torres testified that everything he had previously said occurred on January 18 actually occurred on January 25—and that he had only attended two meetings, on December 21 and January 25 (Tr. 333–334).²¹ He also admitted that during this meeting Martinez had stated that the company respected their rights to join or support the Union, and that all wages/benefits were subject to negotiations, that there would be no automatic increases because everything had to be bargained for. (Tr. 330–331.) Lopez testified that she attended a meeting conducted by Martinez and Hana early on the morning of January 18, with about 10 other employees. After initially testifying that she could not remember much about this meeting (Tr. 441), Lopez provided a vaguely-worded and difficult-to-follow description of Hana drawing triangles and writing numbers on a board, which indicated that with the Union in place there wasn't going to be enough money to give raises.²² Lopez added that Hana said that the Union wasn't going to do anything for employees, and then repeated that she couldn't remember much else about the meeting. (Tr. 442–443.)

In support of paragraph 7 of the complaint, which alleges that Martinez stated on January 18 that it would be futile to select the Union as bargaining representative because nothing would change, the General Counsel proffered the testimony of Santos. He testified that at the same meeting on January 18 discussed above, Martinez said that the Union was no good and would only take the employees' money, adding that the Union would not do anything for them.

Both Martinez and Hana denied that they made the above-described statements. Martinez testified in detail about the series of meetings that she and Hana conducted starting on January 18 in the wake of the Union's petition being filed in early January. According to Martinez, the first set of meetings

was held on January 18–19, which covered the topic of the Union's constitution, as well as its "financials," including dues. She and Hana conducted a second set of meetings on January 25, covering the topic of negotiations, and a third set of meetings on January 28–29 covering the topic of strikes. She stated that additional "mini-meetings" were held on January 31–February 1, just to remind employees of the dates and times of the election.²³ During the meetings on January 18 and 19, Martinez testified, she and Hana announced the Union's filing of the petition, and stated that an election would be held.²⁴ They told the employees they had a right to join or support the Union, but that the company felt they did not need a union, adding that if the Union came in the company would bargain in good faith. Martinez also testified that during these meetings, they distributed copies of the Union's constitution and by-laws (GC Exh. 2), and thoroughly discussed the contents of pages 82–92 of such document, which pertains to the Union's rules regarding misconduct and penalties. They also discussed the Union's "financials," pertaining to union dues and expenditures.²⁵ Martinez specifically denied that either she or Hana ever said that if the Union came in, employees would be written up or disciplined, and specifically denied that she ever said that the Union would not do anything for employees, or that supporting the Union would be futile. To the contrary, she testified that Respondent would bargain in good faith and that as a result of such negotiations, employees could end up with more, or with less, or stay the same. (Tr. 1081–1089.) During his testimony, Hana corroborated Martinez' testimony regarding the dates of the series of meetings held in January, as well as the topics discussed during these meetings.²⁶ He admitted that he and Martinez conducted "a lot" of meetings on this date, and could not be sure of the exact number. Hana specifically denied that he stated that if the Union was selected, it could not protect employees from being fired or disciplined; he specifically denied that either he or Martinez said that it would be futile or

²³ As mentioned earlier, during the course of these meetings, Respondent distributed many documents and literature to the attending employees as part of its campaign to persuade employees not to support the Union. None of the documents/literature distributed, which is part of the record, has been alleged in the complaint to contain unlawful statements. Thus, I will not discuss the content of said documents unless it pertains to the credibility of witnesses who testified about what occurred during these meetings, or to provide context to the testimony.

²⁴ Respondent had earlier, on January 13, sent the employees a letter informing them that the Union had filed a new petition (R. Exh. 20; Tr. 1079–1080).

²⁵ They distributed copies of the Union's LM-2 filings with the Department of Labor (GC Exh. 4).

²⁶ Hana confirmed that he and Martinez used written "talking points" during the course of the meetings to guide their discussions of the various topics described above. One of these talking points was introduced as Respondent's Exhibit 32 (R. Exh. 32), which Hana was not sure was distributed to the employees. (Tr. 1710–1714; 1716). Hana admitted, however, that he and Martinez did strictly follow the format "as written." (Tr. 1710–1711). Hana also confirmed that a number of documents were distributed during these meetings, including copies of the Union's constitution and by-laws (GC Exh. 2), and documents related to the Union's finances (GC Exhs. 3; 4; R. Exh. 14).

²¹ As discussed before however, no meetings took place on December 21, and Torres eventually changed that to December 17 (Tr. 355).

²² I find it unnecessary to reprint, verbatim, this portion of Lopez' testimony. I found it vague and uncertain while she was on the stand, as reflected in my trial notes, an impression only re-enforced upon reading the transcript.

useless to select the Union; he specifically denied saying that the Union would not change the way Respondent operated or that Respondent would not pay employees more money; and he specifically denied saying that if the Union came in, he would write up employees who were late 30 seconds.²⁷ (Tr. 1707–1709, 1713–1714, 1718–1720.)

Respondent also proffered the testimony of driver Scott Debyah, apparently to rebut the testimony of the General Counsel’s witnesses regarding the above-described events on January 18. To be sure, Debyah specifically denied that either Martinez or Hana had on that date made the statements ascribed to them by the General Counsel’s witnesses, as described above. I note, however, that Debyah testified that the meeting he attended on 18 was held by Martinez and Hana at 3 p.m., which is at a different time than the January 18 meetings described by the General Counsel’s witnesses (Tr. 1512; 1522–1523).²⁸ It is also noteworthy that during direct examination, Debyah initially testified that Hana, during the January 18 meeting, had said that the Union would become “our boss” if it came in, and could request the termination of employees for not following rules of the Union’s constitution. (Tr. 1524.) Debyah later changed his testimony, insisting that he, not Hana, was the one who said the Union would become the strict boss that could have employees disciplined if they did not wear uniforms or were late (Tr. 1542–1545).

Credibility resolutions

I credit the testimony of Santos and Washington regarding the statements made by Hana on January 18 about disciplinary action that employees might face in the wake of the Union being selected. I thus credit Santos’ testimony that Hana stated that employees would be “written up” if they were late even 30 seconds, and credit Washington’s testimony that Hana stated that Respondent would not be as lenient and that rules regarding uniforms and tardiness would be more strictly enforced. In doing so, I note the following: First, their testimony was forthright and straightforward, and their demeanor reflected trustworthiness and candor; indeed, they admitted that Hana and Martinez also said things that might be detrimental to or diminish the General Counsel’s case. Second, their status as current employees enhances their credibility, since they are testifying against their employer’s interest and their own pecuniary interest. Third, not only did they corroborate each other’s testimony, but I conclude that their testimony is also supported by the testimony of Torres, also a current employee, who had testified that Hana had made eerily similar statements during a December 2015 meeting. While I did not credit Torres’ testimony that such statements were made by Hana in **December**, for the reasons I previously discussed, I did not discredit Torres’ credibility, or find that such statement had never been made. Indeed, I

explained that given the numerous meetings that employees attended during this period, it was likely that dates and events were conflated in the mind of some of the witnesses, particularly given the passage of time. I conclude that Torres indeed heard Hana make such statements, but that this most likely occurred during one of the January meetings, which were admittedly held for the purpose of discussing the Union. Indeed, Torres’ testimony, in conjunction with that of Santos and Washington, tends to show that Hana engaged in a pattern of repetitive behavior at these meetings. Finally, I note that to some degree, Respondent’s witness, Debyah, may have unwittingly helped corroborate Santos and Washington when he initially testified that Hana discussed how rules would be more strictly observed in the wake of the Union—only to reverse course during cross-examination and claim that he, not Hana, had brought that up. Accordingly, I credit Santos’ and Washington’s testimony, and do not credit Hana’s and Martinez’ denials that Hana made such statements.

With regard to the statements attributed to Hana by Santos, Torres, and Lopez that suggested that selecting the Union would be an exercise in futility, I am not persuaded that Hana used the exact words attributed to him by these witnesses. Rather, I find that the expressions used by these witnesses represented their interpretation of what Hana actually said, interpretations that while perhaps not unreasonable for individuals not versed in labor law, did not reflect the words that Hana (or Martinez) actually used. All of the General Counsel’s witnesses admitted, for example, that Martinez and Hana repeatedly stressed that Respondent would bargain in good faith, that such negotiations may take a while, and that the results could be positive or negative for employees—or that things might stay the same. This is a perfectly valid summation of the law and reality of labor relations, but one that could be easily misinterpreted by employees to mean that “nothing will change, business as usual” or to mean that Respondent was not going to pay them more, or to mean that the Union wasn’t going to do anything for them.²⁹ In other words, Hana’s (and Martinez’) proper statement that selecting the Union would not result in an automatic panacea was interpreted by these employees as a statement that their support for the Union would be futile because it could not deliver.³⁰ In so concluding, I note that there are some inherent contradictions in the testimony of the General Counsel’s witnesses, which makes them less reliable in this instance. For example, Santos’ and Torres’ testimony that Hana said that nothing would change appears to directly contradict their testimony that Hana stated that discipline would be imposed more harshly following selection of the Union, which I credited. As for Lopez, as previously discussed, her description of what occurred during the meeting was vague at best, and her testimony was interspersed with admissions that she could

²⁷ Hana explained that he does not supervise drivers and would not be involved in disciplining drivers for coming in late; that he would only be involved in disciplinary matters involving violations of safety or accidents. (Tr. 1699–1700.)

²⁸ Thus, Santos testified that he attended the meeting on June 18 at 5:30 p.m., while Washington, Torres, and Lopez all testified that they attended a meeting in the morning on that date.

²⁹ By contrast, Hana’s statement that anyone coming in late 30 seconds would be “written up,” as I found he said, calls for little interpretation.

³⁰ Indeed, I note that this exact type of language explaining that there are no automatic guarantees in the wake of the Union winning the election is contained in “talking points” read from and/or used by Martinez and Hana during the course of these meetings (R. Exh. 21).

not recall very well what had occurred at the meeting. In these circumstances, I do not credit the testimony of Santos, Torres, or Lopez that Hana used the exact words or expressions attributed to him by these witnesses. Nonetheless, I again stress that in not crediting these witnesses in this particular instance, I do not discredit them as witnesses, since I have found their testimony credible with regards to other events.

C. The Alleged Statements at the January 25 Meeting

Paragraph 6(e) of the complaint alleges that about January 25, Hana threatened employees with job loss by telling them that they could quit if they did not like their working conditions. In support of this allegation, the General Counsel proffered the testimony of several witnesses, although they were not all certain that this occurred on January 25.

Lopez testified that a second meeting took place a few days after the January 18 meeting previously discussed, at 4 a.m. (Tr. 448), although she later said she believed it occurred around January 25 (Tr. 458). According to Lopez, this meeting was conducted by Martinez and Hana, and attended by a couple of other employees besides herself. Martinez did not say much other than good morning, and then Hana conducted the meeting. Lopez testified that Hana said something she did not like: he told them that “if drivers didn’t like it [at the company], there was other options out there. And they were saying like if you don’t like it, get another job.” (Tr. 451; 462.) Washington testified that he attended a second meeting a few days after the January 18 meeting, which may have been on January 25, although he was not sure of the date (Tr. 538–539). This meeting took place in the morning, was attended by about 10 employees, and conducted by Martinez and Hana. According to Washington, during the meeting Hana stated that it was the employees’ choice to choose what they wanted, but that the company wanted then to say no to the Union. Hana then stated that “if you feel that the Company is not fair or either is not holding their agreement, or will be fair to you, there’s other companies out there that you can go to.” (Tr. 541; 544.) Anaheim bus driver Daniel Romero testified he attended a meeting at 6 a.m. on January 25, conducted by Martinez and Hana and attended by five to six drivers. According to Romero, during the course of the meeting Hana related that he had had conversations with employees who had asked him if the company was afraid of the Union, because they were holding so many meetings about it. Hana stated that he had replied that the company was not afraid because they had good lawyers. When an employee pointed out that other companies paid more money, Hana said this was not a government company, and that they cannot pay more money, adding “If other companies pay more money to go work with them.” (Tr. 707–710.)

Additionally, I note that Santos testified that Hana had made a similar statement, albeit on a different date. According to Santos, during the meeting on January 18 previously discussed, Hana, after saying that employees who were late more than 30 seconds would be written up, said “if other companies are paying more, then you can leave.” Santos testified that after Hana said this, he made a military salute and said “hasta la vista.” (Tr. 144.)

Both Martinez and Hana specifically denied that Hana had

stated, either at the January 18 or January 25 meetings, that employees who did not like the conditions or pay could quit or go work elsewhere (Tr. 1089; 1106; 1719; 1723). Additionally, Respondent proffered the testimony of two employees, Donnat Gardener and Albert Selejmani, to refute such allegations. Gardener testified that he attended a meeting on January 25 at 6 a.m. conducted by Martinez and Hana—although he stated that Martinez did not arrive until 15 minutes after the meeting had started. He testified that Martinez distributed some literature which she also read from. He denied that Hana ever stated that employees could quit if they did not like things. He also testified, however, that at this meeting, Hana made the same “Power Point” presentation that he had made during the December “safety week” presentation (Tr. 1279–1280; 1292–1293; 1297–1298; R. Exhs. 22; 28; Tr. 1089; 1106) Sulejmani testified that he attended a meeting at 4 a.m. on January 25, conducted by Martinez and Hana, also attended by 5–7 other employees. He testified that Martinez spoke first, followed by Hana, and they distributed literature (which he identified as that introduced as R. Exh. 22), although he could not recall the contents of such document. He also did not recall if employees had any questions. He specifically denied, however, that Hana had said that employees could quit or get another job if they did not like things or if other companies were paying more (Tr. 1652–1657; 1660–1602; R. Exhs. 22; 31).³¹

Credibility Resolutions

I credit the testimony of Lopez, Washington, and Romero regarding the statements that Hana made at the January 25 meeting, to wit, that employees who did not like the conditions or their pay could quit or go work elsewhere. I do so essentially for the same reasons that I previously credited the testimony of Santos and Washington with respect to the events on January 18. Their status as current employees enhances their credibility, and nothing in their demeanor revealed a hesitancy or lack of candor. Moreover, not only did they corroborate each other’s testimony, but their testimony was supported by the testimony of Santos, who testified that Hana had made similar statements on January 18. This testimony supports a narrative that Hana had a recurring theme regarding his views about employees who were unhappy with their current conditions or pay. I do not credit Martinez’ or Hana’s serial denials that Hana made the statements in question.³² Likewise, I do not credit the testimony of Gardener and Sulejmani, whose recollection of events at these meetings did not appear to be as good.³³

In light of the above, I conclude that during the various

³¹ Sulejmani’s testimony was difficult to understand or follow, perhaps because English is not his first language and the syntax was at times fractured (see, for example, Tr. 1655–1656).

³² Indeed, according to the testimony of Respondent’s witness Gardener, Martinez did not arrive at the meeting he attended—which appears to be the same 6 a.m. meeting attended by Romero—until 15 minutes after the meeting had started, and could not testify as to what Hana may have said during that time.

³³ I also note that although they are also current employees, their testimony favors their employer, and hence their credibility—while not diminished by such factor—is not enhanced either.

meetings held on January 25, Hana told employees that those who were unhappy with their conditions or pay could quit or go work elsewhere.

B. Discussion and Analysis

1. The alleged conduct in December 2015

Paragraphs 6(a) and 6(b) of the complaint allege that on December 19 and December 21, 2015, respectively, Respondent, acting through Hana, made threatening or coercive statements in violation of Sec. 8(a)(1) of the Act.³⁴ As discussed above in the Facts section of this decision, however, I did not credit the testimony of the General Counsel's witnesses proffered in support of these allegations of the complaint, and thus found that the alleged conduct of December 19 and 21, 2015, had not occurred.

In light of these findings, I conclude that the General Counsel has not met its burden of proof with regard to the allegations in paragraph 6(a) and 6(b) of the complaint. Accordingly, I recommend that these allegations of the complaint be dismissed.

2. The alleged conduct of January 18, 2016

Paragraph 6(c) of the complaint alleges that on January 18, Respondent, acting through Hana, made implied threats of discipline to employees if they selected the Union. As discussed above in the Facts section of this decision, I credited the testimony of Santos and Washington that on that date, Hana stated that if the Union was selected, he would discipline employees for coming in 30 seconds late, and by stating that he would enforce rules more strictly than Respondent was currently doing. A threat, or implied threat, by an employer to enforce rules more strictly if employees select a union as their representative violates Sec. 8(a)(1) of the Act. *Flamingo Las Vegas Operating Company, LLC*, 360 NLRB 243, 246 (2014); *DHL Express, Inc.*, 355 NLRB 1399, 1402–1405 (2010); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074 (2004); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995).

Accordingly, I conclude that Respondent violated Sec. 8(a)(1) of the Act by engaging in such conduct, as alleged in paragraph 6(c) of the complaint.

Additionally, paragraphs 6(d) and paragraph 7 of the complaint allege that on January 18, Respondent, acting respectively through Hana and Martinez, violated Sec. 8(a)(1) of the Act by telling employees that it would be futile for them to select the Union as their representative. As discussed above in the Findings of Fact, I did not credit the testimony of the General Counsel's witnesses that these statements had been made by Hana or Martinez. Instead, I found that the statements made by them—to the effect that bargaining, which could take some time, could result in more, less, or the same for employees—had likely been misinterpreted by the witnesses as suggesting that selecting a Union would be an exercise in futility. I note that statements like the ones I found were made by Martinez

and Hana to the effect that bargaining (described as a “roll of the dice”) could result in the different results—even adverse results—have been found to be lawful. *City Market, Inc.*, 340 NLRB 1260, 1272–1274 (2003); *Mediplex of Connecticut, Inc.*, 319 NLRB 281 (1995).

Accordingly, I conclude that the General Counsel did not meet its burden of proof with regard to the allegations of paragraphs 6(d) and 7 of the complaint, and therefore recommend that these paragraphs of the complaint be dismissed.

3. The alleged conduct of January 25, 2016

Paragraph 6(e) of the complaint alleges that about January 25 Respondent, acting through Hana, threatened employees with job loss by telling them they could quit or go work elsewhere if they did not like the working conditions. As discussed in my Findings of Fact, I credited the testimony of three employee witnesses who testified that on or about January 25, during the course of meetings attended by groups of employees, Hana had stated that employees who did not like the conditions or wages could quit and go work for other employers. I also credited the testimony of a fourth employee who testified that Hana said the same thing, albeit on January 18, which corroborated the other employees.

The Board has found statements like the ones made by Hana to be unlawful because such statements imply a threat of job loss. *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170, 171 (2011); *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006); *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997). The Board explained its rationale in *Jupiter Medical Center*, at 651:

The Board has long found that comparable statements made either to union advocates or in the context of discussions about the Union violate Section 8(a)(1) because they imply that support for the Union is incompatible with continued employment. *Rolligon Corp.*, 254 NLRB 22 (1981). Suggestions that employees who are dissatisfied with working conditions should leave rather than engage in union activity in the hope of rectifying matters coercively imply that employees who engage in such activity risk being discharged.

Accordingly, I conclude that Respondent violated Sec. 8(a)(1) of the Act by engaging in such conduct, as alleged in paragraph 6(e) of the complaint.

Before I summarize the conclusions of law in the above-discussed unfair labor practice case, I will next discuss the objections in the representation case.

II. THE OBJECTIONS IN CASE 21–RC–167379

As previously discussed above, the Petitioner/Union filed a petition in Case 21–RC–167379 on January 8, 2016,³⁵ seeking to represent a unit of the employer/respondent's employees working at the Anaheim, Van Nuys, and Bakersfield facilities. Pursuant to a Stipulated Election Agreement, an election was held at all three locations on February 4, and again at the Ana-

³⁴ As previously discussed, the General Counsel's witness testified that the alleged conduct of December 21, 2015, actually occurred on December 17, but the General Counsel never moved to so amend the complaint.

³⁵ All dates hereafter will refer to calendar year 2016, unless otherwise specified.

heim facility on February 5.³⁶ A tally of ballots served on the parties after a ballot count showed that out of approximately 246 eligible voters, 73 cast ballots for and 118 cast ballots against the Petitioner/Union, for a total of 191 valid ballots counted. There were no challenged ballots.

On February 10, the Union filed timely objections to the conduct of the election. Thereafter, on April 28, the Regional Director issued a Report on Objections, Order Consolidating Cases and Notice of Hearing, which consolidated the unfair labor practice case alleged in the complaint.³⁷ In her report, the Regional Director recommended that objections 1 through 6 be set for hearing. Objection 1 mirrors some of the allegations of the complaint in the unfair labor practice case discussed above, whereas objections 2 through 6 allege separate or independent conduct which is not alleged as an unfair labor practice. The objections will be discussed below in their numerical order.

Objection 1

The Employer threatened its employees with discipline for prounion conduct in the event the union was voted in.

This objection, according to the Report on Objections by the Regional Director, mirrors the allegations of the complaint, which allege that the Respondent employer threatened the employees with discipline and job loss if the Union was selected as their representative. As discussed above in the unfair labor practice section of this decision, I found that Respondent had engaged in the conduct alleged in paragraphs 6(c) and 6(e) of the complaint, and concluded that Respondent had accordingly violated Sec. 8(a)(1) of the Act.

These unfair labor practices, I note, occurred on or about January 18 and January 25, during the “critical period,” which is the period between the filing of the petition and the date of the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962). In *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016), the Board recently reiterated its long-standing rule that a violation of Section 8(a)(1) during the critical period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is “virtually impossible to conclude that [the violation] could have affected the results of the election.” See, also, *Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, supra, at 1786. In determining whether the unlaw-

ful conduct is de minimis, the Board considers a number of factors, including the number of incidents, their severity, the extent of dissemination, and the size of the unit. *Super Thrift Market*, supra at 409. I conclude that there was nothing de minimis about the conduct that occurred here. In that regard, I note that the statements I found violated the Act were made by Hana, a manager, in the presence of Martinez, another high-level manager, and were made during several mandatory meetings attended by groups of employees. Coercive threats of discipline by a manager, heard by multiple employees on separate dates, cannot be considered de minimis in these circumstances.

In light of the above, I conclude that the conduct by the Respondent as alleged in Objection 1, which I earlier concluded violated Sec. 8(a)(1) of the Act, is conduct that interfered with the results of the election. Accordingly, I recommend that Objection 1 be sustained.

Objection 2

The Employer surveilled or gave the impression of surveilling its employees as they were going to vote by: placing voting signs directly under signs indicating the premises was under video surveillance; not covering up cameras as it assured the Board and Union at the preelection meeting on February 3, 2016, that it had; and failing to paper over dispatch (supervisor) windows leading to the voting area.

Before discussing the issues raised by the above objection, as well as the remaining Objections (Objections 3 through 6), it should be noted that these 5 objections, unlike Objection 1, are not alleged as unfair labor practices. The criteria used by the Board to evaluate alleged objectionable conduct that is not also an unfair labor practice differs somewhat from the criteria discussed in *Intertape Polymer*, as discussed above, and cases cited therein. Thus, when the alleged objectionable conduct is not also an unfair labor practice, the proper standard to apply is whether the alleged misconduct, taken as a whole, warrants a new election because it has “the tendency to interfere with employees’ freedom of choice” and “could well have affected the outcome of the election.” *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003). In making this determination the Board examines several factors: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157 (2001); *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

Objection 2 relates to events at the Van Nuys facility on February 4, and raises several distinct issues, which I will discuss below. The objection alleges that Respondent engaged in surveillance or in creating the impression of surveillance. First,

³⁶ The stipulated bargaining unit was as follows:

Included: All full-time and regular part-time drivers-charter, drivers-contract, drivers-regular route, drivers-sightseeing and tours, Megabus drivers, lead maintenance mechanics, mechanics A, mechanics B, mechanics C, maintenance support wash/cleaning associates, maintenance support wash/cleaning contributors, ticket clerk associates, and ticket clerk contributors employed by the Employer at its facilities located at 2001 South Manchester Avenue, Anaheim, CA 92802; 1800 Golden State Avenue, Bakersfield, CA 93301; and 6828 Valjean, Van Nuys, CA 91406.

Excluded: All other employees, administrative employees, reservationists, hotel sales representatives, accounting employees, customer service employees, dispatchers, porters, temporary employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined by the Act.

³⁷ GC Exh. 1(m).

at the outset, it should be pointed out there is absolutely no evidence in the record that Respondent in fact engaged in surveillance. The record is devoid of evidence of any supervisor or manager actually engaging in surveillance, whether in person by watching voters, or by looking at a camera feed, or by engaging in some other monitoring method. Moreover, as further discussed below, there was only one functioning camera at the Van Nuys facility, and this camera monitored the immediate area near the front of dispatcher's office. There is no evidence that this camera captured any voters on their way to or from the polls, nor any evidence of any supervisor actually watching the monitor feed from such camera, located at the dispatcher's office.³⁸ Thus, actual surveillance was not factually or legally established.

The evidence proffered by the Union instead focused on the creation of the impression of surveillance. First, the Union alleges that voting signs (directing voters to the polling area) were placed next to signs that indicated the area (or premises) were under camera surveillance. The evidence adduced at the hearing, which is not truly in dispute, shows that Board election signs (Voting Place) were posted (by the Board Agent) next to a sign that says "Warning Security Cameras in Use."³⁹ Both of these signs were on the outside of the building, adjacent to bay doors leading to the polling area. Uncontroverted testimony establishes that the Board agent placed a Board sign at this location following the first election shift that occurred between 3 a.m. and 5:30 a.m. Ironically, testimony also establishes that the Board Agent posted this sign sometime after 5:30 a.m. after Union Representative Bonnie Morr complained that there were not enough signs that directed voters to the polling area, which was on the north (or left) side of the building. Uncontroverted testimonial evidence established, however, that there were no operational inside or outside cameras on the north side of the building where the election was held or anywhere near the polling area. The signs warning of surveillance cameras had been in place for a long time, before Respondent took over that part of the facility, and were essentially a permanent fixture on the walls. It can thus be reasonably assumed that Van Nuys employees routinely walked by these signs on a daily basis for a long time, likely paying little heed to them, as most fixed objects typically become part of an "invisible" background after a while. It is hard to imagine that such permanent fixtures suddenly acquired an ominous and coercive character on the day of the election. Moreover, the Board had held that it is neither unlawful nor objectionable to maintain or operate security cameras that happen to record protected activity while operating in a normal, customary manner. *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1841 (2011); *Robert Orr-Sysco Food Services*,

334 NLRB 977, 978 (2001). Accordingly, in these circumstances, I find that cameras that were not operational, and long-standing signs warning about the existence of such (non-operational) cameras, could not reasonably create the impression of surveillance. I thus conclude that this part of objection 2 has no merit.⁴⁰

The Union additionally alleges in Objection 2 that the Employer failed to cover the windows of the dispatch office "leading the way" to the polling area, which arguably permitted dispatchers to observe voters on their way to the polling area. This part of the objection is fatally flawed in several respects. First, the polling area was on separate part of the building at a considerable distance from the dispatchers' office, and the polling area had direct access from the outside parking lot, so that any voter could go directly there without having to pass near the dispatch office. Indeed, there is not even a scintilla of evidence that **any** voter walked past the dispatch office on the way to the polling area. More importantly, there is absolutely **no** evidence that dispatchers are supervisors or agents of Respondent, and thus any "observation" of voters by them is ultimately irrelevant.⁴¹ Finally, even assuming, arguendo, that dispatchers are supervisors, a casual or inadvertent glance at a voter by a supervisor (or vice-versa) will not turn that voter—or the election—into a "pillar of salt," as occurred in the biblical tale to Lot's wife when she took a forbidden glance at Sodom. The Board has never assumed such extreme fragility in voters, nor applied the doctrine of "laboratory conditions" in a strict clinical sense, where the slightest imperfection will ruin the experiment, or worse, result in a raging infection that dooms the patient. To the contrary, the Board and the courts have repeatedly stressed that elections will not lightly be set aside. *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)).

In sum, applying the criteria for reviewing objectionable conduct under *Cambridge Tool*, supra, I find that the evidence the Union submitted in support of this objection has fallen significantly short of the test. Accordingly, and for these reasons, I conclude that Objection 2 lacks merit in its entirety, and recommend that it be overruled.

Objection 3

Failing to separate at least one voting area from supervisory offices

This objection, according to the Regional Director's report, relates to the Bakersfield polling place. It is difficult to ascertain the gist of this objection. Uncontroverted testimonial and

³⁸ As further discussed below, the dispatcher's office at the Van Nuys facility is a different and separate part of the building from the polling area. Second, testimony at the hearing established that the monitor screen for this camera, located at the dispatcher's office, was turned toward the wall on the day of the election, so no one could see it. Finally, there is absolutely no evidence that dispatchers are Sec. 2(11) supervisors or Sec. 2(13) agents.

³⁹ A photo showing the Board election sign next to the security camera sign was introduced as P. Exh. 21.

⁴⁰ I note that Eisentrager credibly testified that on the day of the election a Van Nuys mechanic (who I note is part of the bargaining unit) confirmed to him that the cameras were not operational, something also confirmed by Brown. This strongly suggests that employees were aware of this fact.

⁴¹ As the proponent of the dispatcher's supervisory status, it was the Union/Petitioner's burden to establish such status by the preponderance of the evidence. No evidence was proffered in support of such proposition.

photographic evidence showed that the polling place in Bakersfield was located at the drivers' break room. Adjacent to that room was an empty office, and the glass window between the two rooms was covered with paper, and a door between the two rooms remained locked at all times during the election. On the *other* side of the empty office opposite the break room, was the office of the person in charge of the Bakersfield operation, Contract Manager Karyn Pfening. In other words, there was one empty office, and two sets of walls between the room where the polling took place and Pfening's office. Pfening testified that she never left her office during the vote, and there is no evidence to the contrary.

The only evidence proffered by the Union in support of this objection was the testimony of Richard Haas, the Secretary Treasurer of a local affiliate of the Union in Bakersfield, who represented the Union at that location on the day of the election. Haas testified that after the polls closed and he and the Employer's representatives came back to the polling room, he asked the Union's observer if there had been any problems. The observer replied that things had gone smoothly, and in fact things had been slow, and wished they had had some type of entertainment to distract them. According to Haas, at this point Pfening said "it didn't sound like you guys were having a shortage of entertainment in here." (Tr. 803.) The Union, in essence, argues that Pfening's statement shows she could hear what was being said in the polling area during the election, which rendered the location inherently improper because the employer could engage in surveillance.

I find no merit to this argument or to the objection. First, I note that Pfening denied making the statement, and that the Union observer was never called to testify corroborate Haas. Accordingly, I conclude the Pfening did not make the statement. Even assuming that the statement was made, however, I find such comment insufficient to support the objection. I note that there is no evidence that any other voter was aware of the fact that voices from the polling room carried all the way to Pfening's office, either during the election or thereafter. Applying the criteria under *Cambridge Tool*, supra, I find that the evidence the Union submitted in support of this objection is extremely weak and plainly insufficient. I therefore recommend that this objection be overruled.

Objection 4

Failing to close off at least one voting room from access by those not voting

This objection, according to the Regional Director's report, refers to conduct that allegedly occurred at the Anaheim facility. More specifically, as discussed below, the objection relates to alleged conduct by Haney Hana, Respondent's safety manager (and admitted supervisor in the accompanying unfair labor practice case), who allegedly walked into the polling area while the vote was in progress.⁴² By way of background, it is undis-

⁴² During the hearing, and again in its posthearing trial brief, Respondent strenuously objected to my permitting testimony regarding Hana's alleged conduct in this instance. Respondent argues that the wording of the objection does not specifically allege the involvement of Hana or any other supervisor, and that therefore it is not broad enough

puted that the election was conducted at the Anaheim facility on February 4 and 5. In support of this objection, the Union proffered the testimony of Fernando Torres, a driver who works out of the Anaheim facility. Torres testified that he voted around 8 p.m. on February 4, at the Anaheim polling site, which was in the employee break room. According to Torres, as he was checking in with the election observers sitting at a table, he looked to his right and saw Hana walk through one of the doors at the far side of the room, approach one of the food or beverage machines in the room, make a purchase, and then walk right out, without saying anything. Torres additionally testified that neither the observers nor the Board agent present at the time saw this happen, and no other voter was present in the room at the time (Tr. 259–262).⁴³

There are some significant problems with Torres' testimony about this alleged event that persuades me that it did not occur as he testified. First, I note that although Torres was alone in the break room with the 2 observers and the Board agent (no other voters present), no one but him noticed Hana. In Torres' version of events, Hana came in, walked to the vending machines, made a selection, inserted his money (and presumably received change, if called for), retrieved the item selected, and walked out without being noticed by the 3 other persons in the room. Given the close proximity of the observers and the Board agent to the vending machines, I find it highly implausible—indeed, incredible—that they would not have seen Hana enter the room and approach, or at least not been alerted to his presence by his use of the vending machines.⁴⁴ Moreover, there were other inconsistencies in Torres' testimony that in my view undermine his story. He admitted, for example, that he never said anything to the observers or the Board agent about Hana's presence in the polling area, nor said anything to any other employees afterward. Moreover, he admitted that during the election campaign he routinely sent text messages to the

to cover his conduct. I disagree. The term *those not voting* as used in the objection arguably is broad enough to include, and could reasonably be interpreted to mean, individuals not eligible to vote, which would include Hana and any other supervisor or those not otherwise in the bargaining unit.

⁴³ At my request, Torres provided a hand-drawn depiction of the break room in order to illustrate his testimony, a drawing admitted as P. Exh. 3. In the drawing, which is sufficiently self-explanatory, the break room appears as a rectangle, with two entry doors (Door A and B) on the lower part of the rectangle. On the upper left side are the two tables where the observers were seated, and to the right (or the observers' left) were the vending machines in the room. An "X" surrounded by a circle marks the spot where Torres testified he saw Hana, as Torres stood facing the observers' table. On the low center portion of the drawing, near the square depicting the voting booth, is the table where the Board Agent was located, with a partial wall behind that table. According to Torres, Hana entered and exited through door "B" on the lower right hand portion of the drawing. This illustration, as well as photographs of the room (R. Exh. 25) and testimonial evidence, clearly show that the vending machines were in close proximity (no more than 5 to 7 feet) from the tables where the observers were seated, as well as the table where the Board Agent was located.

⁴⁴ Indeed there was testimony from one of the observers that at one point a mechanic (who was part of the bargaining unit) walked into the break room to use the vending machines, only to be immediately intercepted by the Board agent, who asked him to leave.

Union to report any events that he considered important or noteworthy, yet never sent a text to the Union to report Hana's alleged visit to the polling room during voting. I also note that in his Board affidavit, provided a few days after the election, he never mentioned this incident. These failures to report the incident in these circumstances persuade me that Torres' testimony in this instance is not trustworthy, and I thus do not credit it.

Finally, even assuming that the incident occurred as Torres described it, I conclude such isolated incident, not noticed by or disseminated to any other voters, would not likely have affected the outcome of the election. *Cambridge Tool*, supra. Accordingly, I recommend that objection 4 be overruled.

Objection 5

The Employer improperly electioneered urging employees to vote no and managers and supervisors had conversations with employees immediately headed in to vote

This objection, according to the Regional Director's report, refers to conduct that allegedly occurred at the Van Nuys facility. The Union proffered evidence of three distinct or separate events or incidents to support its objection. I will discuss each one sequentially.

First, Union Representatives Bonnie Morr and Sheny Mendez testified that when they arrived at the Van Nuys facility on February 4 around 2 a.m., prior to the start of the election, they first went to the driver's break room located on the "right" or south side of the employer's facility and waited for management officials to show up.⁴⁵ While waiting at the driver's break room, they found election literature that had earlier been distributed by Respondent to its employees laying on the table.⁴⁶ They found two different documents on the table. One, in bold letter at the top said "Your Vote Is Very Important," followed by a listing of the times of the election and locations of the polling places at all 3 facilities, followed by another bold-lettered statement at the bottom "We Hope You Vote No, For No Union!" (P. Exh. 5(a), 5(b); 6.) The second document found on the table(s) had a series of questions and answers about the election and the Union, and on the bottom in bold letters it said: "Please Vote No on February 4th and 5th." (P. Exh. 7; 8.) They photographed these documents as they found them. A short while later, management representatives arrived, and following a discussion of where the election would be conducted, the group left the break room and headed to the other side of the building (the left or north side), to inspect the "meeting room" where the election would be held. Neither Morr nor Mendez nor any other union representative said anything about the literature they had found in the driver's break room. Mendez testified that when she and other union representatives

⁴⁵ They had parked their car inside the building on the south (or right) side, where the dispatcher's office and driver's break room is located. By all accounts, it was cold and dark, and the break room seemed to be the only place to wait. They were directed by a cleaning person to wait there. The election shifts at Van Nuys on February 4 were from 3 a.m. to 5:30 a.m.; 11 a.m. to 1:30 p.m.; and 2:30 p.m. to 5 p.m.

⁴⁶ Martinez had admitted that this literature had been distributed to employees on the days preceding the election.

came back to the driver's break room when the first election shift closed at 5:30 a.m. (before they headed to the voting room on the other side of the building), the above-described literature was still there on the table(s).

The second incident or event occurred when the union representatives returned to their car around 5:30 a.m., as the election was about to begin on the other side of the building. Mendez testified that as she was walking back to their car, she walked by 3 individuals who appeared to be having a conversation while standing near the dispatcher's office. Although Mendez did not know their names, there is no dispute as to who these individuals are. Mendez photographed them from their car as she and the other union representatives drove past them on the way out of the building. (P. Exhs. 17; 18; 19.) These individuals later identified themselves during their testimony on the photographs taken by Mendez: Daniel Eisentrager, Respondent's then regional vice president, since retired, the only man in the photos; Robin Brown, Respondent's compliance supervisor (and person in charge of the Van Nuys facility); and Gail Tobey, a driver at the Van Nuys facility. Mendez testified that as she walked by, about 8 to 10 feet from this group, she saw Brown (described as the woman in the photos dressed in red) hand Tobey (the other woman in the photo, dressed in black) a piece of paper. Mendez testified that she recognized the paper that Brown handed Tobey as the document described above, containing the dates and times of the election, with the message at the bottom, in red letters, that said "We Hope You Vote No, For No Union!" It is not clear from Mendez' testimony whether she could actually read the wording on the document, but she testified that she could see the red letter at the bottom.⁴⁷ For their part, Eisentrager, Brown, and Tobey testified that their conversation was about the fact that Tobey, who had been the designated employer observer for the first shift of the election, had arrived late, and Eisentrager and Brown informed her that they had found a substitute for her and that she could serve as an observer on a later shift—which she did. Brown and Tobey denied that Brown had handed her any document or paper, and Eisentrager did not recall one way or the other.⁴⁸

Finally, the last conduct raised by the Union as part of this objection concern conversations that Eisentrager allegedly had with employees in the periods immediately before the polls opened or just after they closed. Demetris Washington testified that he was a driver based in Anaheim who served as the union observer at the Van Nuys facility during all 3 election shifts on February 4. He testified that during the periods before the polls opened, or after they closed, he saw Eisentrager speaking to various individuals, including Brown, an employer observer, dispatchers, and drivers, although he did not identify the drivers, or explained how he knew they were drivers. Washington testified these conversations did not occur inside the polling

⁴⁷ A photo taken by Mendez of the document found on the table top on the driver's break room (P. Exh. 16), the same document as P. Exh. 5(a) &(b) (which are in black & white), shows that the words "Vote No, for No Union" at the bottom of the page are in red.

⁴⁸ The photographs taken at the time (P. Exhs. 17, 18, & 19) do show Tobey holding a piece of paper in her hand, although she could not recall what it was.

room, nor while the polls were open. Washington testified he did not hear what the conversations were about or say how long they lasted. His testimony was vague as to exactly where he saw these conversations took place, or exactly during which of the periods between election shifts the various conversations he observed took place.⁴⁹

For the following reasons, I conclude that none of the incidents or events described above represents objectionable conduct. First, regarding the literature found by the union representatives in the driver's break room prior to the opening of the polls, which contained language exhorting employees to vote "no," there is no evidence that this literature was placed there by the employer. To the contrary, it is reasonable to infer that this literature was left behind by drivers using their break room the night before.⁵⁰ More importantly, even assuming that this literature was intentionally left at this location by the employer, such conduct does not amount to "electioneering" nor is it objectionable. The term "electioneering" refers to conduct prohibited under the *Milchem*⁵¹ rule, cited by the Union, which consists of a party (or its representatives or agents) having a prolonged conversation with voters at or immediately adjacent to the polling area *while polls are open* and voters are lined up or headed to vote. Such term, and the rule which defines it, does not apply to perfectly legal campaign literature left behind on the day of the election at a location far removed from the polling site, at a time while the polls were not even open. See, e.g., *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1840–1841 (2011) (campaign posters placed in area leading to polling place), citing *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982).

The *Milchem* rule is likewise not applicable to the two other incidents testified to by union witnesses. First, regarding Mendez' testimony that she saw Brown hand employee Tobey a piece of paper that said "Vote No," I find it highly implausible that Mendez—who was walking by about 8 to 10 feet away from Brown and Tobey at the time, and moving away from them—could have recognized the fine print of the document, even if a portion of the lettering was in red. Accordingly, I do not credit Mendez' testimony in that regard. Even if I were to credit Mendez' testimony, however, it would not make a difference. Exhorting an employee to vote against the Union, either verbally or in writing, in a location far removed from the polling area, does not violate the *Milchem* rule, or any other rule for

⁴⁹ Washington testified that one of these conversations occurred near the entrance to the bathrooms, which were located in an area nearby the entrance to the polling area.

⁵⁰ Indeed, both Morr and Mendez testified that next to this literature they also found a driver's log book, which can reasonably be assumed was left behind by a driver. This inference is also supported by the fact that only a couple of pieces of literature were found on the tables. If the employer was truly trying to send a message, it would presumably have placed large amounts of this literature all over the break room. I also note that Brown credibly testified that she had cleaned the driver's break room the prior evening around 6:30 p.m. before she went home. She also testified that the Van Nuys operation is open 24 hours a day, with drivers coming in or out at all times in the day and night. It is thus very likely that drivers who arrived after Brown went home for the evening left the literature—and log book—there.

⁵¹ *Milchem, Inc.*, 170 NLRB 362 (1968).

that matter. Indeed, the Board has held that supervisors or even high-ranking employer officials may speak to employees one-on-one on the day of the election and exhort them to vote against a union, so long as those conversations are not threatening or coercive, and take place away from the polling area and away from the "locus of final authority," such as a manager's office. *2 Sisters Food Group*, supra at 1821, citing *Peerless Plywood Co.*, 107 NLRB 427 (1953); *Electro-Wire Products, Inc.*, 242 NLRB 960 (1979), citing *Associated Milk Producers, Inc.*, 237 NLRB 879 (1978).

These principles also apply to the conversations that Washington saw Eisentrager having with drivers, assuming they were indeed drivers. There is no evidence that these conversations were prolonged, and the evidence proffered shows they occurred away from the polling area during the periods between the election shifts, when the polls were closed.⁵² Thus, even assuming that Eisentrager's topic of conversation was the Union, and that he exhorted those individuals to vote against it, his conduct was permissible under *Milchem* and other cases cited above.

Accordingly, I conclude that Objection 5 lacks merit and should be overruled.

Objection 6

The Employer failed to post signs indicating where a vote was to be held, leading employees to go into a room where they thought it would be and where improper electioneering materials were placed

As with Objections 4 and 5, Objection 6 also refers to events at the Van Nuys facility, according to the Regional Director's report. The evidence proffered in its support is meager, to say the least. Boiled down to its essence, the Union's argument is that its representatives were confused as to where the polling room in Van Nuys was located, apparently believing that the vote was to take place at the (driver's) break room—even though the election agreement clearly specified that the vote would be held in the "meeting room." In other words, the Union in essence argues that since *they* were confused, therefore the *voters* were confused also, therefore voters went to the wrong place, where they were improperly exposed to "electioneering" literature (see Objection 5, above) and then on their way to the actual polling area, were subjected to surveillance (see Objection 2, above). This objection, and its premise is, is fatally flawed. Suffice it to say, that other than testimony from Morr and other union representatives that they had "understood" that the election was to take place in the break room—despite the clear language of the election agreement to the contrary—the Union proffered no evidence that *any* voter was confused, let alone that any voter went to the wrong place, or that any voter was disenfranchised because of such alleged confusion. While the Union's representatives' confusion may

⁵² Indeed, the only reason Washington, who was the union observer during the election, could observe these events was because the polls were closed at the time and Washington had left the polling area at the time, or saw Eisentrager and other officials—including union officials—either approaching the polling area after the polls closed, or leaving it just before the polls opened.

be understandable—they had never visited the Van Nuys facility prior to the day of the election, and the election at the two other facilities, Anaheim and Bakersfield, was in fact held in their respective employee *break rooms*—their confusion is ultimately irrelevant. There is absolutely no evidence of any confusion in the mind of the voters at the Van Nuys facility, and indeed no evidence that they did not know that the polling would take place in the **meeting room**, or evidence that they did not know where the meeting room was (no employees testified to any of this).⁵³ Moreover, even if employees initially went by mistake to the break room, and happened to see some of the literature left there, this was not objectionable conduct (see discussion of Objection 5 above).

Accordingly, I conclude that objection 6 lacks merit and recommend that it be overruled.

In sum, I conclude that objection 1 should be sustained, and that Objections 2 through 6 should be overruled.

CONCLUSIONS OF LAW

1. Pacific Coast Sightseeing Tours & Charters, Inc., a wholly owned subsidiary of Coach, USA, Inc., and Megabus West, LLC, an Indirectly Owned Subsidiary of Coach USA, Inc. (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Sheet Metal, Air, Rail, and Transportation Workers-Transportation Division (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing employees that those who were not satisfied with their wages, hours or working conditions could quit or go work elsewhere; and by threatening to discipline employees or threatening to enforce disciplinary rules more strictly if the Union was selected as their representative, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

5. Respondent has not otherwise violated the Act as alleged in the complaint.

6. Respondent has engaged in objectionable conduct warranting the setting aside of the results of the election held on February 4–5, 2016, and warranting the conduct of a new election.

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Respondent to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, the Respondent will be required to cease and desist from informing employees that those who were not satis-

fied with their wages, hours, or working conditions could quit or go work elsewhere, and from threatening to discipline employees or threatening to enforce disciplinary rules more strictly if the Union was selected as their representative. Moreover, Respondent will be required to post a notice to employees assuring them that it will not violate their rights in this or any other related matter in the future. Finally, to the extent Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁵⁴

ORDER

Respondent, Pacific Coast Sightseeing Tours & Charters, Inc., a wholly owned subsidiary of Coach, USA, Inc., and Megabus West, LLC, an indirectly owned subsidiary of Coach USA, Inc., Anaheim, Bakersfield, and Van Nuys, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that those who were not satisfied with their wages, hours, or working conditions could quit or go work elsewhere;

(b) Threatening to discipline employees or threatening to enforce disciplinary rules more strictly if the Union was selected as their representative.

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

(a) Within 14 days after service by the Region, post at its facilities in Anaheim, Bakersfield and Van Nuys, California, where notices to employees are customarily posted, copies of the attached notice marked “Appendix.”⁵⁵ 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 facilities involved in these proceedings, the Re-

⁵⁴ 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.

⁵⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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.”

⁵³ The employer properly placed election notices on the doors of the employee break room and by the dispatchers’ office, where the employer typically post notices to employees (R. Exh. 16—photo of Union Representative Mendez by the door of the driver’s break room in Van Nuys, with election notices posted). Moreover, the employer had held several employee meetings at the meeting room in Van Nuys, as part of its preelection campaign.

spondent 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 January 18, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21, 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.⁵⁶

I FURTHER RECOMMEND that the Board set aside the results of the election held on February 4–5, 2016, and direct a second election be held by secret ballot in the unit found appropriate whenever the Regional Director deems appropriate. In the absence of exceptions to this decision, Case 21–RC–167379 shall be severed from the unfair labor practice cases herein, and shall be remanded to the Regional Director for action consistent with my findings and Order.

Dated, Washington, D. C. March 17, 2017

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.

⁵⁶ I granted the General Counsel's motion, made at the hearing, to amend its complaint to request a notice reading as a remedy in this case (Tr. 15–16; GC Exh. 8). I am not persuaded, however, that a notice reading is appropriate or required in this instance. Traditionally, the Board has granted this remedy when the violations found were either egregious or extensive (i.e., widespread) and serious. See, e.g., *Postal Service*, 339 NLRB 1162, 1163 (2003); *Evenflow Transportation, Inc.*, 361 NLRB No. 160, slip op at 1 (2014). In this case, I have found two separate violations of Sec. 8(a)(1) pursuant to statements made to employees at meetings. While serious, I do not view these violations as widespread or egregious, even if they were deemed to also be objectionable conduct. Accordingly, I deny the General Counsel's request for a Notice reading.

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.

In recognition of these rights, we hereby notify employees that

WE WILL NOT tell employees that we will enforce disciplinary rules more strictly, or threaten them with discipline, if the Union is selected as their representative.

WE WILL NOT impliedly threaten to discharge employees by telling them that if they did not like their wages, hours, or working conditions they could quit or go work elsewhere.

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

PACIFIC COAST SIGHTSEEING TOURS & CHARTERS, INC., A WHOLLY OWNED SUBSIDIARY OF COACH, USA, INC., AND MEGABUS WEST, LLC, AN INDIRECTLY OWNED SUBSIDIARY OF COACH USA, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/21-CA-168811 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

