UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ADVANCEPIERRE FOODS, INC.,	:	
Petitioner,	:	
vs.	:	18-1219
NATIONAL LABOR RELATIONS BOARD,	:	
Respondent.	:	

PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Pursuant to 29 U.S.C. § 160(f) and Fed. R. App. P. 15, Petitioner AdvancePierre Foods, Inc. hereby petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision and Order of the Respondent National Labor Relations Board (the "Board"), entered on July 19, 2018, in Cases No. 09-CA-153966, 09-CA-153973, 09-CA-153986, 09-CA-154624, 09-CA-159692, 09-CA-160773, 09-CA-160779 and 09-CA-162392, attached hereto as Exhibit A. Petitioner requests that the Order be vacated and set aside in its entirety because it is not consistent with the law or supported by substantial evidence on the record.

Dated: August 8, 2018

Respectfully submitted,

Thompson Hine LLP,
Counsel for AdvancePierre Foods, Inc.

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Petitioner,	:
vs.	:
NATIONAL LABOR RELATIONS BOARD,	:
Respondent.	:

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the Rules of this Court, Petitioner AdvancePierre Foods, Inc., states as follows: AdvancePierre Foods, Inc. is a wholly-owned subsidiary of Tyson Foods, Inc.

Dated: August 8, 2018

Respectfully submitted,

/s/Eric S. Clark
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CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25(b), I hereby certify that true and correct copies of the foregoing AdvancePierre Foods, Inc.'s Petition for Review of An Order of the National Labor Relations Board was served upon the following via Federal Express on this the 8th day of August, 2018:

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

AdvancePierre Foods, Inc., *and* United Food and Commercial Workers Union, Local 75 a/w United Food and Commercial Workers International Union. Cases 09–CA–153966, 09–CA–153973, 09–CA–153986, 09–CA–154624, 09–CA–156715, 09–CA-156746, 09–CA–159692, 09–CA–160773, 09–CA–160779, and 09–CA–162392

July 19, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On June 27, 2016, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Additionally, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel 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 adopt the judge's rulings, findings,[1] and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified and set forth in full below.[2]

INTRODUCTION

The Respondent operates a food processing and packaging plant in Cincinnati, Ohio. In March of 2015,[3] a few employees contacted the Union about organizing the Respondent's 600 food workers. By early May, employees began to openly distribute union literature and union authorization cards at or near the plant. It is undisputed that the Respondent became aware of the Union's organizing campaign by at least May 11.

The judge found that the Respondent violated Sections 8(a)(3) and (1) of the Act in several respects during the course of the Union's organizing campaign, including by maintaining an unlawful no-solicitation/no-distribution policy, surveilling, interrogating, and disciplining four employees for engaging in protected union activity, and soliciting grievances from employees. We adopt the judge's findings on all of the issues,[4] and find three addition-

[1] The Respondent 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*, 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.

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall substitute a new notice to conform to the modified Order. In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. Also, in accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall amend the remedy to require the Respondent to compensate Diana Concepcion for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. In addition, we find merit in the General Counsel's exception to the judge's failure to recommend that the notice be read aloud to employees, assembled on company time, and will amend the remedy to require a notice-reading. We find this case merits such a remedy because the Respondent's violations of the Act are sufficiently serious and widespread and for the reasons further explained in the "Amended Remedy" section. Member Emanuel would not order a reading of the notice, for the reasons stated in fn. 11 below.

[3] All dates are in 2015 unless indicated otherwise.

[4] Specifically, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining an overbroad no-solicitation/no-distribution policy, engaging in surveillance by reviewing archived video footage of Carmen Cotto and Sonja Guzman engaged in distributing union literature in the employee breakroom; interrogating Cotto about Guzman's union activity in the breakroom; engaging in unlawful surveillance by searching employees' clipboards for union authorization cards; assessing an attendance point to Jessenia Maldonado for engaging in a protected strike; soliciting employee grievances and impliedly promising to remedy them through the implementation of its Communicating Answers Tracking System (CATS) program; engaging in surveillance of employees' union activity online, including investigating union sympathizers' Facebook pages; demanding that Diana Concepcion provide documents to verify her identity and immigration status in retaliation for her union activity; and disciplining Cotto, Guzman, and Ronnie Fox for violating the unlawfully overbroad no-solicitation/no-distribution policy. We also adopt the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) by disciplining Cotto and Guzman for distributing union literature; disciplining Fox for having union cards in his clipboard (which the Respondent discovered through its unlawful clipboard search); and suspending Concepcion for failing to provide documents to verify her identity and immigration status, which the Respondent unlawfully demanded that Concepcion provide in retaliation for her union activity. In addition, we agree with the judge, for the reasons he states, that the Respondent's plant-wide wage increase did not violate Sec. 8(a)(3) and (1). There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by instructing employees, in its August 27 letter to them, not to discuss their wages with their coworkers, and we adopt that finding as well.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by assessing employee Maldonado an attendance point for the day she was absent from work to participate in the strike, Mem-

al 8(a)(1) violations involving the Respondent's interrogation of Sonja Guzman about her union activity, the Respondent's solicitations to employees to revoke their union authorization cards, and the Respondent's confiscation of employees' union authorization cards. We also grant the General Counsel's notice-reading remedy request.

1. Interrogation of employee about own union activity

On June 8, prompted by employee complaints that coworkers were distributing union literature and authorization cards in the employee break room, Human Resources Manager Mandy Ramirez reviewed the day's break room video footage and observed Sonja Guzman and Carmen Cotto, two known union supporters, appearing to distribute and/or receive materials. Ramirez and Director of Human Resources Renee Chernock discussed the video, and the following day they summoned Cotto to meet with them in Ramirez' office. During this meeting, Ramirez told Cotto that she had reviewed video of the break room after employee complaints and observed Guzman receiving a "stack" of union literature from Cotto. Ramirez further questioned Cotto about Guzman and whether "[Guzman] gave [Cotto's] paper to other people," which Cotto denied. Ramirez and Chernock issued a verbal discipline to Cotto for violating the Respondent's no-solicitation/no-distribution policy and warned her not to distribute literature in the break room in the future. Shortly after the meeting with Cotto, Guzman was called to Ramirez' office. In this meeting, Chernock and Ramirez (who translated in Spanish) similarly told Guzman about the employee complaints regarding the distribution of literature in the break room and how they had observed video of her and Cotto engaged in such activity. Ramirez asked Guzman whether she had distributed union literature; Guzman denied doing so and stated that Ramirez was trying to "intimidate" her. Ramirez responded, "There's no reason to feel intimidat-

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ber Pearce notes that the discipline was unlawful even assuming, as the Respondent asserts, that Maldonado did not mention, when calling in, that the strike was the reason for her absence. Member Pearce observes that the Act protects the right of employees to strike without prior notice to their employer. See *Iowa Packaging Co.*, 338 NLRB 1140, 1144 (2003); *Savage Gateway Supermarket*, 286 NLRB 180, 181 & 183-184 (1987), enfd. 865 F.2d 1269 (6th Cir. 1989).

In addition to adopting the judge's findings above, we clarify the judge's decision in the following respects. First, in adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining an overbroad no-solicitation/no-distribution policy from May 13 until June 10, we further find that the door sign, which was posted contemporaneously with the unlawful policy, was also unlawful. Posted on the main employee entrance, the door sign read: "AdvancePierre Foods has a non-solicitation and non-distribution policy. Any questions should be directed to Human Resources. Thank You." We find that the sign constitutes an unlawful complete ban on solicitation and distribution. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616 & 621 (1962). Accordingly, we clarify the judge's holding and find that both the policy and door sign are facially unlawful under Sec. 8(a)(1). Moreover, we find that the policy and door sign are unlawful on the additional ground that they were promulgated in response to union activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004); see also *The Boeing Company*, 365 NLRB No. 154 (2017) (overruling the "reasonably construe" prong but not the "promulgated in response to union activity" prong of *Lutheran Heritage*). On this issue, Employee Relations Manager Mandy Ramirez' credited and undisputed testimony is that the company posted the policy "so that associates knew what they could and could not do" after learning about the union organizing campaign, specifically, that employees were distributing union literature and authorization cards. See *Wild Oats Markets, Inc.*, 344 NLRB 717, 737 (2005) (adopting judge's finding that respondent violated Sec. 8(a)(1) by posting a no-solicitation rule in response to union organizing activity). Second, we adopt the judge's finding that Ramirez's review of video footage of the employee breakroom, after complaints that employees were distributing union literature, constituted unlawful surveillance in violation of Sec. 8(a)(1). We find no need to pass, however, on whether the Respondent's maintenance of security cameras in the break room and throughout its plant constitutes unlawful surveillance, as the judge suggests. The General Counsel does not make this argument, and there is no evidence that the security cameras were put in place in response to union activity. See *Lutheran Heritage*, supra. Third, in adopting the judge's findings that the Respondent unlawfully disciplined employees Guzman, Cotto, and Fox for violating the unlawful no-solicitation/no-distribution policy in violation of Sec. 8(a)(1), we further rely on *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), and *Continental Group, Inc.*, 357 NLRB 409 (2011) (discipline imposed pursuant to an overbroad rule is unlawful under Sec. 8(a)(1)). Fourth, in addition to affirming the judge's finding that the Respondent's search of production employees' clipboards constituted unlawful surveillance in violation of Sec. 8(a)(1), we find that the confiscation of union authorization cards uncovered from that unlawful search also violated Sec. 8(a)(1), as it interfered with employees' protected right to receive union literature. See e.g., *Romar Refuse Removal*, 314 NLRB 658, 665 (1994). Even where an employer has lawfully prohibited distribution, it is not permitted to confiscate union literature. *NCR Corp.*, 313 NLRB 574, 577 (1993). Finally, in affirming the judge's findings, we do not rely on *OS Transport, LLC*, 358 NLRB 1078 (2012), cited by the judge, a case decided by a panel that included two persons whose appointments to the Board were not valid. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Member Emanuel joins his colleagues in affirming the judge's finding that the Respondent's no-solicitation/no-distribution policy and door posting were facially unlawful. He also joins his colleagues in affirming the judge's finding that the Respondent's search of production employees' clipboards constituted unlawful surveillance in violation of Sec. 8(a)(1). He notes that an employer generally has a right to search company equipment for lawfully prohibited items in a work area. Here, however, the Respondent conducted the search with the goal of uncovering union activity. As the judge found, the Respondent's argument that it was enforcing a safety and sanitation rule that banned personal items on the production floor was pretextual. Contrary to his colleagues, Member Emanuel finds it unnecessary to pass on whether the no-solicitation/no-distribution policy and door sign are unlawful because they were promulgated in response to union activity. He also finds it unnecessary to pass on their finding, under *Double Eagle Hotel & Casino*, supra, and *Continental Group, Inc.*, supra, that disciplining Guzman, Cotto, and Fox for violating an unlawful no-solicitation/no-distribution rule was an additional basis for finding the violation.

ed, it is just a conversation." Chernock testified that they had called Guzman in as a "friendly reminder" about the no-solicitation/no-distribution policy; however, the judge found that Ramirez issued Guzman a verbal warning not to distribute union literature.[5]

The judge found, and we affirm, that the Respondent unlawfully surveilled Cotto's and Guzman's union activity in violation of Section 8(a)(1) and unlawfully disciplined Cotto and Guzman for engaging in union activity in violation of Section 8(a)(3) and (1). The judge further found, and we agree, that the Respondent unlawfully interrogated Cotto about Guzman's union activity in violation of Section 8(a)(1). As discussed below, we additionally find that the Respondent violated Section 8(a)(1) by unlawfully interrogating Guzman about her own union activity.[6]

In determining whether an interrogation is unlawful under the Act, the Board looks at whether, under all the circumstances, the questioning would reasonably tend to coerce the employee at whom it is directed. *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The interrogation need not take the form of a question to be unlawful. Thus, statements designed to elicit a response may constitute an unlawful interrogation. See, e.g., *Grass Valley Grocery Outlet*, 338 NLRB 877, 882 fn. 1 (2003), affd. sub nom. *NLRB v. Cubitt*, 121 Fed. Appx. 720 (9th Cir. 2005); and *Medcare Associates*, 330 NLRB 935, 941 fn. 21 (2000). Here, Guzman—for the first time in her almost 10 years of employment—was called to the Human Resources office to meet with two high-level managers. At this meeting, Ramirez told Guzman that employees had complained about her, remarked that she and Chernock had seen video of Guzman engaged in union activity in the employee break room, and accused her of distributing union literature. Although the video showed Guzman *receiving* literature from Cotto, Ramirez' statements to Guzman are consistent with the judge's finding that Ramirez had, just moments before, unlawfully interrogated Cotto about whether Guzman had given the union literature that she had received from Cotto to "other people." In any case, Ramirez' accusation during her meeting with Guzman was designed to elicit a response, and it elicited a denial and a remark from Guzman that Ramirez was attempting to intimidate her. Moreover, the judge found that Chernock and Ramirez concluded the meeting by unlawfully disciplining Guzman. Under these circumstances, we have no trouble finding that the Respondent's line of questioning of Guzman regarding her own union activity was a coercive interrogation in violation of Section 8(a)(1).

2. Solicitations of employees to revoke their union authorization cards

As earlier discussed, the Respondent learned of the Union campaign no later than May 11 and responded swiftly. Indeed, by May 13, the Respondent had posted the no-solicitation/no-distribution policy and related door sign. From mid-May to mid-June, the Respondent's supervisors held approximately five to six employee meetings, each lasting about 20–25 minutes. At these meetings, supervisors distributed a "How to Withdraw Your Signed Union Authorization Card" flyer and explained to employees how they could get their cards back. The flyer, which was also left out in the main employee corridor, listed these steps: (1) Use the attached form to request in writing that you want your card back and are withdrawing your membership in the union; (2) Make a copy of the form and mail the original to the union address on the form; and (3) Go to the union representative you gave the union authorization card to and tell him or her that you want your card back. The flyer concluded: "Please understand that other than giving you this information, AdvancePierre Foods is not permitted by law to assist you in any other way in getting your card returned."

By the end of May, the Union had gathered 165 signed cards. On June 8, the Respondent conducted an unprecedented search of production employees' clipboards, confiscated union cards found during that search, and disciplined employee Ronnie Fox for violating the no-solicitation/no-distribution rule because of the union cards found in his clipboard.[7] That same day, as earlier discussed, prompted by employee complaints about coworkers distributing union literature in the break room,

[5] A verbal warning is the first step in the Respondent's progressive discipline system.

[6] While finding that Ramirez and Chernock unlawfully interrogated Cotto about Guzman's union activity in the breakroom on June 8, the judge dismissed complaint par. 5(f), which alleges that Ramirez and Chernock "[i]nterrogated an employee regarding the employee's union activities and sympathies." The basis for the judge's dismissal was that the General Counsel had apparently not asserted the matter in his post-hearing brief. We conclude that the dismissal was erroneous. Par. 5(f) of the complaint properly pleads the allegation. In turn, the General Counsel introduced evidence in support of that allegation at the hearing, and the judge's findings support the allegation. The General Counsel properly excepted to the judge's dismissal and briefed the issue. Accordingly, we find the 8(a)(1) violation, and we shall order that the Respondent cease and desist from interrogating employees about their own union activity as well as the union activity of other employees.

[7] As the judge found, many employees carry a clipboard with a closed metal container affixed to it, in which they store and carry daily work materials.

Ramirez watched video of the break room and observed Cotto and Guzman engaged in such activity. The Respondent wasted no time interrogating Cotto and Guzman about their union activity in the break room, issuing verbal warnings that they had violated the no-solicitation/no-distribution policy, and telling them not to distribute union literature in the future. The Respondent does not dispute that the May 13 no-solicitation/no-distribution policy was unlawfully overbroad in violation of Section 8(a)(1). The judge found that the Respondent's related actions on June 8 and June 9, above, violated Section 8(a)(3) and (1). And we have additionally found that the employer's confiscation of the union cards from the unlawful clipboard search violated Section 8(a)(1) (see above, fn. 4).

As a general rule, an employer may not solicit employees to revoke their union authorization cards. *Uniontown Hospital Assn.*, 277 NLRB 1298, 1307 (1985). "An employer may, however, advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing so nor seeks to monitor whether employees do so nor otherwise creates an atmosphere wherein employees would tend to feel peril in refraining from revoking." *Mohawk Industries*, 334 NLRB 1170, 1171 (2001) (citing *R. L. White Co.*, 262 NLRB 575, 576 (1982)).

Here, the judge found the Respondent's explanation of how to revoke cards was, by itself, not unlawful. The only issue, according to the judge, was whether the Respondent's advice was given in a manner that "create[d] an atmosphere where employees tend to feel peril in refraining from revoking." Despite recognizing that "serious" unfair labor practices had occurred during the mid-May to mid-June solicitation period, the judge concluded that "even taken as a whole . . . [the violations] do not rise to the scope or level found in other cases where the mere provision of information to employees is condemned." The primary case the judge relied on is *Mohawk Industries*, supra, where the Board found that the employer had unlawfully solicited employees to revoke their authorization cards in the context of threats of plant closure, unspecified reprisals for supporting the union, and the discharges of two union supporters. 334 NLRB at 1171. The judge distinguished *Mohawk Industries* from the instant case as involving "numerous and substantial unfair labor practices close in time to the solicitation to employees [to] revoke cards." We disagree that *Mohawk Industries* is distinguishable, for two reasons.

First, we do not agree with the judge that *Mohawk Industries* establishes a floor as to the types of violations needed to create a perilous atmosphere. For example, in *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991), enfd. mem. 970 F.2d 898 (3d Cir. 1992), the Board found that the employer unlawfully explained the card-revocation process by distributing a sample revocation letter to employees in a context of contemporaneous unfair labor practices similar to the ones here, including interrogation, solicitation of grievances, creating the impression that employee union activities were under surveillance, and the discharge of a union supporter.[8] Second, we do not agree with the judge that the violations in *Mohawk Industries* are more egregious than the violations that occurred here, in particular because these violations all stem from the Respondent's efforts to, as the judge found, "squelch" the Union's organizing campaign as soon as it began. To this point, we find compelling that the Respondent's unlawful search for and confiscation of cards during the unprecedented clipboard audit and Fox's related discipline, and the disciplines of Cotto and Guzman for distributing union cards in the break room, all relate to the card-signing process. Further, the disciplines were pursuant to the unlawful no-solicitation/no-distribution policy, which we have found the Respondent promulgated in direct response to the Union campaign, and specifically, after learning that employees were distributing union authorization cards. Accordingly, we find that the Respondent's explanation of how employees could revoke their cards in the context of these contemporaneous serious unfair labor practices—all related to the card-signing process and the organizing effort to select the Union as the employees' collective-bargaining representative—created an atmosphere where employees would tend to feel peril if they refrained from revoking their support for the Union.

Accordingly, we find that the Respondent's solicitations to employees to revoke their cards violated Section 8(a)(1), as they occurred contemporaneously with serious violations that went to the heart of the card-signing process and began immediately after the Respondent learned of the Union's organizing campaign.[9]

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[8] The dissent attempts to distinguish *Escada* on the basis that the employer in that case also told employees that "it would be in [the employees'] best interests" to revoke their union authorization cards. 304 NLRB at 849. We disagree that *Escada* is distinguishable. Although the Board in *Escada* noted this statement, it relied solely on the employer's contemporaneous unfair labor practices to find the violation, id., and the statement the dissent relies on was not separately alleged or found to be an unfair labor practice.

[9] Member Emanuel would affirm the judge's dismissal of this allegation. He notes that the General Counsel did not take issue with the content of the flyer, but instead relied solely on the surrounding unfair labor practices. Member Emanuel finds that these violations, while serious, did not "create[] an atmosphere wherein employees would tend to feel peril in refraining from revoking" their authorization cards. *Mohawk*, supra at 1171. The cases cited by his colleagues are distinguishable. As noted by the judge, the employer in *Mohawk Industries*

AMENDED REMEDY

We adopt the judge's recommended remedies,[10] and we shall additionally order, in accordance with *King Soopers, Inc.*, supra, that the Respondent compensate Diana Concepcion for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.[11] Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

We shall further order the Respondent to compensate Concepcion for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 9 a report allocating the backpay awards to the appropriate calendar year for Concepcion in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Finally, we shall order the notice to employees to be read aloud by Employee Relations Manager Ramirez (a high-level manager who was personally involved in several of the serious unfair labor practices) or,[12] at the Respondent's choice, by an agent of the Board with Ramirez present.[13] See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (giving the employer the option of having a Board agent read the notice aloud with the named official present). In cases where a particular manager, to the knowledge of employees, was directly responsible for many of the violations that justified the notice-reading remedy, the Board has required that individual to read the notice in order to make the remedy fully effective. See *Domsey Trading Corp.*, 310 NLRB 777, 779-780 (1993), enfd. 16 F.3d 517 (2d Cir. 1994); *Monfort of Colorado*, 284 NLRB 1429, 1479 (1987), affd. sub nom. *United Food & Commercial Workers Intern. Union, AFL–CIO v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988). Here, Ramirez posted the unlawful no-solicitation/no-distribution policy; surveilled, interrogated, and disciplined Cotto and Guzman for distributing union cards; disciplined Fox for distributing union cards; surveilled union activity by searching for employee union activity online and by searching union sympathizers' Facebook pages; demanded documents from Concepcion to support her identity and immigration status in retaliation for her protected activity and thereafter suspended her for failing to provide such information; disciplined Maldonado for participating in a protected strike; and solicited grievances from employees under the unlawful CATS program. Moreover, the card-revocation solicitations, the no-solicitation/no-distribution policy, the CATS program, and the Respondent's instruction to employees not to discuss their wages were all plant-wide violations that affected every employee. In light of these serious and widespread violations, we find that a reading of the notice is appropriate "to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices," and will allow the employees to "fully perceive

committed numerous and substantial unfair labor practices close in time to the solicitation, including unlawfully threatening plant closure or relocation, discharge, loss of jobs and benefits, and unspecified reprisals; threatening that unionization would be futile; unlawfully interrogating employees; creating the impression of surveillance; and discharging two employees. In Member Emanuel's view, the violations in the present case, though serious, are not as widespread or egregious as those in *Mohawk*. Moreover, the Board in *Mohawk* did not rely solely on the context of unfair labor practices, but emphasized that the employer told employees that one way to obtain card revocation forms was to visit the Respondent's office, which gave the company an opportunity to observe which employees chose to revoke. Id. Here, as the judge found, there was no attempt to require employees to inform management (indirectly or directly) whether they chose to revoke their cards. In *Escada (USA), Inc.*, 304 NLRB 845 (1991), in addition to committing multiple violations, including the discharge of an employee to discourage membership in or support of the union, the employer exceeded the bounds of simply providing information by telling employees it was "in [their] best interests" to revoke their cards. *Escada*, supra at 849. The Respondent made no such statements here.

[10] In agreement with the judge, and for the reasons stated in the judge's decision, we do not find the other remedies requested by the General Counsel to be warranted. We endorse the judge's determination that traditional remedies, including the *King Soopers* remedy and a notice reading, will sufficiently ameliorate the effects of the Respondent's unfair labor practices. See *First Legal Support Services, LLC*, 342 NLRB 350, 350 fn. 6 (2004).

[11] Applying extant law at the time, the judge denied the General Counsel's request that Concepcion be reimbursed for her search-for-work and work-related expenses. In the meantime, the Board issued its *King Soopers* decision, which provides for this remedy and ordered that it be applied retroactively "in all pending cases in whatever stage." 364 NLRB No. 93, slip op. at 11.

[12] Contrary to his colleagues, Member Emanuel would not order a reading of the notice. The Board has recognized that this extraordinary remedy may be warranted "where the violations are so numerous and serious that the reading aloud of a notice is considered necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion, or where the violations in a case are egregious." *Postal Service*, 339 NLRB 1162, 1163 (2003). Here, Member Emanuel agrees with the judge's finding that the Respondent's unfair labor practices, although serious, are not so egregious as to warrant a notice-reading.

[13] If Ramirez is no longer employed by the Respondent, then the Respondent shall designate an owner or officer to conduct or be present for the reading. *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (ordering that the notice be read aloud because of the public nature of the unfair labor practices, the timing of the violations, and the involvement of upper management), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017).

that the Respondent and its managers are bound by the requirements of the Act."[14] *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (internal quotes omitted), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). See also *Bozzuto's, Inc.*, 365 NLRB No. 146 (2017) (notice-reading appropriate where respondent disciplined and discharged two employees who initiated union campaign).

ORDER

The National Labor Relations Board orders that the Respondent, AdvancePierre Foods, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing an unlawful and overbroad no-solicitation/no-distribution policy.

(b) Promulgating a no-solicitation/no-distribution policy in response to union activity.

(c) Engaging in surveillance of employees' union activity by reviewing archived video of union activity in the employee break room.

(d) Soliciting its employees to revoke authorizations to the Union to be their collective-bargaining representative.

(e) Interrogating employees about their union activities or those of their coworkers.

(f) Engaging in surveillance by searching employee clipboards to find union literature.

(g) Confiscating union authorization cards from employees.

(h) Disciplining employees in retaliation for distributing, receiving, and/or possessing union literature.

(i) Engaging in surveillance of employee union activity by searching for employee union activity online and searching union sympathizers' Facebook pages.

(j) Demanding any employee provide documents to verify his or her identity and immigration status in retaliation for his or her union activity, and suspending any employee for failing to satisfy the unlawful demand.

(k) Disciplining any employee for an absence caused by participation in a protected strike.

(l) Instructing employees that their pay rate is considered personal and confidential and is not to be shared with other employees.

(m) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from organizing a union.

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

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

(a) Rescind the unlawful disciplinary warnings issued to Sonja Guzman and Ronnie Fox.

(b) Rescind the attendance point unlawfully issued to Jessenia Maldonado for her participation in protected concerted activities.

(c) Within 14 days from the date of this Order, offer Diana Concepcion full reinstatement to her job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Diana Concepcion whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate Diana Concepcion for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Diana Concepcion, and within 3 days thereafter, notify Concepcion in writing that this has been done and that the suspension will not be used against her in any way.

(g) Rescind the CATS (Communicating Answers Tracking System) grievance program.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings given to employees Carmen Cotto, Sonja Guzman, and Ronnie Fox, and the attendance point unlawfully assessed against Jessenia Maldonado, and within 3 days thereafter, notify these employees in writing that this has been done and that the warnings or attendance point will not be used against them in any way.

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

[14] The notice-reading remedy ordered is consistent with the judge's proposed order, which we adopt, that the Respondent shall be required to post the notice in both English and Spanish, and any other languages the Regional Director finds appropriate, based on the judge's finding that a large number of employees' primary language is not English.

(j) Within 14 days after service by the Region, post at its facility in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be translated into Spanish and any other languages that the Regional Director determines is appropriate, and the Spanish, other language(s), and English notices shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since May 13, 2015.

(k) Within 14 days after service by the Region, hold a meeting or meetings, which shall be scheduled to ensure the widest possible attendance of employees, at which the attached notice marked "Appendix" is to be read in English, Spanish, and any other language or languages the Regional Director determines are appropriate by the Respondent's Employee Relations Manager Mandy Ramirez (or, if she is no longer employed by the Respondent, by a high-ranking responsible management official of the Respondent) in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of Ramirez or another management official, if Ramirez is no longer employed by the Respondent.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

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

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. July 19, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an unlawful and overbroad no-solicitation/no-distribution policy that restricts you from exercising the rights set forth above.

WE WILL NOT promulgate a no-solicitation/no-distribution policy in response to your union activities.

WE WILL NOT engage in surveillance of your union activity by reviewing archived video of your union activity in the employee break room.

WE WILL NOT solicit you to revoke your authorization to the Union to be your collective-bargaining representative.

WE WILL NOT interrogate you about your union activities or those of your coworkers.

WE WILL NOT engage in surveillance by searching your clipboards to find union literature.

WE WILL NOT confiscate union authorization cards from you.

WE WILL NOT discipline you in retaliation for distributing, receiving, and/or possessing union literature.

WE WILL NOT engage in surveillance of your union activity by searching for union activity online and searching suspected union sympathizers' Facebook pages.

WE WILL NOT demand you provide documents to verify your identity and immigration status in retaliation for your union activity, and WE WILL NOT suspend you for failing to satisfy the unlawful demand.

WE WILL NOT discipline you for an absence caused by participation in a lawful strike.

WE WILL NOT instruct you that your pay rate is considered personal and confidential and is not to be shared with other employees.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from organizing a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful disciplinary warnings issued to Sonja Guzman and Ronnie Fox.

WE WILL rescind the attendance point unlawfully issued to Jessenia Maldonado for her participation in a protected strike.

WE WILL rescind the CATS (Communicating Answers Tracking System) grievance program.

WE WILL, within 14 days from the date of the Board's order, offer Diana Concepcion full reinstatement to her job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diana Concepcion whole for any loss of earnings and other benefits suffered as a result of our unlawful suspension of her, less any net interim earnings, plus interest, and WE WILL make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Diana Concepcion for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension of Diana Concepcion, and WE WILL, within 3 days thereafter, notify Diana Concepcion in writing that this has been done and that the suspension will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings given to Carmen Cotto, Sonja Guzman, and Ronnie Fox, and the attendance point unlawfully assessed against Jessenia Maldonado, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that the warnings or attendance point will not be used against them in any way.

ADVANCE PIERRE FOODS, INC.

The Board's decision can be found at www.nlrb.gov/case/09-CA-153966 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.

Zuzana Murarova, Esq. and *Gideon Martin, Esq.* for the General Counsel.

Keith P. Spiller Esq. and *Megan S. Glowacki, Esq. (Thompson Hine LLP)* of Cincinnati, Ohio, for the Respondent.

Pamela M. Newport, Esq. (UFCW Local 75) of Dayton, Ohio, for the Charging Party.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a series of alleged unfair labor practices that arose out of a union organizing campaign and the employer's opposition to it at food product manufacturer's Cincinnati, Ohio facility.

As discussed herein, I find that as alleged, the employer unlawfully maintained and enforced an unlawfully broad solicitation/distribution policy during an approximately 1-month period from the inception of the union campaign in May 2015, until the employer realized that its policy was unlawful. I further find that, in a flurry of unlawful activity, on or about June 9, the employer unlawfully disciplined three employees for engaging in union activity. In the midst of one of these disciplinary meetings, it engaged in one unlawful act of interrogation, questioning an employee about whether another employee assisted her in distributing literature during a work break in the break room. At about the same time, I find that the employer unlawfully surveilled employees by searching for and confiscating union authorization cards. The following week, the employer unlawfully surveilled union activity online, which, as discussed

at length herein, led to the unlawful demand that an employee provide identification documents, and her unlawful suspension when she failed to comply. I find that, on or about July 17, the employer unlawfully assessed an attendance point against an employee who was engaged in protected activity as part of a one-day strike by some employees. Further, I find that in mid-July, the employer unlawfully implemented a program to solicit employee grievances and impliedly promised to remedy them in an effort to discourage union organizational activity. Finally, I find that in an August 27 letter to each employee explaining a pay raise they were to receive, the employer unlawfully directed employees not to share pay information with other employees.

In addition to these violations, I dismiss allegations that the employer unlawfully solicited employees to withdraw union authorization cards. I dismiss one alleged act of interrogation for which there is no evidence, and I decline to find a violation with regard to another such violation urged by the General Counsel but unalleged in the complaint or by amendment. Finally, I dismiss the General Counsel's allegation that the pay raise granted employees on or about August 30, and the announcement of it on July 15, violated the Act. I believe that the employer has successfully demonstrated that the pay raise was implemented as the culmination of a multiplant pay restructuring plan envisioned, planned, and developed long before and unrelated to the union organizing campaign.

Finally, as discussed herein, the General Counsel has requested a panoply of extraordinary remedies. Some have no precedent in existing Board law, and thus, are more appropriately considered by the Board on exceptions, should the General Counsel choose to pursue that route. Others are simply unwarranted under the circumstances of this case. I do agree, however, that the posting of a notice, in English, Spanish, and any other languages determined appropriate by the Regional Director, constitutes part of an appropriate remedy in this case.

STATEMENT OF THE CASE

On June 10, 2015, the United Food and Commercial Workers Union Local 75 (Union) filed unfair labor practice charges alleging violations of the National Labor Relations Act (Act) by AdvancePierre Foods Inc. (AP), docketed by Region 9 of the National Labor Relations Board (Board) as Cases 09–CA–153966, 09–CA–153973, and 09–CA–153986. Based on an investigation into these charges, on August 31, 2015, the Board's General Counsel, by the Regional Director for Region 9 of the Board, issued an order consolidating these cases, and a consolidated complaint and notice of hearing, alleging that AP had violated the Act. On September 14, 2015, AP filed an answer denying all alleged violations of the Act.

On June 22, 2015, the Union filed a further unfair labor practice charge against AP, docketed by Region 9 of the Board as Case 09–CA–154624. On July 24, 2015, the Union filed further charges, docketed as Cases 09–CA–156715 and 09–CA–156746. Based on an investigation into these charges, on September 30, 2015, the Board's General Counsel, by the Regional Director for Region 9 of the Board, issued an order consolidating these cases with Cases 09–CA–153966, 09–CA–153973, and 09–CA–153986, and a second consolidated complaint and notice of hearing, alleging additional violations of the Act by AP. On October 14, 2015, AP filed an answer to the second consolidated complaint denying all alleged violations of the Act.

On September 9, 2015, the Union filed a further unfair labor practice charge against AP, docketed by Region 9 of the Board as Case 09–CA–159692. On September 11, 2015, the Union filed a first amended charge in that case. On September 25, 2015, the Union filed further charges, docketed as Cases 09–CA–160773 and 09–CA–160779. On October 29, 2015, the Board's General Counsel, by the Regional Director for Region 9 of the Board, issued an order consolidating these cases with the cases contained in the second consolidated complaint, and issued a third consolidated complaint and notice of hearing, alleging additional violations of the Act by AP. On November 12, 2015, AP filed an answer to the third consolidated complaint denying all alleged violations of the Act.

On November 27, the Board's General Counsel, by the Acting Regional Director for Region 9 of the Board, issued an amendment to the third consolidated complaint. AP filed an answer to the amendment to the third consolidated complaint on December 10, 2015, denying all allegations of the Act. A second amendment to the third consolidated complaint was filed January 7, 2016, and an answer denying the allegations filed by AP on January 13, 2016.[1]

On October 21, 2015, the Union filed a charge, docketed by Region 9 as Case 09–CA–162392. (GC Exh. 28(a).) Based on investigation into the charge, a complaint issued November 25, 2015. (GC Exh. 28(c).) AP answered, denying all alleged violations of the Act, on December 10, 2015. (GC Exh. 28(e).) I consolidated this case for hearing with the previously-described cases on December 4, 2015. (Tr. 951.)

A trial in these cases was conducted on November 30 through December 4, 2015, and on January 14, 2016, in Cincinnati, Ohio. Counsel for the General Counsel and the Respondent filed posttrial briefs in support of their positions by February 18, 2016.

At trial, counsel for the General Counsel moved to amend the complaint to allege, in paragraph 4, that Eric Hayes had the job title production supervisor and was a statutory supervisor and agent under the Act. Counsel also moved to amend paragraphs 5(a) and (k) to substitute Eric Hayes for Ernie Hayes. Additionally, counsel moved to amend complaint to include an allegation (Tr. 566) that the Respondent, by Mandy Ramirez, unlawfully surveilled Carmen Cotto's distribution of union literature. These motions were granted. The parties stipulated that Ernie Hayes, former HR manager for AP, was an agent of the Respondent at all material times.

Posttrial, on March 31, 2016, counsel for the General Counsel moved, without opposition, to consolidate Cases 09–CA–157262 and 09–CA–163048 with the previously-consolidated cases and on April 29, 2016, moved to reopen the hearing to take evidence in these new cases. That motion was granted May

[1] As it was filed after the commencement of the hearing, I deemed and treated the second amendment to the third consolidated complaint as a motion to amend the third consolidated complaint. That motion was granted January 14, 2016. (Tr. 1054, 1058.)

16, 2016, and the hearing set to resume June 2. On May 31, 2016, counsel for the General Counsel moved, without opposition, to have Cases 09–CA–157262 and 09–CA–163048 severed and remanded to the Regional Director to consider the Charging Party's request for withdrawal of the charges in those cases. That motion was granted by order issued June 1. That same day, the Regional Director for Region 9 issued an order approving withdrawal of the charges in Cases 09–CA–157262 and 09–CA–163048.[2]

On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

AP is and at all material times has been a corporation with an office and principal place of business in Cincinnati, Ohio, and has been engaged in food production and distribution at that facility. In conducting its operations during the 12-month period ending August 1, 2015, and the 12-month period ending November 1, 2015, AP sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Ohio. At all material times, AP has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties stipulated, and I find based on the record as a whole that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Below, after a short introduction establishing some of the background facts, I set forth factual findings and analysis for each of the unfair labor practice allegations advanced by the General Counsel.

INTRODUCTION

AP manufactures processed foods for restaurant chains, retail businesses such as Wal-Mart and Costco, and for sale in convenience stores such as 7-11 and Speedway. According to the testimony of its senior vice president for human resources, Chuck Aardema, Advance Pierre has approximately $1.7 billion in sales, and employs approximately 4100 employees in eleven locations.

AP maintains a manufacturing facility near Cincinnati, Ohio, which is the site of the alleged unfair labor practices in these cases. Approximately 600 hourly employees work there. The production is carried out on ten separate production lines, where workers grind, process, box and pack specified products

In the spring of 2015,[3] the Union began meeting with AP employees. Union organizer Ellen Vera testified that she first met with a group of AP Cincinnati plant workers on March 31, after employee Sonja Guzman contacted the Union. (Guzman testified that the first meeting was in approximately May, but the conflict is immaterial.) The evidence suggests that the first "flyered" meeting (i.e., openly advertised meeting) was May 16. By the end of May, approximately 165 union authorization cards had been signed.

Beginning in May, on a weekly or semiweekly basis the Union and employee supporters distributed union literature, sometimes with authorization cards attached, at the entrances and exits of AP's parking lot. This distribution was open and could be seen "clearly" by AP HR personnel and perhaps others who were standing in a smoking area adjacent to the facility. In addition, there is evidence in the record that management received "union updates" from some employees, including information about what occurred at union meetings, although it is unclear how early that began.

In any event, by May 11, before the Union's first openly publicized meeting, news of the union activity had reached Senior Vice President of Human Resources Chuck Aardema, who has overall responsibility for the human resources for the entire company nationwide. On that day, Aardema received a call about the union activity from Renee Chernock, director of human resources, whose office is in Blue Ash, Ohio, about ten minutes away from the Cincinnati plant, and who provides HR support for five AP manufacturing plants including Cincinnati. Chernock had received a piece of union literature from the Cincinnati plant manager, Petra Sterwerf, who had received it from Operations Manager Dwayne Stanford. During this time period, Sterwerf heard from Employee Relations Manager Mandy Ramirez that the Union was holding meetings.

AP moved quickly to oppose unionization. It hired a management consulting firm to assist "with the campaign that had got started at the Cincinnati plant." As discussed below, on May 13, "because of the union activity that was occurring in the plant," AP posted a no-solicitation/no-distribution policy "so that associates knew what they could and could not do."

AP's front line supervisors began meeting in May with production workers on the production floor, stopping the lines and work for 20–25 minutes for a meeting, often near the end of a shift. At these meetings, in which employees working on the line were brought to the back area of the facility, the supervisors would meet with the lines under their supervision and pass out literature opposing unionization, and the literature would be left in the hallway as well. At these meetings, supervisors would discuss issues around the campaign. The first such piece of literature, dated May 21, was distributed in several languages, reflecting the diverse and immigrant workforce employed at AP. Chernock testified that there are at least five languages spoken by employees in the facility.

These meetings were repeated, on a roughly weekly, or every other week basis, for five or six times.[4]

[2] Throughout this decision, references to the complaint are to the extant and most recent consolidated complaint, as amended.

[3] Throughout this decision, dates are 2015 unless otherwise stated.

[4] Employee Sonja Guzman testified that these meetings occurred "[e]very day for a week." I am not sure if that is a translation error (there were some) or a misstatement, but I do not credit that account of the frequency of the meetings. It is in contradiction to much other testimony and documentary evidence.

I. ALLEGED SOLICITATIONS TO EMPLOYEES TO REVOKE UNION AUTHORIZATION CARDS (COMPLAINT PARAGRAPH 5(A))

Facts

The midshift supervisory-led meetings with employees included instruction from supervisors on how employees could rescind union authorization cards that they had already signed. Employee Ronnie Fox works on Line 2 as a grinder. He testified that the supervisor for Line 2, Daran Bishop, ran the meetings he attended. Among the matters Bishop raised was how an employee "could get your card back." Bishop read his comments and added things himself. Fox testified that papers explaining how to rescind the union authorization cards were handed out or placed on the table in the hallway.

Machine Operator Kenneth Favors testified that his line supervisor, Bob Stacy, ran the meetings he attended. According to Favors, Stacy "volunteered" to employees that "if you don't want to be part of the union that's taking place, you can go ahead and sign this paper and that will basically waive off your signature that you probably already signed. . . . If you sign this paper, it would basically take you off the union."

Line 9 Packer Sonja Guzman testified that her supervisor, Eric Hayes, told employees "that if we had signed the cards, how to revoke that." This information was not provided in response to an employee question on how to revoke union cards.[5]

The literature distributed (or posted) by the AP supervisors included information on "How to Withdraw Your Signed Union Authorization Card," and stated the following:

> How to Withdraw Your signed Authorization Card
>
> To All AP Foods Associates:
>
> Many of you have told us that you signed a union authorization card without understanding that it is a legal statement authorizing the UFCW Local 75 union to represent you. You have asked us how to withdraw your card. Here is how:
>
> 1. Use the attached form to request in writing that you want your card back and are withdrawing your membership in the union;
>
> 2. Make a copy of the form and mail the original to the union address on the form.
>
> 3. Go to the union representative you gave the union authorization card to, and tell them that you want your card back.
>
> Please understand that other than giving you this information, AdvancePierre Foods is not permitted by law to assist you in any other way in getting your card returned.

On the back of the card was a preprinted letter to the Union, with space for a signature, dated, and printed name, stating:

> I write to inform you that I do not want to be "represented" by your union and I hereby revoke and rescind any union "authorization" card, or any other indication of support for your union, that I may have signed in the past. Any such card or indication of support for your union is null and void, effective immediately.
>
> Please return to me any union authorization card that I may have signed. Also, please inform me in writing that you are honoring this revocation and rescission of support for your union.
>
> Please be aware that refusing to honor my revocation and rescission will violate my rights under the National Labor Relations Act. Moreover, representing to my employer (or any third party or "arbitrator ") that I support representation by your union will similarly violate my legal rights.

Other literature provided to employees informed that "*if you signed a union card and want to withdraw your support, the union must give it to you. Contact HR for more information.*" (Emphasis in original.)

Analysis

The General Counsel alleges that the Respondent violated the Act by soliciting employees to withdraw their authorization cards. However, I find that there is no violation.

> Under established Board law, an employer may provide only ministerial or passive aid to employees who wish to withdraw from union membership. Thus, the employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere wherein employees would tend to feel peril in refraining from [withdrawing].

Space Needle, LLC, 362 NLRB No. 11, slip op. at 2 (2015) (citations and internal quotations omitted; Board's bracketing).

In this case, the Respondent explained to employees in group meetings how they could get their cards back. Instructions for accomplishing this were set forth in forms handed out to employees and placed on a table. There was no attempt to require employees to inform management (indirectly or directly) whether they availed themselves of the opportunity.

It has long been accepted by the Board that an employer's provision to employees of information on how to revoke their authorization cards is, without more, not unlawful assistance or solicitation. *R.L. White Co.*, 262 NLRB 575, 576 fn. 5 (1982); *Aircraft Hydro-Forming*, 221 NLRB 581, 583 (1975) (employer did not violate the Act by its "unrequested advice to employees as to mechanics of revocation with no attempt to elicit information as to whether employees availed themselves of this advice and with no assistance or offer of assistance"). See by contrast, *Space Needle*, supra at slip op. at 3 (noting "Respondent's attempt to monitor its employees' responses to the letters by requiring the sample resignation letters to be requested directly from management. This put the Respondent in the position of knowing exactly which employees chose to resign their union membership—a fact obvious to employees—and thereby further pressured employees to make that choice"); *Vestal Nursing Center*, 328 NLRB 87, 102 (1999) (employer "provided envelopes, postage, and on several occasions, actually

[5] I credit Fox, Favors and Guzman on these points. The testimony was offered credibly. Moreover, Bishop and Hayes testified but did not dispute this testimony. Stacy did not testify.

mailed letters for the employees," rendering assistance "neither passive nor ministerial"). Thus, AP's explanation of how to revoke authorization cards was, by itself, not unlawful.

The only remaining issue is whether the Respondent's advice was given in a manner that "creates an atmosphere where employees tend to feel peril in refraining from revoking." Typically, this includes providing information on solicitation in the context of significant and coercive unfair labor practices. Here, by all evidence, these meetings occurred in the first month or so of the open union drive (May and into June). As discussed below, there were other unfair labor practices. However, even taken as a whole, the other unfair labor practices, while serious, do not rise to the scope or level found in other cases where the mere provision of information to employees is condemned. See, e.g., *Mohawk Industries*, 334 NLRB 1170 (2001).[6]

The General Counsel asserts (GC Br. at 24) that "[b]y stating to employees that the Union must return cards upon request, Respondent has solicited revocation of union support." He cites *Mohawk*, supra, and *Vestal Nursing Home*, supra, for this proposition. However, neither case condemns that formulation per se. Rather, in both cases, the violation turned on the commission of "numerous and substantial unfair labor practices close in time to the solicitation to employees to revoke cards" (*Mohawk*, supra at 1171) of much greater scope and severity than is present here. See, unfair labor practices in *Mohawk*, supra; see also extensive list of unfair labor practices found in *Vestal Nursing Home*, 328 NLRB at 103–104. Additionally, in *Mohawk* the Board relied upon the employer's announcement to employees that "one option for obtaining revocation forms was to visit the Respondent's office, giving the company an opportunity to observe whether they availed themselves of their right to revoke union authorizations" (supra at 1171 (internal quotation omitted)) and in *Vestal Nursing Home* the Board also relied upon the additional finding that the employer "provided envelopes, postage, and on several occasions, actually mailed the letters for the employees." 328 NLRB at 102. These cases do not advance the General Counsel's position here. I will recommend dismissal of these allegations.

[6] In *Mohawk*, the Board found that during the same period of the solicitation of revocation of cards, the Respondent's misconduct included unlawfully threatening plant closure or relocation, discharge, loss of jobs and benefits, and unspecified reprisals. It also threatened employees that it had a list of union supporters and planned to "ride" the instigators and issue warnings, and threatened them with the futility of selecting the Union as their bargaining representative. Further, it unlawfully interrogated employees and created among them an impression of surveillance of their union activity. Finally, the Respondent discharged two employees in violation of the Act. In these circumstances, there can be no question under settled case law that the Respondent's solicitation of employees to revoke authorization cards was an independent unfair labor practice.

334 NLRB at 1171.

II. MAINTENANCE AND ENFORCEMENT OF THE 2001 SOLICITATION POLICY; SURVEILLANCE OF UNION LITERATURE DISTRIBUTION IN THE CAFETERIA/BREAK ROOM; THE DISCIPLINING OF COTTO AND GUZMAN; INTERROGATION OF COTTO (COMPLAINT PARAGRAPHS 5(B), (E), (F), 6(A) AND (C), AND ORAL AMENDMENT (TR. 566))

FACTS

As noted, above, in response to learning of the union campaign, Director of Human Resources Chernock directed then Employee Relations Manager Ramirez[7] to post a copy of the solicitation/distribution policy.

Chernock testified that the policy "is something we've always had posted" on the production hallway HR bulletin board. But upon learning on May 13 that employees were distributing authorization cards, Chernock and Ramirez checked the bulletin board and noticed that it was no longer posted. Neither knew why it was no longer posted—the bulletin boards were unlocked and both speculated that someone unknown had removed it. Alternatively, they both mentioned that the hallway and bulletin board had been cleaned and painted in the fall of 2014 when the new plant manager Sterwerf started managing the facility, suggesting that this may have been when the policy was taken down.

In any event, the policy was reposted May 13, in response to the reports of union activity. Ramirez explained that "[b]ecause of the union activity that was occurring in the plant, we wanted to make sure that it was there so that associates knew what they could and could not do."

Although the policy had been revised in January 2012, neither Chernock nor Ramirez claimed familiarity with the substance of the new policy. Ramirez went to her computer and from the shared drive where the human resources policies are maintained, printed and posted the 2001 "no solicitation and no distribution" policy, not the one from 2012. This policy stated:

> I. PURPOSE
>
> To set forth a "no solicitation and no distribution" policy in order that the rights of everyone are protected so we may give our undivided attention to the work of the Company.
>
> II. APPLICATION
>
> All employees of the Company.
>
> III. POLICY
>
> A. It is a long-standing belief of the Company to provide a work place free from unnecessary interference so that all employees can work most effectively to achieve the highest quality results possible.
>
> B. Accordingly, the following rules apply and should be understood by all employees.
>
> 1. No employee ,is permitted to solicit memberships, contributions, conduct similar personal business or distribute printed matter for any such purpose at any time in "immediate work areas."

[7] Ramirez was promoted to plant HR manager in approximately August 2015, when manager Ernie Hayes left.

2. No employee is permitted to solicit memberships, contributions, conduct similar personal business or distribute printed matter for any such purpose during specified periods of the workday when either the soliciting or the solicited employee is supposed to be engaged in performing assigned work.

3. In addition to the limitations expressed in paragraphs 1: and 2. above, no employee is permitted to distribute literature for any such purpose at any time in employee work areas or work corridors.

4. No employee is permitted to sell merchandise, subscriptions, tickets, chances or similar items under the circumstances described in paragraphs 1. through 3. above.

5. Solicitations of any kind or distribution of literature by non-employees is not permitted at any time on the premises of the Company.

6. No persons shall deface any Company property, including buildings, hallways, or equipment by affixing any poster, sign, sticker or other advertising or propaganda matter.

7. Consistent with our long-standing practices, the only exceptions to the above rules are the annual United Way campaign, and other Company sponsored fund-raising campaigns for the direct benefit of the Company when employees are given an opportunity to make a voluntary contribution if they so desire.

8. This revision replaces and supersedes any prior policies or interpretations on the subject of solicitations and distributions.

Ramirez testified that she did not know that the 2001 policy had been replaced by the 2012 policy and that she had no reason to review the policy before posting it. Neither Ramirez nor any other official of AP had any explanation for why the 2001 policy continued to be in the company's shared computer HR files.

In addition to this posting, for approximately a month in May and June, after the Union flyering, a sign was posted on the door of the main employee entrance that stated: "AdvancePierre Foods has a non-solicitation and non-distribution policy." In smaller print at the bottom it stated: "Any questions should be directed to Human Resources. Thank You."[8]

A few weeks after the May 13 posting of the 2001 policy, in June, Ramirez received complaints that employees on break were tired of other employees talking to them about the Union. Chernock heard from Ramirez that "an employee had approached her and complained that people were handing out union literature in the breakroom."[9] One of the employees gave Ramirez some of the union literature handed to them in the break room. Plant manager Sterwerf testified that she heard from Ramirez that employee Carmen Cotto was handing out union material in the breakrooms. She discussed this with Ramirez and "several" other unidentified people (probably including Chernock). Sterwerf agreed that Cotto should be called into a meeting and informed that this was not allowed.

From her office computer, Ramirez was able to view live feed and video recording from cameras maintained in various parts of the facility, including two cameras in the employee breakroom. On June 8, after the discussions with Chernock referenced above, Ramirez used the video-recording system to view video that showed employee Carmen Cotto passing out papers to employees in the cafeteria. On the video, Ramirez also witnessed Cotto handing "a stack of papers" to employee Sonja Guzman.

Ramirez discussed the matter with Chernock. The next day, June 9, they called a supervisor and had him bring Cotto to the HR office. Chernock identified this supervisor as Daran Bishop, who supervised the line Cotto worked on, line 1. Cotto identified the supervisor who brought her to the office as Bob Stacy. Cotto testified that Stacy told her she had to go to human resources. Cotto asked why, but Stacy said, "I can't tell you", so you have to go with me." This was the first time in her nearly 27 years at the facility that Cotto had been called to HR regarding her conduct.

Ramirez and Chernock told Cotto that they had received a complaint about her distributing materials in the lunchroom and that on video Ramirez had seen her distributing papers in the cafeteria. She told Cotto, "according to our solicitation policy, she was not allowed to do that." Cotto testified credibly that Chernock told her she could be suspended or fired for distributing the materials.[10] According to Chernock's affidavit, which I credit, "we told Cotto that she would receive a written warning for distributing."[11]

[8] It is unclear who posted this door notice. Ramirez denied knowing about it, although she described "a small sticker" on a door to the facility that is still there and which says "something to the effect of we have a no solicitation/distribution policy." That seems to be something different than what looks (GC 13) to be an 8.5 X 11 inch piece of paper posted in the middle of a doorway. Fox identified this as being posted after the union flyering but taken down at some point afterwards. Chernock testified that "[a]t some point" in "the May timeframe," . . . there was a paper that was posted on one of the doors of the facility about the fact that Pierre has a no solicitation/no distribution policy." Favors described a similar notice being posted "[r]ight outside of the front entrance of where the employees walk in, not where visitors or guests walked in." The clear weight of the evidence is that the notice in GC 13 was posted on the front door of the employee entrance after the union activity began, and that it remained posted for about a month. And while no one admitted posting it, it remained up long enough, with its reference to contacting the HR department with any questions, and is consistent with, albeit even more overbroad than the policy posted at the HR bulletin board, that I conclude that AP management is responsible for the maintenance of this posting. It would not have remained up for as long as it did if it had been posted by someone not an agent of AP.

[9] The employee breakroom and the cafeteria are the same place, used for breaks and meals. I refer to them interchangeably throughout this decision.

[10] As discussed below, they told Fox the same thing when he received a verbal warning, either that day or the day before.

[11] At trial, Chernock testified that "[w]e told her that she would receive a verbal warning." She described her statement in her sworn pretrial affidavit that "[Cotto] would receive a written warning" as an "error." However, I credit her sworn pretrial statement which is an admission pursuant to Federal Rule of Evidence (F.R.E.) 801(d)(2). I am particularly convinced by the fact that before signing it, Chernock specifically corrected her affidavit to state that "We did not write her up at that time but planned to give her the written warning the following day." While Ramirez also claimed they told Cotto she was getting a

Cotto testified credibly that at this meeting she was asked about Sonja Guzman: "She told me Sonja Guzman—she gave my paper to the other people. I said no. The only piece of paper myself that day, not her."[12] Cotto denied disturbing people, and asked who had complained about her, but Chernock and Ramirez said they were not allowed to tell her. They verbally warned Cotto at that time for not abiding by the solicitation policy, disciplining her for distributing documents and telling Cotto she was not allowed to pass out documents in the cafeteria/break room under AP's solicitation policy.[13]

According to Chernock, Mandy printed and gave Cotto a copy of the 2001 policy, although Cotto denied that she was provided a copy. Cotto told Ramirez and Chernock that the union representative had told her she could pass out information on her free time. Cotto told them she was going to contact the Union. According to Cotto, Ramirez told her that the paper she was giving out to the people from the Union contained "li[es]." Cotto disagreed. The meeting lasted approximately five minutes.[14]

After Cotto left, Chernock and Ramirez summoned Eric Hayes, Sonja Guzman's supervisor, and told him to send Guzman to them. This was the first time, since being hired in 2006, that Guzman had been called to HR. Chernock testified that they had not seen Guzman distributing leaflets—the video showed her *receiving* "a stack of papers" from Cotto—but they "wanted to remind her of the solicitation policy" and that this was "a friendly reminder not to distribute." In the meeting, Chernock and Ramirez (with Ramirez, who speaks Spanish translating) told Guzman of the complaints of literature being passed out in the cafeteria and that they had seen "historical video" of Carmen Cotto handing literature to Guzman.

Guzman told a different story. Guzman testified that she was verbally disciplined in this meeting for distributing flyers in the cafeteria. She testified that she denied distributing, but received "verbal" discipline." Ramirez testified that "Sonja became very upset" and told Ramirez that she "was trying to intimidate her." (Guzman denied saying that, but admitted she felt it). Ramirez testified that she told her "there's no reason to feel intimidated, it is just a conversation." This conversation lasted 2 or 3 minutes.

To the extent the question is, was Guzman verbally disciplined, my conclusion is, yes, she was. Clearly, Guzman was verbally warned not to hand out flyers and forbidden to do so. There is something intangible about a verbal warning that is not recorded—as AP management testified was the practice—although they also testified that it was the first step in a progressive discipline system (one wonders how they keep track of verbal discipline). This was a verbal warning on a disciplinary matter, and I believe that this warning would have been used against her had she been caught later that day distributing literature in contravention of this warning.[15]

Later that day, Cotto and Guzman returned to Ramirez's office. Cotto "came in and said that she wanted to make sure that we were aware that Sonja had not been distributing any documents in the cafeteria." During this conversation, Guzman told Ramirez and Chernock that she had put the information she received into her locker.[16]

After that, this same day, a group of other employees, including Cotto, came by Ramirez's office and asked for a copy of the policy. These included Charles Rogers, who initially came by himself. About an hour later, Rogers returned with Ronnie Fox, Marcus Thompson, and David Moore, and Carmen Cotto came with them. All of these employees were provided with copies of the 2001 solicitation policy. Rogers questioned why the policy was dated 2001.

In her meeting with Chernock and Ramirez, Cotto had told them that the Union had told her she was allowed to distribute literature. Chernock suggested that this prompted her and

verbal warning, Cotto denied it. All of this is a little beside the point. A warning is verbal, until it is converted to writing. My considered conclusion is that the intention was to formalize the discipline as a written warning the following day but, for reasons described below, that decision was not carried out, and Cotto never received more than a verbal warning as part of this incident.

[12] I credit this testimony. It was credibly offered, but also, it is highly plausible that Chernock inquired whether Guzman had passed out papers too. The managers saw Cotto pass them out and hand "a stack" to Guzman. Given the discipline of Cotto for distributing, it makes sense that they wanted to know, and as Cotto testified, questioned, whether Guzman had distributed the papers she had been seen on video receiving.

[13] Although I have found that the intent as of that day was to follow up the verbal warning with a written warning, there is no dispute that a verbal warning is the first step in AP's progressive discipline system.

[14] I have no doubt that Ramirez and Chernock knew that Cotto was passing out union literature when they decided to discipline her and that they were motivated by that knowledge. As noted, Ramirez had received complaints about union literature being passed out in the break room and Sterwerf testified that she had heard from Ramirez that Cotto was handing out union material in the brea kroom. Management was on alert for union activity. On the other hand, I think it likely, and I find, that Chernock and Ramirez provided Cotto a copy of the 2001 solicitation policy. They testified credibly to this effect and it seems entirely plausible that while disciplining Cotto, allegedly for violating the solicitation policy, that they would provide her with a copy. As noted, Ramirez could easily retrieve a copy from her computer, and I believe she did.

[15] The Respondent's claim that Guzman was not being disciplined, but—uniquely in her 9-year tenure—was being summoned to the HR office to be given "a friendly reminder" not to distribute literatures is a little bit rich. She was called to the office because she was observed on a video receiving "a stack" of union literature from an employee disciplined for distributing it. Clearly, Guzman was suspected of passing out union literature. As referenced, I believe that had Guzman been observed passing out literature later in the day, she would have been subject to stiffer discipline, not a first offense. In this regard, I note the evidence that of the two employees seen on videotape, Cotto, who was the distributer, was going to get a written warning (until a decision was made that the whole thing had to be called off). It makes sense then that the lesser "offense" of receiving a stack of union literature, obviously to be distributed, would warrant a paperless verbal warning. But it defies credulity, and I do not accept that Guzman was called to the office as a "friendly reminder not to distribute."

[16] Cotto denied that she returned with Guzman. I credit Ramirez's recollection on this point. I also note that there would have been no reason for this return visit if Guzman had not left the first meeting with Ramirez and Chernock believing that she was accused of distributing literature in the break room.

Ramirez to contact legal counsel. Ramirez testified that the next morning the vice president of human resources for AP, Chuck Aardema, called and asked for a copy of the solicitation policy.

Ramirez and Chernock were told by Aardema, probably June 10, that the posted policy was outdated and they were to remove the posted policy from the production hallway and post the 2012 policy. They took down the 2001 policy and posted the 2012 policy. They called Cotto in and told her they were rescinding the warning she had been given, because it "was in reference to an outdated policy." Chernock testified that they "apologized to her" and told her "[i]t was an honest mistake." They gave Cotto a letter, drafted by Chernock, dated June 10, which stated:

> On June 9, 2015 we had a conversation regarding AdvancePierre Foods Non-solicitation and Distribution Policy. When we spoke we had given you an outdated policy. Attached is the policy that has been in place since 2012. The memo is also to let you know that we are rescinding the prior warning due to the interpretation of a prior policy.

Cotto could not recall if the 2012 policy was attached, but I find, in accordance with Ramirez' testimony, that it was.

Ramirez told Cotto to tell Fox to come to her office and to tell the other employees (Thompson, Moore, and Rogers) who had been given the older policy to return to her office. These employees were called one at a time into Ramirez' office and given a highlighted piece of paper listing the 2012 solicitation policy. Ramirez told Fox that she was sorry for the miscommunication.

Ramirez testified that she did not call Guzman back to provide her a new policy. Ramirez indicated there was no reason to do so because she had not disciplined Guzman and not provided her with a copy of the 2001 policy. Guzman disputes this. She says that she was later recalled to the office and told "that the rules had changed, that it was fine as to what I was doing." I credit Guzman on this. She was a credible and strong witness. Moreover, it is implausible that Ramirez would call back Fox, Rogers, Thompson, and Moore to make sure they knew about the updated policy, but not call back Guzman whom they had admonished under the wrong 2001 policy. By their own account, Guzman had been sought out by Ramirez and Chernock, and told to come to Ramirez' office for the purpose of being warned that she must comply with the 2001 solicitation policy. It does not make a lot of sense that Ramirez would seek out everyone they talked to except Guzman to explain the change in policy. I credit Guzman.

Analysis

a. Maintenance and enforcement of the 2001 solicitation/distribution policy

As set forth above, on May 13, "because of the union activity that was occurring in the plant," AP posted a no-solicitation/no-distribution policy "so that associates knew what they could and could not do." In addition, after the Union flyering, a sign was posted on the door of the main employee entrance that stated: "AdvancePierre Foods has a non-solicitation and non-distribution policy." In smaller print at the bottom it stated: "Any questions should be directed to Human Resources. Thank You." As I have found, although no one took responsibility for posting this sign—which is even more overbroad than the 2001 policy—AP management is responsible for this posting and its maintenance for approximately a month.

The Respondent does not dispute that this 2001 policy, not to mention the door flyer, were unlawfully overbroad.[17] And they were maintained for nearly a month—until June 10—after the Respondent first learned of the union campaign on May 11, and within 2 days posted the 2001 policy. Indeed, the Respondent told Cotto that it was the basis for disciplining her, and Guzman was warned that Respondent was enforcing the policy. In addition, in response to the disciplining of Cotto, four employees came to the HR office and asked for and received a copy of the disciplinary policy—they were provided the 2001 disciplinary policy. Thus, the unlawfully overbroad policy was maintained and in some instances enforced, from at least May 13 to June 10. The maintenance and enforcement of this overbroad policy violated Section 8(a)(1) of the Act.[18]

b. Surveillance of union literature distribution in the cafeteria

The General Counsel alleges that Ramirez' review of the videotape of Cotto distributing literature in the cafeteria constituted unlawful surveillance in violation of Section 8(a)(1) of the Act.

An employer's videotaping or photographing of employees engaged in union or protected concerted activity, without proper justification, violates the Act, as it has a tendency to intimidate employees. *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993); *Titan Wheel Corporation of Illinois,* 333 NLRB 190, 194 (2001); *Frontier Hotel & Casino*, 323 NLRB 815, 837

[17] Among other things, the 2001 policy prohibits distribution of literature for a broad range of purposes that would include distribution of union literature "at any time in employee work areas or work corridors." A work "corridor," which, logically, must be something other than a "work area," reasonably a passageway leading to a work area, constitutes an overbroad limitation on distribution. *Stoddard-Quirk, Mfg.*, 138 NLRB 615 (1962). In addition, the door flyer policy is reasonably understood as an unnuanced (and unlawful) flat ban on all distribution and solicitation at the employer's premises.

[18] The Respondent's contention that the 2001 policy was "mistakenly" maintained or enforced is not entirely accurate, and not at all relevant. It is not entirely accurate to the extent that it ignores that Ramirez and Chernock consulted the terms of the policy as part of the discipline of Cotto and Guzman. In other words, even if they did not necessarily know it was illegal, or "the wrong" policy, they knew what they were maintaining. However, even if the Respondent acted by mistake, this does not change the significance of the fact that the policy was maintained and enforced for nearly a month. It has long been settled that "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *American Freightway Co.*, 124 NLRB 146, 147 (1959); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339, fn. 3 (2000) (employer's misunderstanding of the law not relevant to assessing unlawful interference under 8(a)(1)).

(1997). Photographing in the mere "belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 499 (1997), review denied, 156 F.3d 1268 (D.C. Cir. 1998).

Here, no justification is offered for the ongoing videotaping of the employees' breakroom. It is unlawful. However, the specific allegation at issue (Tr. 566) is Ramirez's surveillance of Cotto's distribution of union literature in the breakroom. This too was unlawful.

Ramirez was engaging in the surveillance in response to complaints from employees who were tired of other employee talking to them about the Union while on break. More specifically, the decision to view the videotape of the breakroom was made after an employee complained and provided Ramirez with union literature given to them in the break room. The Respondent contends that "Ramirez was following up on complaints from employees, like she would in any other situation." (R. Br. at 28.) However, the complaints prompting the surveillance were that employees were engaged in protected and concerted activity. Ramirez and Chernock claim that the surveillance was warranted because the distribution of literature was not permitted under the Respondent's rules. As discussed below this rule was unlawful, as maintained and applied. Indeed, that is not seriously contested. Thus, the "justification" for the surveillance was to observe an employee engaging in protected activity. As in *F.W. Woolworth*, supra at 1197, "Here, the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur." On the other hand, employees learning that—specifically, of all their activities in the break room—their union activities in the break room would be subject to video review, would reasonably be likely to be intimidated. The surveillance of Cotto's distribution of union literature (and Guzman's receipt of it), without valid justification, is a straightforward violation of Section 8(a)(1) of the Act.

c. The disciplining of Cotto and Guzman

The General Counsel alleges that the disciplining of Cotto and Guzman violated Section 8(a)(3) of the Act. I agree and find that both disciplinary warnings were motivated by the union activity of these employees, in violation of Section 8(a)(3) of the Act.[19]

As discussed above, the Respondent's application of the unlawfully overbroad 2001 policy to Cotto and Guzman constitutes a violation of Section 8(a)(1) of the Act, without regard to the Respondent's motives. *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). However, that does not answer the question of whether the discipline was a violation of Section 8(a)(3). The Respondent contends that enforcement of the 2001 policy was without ill motive, and was rescinded the following day. The reliance on the 2001 policy, argues the Respondent, was "not intentional or motivated by a desire to interfere with employees' Section 7 rights."

However, I do not accept that the true motive for disciplining Cotto and Guzman was their violation of a facially neutral (but unlawfully) overbroad prohibition on the distribution of all nonwork materials. In this case, the Employer's claim that the discipline rested on application of the 2001 policy operates as a pretext, albeit, unusually, one unlawful in its own right.

In truth, the 2001 policy does not sweep so broadly as to proscribe all nonwork distribution even in all nonwork areas, though Ramirez and Chernock claim to have read it that way. In fact, as discussed (below) with regard to the clipboard issue, the discipline of Cotto and Guzman occurred at the very time when the Respondent was actively looking for and trying to squelch union activity within the facility. As discussed below, the unlawful clipboard search occurred the day before or the same day. In fact, as I have found, Ramirez and Chernock knew that Cotto was distributing union literature in the breakroom, they knew that Guzman had received union literature from Cotto, and they knew that it was union literature that they disciplined the employees for handling. The whole incident was in response to employee complaints explicitly about distribution of union materials.

The enforcement of the 2001 policy against Cotto and Guzman was essentially a pretext, designed to cover a direct effort to squelch, punish and discriminate against union activity. This discriminatory discipline for engaging in union activity is a straightforward violation of Section 8(a)(3) regardless of whether the Respondent now acknowledges that its solicitation/distribution policy was unlawfully overbroad in violation of Section 8(a)(1) of the Act.

The Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, (1983) (approving *Wright Line* analysis). Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy its burden to show that an employee's protected activity was a motivating factor in an employer's adverse action, "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014); enfd. 801 F.3d 767 (7th Cir. 2015). Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089.

While extended analysis is not required, all of the elements of *Wright Line*, supra, are met here. Guzman and Cotto were engaged in union activity when they distributed (or received) union literature, AP learned of it, and unlawfully disciplined them for it. By Respondent's own admission, such discipline

[19] As any conduct found to be a violation of Sec. 8(a)(3) would also discourage employees' Sec. 7 rights, any violation of Sec. 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 933 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

would be in violation of Section 8(a)(1). As discussed above, they were targeted because they were distributing union literature, which was the specific complaint of employees that prompted the review of the video in the same time frame that the Respondent was cracking down on union activity in the facility. There is nothing in the record to suggest that Guzman and Cotto would have been disciplined for violating the 2001 policy had they been exchanging Girl Scout cookies in the breakroom. The Respondent has failed to meet its burden under *Wright Line* of demonstrating that it would have taken the same action against them in the absence of union activity.

d. The Respondent's remediation defense

The Respondent contends that it repudiated its unlawful conduct in a manner that obviates the violations. Board precedent provides for this, but in order to be effective a repudiation of a violation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); *Voith Industrial Services, Inc.*, 363 NLRB No. 116, slip op. at 4 (2016). Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. *Passavant*, supra at 138–139.

Here, the repudiation did not meet that standard. While the Respondent moved quickly—the next day—to rescind Cotto's discipline, and to give out the updated solicitation/distribution policy to Cotto and the four employees it gave the 2001 policy to the day before, that is an incomplete and inadequate repudiation, given the violations.

First of all the unlawful 2001 policy, and then the even more overbroad door flyer policy, had been posted for more than three weeks, viewed and passed by employees on a daily basis. No effort was made to communicate with the employees generally about the unlawfulness of the previous policy, or even about the change in the policy. Thus, the scope of even the attempted repudiation did not extend to the scope of the violation. Obviously, providing the new policy to five employees would not constitute adequate publication of any repudiation. Moreover, there was no repudiation as to Fox's disciplinary warning (discussed below). Further, even as to Guzman and Cotto, there were no assurances of a future commitment not to interfere with their Section 7 rights and no admission or even implicit acknowledgement of unlawful conduct by the Respondent in what they had done. Rather, for Cotto it was framed as a "mistake" involving reinterpretation of an outdated policy (rescinding "due to the interpretation of a prior policy"), and for Guzman the Respondent merely told her, "that the rules had changed, that it was fine as to what I was doing." This is insufficiently specific, insufficient as a disavowal, insufficient as an admission of wrongdoing. I reject the Respondent's repudiation defense.

e. Interrogation

The complaint alleges two incidents of interrogation (complaint paragraphs 5(e) and (f)), both during the same time period. Both incidents, as pled, involve an alleged interrogation by Chernock and Ramirez at the HR office. One, 5(e), involves interrogation about the activities of another employee. One, 5(f) involves only interrogation about the subject employee's union activities.

On brief (GC Br. at 31), the General Counsel alleges only that Cotto was unlawfully interrogated during her June 9 meeting with Chernock and Ramirez, when she was asked whether Guzman was distributing literature. As discussed above, I have found that during the meeting with Cotto, Chernock asked her about whether Guzman was distributing the papers that Ramirez saw (on video) Cotto handing to her. This fits the allegations in paragraph 5(e) (at least as to interrogating the employee about another employee's union activity).

It is well established that not every interrogation is unlawful under the Act. Whether the questioning of an employee constitutes an unlawful coercive interrogation must be considered under all the circumstances and there are no particular factors "to be mechanically applied in each case." *Rossmore House*, 269 NLRB 1176, 1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985); *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). While the Board has identified a number of factors that are "useful indicia" in determining whether the questioning of an employee constitutes an unlawful interrogation,[20] the Board has explained that "[i]n the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood*, supra at 940; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).[21]

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[20] *Westwood Health Care Center*, 330 NLRB at 939, quoting *Perdue Farms Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). These include the "Bourne factors," enunciated in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), and set forth in *Westwood*, supra at 939:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

[21] Of course, whether or not the questioned employee was actually intimidated is irrelevant. "It is well settled that the basic test for evaluating whether there has been a violation of Section 8(a)(1) is an objective test, i.e., whether the conduct in question would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise

I have no doubt that this questioning, brief as it was, was coercive and unlawful. An employee is called off the shop floor into the HR office and confronted by two top HR officials. In the midst of unlawfully disciplining her for union activity, they ask about whether another employee was also engaged in the same activity, apparently, and actually, for the purpose of taking action against the other employee. This is clearly an unlawful interrogation. The Respondent's defense is limited to the assertion that it did not happen. I have found otherwise.[22]

III. SEARCHING OF CLIPBOARDS, CONFISCATION OF CARDS; ENFORCEMENT OF SOLICITATION/DISTRIBUTION POLICY; THE DISCIPLINING OF FOX (COMPLAINT PARAGRAPHS 5(B), (C) AND (D) AND 6(B))

Facts

Many AP employees carry a clipboard with a closed metal container affixed to the top that is used to carry daily work materials. Typically this clipboard box holds work materials such as a knife, pens, and daily paperwork. This daily paperwork, called "meat sheets" and issued by AP, indicate the grinding and meat specifications for the day's work. The meat sheets are turned in at the end of the day.

Employee Fox testified that he and others usually keep the clipboard in their locker between shifts. Within the year, AP started issuing clipboards to new employees. Fox still uses the one he bought, before AP started providing them. It is similar to the ones purchased by AP but his older clipboard is rusted inside and out.

AP has developed Good Manufacturing Practices (GMPs), which are rules and standards designed to ensure food quality and sanitation standards on the workplace floor. The current GMP document was entered into evidence. Supervisor Bishop testified that rule 6.5 generally governed the items employees could have in their possession on the production floor. Rule 6.5 states:

> Spitting is forbidden inside or outside of the building. No food, drinks, use of tobacco products, medications including cough drops, toothpicks, candy, breath- strips, gum etc. are allowed in any designated production, warehouse, cooler, freezer, trash dock, attic, dock areas or in fork-lift/pallet jack, compressor, battery, boiler or engine rooms.

In addition, the testimony of employees and managers was largely in agreement that items such as chewing gum, eyelash or fingernail enhancers, and lotion are not permitted on the production floor, including in clipboards. However, based on employee testimony, certain items like check stubs or photographs, and occasionally other personal items are sometimes kept in the clipboards, whether or not in compliance with the GMPs prohibitions. Similarly, a rusted clipboard could be considered not to be in compliance with GMPs, but Fox's rusted clipboard was never raised as an issue by management.[23] Indeed, the consistent employee testimony is that prior to June 8, while supervisors may have done "QA" (quality assurance) audits to make sure the employees' knives matched the appropriate grinder, and checked tagout/lockout devices, both of which are kept in clipboards, supervisors had never before generally searched inside employee clipboards looking for papers and other contraband.[24]

Chernock testified that in a supervisors/management meeting she heard concerns that employees were passing out union authorization cards on the production floor. In response, Chernock, Aardema, and Plant Manager Sterwerf decided to conduct an audit on all grinders and machine operators, which would involve checking clipboards for items prohibited from being on the plant floor. Chernock was normally not involved

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of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*." *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001) (Board's emphasis). Accord, *Miller Electric Pump*, 334 NLRB 824, 825 (2001); *Joy Recovery Technology Corp.*, 320 NLRB 356, 356 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998).

[22] The General Counsel does not allege on brief that Guzman was interrogated in her meeting with Chernock and Ramirez. I will dismiss the second pled allegation of interrogation, complaint paragraph 5(f).

The General Counsel also contends (GC Br. at 31–32) that an interrogation violation should be found based on Guzman's testimony that the "plant manager," whom she identified as "Dwayne," asked her, essentially, who was behind the union drive. Dwayne Stanford, who was the operations manager (not the plant manager), testified and denied asking Guzman anything like this. Employer Diana Concepcion also testified that "Eric [Hayes] asked me if I was in agreement with the union" and another "manager" asked her "if a person or a girl was giving out the cards within the company and to let him know if somebody was giving out the cards." Stanford denied having this conversation with Concepcion. Hayes denied ever speaking to Concepcion about the Union. None of these allegations are set forth in the complaint, or were the subject of a motion to amend. Accordingly, I make no finding regarding them. The General Counsel contends that a violation should be found as to the first of these allegations and that, although not alleged, the issue was fully litigated. I do not agree. First of all, the complaint was amended several times before and during the hearing as to a variety of matters—but not this. I do not know of a reason that the matter could not have been raised during the hearing. Second, the allegation was not admitted to by the Respondent, or any of its witnesses, leaving the possibility that, had it been alleged as a violation, the Respondent might have undertaken a different or more vigorous defense. As noted, Stanford denied the allegation, but it is not even entirely clear that he is the alleged perpetrator. It could have been the then plant manager, or someone else. Given that it was unalleged and factually denied, the allegation is too uncertain, in my view, to find that it was fully and fairly litigated. See *Dalton School*, 364 NLRB No. 18, slip op. at 2 (2016) (interrogation not fully and fairly litigated where respondent not put on notice that the facts pertaining to the encounter would be used to prove a separate interrogation violation).

[23] Bishop testified that he did not notice rust on Fox's clipboard and if he had he would have had the clipboard replaced. The implication was that Fox's clipboard was not rusted. I note that neither side produced the clipboard for inspection at the hearing. I found Fox's demeanor highly credible and I credit his testimony as to the condition of the clipboard he worked with every day.

[24] Bishop agreed (based on leading questioning, see Tr. 668, 670) that the GMPs were enforced by "routine" and "regular" audits and by "essentially watching everybody on the floor." He claimed that he tries to do audits randomly, but also monthly looking for "[s]tuff that doesn't belong in the clipboard, toolboxes, cleanliness." I cannot credit this. Based on the more specific, uniform, and credited employee testimony, I find that clipboards were rarely if ever searched by supervisors prior to on or about June 8, 2015.

in a decision to conduct an audit of the clipboards. According to supervisor Bishop, at this meeting all first and second shift supervisors were directed to conduct a "clipboard audit."

On or about June 8, management performed a search of employee clipboards. Employee Diana Concepcion testified that supervisor Bishop approached her and asked to check her clipboard. After he did, he told her it was fine. He found pay stubs and some hand lotion and told her to put the stubs in her pocket "because somebody could steal my pay stubs." He did not confiscate the lotion or pay stubs.[25] Bishop then searched another clipboard that was unattended nearby that belonged to employee Vianey Guzman. Guzman was not present during this search.[26]

Machine Operator Kenneth Favors testified that his supervisor, Bob Stacy, approached Favors and asked to check his clipboard. Stacy was referring to a clipboard sitting on a metal stand near where Favors was working. However, Favors does not carry a clipboard and he told Stacy that it was not his clipboard. He asked Stacy why he wanted to look at it. Stacy told him, "Well, there's people who have stuff they shouldn't have." This testimony was unrebutted. Prior to this incident, Favors, who had worked at AP for more than 12 years, had never heard of supervisors checking clipboards.[27]

Fox was at work with his clipboard beside him on a table, when his supervisor Derrick Cox and another manager, whose name was unknown to Fox, approached him without notice and said, "Fox, I've got to check your clipboard." Cox opened the clipboard, found a red pen (which is prohibited, only blue and black are to be used). Cox took the pen, and returned the clipboard to Fox. He said, "Fox, you know you can't have this on the floor." Cox then left. There were union authorization cards in the clipboard box, but Cox did not notice or find (or remark upon) them.

About five minutes later, another supervisor, Daran Bishop, approached Fox and told Fox that he needed to check his clipboard. Fox told him that Cox had already checked it, and Fox walked away and went back to work, leaving his clipboard on the table. Soon thereafter, another machine operator (Aiden) who works with Fox told Fox that Bishop went into Fox's clipboard and removed union authorization cards from the clipboard box. Bishop left the area, heading away from production. Later, Bishop approached Fox and told Fox to come to the HR office with him. In his 9 years at AP, Fox had never before been sent to HR.[28]

Fox had been subject to quality audits in the past, based on the GMPs, where managers check the employees' knives to make sure they match the appropriate grinder, and check tagout/lockout devices. But this was the first time that Fox had ever seen supervisors searching inside of clipboards for violations, and searching through the papers in the clipboard.

Cox and Bishop reported to Ramirez that they had found union cards in Fox's clipboard. They gave her the confiscated cards. Fox was called to the HR office over the PA system.

When Fox arrived at the HR office, Ramirez and Chernock were there. Bishop had escorted Fox to the office, and then left. Fox was asked to close the door. Chernock and Ramirez referenced the authorization cards and Fox was then told by Chernock that AP had "a nonsoliciting nondistributing policy." Fox said he understood that, but that he had not distributed the cards. Ramirez challenged him, "So the cards would just sit in your box." Fox said, "yes." Ramirez gave Fox a "verbal warning," telling him that "if it was to happen again . . . you could possibly be suspended or terminated." In this meeting, neither Chernock nor Ramirez referenced "GMPs" that regulated what items could be brought to the production floor by employees. The meeting lasted approximately five minutes.[29]

Analysis

The General Counsel alleges that the Respondent's clipboard search and confiscation of union cards from the clipboards constituted unlawful surveillance of employees' protected and concerted activities, in violation of Section 8(a)(1). The General Counsel further alleges that the disciplining of employee Fox, who was found to have union cards in his clipboard on the work floor, violated Section 8(a)(3) of the Act.

The evidence is clear that the Respondent's (on or about) June 8 "clipboard audit" was a search for union authorization cards. Those found were confiscated. This effort to search for the possessors of union authorization cards is easily found to be a straightforward case of unlawful surveillance of employees' union activity. The search would reasonably interfere with employees' willingness to engage in concerted and protected activity. *Hospital of the Good Samaritan*, 315 NLRB 794, 810 (1994); *Micro Metl Corp.*, 257 NLRB 274, 275–276 (1981).

The Respondent's defense is that it was enforcing a neutral rule that, for safety and sanitation reasons related to production, prohibits any nonwork or "personal" items on the production floor. For purposes of my analysis only, I will assume, arguendo, that such a rule could be consistent with the Act in this

[25] Bishop did not recall whether or not he searched Diana Concepcion, and did not recall finding any lotion. I credit Concepcion's more specific recollection.

[26] Bishop testified generally that during this clipboard audit he did not look in any clipboards when the owner was not present. However, he testified that he had done so in past audits. Given the more specific testimony on this issue, I do not credit Bishop's denial.

[27] USDA inspectors at the plant sometimes check toolboxes to make sure tools are clean, but Favors testified with certainty that supervisors had not previously checked toolboxes.

[28] Bishop testified that Fox was present when Bishop checked his clipboard and put his arm over it to keep it closed. Bishop did the audit anyway. I do not see the dispute between Fox's version of events and Bishop's as material. I do not resolve the disparate accounts. All agree that union authorization cards were found in Fox's clipboard and taken to Ramirez.

[29] At trial, Ramirez testified that though her sworn pretrial affidavit characterized Fox's discipline as a violation of the solicitation/distribution clause, in fact, it was a GMP violation, and that her description of it as a solicitation violation was "a mistake." However, my finding, based on Fox's credited testimony, and buttressed by affidavit impeachment evidence, is that in the disciplinary meeting Ramirez told Fox he was being verbally warned for violating the solicitation/distribution policy and that the GMPs were not mentioned. In addition, I consider Ramirez's pretrial statement to constitute an admission. See, F.R.E. 801(d)(2).

situation,[30] and that there was such a rule.[31]

Even granting these (undue) assumptions, in this case the violation is apparent based on the credited testimony. The search, admittedly triggered by reports that union authorization cards were being solicited on the floor, was unprecedented and directed toward finding and confiscating union authorization cards. Fox, in particular, was a suspect, his clipboard was searched twice. According to the consistent and credited employee testimony, there had never been such clipboard searches in the past, for any other contraband, with supervisors delving into clipboards even in the absence of the employee who maintained the clipboard. Second, during this search alleged "contraband" that was found and unrelated to union activity was ignored or did not provoke discipline. (Fox's red pen, and rust on clipboard; Concepcion's pay stubs and hand lotion.) Moreover, notwithstanding the Respondent's efforts at trial to link the whole matter to GMPs, the issue on June 8, as explained to Fox, was Fox's violation of the Respondent's (unlawfully overbroad) solicitation/distribution policy. GMPs, sanitation and not having personal items on the floor—i.e., the entirety of the Respondent's defense here—went unmentioned in the disciplinary meeting.[32]

Thus, the clipboard search was not a neutral application of safety and sanitation rules, but an unlawful search to uncover who was in possession of union authorization cards.

When the union cards were found in Fox's possession, Fox was disciplined. No one else was disciplined for possession of any other allegedly "unauthorized" items. As the facts show, Fox was disciplined for the protected activity of possessing union cards, not for violating GMPs and, not even—really—for violating the unlawful distribution/solicitation policy. Fox's protest to Ramirez that he had not been distributing or soliciting, but merely in possession of the cards, went unheeded. As with Cotto and Guzman's discipline, described above, and which occurred the next day, the Respondent represented to Fox that it was enforcing the solicitation policy against him. This was an unlawful enforcement of an overbroad rule, and a violation of Section 8(a)(1). But it was also a pretext for the Respondent's real motive—the discriminatory disciplining of Fox for possessing union authorization cards. Thus, the evidence shows that the clipboard search, Fox's discipline, and the Cotto/Guzman incident, were efforts to stamp out union activity in the facility and create a climate in which employees risked discipline for involvement in union activity inside the building.[33]

In terms of *Wright Line*, Fox engaged in protected and concerted activity and was discovered to have done so by the Respondent, when it found the authorization cards in his possession. The Respondent's animus is not in doubt. The Respondent has not shown, in any way, much less carried its burden, of demonstrating that Fox would have been disciplined in the absence of his protected union activity. *Wright Line.* Fox's discipline, then, was a clear violation of Section 8(a)(3).[34]

IV. INTERNET SURVEILLANCE; THE DEMAND FOR DOCUMENTATION OF IDENTITY; THE SUSPENSION OF DIANA CONCEPCION (COMPLAINT PARAGRAPHS 5(G), (H), AND (I), AND 6(D))

Facts

Diana Concepcion is a line coordinator at AP. She has worked at the facility since October 2008. The record demonstrates that she was an early, active and open supporter of the union campaign.[35] On Sunday June 14, 2015, Concepcion,

[30] I have my doubts. While I agree that an employer's need for a clean and sterile work environment could overcome the presumptive right to solicit union authorizations in work areas (during nonworking time), it is clear that the "meat sheets" paperwork carried daily by employees onto the shop floor and stored in the clipboards carry no more assurance of cleanliness or sterility, or any other feature of safe practice, than union authorization cards. In this regard, it is to be remembered that the Act provides an affirmative right to engage in union activity. A content-neutral ban on personal items is presumptively invalid to the extent it covers (or is reasonably understood to cover) union materials.

[31] I note that the assumption is for purposes of argument only. In fact, it is unwarranted. For instance, Fox testified that he has never been told that he could not keep personal papers in his clipboard, and he regularly keeps check stubs in his clipboard. I think his colloquy with counsel on cross examination (Tr. 166–167) vividly demonstrated his sincere and justifiable uncertainty about the scope and exactingness of the rules on what could and could not be brought onto the production floor. Moreover, his acknowledgement that "now"—after being disciplined—he understands that having authorization cards in his clipboard violated the company's rules, but "then" he did not know it, is not exactly bolstering to the Respondent's position. But even more to the point, the rule that Supervisor Bishop testified governed the items employees could have in their possession on the production floor—GMP Rule 6.5—does not, by any stretch, prohibit personal papers from the production floor. See Rule 6.5, set out above.

[32] Moreover, as noted by the General Counsel (GC Br. at 30–31), Fox received a verbal warning, which, under the Respondent's progressive discipline system (GC Exh. 17) is an initial penalty for a violation of the unauthorized solicitation/distribution rules. He did not receive a written reprimand, which is the initial penalty for failure to follow GMPs.

[33] Notably, for two of the three employees (Fox, Guzman, and Cotto) who were allegedly disciplined for violating the solicitation/distribution policy, AP had no evidence that they had solicited or distributed anything at all. It was their union activity that provoked the discipline.

[34] In addition, as with Cotto and Guzman, AP's assertion to Fox that he was being disciplined for violating the 2001 solicitation/distribution policy constitutes unlawful enforcement of an overly broad solicitation/distribution policy in violation of Section 8(a)(1), without regard to motive.

[35] See, e.g., Tr. 206–209 (Concepcion passed out flyers in front of facility on June 1 while supervisors watched from the facility hallway); Tr. 264–265 (Concepcion handed out flyers in plain view and was observed by management including Ramirez). I note that on brief while the Respondent vigorously defends the allegations relating to Concepcion on a number of grounds, it does not claim that it was unaware that Concepcion was a supporter of the Union at the time of the events involving her. However, during the hearing, Ramirez denied knowing before June 16 that Concepcion was a union supporter. I do not believe and I discredit that. In addition to the above cited evidence, and in addition to the fact that the Respondent received reports on union activities, including reports of union meetings from employees and supervisors, I note, as discussed further below, that Ramirez described Concepcion as "a union supporter" in a June 16 email to Aardema identifying Concepcion to Aardema. Ramirez wrote:

along with Sonja Guzman, spoke about the union campaign on a show on a local Spanish-language radio station. The union conducts the radio show monthly about the AP union campaign.

Early Tuesday morning June 16 (at 2:31 am), production supervisor Don Lewis emailed Ramirez providing the following information related to the union campaign:

> Hi,
>
> A second shift QA auditor who has sometimes given me union updates said that there is a Spanish language radio station that broadcasted a question and answer session about the union activity at our plant. The station is 97.7 La Mega. She said that it was Son[j]a Guzman and another lady named Diana being interviewed by the DJ and maybe a union representative. She didn't get all of the interview but thought that it may be available on the station's website.

Lewis' note triggered a swift reaction among management that morning. Although it is unclear from the record how he received it, at 8:01 am Aardema sent a note to Lewis, copied to Ramirez, Ernie Hayes, Sterwerf, Stanford and AP's retained union consultant Hawkins, thanking Lewis and mentioning that he was "sharing this with John [Hawkins] so we can discuss this morning."

Ramirez is scheduled to arrive at work by 8 a.m. She plunged into follow up on Lewis' email as soon as she arrived at work. She went to La Mega radio's Internet site to see if she could listen to the union radio show. She didn't find it, but did click to a link that brought up the radio station's Facebook page. On that page, Ramirez saw a posting by the radio station, dated June 14, at 4:50 pm, that said, "basically" in Spanish "Up next, the hour for the workers talking about the campaign at Pierre Foods with Local 75." Ramirez printed a screen shot of this page "moments after" clicking on it. The screen shot (R. Exh. 5) indicates it is 8:16 am. The post about the Advance Pierre campaign had one Facebook "like" under it, from Yazzmin Trujillo. She clicked on the link for Yazzmin Trujillo, which brought her to Trujillo's Facebook page.

The cover photo on Trujillo's Facebook page[36] was of a smiling child and the profile backdrop appeared to be a child's drawing. That same drawing appears as the latest post, dated June 8, with a note, in Spanish, that translates approximately as ""My son supposedly drew a picture of me." Ramirez then searched through the photos tab on Trujillo's Facebook page. Ramirez testified that she did this "[b]cause I was curious to see who Yazzmin Trujillo was and I didn't recognize the name, so I was just curious."

This brought up a photograph (R. Exh. 5(b)) that Ramirez believed to be of AP employee Diana Concepcion. According to Ramirez, her reaction "at this point" was "why is Diana Concepcion's picture on this page with the name Yazzmin Trujillo[?]" She then proceeded to look through—scour, I think it is fair to say—Trujillo's Facebook page, searching "Friends," reading comments, and generally looking through the profile. She even looked at the Facebook pages and photos of two of Trujillo's friends who shared the last name Trujillo. Ramirez spent a significant amount of time that morning performing this search, returning to it again the "the following day because I was trying to just see how if there were friends on there that shared the last name Concepcion or if there were only friends with the name Trujillo." Ramirez took several screenshots of what she found. She also "pulled" Concepcion's benefit file and reviewed it: "I want to see if she had listed herself as married, and maybe that would explain to me why her last name or the name Trujillo would be the name of the friends" on this Facebook page. Concepcion was listed as single in her benefits file. However, her file listed as her beneficiary an individual with the last name Trujillo.

Based on the foregoing Ramirez testified that "I felt that there was a strong possibility that she may not be who she presented herself to be."[37]

While this conclusion was based on a review that continued into the following day, Ramirez did not wait to bring these matters to the attention of upper management. We know from the screenshot that by 8:16 a.m. Ramirez was on Trujillo's Facebook page. In other words, minutes after arriving at work, she received Lewis' email, went to the radio station's internet page, and entered Trujillo's Facebook page.

Two minutes later, at 8:18 am, Ramirez wrote to Aardema, asking: "Are we meeting this morning? I have some news to share." At 11:21 a.m., Aardema responded telling Ramirez, "we don't have a call this morning . . . could you let me know the information you wanted to share?" She responded to Aardema at 11:36:

> This morning I went to La Mega's website to see if they had any archives, so I could hear what the interview was about. I didn't find any archives on their website, so I went to their facebook page and found a message from 4:50pm on Sunday

> "[She is] Diana Concepcion. She is on 1st shift here at AP and is a union supporter."

This email was sent minutes after she learned that an employee named "Diana" had appeared on a pro-union Spanish speaking radio show (there were only two Spanish-speaking Dianas in the facility), and minutes after finding a Facebook posting "liking" the show from a Facebook posting with what she believed to be Concepcion's picture. The casual use of the word "union supporter" to identify and describe Concepcion to Aardema belies the claim that Concepcion's union support was brand new information for Ramirez. Concepcion's union support was no more new news to Ramirez than was the fact that she worked on first shift.

[36] With a reported 1.59 billion monthly active users worldwide and over 150 million members in the U.S., I am going to assume the reader's familiarity with the Facebook-based terms used in this decision. (https://en.wikipedia.org/wiki/Facebook)

[37] According to the Respondent's brief (R. Br. at 34–35), the sum basis for Ramirez's belief was that it

> was obvious to Ramirez [ ] that Concepcion posted pictures of herself on Facebook under the name Yazzmin Trujillo, that Concepcion referred to other Trujillos on Facebook as her "papi" ("dad"), "hermanito" ("brother") and "Tia" ("aunt"), and that Concepcion's benefit file indicated that her beneficiary is a Trujillo, who also happens to live with her. (Tr. 795:11–15; 796:5–8; 797:16–21; 798:20–25; 799:10–25). These circumstances created a reasonable suspicion in Ramirez's mind that Concepcion was very likely Yazzmin Trujillo.

> that they were about to talk about the union campaign at Pierre Foods. On that post their was 1 "like[,]"[ ] so I clicked on the name (Yazzmin Trujillo) and the picture shows who I know as Diana Concepcion. She is on 1st shift here at AP and is a union supporter.[38]
>
> I am concerned that she may have provided false documents when she began her employment with us. Thanks.

A few minutes later, at 11:42 a.m., Aardema responded, stating:

> Thanks for letting me know and I understand the concern. Do we have any history with this type of situation? While she may be a supporter of the union campaign, we need to be sure that we're approaching this regardless of her views in that regard and in the same manner as we would otherwise. Thanks and let me know.

Ramirez responded at 11:56 a.m.:

> We had the same type of situation come up a couple of years ago. In those cases we called the employee in to HR, expressed our concern, then gave the employee a few days to bring us additional documentation to show us that they are the person they were hired as. I recall two cases and I believe we ended up terming both because they could not provide the documentation. Thanks.

Ramirez' reference to "the same type of situation" arising in recent years was to two employees, in late 2012 and early 2013, as to whom a Facebook page with a name different than the photo of the employees was found. The circumstances surrounding how Ramirez came to find this information on the two employees is not part of the record. Ramirez demanded additional documentation of their identity, documentation different than the employees had provided when hired. When they did not provide it, they were terminated for "falsification." However, one of the employees subsequently provided additional documentation and was rehired, and continues to work for AP.

Based on the Facebook investigation, Ramirez, in consultation with Aardema, decided to require additional evidence of identification from Concepcion.

The next day, on June 17, Ramirez conducted a meeting with Diana Concepcion. This meeting was also attended by then Plant Manager Ernie Hayes. At this meeting, Ramirez asked Concepcion if she had gone to the radio show and Concepcion told them yes. Ramirez told Concepcion that she had been looking on the Internet to see if she could find the radio station broadcast, and "I located a Facebook page and walked her through the entire events of how I found this Facebook page for Yazzmin Trujillo." Ramirez told Concepcion there were concerns about her identity. Concepcion told Ramirez that she did not know what Ramirez was talking about and that she did not have a Facebook page. Ramirez told Concepcion that they were going to investigate and would let Concepcion know what was going to happen.

After the meeting, Ramirez called Concepcion back about five minutes later and told Concepcion that "we were going to need to request documents from her to prove her identity." Ramirez and Hayes then provided Concepcion with a memo, dated June 19, that Ramirez received pre-written from Aardema. The memo was directed to Diana Concepcion from Ramirez, with the subject line "Request – Additional Verification of Identity." The memo stated:

> AdvancePierre Foods is committed to having a lawful workforce, and federal law prohibits us from employing individuals that we know are unauthorized. AP also has a policy under which it may terminate the employment of employees who provide false information or documentation to the Company—whether the falsification is discovered at the time it is made or later.
>
> When a situation comes to our attention resulting in a reasonable concern suggesting an individual may not be who he/she claimed to be for employment purposes, it is AP's practice to request additional evidence to prove that the documentation provided at the time the I-9 was completed was valid. In line with this policy, and how prior similar situations have been handled, we asked you during our meeting on June 17th to provide us with additional evidence that the I-9 documents provided at the time of your employment were indeed valid and support that you are Diana Concepcion. This evidence cannot be the same type of evidence you previously provided for your I-9 (State ID card /Driver's License or Social Security Card). Instead, it should be other official documentation that supports that you are Diana Concepcion, such as an unexpired passport, birth certificate, military ID, etc. (see attached example list of acceptable documents). Please provide this additional information to me by June 29, 2015. We will review that information and let you know if there are still any questions.
>
> Thanks for your help in providing this information.

A second page provided to Concepcion at the meeting contained a list of acceptable documents to prove identity. (This page was created by the Federal government for employer and employees' use in completing Form I-9 identification and employment authorization requirements). Ramirez gave Concepcion eight business days to provide the information, a matter that had been decided upon by Aardema who kept in close contact with Ramirez on this situation. The meeting ended.

A couple of hours later Concepcion returned to Ramirez's office accompanied by co-workers Vianey Guzman and Carmen Cotto. Ramirez brought Ernie Hayes in as a witness.

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[38] Ramirez suggested in her testimony that this reference to Concepcion as a union supporter was based solely on the fact that her Facebook sleuthing had led her to believe that the person who "liked" the union radio program was Diana Concepcion and that, therefore, this must be the Diana identified by Lewis as the AP employee on the radio show. I do not believe that. As noted, above, I discredit the suggestion that this was the first Ramirez learned or came to believe that Concepcion was a union supporter. Indeed, given Ramirez's professed in-depth knowledge of the AP workforce, given that there were only two Spanish-speaking Dianas in that workforce, given the record evidence of Concepcion's open union support including her past leafleting in view of management, and specifically, in front of Ramirez, I conclude that when Ramirez read Lewis' email she knew then it was more likely than not that the Diana speaking for the Union on the Spanish-language radio show was Diana Concepcion.

With mostly Ramirez, Cotto, and Concepcion speaking, they discussed the Facebook issue. Cotto and Guzman said that many people have Facebook pages with names different than their own, and Guzman used herself as an example saying she used her single name for employment but her married name on Facebook. The employees told Ramirez it was illegal to re-"E-Verify" an employee. Ramirez said she was not re-"E-Verifying" Concepcion, but rather "confirming that the person who was sitting in front of me was Diana Concepcion."[39]

Concepcion provided the following letter to Chernock and Ramirez, dated June 26, 2015:

> My employer, AdvancePierre Foods, has instructed me to provide additional documents, other than the ones I provided when I was; hired, to show that my original I-9 documents were valid. I believe that this request is illegal, discriminatory, and retaliatory.
>
> Under the rules for E- Verify, companies may not verify or re-verify current employees. The Company has no legitimate reason and has provided no proof for why it feels it needs additional documentation from me. In addition, companies are not allowed to specify which documents an employee may use for verification. By telling me that I cannot provide certain documents, Pierre is acting unlawfully. Companies may also not target groups of employees based on such characteristics as national origin or union activity. I believe that the request by Pierre is discriminatory and nothing more than an attempt to bully and intimidate me and my co-workers so that we will not exercise our right to form a union.
>
> In order to avoid being disciplined or terminated for insubordination, however, I am providing a birth certificate, under protest. I trust this will end the inquiry and no further action will be taken against me.

Attached to this, and also provided to Ramirez, was a Puerto Rican birth certificate for Diana Concepcion. However, the birth certificate indicated that it had been issued December 17, 2003. Ramirez told Concepcion that she could not accept a Puerto Rican birth certificate issued prior to July 1, 2010.

Ramirez offered to give Concepcion more time to obtain a valid birth certificate, telling her that "if she chose to pursue acquiring a new birth certificate from Puerto Rico that the company would help pay for expedited shipping, and that if she needed time off work in order to obtain it, that we would give her that time, and that it would be paid, or that she could return to work, either which she chose." Concepcion told Ramirez she would obtain the birth certificate but that she was relying on the Union's help, and that she would return to work the next day. The next day, June 30, Ramirez met with Concepcion and provided a letter to Concepcion (in Spanish and English), from Chernock, and dated June 30, 2015, stating

> On June 29, 2015, you provided a copy of a birth certificate from Puerto Rico in response to our request to provide additional confirmation of your identity. Unfortunately, on July 10, 2010, Puerto Rico declared that all birth certificates issued prior to that date would be invalid since they had been used in the past to illegally obtain U.S. passports, Social Security benefits, and other federal services. The Certificate you provided is dated December 17, 2003, and is therefore invalid.
>
> In our conversation on June 29th with Mandy Ramirez, you indicated that you do not have another acceptable form of identification. You also indicated your intention to pursue a valid birth certificate from Puerto. Rico. I want to provide you with a website that can be used for that purpose, which will take between 8-12 days to receive an updated certificate. That site is: https://serviciosenlinea.gobierno.pr/Salud/Servicios.aspx?goto=nacimiento. If you decide to use this website, please use the Express Service shipping which will speed up the process. The Company will gladly reimburse you the cost of that service if you use this specific site. If you choose to pursue a certificate through another source, please know that such certificate must be valid and received through a reliable source.
>
> I do want to clarify a few points of concern that were raised in your letter of Jun 26, 2015. Please be assured that we are not verifying or re-verifying your identity through E- Verify. We also informed you when we first met on this topic regarding the reasons why there was a reasonable concern regarding your identity. And, contrary to what you may have been told, there is a very specific list of acceptable documents (attached again for your reference) that establish identity or employment authorization on the federal government's I-9 form as required by law.
> More information can be found on these requirements online on this site:
> http: /www.uscis.gov./i-9-central/acceptable-documents
> As mentioned when we spoke, you will be paid for your work time on June 29th and there will be no discipline imposed for that day. We also provided you the option to return to work while you're pursuing your birth certificate, or to be on paid leave to provide you additional time to do so. You elected to return to work on June 30, 2015 and work during this period.
>
> In order to provide at least 12 business days for you to receive a valid birth certificate from Puerto Rico, please provide that documentation to us no later than Friday, July 17, 2015. Again, you may continue to work during this time.
>
> Please let me know if you have any questions.

As referenced above, AP supervisors and management passed along to upper management information it learned about the union campaign. By email dated the afternoon of June 30, Ernie Hayes sent a note to Aardema, copying Chernock, Ramirez, and Sterwerf, indicating that

> I heard from a supervisor that the situation with Diana Concepcion may have sparked the union cord again. He heard

[39] E-Verify is a Federal government internet-based program that compares the Form I-9 information submitted by new employees with data in U.S. government records. I note that Ramirez denied that she or AP was using the E-Verify system to check Concepcion's documentation or identity. Ramirez testified that she agreed that E-Verify was not to be used with regard to incumbent or current employees.

> from one of his sources that the union talk was dying down until this situation with Diana came about. In his sources words (who is not a union supporter) "Why don't they just leave these people alone and quit F-ing with them. Now this union stuff is starting again."

Approximately 20 employees signed a petition calling on AP to cease requesting re-verification of Concepcion and accusing AP of frightening her and intimidating employees from creating a union. The petition made a number of demands regarding ceasing the re-verification of Concepcion and other workplace demands. The petition stated that "We are prepared to take collective action if our demands are not met by July 16, 2015." In addition, a rally was held in the parking lot on July 16 by employees, at which time Concepcion delivered a letter to Ramirez that contended that AP's request for documentation was unlawful and unwarranted. Notwithstanding this, the letter stated

> In order to avoid being disciplined or terminated, however, I am attempting to comply with the Company's request and obtain the documentation it has requested but have not been able to do so yet. I am requesting at least an additional 90 days to obtain the information. Please let me know.

AP did not give Concepcion additional time. On July 17, the deadline set by AP, Concepcion called off work, leaving a voicemail that she was on strike for the day. (As discussed below, a number of employees called off as part of a one-day strike that day.)

Ramirez called Concepcion and after a few calls, reached her that day. Ramirez asked Concepcion "if she was . . . able to give us the document. She said she did not have it." Ramirez told Concepcion that "we are going to move towards suspension. Ramirez provided a July 17 letter to Concepcion that set forth the previous requests and deadlines for the additional documentation, the rejection of the Puerto Rican birth certificate, and the July 17 deadline. The letter then stated,

> We have consistently communicated to you that your December 17, 2003 Puerto Rican birth certificate is not a valid document for purposes of confirming your identity, and that you are obligated to provide us with some form of valid documentation to remain employed with the Company. We provided you the time and resources to take care of this issue by today.
>
> As of today, you have not provided us any documentation to confirm your identity, or even any information to suggest that you have attempted to begin the process of obtaining a new birth certificate. Accordingly, you have not fulfilled your obligation to provide the requested proof of your identity. For this reason, you are being suspended indefinitely without pay while the Company reviews this matter further. Your badge has been deactivated, and you are not authorized to be on Company property effective immediately.
>
> We will make a final determination on the status of your employment at some point in the near future. If you do obtain and provide proper documentation to validate your identity before a final decision on your employment status is made, the Company will appropriately consider such documentation if you supply it to us.

As of the time of the hearing in this matter, Concepcion remained suspended.

Analysis

a. Surveillance

The General Counsel alleges that Ramirez's Facebook searches in conjunction with the union radio show constituted unlawful surveillance in violation of Section 8(a)(1) of the Act.

Unlawful surveillance occurs when an employer's agent takes intentional action to observe or learn of employee union activity. *Astro Shapes, Inc.*, 317 NLRB 1132, 1133 (1995) (unlawful surveillance for supervisor to park in tavern parking lot where union meeting was scheduled because he was curious how many employees would show up); *Dadco Fashions*, 243 NLRB 1193, 1198-1199 (1979) (unlawful surveillance for supervisor purposely to drive by union's roadside park highway meeting "because she was curious"), enfd. 632 F.2d 493 (5th Cir. 1980). See in contrast, *Milum Textile Services*, 357 NLRB 2047, 2072 (2011) (no unlawful surveillance where supervisor "in the course of her normal routine" regularly ate lunch parked on street next to the facility where she observed employees engaging in prounion activities) and *Valmont Industries*, 328 NLRB 309, 318 (1999) (no violation where supervisor's presence at motel while union meeting was being conducted there was coincidental and unrelated to union meeting).

In this case, prompted by a supervisor's report that Sonja Guzman "and another lady named Diana" had appeared on a radio show devoted to "union activity at our plant," Ramirez seemingly dropped everything upon arriving at work the morning of June 16, to investigate this matter. She searched (unsuccessfully) for the archived union radio show and then went further and investigated who the person was who "liked" (i.e., supported) the union radio show. When Ramirez did this, she was searching for information on union supporters and activities. In this regard she intensively searched the Facebook page, photos, and friends of the union supporter identified as Yazzmin Trujillo, and determined that, in her view, Trujillo was "1st shift" "union supporter" Diana Concepcion.[40]

Although carried out with a more modern methods, this is no different than the "curious" supervisor who, upon hearing that there would be union activity at a roadside park or a local tavern, takes a ride over there to see what he or she could see. *Dadco Fashions*, 243 NLRB at 1198-1199; *Astro Shapes, Inc.*, 317 NLRB at 1133.

The Respondent argues that Ramirez merely consumed publicly available media, but that is beside the point. Just as it is not necessary for a supervisor to sneak into a private union meeting in order to unlawfully surveil employees, it was not necessary for Ramirez to enter unauthorized or break through password-protected websites in order to be engaged in unlawful surveillance. Rather, as with supervisors who unlawfully sur-

[40] Ramirez testified that she investigated Trujillo's Facebook page because she "was curious to see who Yazzmin Trujillo was." But she was curious precisely because this individual had expressed support (a "like") for a union-themed radio show about the AP plant and union drive. She wanted to know more about the union supporters.

veil by intentionally seeking out protected and concerted activity in the physical world to view, Ramirez violated the Act by seeking out information on the internet about the employees' union activity on the radio and then by investigating who liked it.

The Respondent also argues that Ramirez' "curiosity" is immune from sanction because she did not recognize the name Yazzmin Trujillo as an employee. This is a meritless argument. Indeed, the contention (R. Br. at 33) that "Ramirez's intent was to determine who Trujillo was and why a non-employee would be interacted in AP"—and not to determine if Trujillo supported the Union—strikes me as sophistry. Ramirez knew Trujillo supported the Union and its efforts at AP—that is precisely why she investigated Trujillo. She was looking for information about Trujillo and her connection to the union and other union supporters. In any event, Ramirez quickly formed the belief that she was viewing an employee's Facebook page, one she did not stumble upon but, rather, arrived at during an investigation of a person expressing support for the union radio show that was about the union drive at AP. This did not deter her search. She pressed on. I note that if a supervisor heads to a union meeting to investigate who is there, it is hardly lawful surveillance until the moment she spies an employee she knows. And the subsequent surveillance is not immune from condemnation once the supervisor spies someone she believes to be an employee. Ramirez's entire investigation—and particularly—her admitted effort to glean information about Trujillo and her connection to the AP workforce, constituted unlawful surveillance.[41]

Finally I note that any doubt about the reasonable likelihood of the surveillance to coerce employees is removed by the Respondent's disclosure to Concepcion of the surveillance in which Ramirez engaged. While "it has long been held that surveillance may be unlawful regardless of whether the employees knew of it" (*National Steel and Shipbuilding Co.*, 324 NLRB 499, 504 fn. 20 (1997) (citing, *NLRB v. Grower-Shipper Vegetable Ass'n*, 122 F.2d 368, 376 (9th Cir. 1941) and *Bethlehem Steel Co.*, 120 F.2d 641, 647 (D.C. Cir. 1941)); *Starbrite Furniture Corp.*, 226 NLRB 507, 510 (1976)), in this case Concepcion was told by the Respondent that it was the surveillance of the union radio show and the person who "liked" it that resulted in the further adverse action against her. The knowledge that the Employer engaged in this surveillance would, at a minimum, be reasonably likely to interfere with employee willingness to participate in union activities and express support for the union.

b. The demand for documentation of identity and the suspension of Diana Concepcion

Having found that Ramirez's investigation into the La Mega radio show and its Facebook supporter constituted unlawful surveillance, I now turn to the different issue of whether the Respondent's demands of Concepcion for further identification, and her suspension when she failed to provide it, constitute unlawful action.

The General Counsel argues (GC Br. at 36) that the demand for documentation and the suspension were unlawfully motivated retaliation for Concepcion's union activity. As discussed above, the Supreme Court-approved analysis in 8(a)(1) and (3) cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, (1983) (approving *Wright Line* analysis).

While I have applied *Wright Line* earlier in this decision, a more extended treatment of its rationale and operation are useful in analyzing these alleged violations.

The *Wright Line* test, while applicable to pretext cases in which the employer has no legitimate motive for the action taken against an employee, was chiefly adopted as a mode of analysis in the "dual motive situation where the legitimate interests of the parties most plainly conflict." Id. at 1083:

In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. [Id.].

In *Wright Line*, the Board adopted a mode of analysis for examining causality in dual motive cases under the Act based on the analysis used by the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*—a non-NLRA case—the Supreme Court considered a public school district's refusal to renew a teacher's contract. There were two reasons: one, a legitimate reason, involving the teacher's use of obscenity in the school cafeteria, but also, a second, illegitimate reason, involving constitutionally-protected conduct when the teacher conveyed school information to a local radio station. The lower court reasoned that since protected activity played a substantial part in the school board's decision, its refusal to renew the contract was unlawful. The Supreme Court reversed, ruling that "the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred." *Wright Line*, supra at 1086. The Supreme Court in *Mt. Healthy*, 429 U.S. at 285–286, reasoned that:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The diffi-

[41] The cases cited by the Respondent, which involve an employer's viewing of union activity openly conducted on its own property and observed incidental to normal operations or "legitimate proprietary prerogative[s]," are flatly inapposite to the circumstances presented here. See, e.g., *Chemtronics, Inc.*, 236 NLRB 178, 178 (1978) (no surveillance violation where employer (lawfully) interrupted meeting conducted on his parking lot to tell union officials to leave premises); *Hoschton Garment Co.*, 279 NLRB 565, 566–567 (1986) (no surveillance violation where employer attempted to eject trespassing union representatives from its property); *Harry M. Stevens Services*, 277 NLRB 276 (1985) (no unlawful surveillance where the employer's "standard manner of supervising its employees" working concessions at Houston Astrodome involved "mov[ing] throughout facility" and incidental to this a supervisor witnessed a card solicitation).

culty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.

With this background, the Board in *Wright Line* determined that in dual motive cases under the Act, the General Counsel carries his initial burden by persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action. *Wright Line*, supra at 1089. Under the *Wright Line* framework, as subsequently developed by the Board, the elements required in order for the General Counsel to satisfy its burden to show that an employee's protected activity was a motivating factor in an employer's adverse action, "are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016); *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014); enfd. 801 F.3d 767 (7th Cir. 2015).

Such showing proves a violation of the Act subject to the following affirmative defense: the employer, even if it fails to meet or neutralize the General Counsel's showing, can avoid the finding that it violated the Act by "demonstrat[ing] that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. As developed by the Board, for the employer to meet its *Wright Line* burden, it is not sufficient for the employer simply to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1184 (2006). Rather, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun Int'l*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) (approving *Wright Line* and rejecting employer's claim that its burden in making out an affirmative defense is met by demonstration of a legitimate basis for the adverse employment action).

If the employer fails to prove that the same action would have taken place in the absence of protected activity, then the General Counsel's initial showing that unlawful motive was a part of the reason for the adverse action proves the violation. In such cases, the Board will not weigh the relative quantity or force of the unlawful motive compared to the lawful motive: the violation is established if the employer fails to prove it would have taken the action in the absence of protected activity.[42]

Applying *Wright Line* to the issues at hand, AP's demand for documentation from and suspension of Concepcion, the General Counsel's prima facie case is easily met. Concepcion was an early, active, and open supporter of the union campaign, to the extent of appearing on the radio show that prompted Ramirez's surveillance. As I have found, the Respondent was aware that Concepcion was a union supporter. And in terms of *Wright Line* analysis, one must include in that the Respondent's suspicion—whether correct or not—that Diana Concepcion (and not Yazzmin Trujillo—had "liked" the La Mega Facebook posting about the union radio broadcast.[43]

Finally, the element of union animus on the part of the employer is established not only by the unlawful surveillance, but by the maintenance and enforcement of the unlawful solicitation/ distribution policy, the interrogation of Cotto, the disciplining of her and Guzman, as well as Fox, and the unlawful clipboard search.

I note that in evaluating the element of union animus, the Board holds that it is unnecessary for the General Counsel to make a "showing of a particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10; *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 ("we emphasize that such a showing is not required"). However, in this case, it is worth pointing out that each indicia of the Respondent's demonstrated animus is part of an overall response to information it received (or solicited) about the union drive. And specifically with regard to the investigation of Concepcion, this antiunion vigilance accounts for the ardor with which Ramirez plunged into the investigation of the union radio broadcast and then into the investigation of Yazzmin Trujillo's Facebook. By 8:18 a.m., just a few minutes after arriving at work, she wrote Aardema, "I have news to share." There is an enthusiasm that is hard to miss in her report to Aardema explaining how she got to Trujillo's Facebook page, and that "the picture shows who I know as Diana Concepcion," who "is on 1st shift here at AP and is a union supporter."

Thus, under *Wright Line*, the General Counsel has demonstrated that antiunion animus was a motivating factor in Concepcion's suspension and the demand for documentation, and he has proven a violation of the Act, subject to the Respondent's defense. The Respondent can avoid a finding that it violated the Act by (and only by) demonstrating by a preponderance of the evidence that the same action would have taken

[42] As the Board explained in *Wright Line*:

> in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

Wright Line, supra at 1089 fn. 14.

[43] It is well settled that adverse action motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity is violative of Section 8(a)(1) and/or (3) of the Act. *Salisbury Hotel*, 283 NLRB 685, 686 (1987); *Metropolitan Orthopedic Associates*, 237 NLRB 427, 429 (1978).

place even in the absence of the protected conduct. *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Willamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra.

The Respondent contends just that. The Respondent maintains that when it found the Facebook page, it took action to require identification and then to suspend Concepcion when she did not provide it, and that it would have taken these actions even in the absence of her union activity. But undeniably, Concepcion's "misconduct" warranting suspension was the failure to provide the requested documentation, a requirement that itself was the result of Ramirez' unlawful surveillance.

The problem with the Respondent's defense is that in the circumstances presented here, *Wright Line* undercuts the defense before it begins. Thus, the unavoidable difficulty with the Respondent's argument is that in the absence of its unlawful surveillance, by its own account it would not have taken any actions against Concepcion. *Wright Line* is very clear that once, as here, the General Counsel has proven that animus was a motivating factor in the adverse action, to avoid liability, the employer must "demonstrate that the same action would have taken place in the absence of the protected conduct." *Wright Line*, supra at 1089. In this case the Respondent's unlawful surveillance precludes such a showing. For in the absence of Concepcion and her coworkers' protected activity—had she not spoke out for the union on the radio show, and had she not (rightfully or wrongfully been suspected by AP of having) demonstrated support for the union broadcast by "liking" it on Facebook, AP would not—based on its own explanation—have taken any action against Concepcion. It would not have been demanding documentation, and it would not have suspended her for a failure to comply with that demand. As the Board explained in *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 2 (2003), about a discharge based on an unlawfully undertaken investigation of the employee:

> As the judge found, the General Counsel established that antiunion animus was a motivating factor in Petrichella's discharge. The burden then, shifted to the Respondent to prove that it would have discharged Petrichella even in the absence of his union activities. *Given the Respondent's unlawful motivation for investigating Petrichella, the Respondent has created its own barrier to satisfying its burden of proof.* [Emphasis added.]

Supershuttle of Orange County is instructive. In that case, the employer contended that it discharged an employee for misconduct (lying) occurring *during* an unlawfully motivated disciplinary investigation. The Board made clear that the unlawfully motivated impetus for the investigation (in which the alleged lying occurred) fatally undercut the Respondent's defense. 339 NLRB at 3. Here, Ramirez' failure to supply the demanded documentation provides the stated basis for her suspension. Yet, as in *Supershuttle*, this failure to comply with the management directives "did not exist independently of the unlawfully motivated investigation." As in *Supershuttle*, 339 NLRB at 3, in the instant case,

> there is a clear and direct connection between the employer's unlawful conduct and the reason for the discipline. . . . The common principle is that employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline. These cases cannot easily be reconciled with the notion that the existence of a potential reason for discharge will be sufficient to justify the actual discharge, regardless of the employer's own unlawful conduct and its causal connection to the discharge.

In considering this case, it is important to recognize that there was no demonstrated preexisting wrongdoing by Concepcion that prompted the demand for documentation or the suspension. Other than her protected activity, there was only an asserted suspicion of her identity, based on a Facebook page. She was not suspended for maintaining a Facebook page with another's name. She was suspended for failing to provide documentation requested as part of the investigation into her identity. Thus, this case bears no relationship to the line of cases, distinguished by *Supershuttle*, where an employer unlawfully denies an employee the right to union representation during an investigatory interview but the Board still permits the employee to be disciplined for the preexisting misconduct that prompted the interview, "because there is an insufficient connection between the procedural unfair labor practice committed and the substantive reason for the discipline." *Supershuttle*, supra at 3, citing to *Taracorp, Inc.*, 273 NLRB 221 (1984). To the contrary, this case is like the line of Board cases "holding that employee misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful." *Kidde, Inc.*, 294 NLRB 840, 840 fn. 3 (1989) (and cases cited therein). Here, while there was no misconduct per se by Concepcion, the point is that she was suspended—not for maintaining a Facebook page, not for providing false documentation, and not for any other misconduct on her part that preexisted the investigation into her status. Rather, she was suspended for not complying with directives to produce documentation during the investigation—that is the "misconduct" for which she was suspended, and both the demand for documentation and the suspension "did not exist independently of the unlawfully motivated investigation." *Supershuttle*, supra. Thus, as in *Supershuttle*, "the [suspension] was not based on [preexisting] misconduct *uncovered* during the investigation, but rather on misconduct triggered by and elicited during the investigation." Id. (bracketing added, emphasis in original].

I would add that the reliance on AP's unlawful actions—in this case surveillance of protected activity—to essentially bar AP from proving that its adverse actions against Concepcion would have been taken in the absence of protected activity is not a technicality, but rather goes to the heart of *Wright Line's* balancing test. As the Supreme Court explained in *Mt. Healthy*, the Court's test avoids a situation that

> could place an employee in a better position as a result of the exercise of [ ] protected conduct than he would have occupied had he done nothing. . . . *The . . . principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.*

Mt. Healthy, 429 U.S. at 285–286 (emphasis added).

Here, pursuant to the Employer's rationale for adverse action, due to AP's unlawful surveillance of protected activity, Concepcion has been placed in a worse position precisely because and only because of her and her coworkers' protected conduct (actual and suspected). To rearrange the *Mt. Healthy* articulation of the issue, but to the same point: there is no avoiding the conclusion that acceptance of the Employer's defense would lead directly to Concepcion being in "worse a position than if [s]he had not engaged in the [protected] conduct." Due to AP's unlawful surveillance, Concepcion is in "worse a position" "as a result of the exercise of protected conduct than [s]he would have occupied had [s]he done nothing."

Finally, it is worth pointing out that the policy implications for accepting the Employer's defense would be staggering and profound. For instance, with the same rationale, the Respondent could target all known union supporters for drug tests and then lawfully discharge any and all that showed results calling for discharge under an otherwise legitimate policy. Such a scheme would not pass muster under the Act. See *McClain of Georgia, Inc.*, 322 NLRB 367, 377 (1996) (discipline imposed as a result of positive drug results found after unlawful discriminatorily motivated change in drug policy is unlawful); enfd. 138 F.3d 1418 (11th Cir. 1998); see also *Kidde, Inc.*, 294 NLRB at 840 fn. 3, and cases cited therein.[44]

Thus, even assuming AP had some valid motives for requiring documentation from Concepcion, and suspending her when she failed to produce it, the Respondent cannot prove it would have acted on those valid motives in the absence of Concepcion and her coworkers' protected activity (and, in the case of the "like," the Employer's belief of Concepcion's protected activity). As in *Supershuttle of Orange County*, "Given the Respondent's unlawful motivation for investigating [the employees], the Respondent has created its own barrier to satisfying its burden of proof." 339 NLRB at 2. In this situation, the General Counsel's demonstrated prima facie proof of unlawful motive for the documentation and suspension proves the violation without regard to any weighing of good and bad motive. *Wright Line*, supra at 1089, fn. 14.[45]

V. ASSESSMENT OF ATTENDANCE POINT AGAINST JESSENIA MALDONADO (COMPLAINT PARAGRAPH 5 IN CASE 09–CA–162392)

Facts

AP maintains an attendance policy pursuant to which one point is assessed for each absence as long as the employee calls in the absence up to 30 minutes into their scheduled work shift. Being late to work or leaving early will result in assessment of ½ a point.

When an employee accumulates six points they receive a verbal warning. At eight points they receive a written warning. At ten points they receive a final warning. Beyond ten points is grounds for possible termination. Points accumulate on a rolling calendar year basis. In other words, an assessed point "falls off" one year after its assessment.

An employee reports that they will be absent by calling an 800 number designated for this purpose. The employee calls in and leaves a message with their name and supervisor, and states that they will not be in. The employee can ask at that time that the absence be attributed to PTO/vacation. This is the exclusive method for calling in absences that are not preapproved. These calls are made to a voice-recording system. There is not

[44] I note that *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007), review denied, 303 Fed. Appx. 899 (D.C. Cir. 2008), is not to the contrary. In that case, a Board majority found that employees disciplined for "uncontested misconduct . . . . warranting discipline," proven through use of a camera unilaterally installed in violation of Section 8(a)(5), could not be made whole (reinstated or provided backpay). The Board found that as a remedial matter, the employees' discipline was "for just cause" under Section 10(c) of the Act. Unlike the instant case, *Anheuser-Busch* merely presented a remedial question for an 8(a)(5) violation affecting employees who had engaged in proven misconduct warranting discipline. The only issue was the appropriate remedy for the underlying 8(a)(5) violation. Here, very unlike *Anheuser-Busch*, the issue at hand is not remedial. Rather the contention and the finding is that the discipline (and demand for documentation) independently constituted discriminatory animus-based violations of the Act. Moreover, even in terms of remedy, there simply is no proven misconduct (apart from a failure to produce documentation) by Concepcion—the Respondent's suspicion hardly amounts to "uncontested misconduct warranting discipline."

[45] The matter ends there, but for the sake of completeness I would add that the suggestion in the Respondent's brief (R. Br. at 35) that Ramirez's Facebook surveillance triggered "a legal obligation to confirm Concepcion's identity" is unsupported. Much of the claim of the "reasonableness"—by which the Respondent means a nondiscriminatory valid motive—for the Respondent's actions rests on a suggestion that by failing to investigate the matter, the Respondent risked liability under the Immigration Reform and Control Act of 1986 ("IRCA"). But this has not been demonstrated. The Respondent sums up the "evidence" against Concepcion (R. Br. at 34–35) as follows: (1) there was one or more pictures of (someone assumed to be) Concepcion on Trujillo's Facebook page, (2) Trujillo refers to others on her Facebook page who have the name Trujillo as relatives (e.g. brother, aunt, dad), and (3) Concepcion's AP benefits file lists a Trujillo as her beneficiary, sharing her home address. IRCA makes it unlawful to continue to employ an alien "knowing the alien is (or has become) an unauthorized alien with respect to such employment." 8 U.S.C. § 1324a(a)(2). See 8 CFR § 274a.1(l) ("The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition"). However, the Respondent's brief does not and cannot cite to any case remotely suggesting that a Facebook page or beneficiary's last name provides an employer with knowledge, actual or fairly inferred, that the employee is unauthorized for employment. This standard requires "positive information" that the employee is undocumented. See, *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554-555 (9th Cir. 1991) (constructive knowledge requires "positive information" and is "sparingly applied"). The point, of course, is not that it could not be the case that Concepcion is unauthorized. The point is that Ramirez's and AP's enthusiastic plunge into the issue was, at best, wholly discretionary, and not required by any authority. Ramirez testified that in two instances in 2012, Facebook discrepancies led her to undertake similar requests for documentation and execute adverse employment actions. However, the record contains no evidence of the circumstances in which the Facebook issue came to Ramirez's attention in those previous matters, the manner in which the search was carried out, or the import of what was found. It is, of course, Ramirez's motivation for *this* incident that is squarely at issue here, and whether *it* would have occurred in the absence of union activity. It would not have.

a live person who answers. AP has employees with the title "manufacturing coordinator" who are assigned to listen to the messages for each shift. (Although the evidence shows that in some cases a supervisor might listen to messages). There is one manufacturing coordinator for each shift. That employee calls into the 800 number and uses a passcode to listen to the voicemails left for that shift. The manufacturing coordinators write down the time of the calls, the name of the employee calling off or calling in late, their shift, and if they want to be paid PTO or vacation for the absence. The messages are deleted immediately once they are heard.

This written record is called the "call-in sheet." At the end of the third shift, the call-in sheet is provided to the "timekeeper" who keeps the attendance records for AP, and assigns occurrence points, vacation and PTO.

According to Ramirez, AP averages about 10-15 call-ins a day, but on a bad weather day that number can reach upwards of 50.

Employee Ni Phan is the manufacturing coordinator who listens to the answering machine for the second shift. Other employees perform this job for the first and third shift. Barbie T. Myer is the timekeeper.

Some time the week of July 13, 2015, Ramirez found "a stack" of "call-off/strike script[s]," in the women's locker room which had the following typed in English and Spanish:

> I am not reporting to work today to protest the Company's unfair labor practices. I will unconditionally return to work on my next scheduled shift.

Ramirez learned that this strike was being planned for Friday July 17. Anticipating this, and with AP having "done some research," and "learn[ing] that we shouldn't levy an occurrence point for folks calling in with this script," Ramirez asked the manufacturing coordinators "to put a star or an asterisk next to each name of any person who used this script when they called in on the 17th."

For the day of July 17th, the call-in sheet lists 27 employees who "won't be in" (WBI). Nine have an asterisk next to their name indicating that they told the manufacturing coordinator they were part of the strike. These employees with the asterisk by their name were not assessed an attendance point by the timekeeper. The remaining WBI employees were given an attendance point. The nine who were marked as calling in for the strike and who did not receive an attendance point included known union supporters such as Concepcion, Cotto, Sonja Guzman, and Vianey Guzman.

Second shift employee Jessenia Maldonado testified that she called in and left a message that she would be involved in the strike, using the language of the script. However, while the call-in sheet indicates that Maldonado called off work at 3:36 p.m., there is no asterisk by her name. Maldonado was assessed a point. Manufacturing Coordinator Ni Phan's initials indicate that she was the manufacturing coordinator who recorded the Maldonado absence

Maldonado, who has worked at AP since 2010, is currently employed by AP as a "cashier." Maldonado was active in the union campaign. For instance, she was involved in distributing union flyers in the AP parking lot to co-workers and her photograph was included in photos on some union flyers. Maldonado testified that she learned of the strike on July 16, and received a copy of the script from a union organizer. She could not remember the time she called, but it was after 1 p.m. Maldonado was scheduled to work at 4 p.m.[46] Maldonado testified that when she called she left her message by reading her script in Spanish. Maldonado testified that she called three times, which she stated, was typical for her.

As I ruled at trial (Tr. 1107–1108), while the call-in sheet, generally, is admissible as direct and non-hearsay evidence pursuant to F.R.E. 803(6) (record of a regularly conducted activity), the asterisks, devised as a one-time tool by AP, are not part of "regular practice of the activity" (F.R.E. 803(6)(C)) associated with maintaining the call-in sheets. We cannot attribute to the asterisks the reliability on which the 803(6) hearsay exception is premised. This was a one-time notation, which the maintenance coordinators were to utilize on this one particular day. See, Steven Goode & Olin Guy Wellborn III, Courtroom Handbook on Federal Evidence, Chapter 5, Evidence Rules with Authors' Commentary, Article VIII, Authors' Comments (4) (2016) ("The second element [of Rule 803(6)], routineness, goes to the heart of the theory of trustworthiness of business records. Reliability does not attach to a statement just because a person engaged in a business activity writes it down; it is essential to any claim of reliability that the statement be of a type that persons engaged in the activity record routinely").

This is particularly true with regard to Ni Phan, the coordinator who took and recorded information about Maldonado's message, as she does not speak Spanish, the language in which Maldonado's message was left. Ramirez testified that the procedure in such cases was for the coordinator to get a Spanish speaker on the shift, either management or an employee, to translate the message. However, Ramirez did not know and the record does not speak to who assisted Phan. Ni Phan did not testify, for reasons not explained in the record.

Thus, the state of the record is that Maldonado's testimony is disputed only by hearsay evidence in the form of the lack of an asterisk, omitted by an employee using a one-time, new marking procedure, who did not speak the language at issue, and who did not testify about what she heard or what procedure she used to mark the asterisks or even to learn what the Spanish message said. I note that Ni Phan did not mark *any* asterisks next to the four call-offs she recorded. This could mean nothing, of course. But it is also consistent with someone who did not understand or know that she was supposed to use asterisks. In the absence of Ni Phan's testimony, I credit Maldonado's undisputed testimony.[47]

Maldonado testified that the following week she went to Ramirez's office to ask how many points she had accumulated.

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[46] Ramirez indicated that Maldonado would have been scheduled to begin at 4:30 p.m. I do not resolve that immaterial dispute.

[47] Although, I do not credit her claim that she called in three times. It did not have the ring of truth, and it seems unlikely for her to do that, and unlikely that it would not be referenced in some way on the call-in sheet. In any event, while it strikes me as an overzealous effort to burnish the record by Maldonado, and while it is a factor weighing against her credibility, on balance I believe her undisputed testimony that she called in and left the strike message using the script.

When Ramirez told her seven, Maldonado said, "why seven? I only have six." Maldonado asked when her last point was received. Ramirez said July 17th. Maldonado asked again, "[t]he last point was given to me on July 17th?" Ramirez said yes. Maldonado did not mention the strike or protest, but said, "Okay. Thank you very much." Then she left.[48]

Analysis

The General Counsel alleges that the Respondent violated the Act by assessing Maldonado an attendance point for participation in the one-day strike on July 17.

The General Counsel argues (GC Br. at 46) and the Respondent (R. Br. at 38–40) does not dispute that the one-day "call-off" strike engaged in by some of the employees on July 17 was protected activity. Indeed, the Respondent anticipated the strike, and instructed its manufacturing coordinators to note those employees who called in to say they were striking and then instructed the timekeeper not to assess attendance points against such employees. According to the call-in sheets, nine of 27 employees who called saying they wouldn't be in that day had an asterisk next to their name, indicating that they had announced they were part of the strike. They were not assessed an attendance point by the Respondent.

As I have found, Maldonado also called in and announced to the employer that her absence from work was because she was participating in the strike. Given this, and although I am inclined to accept that the Respondent assessed Maldonado with an assessment point for no reason other than that an asterisk was not placed by her name on the call-in sheet, the violation of Section 8(a)(1) of the Act is complete.

Maldonado was engaged in protected and concerted activity when she called in, read the script, and joined in the strike. In this context, as the Board recognized in *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 303 (1990), enfd. without op. 956 F.2d 1167 (9th Cir. 1992), an employer's mistaken (albeit good faith) belief that an employee engaged in misconduct is not a defense to a finding that an employee was disciplined (in that case discharged) for engaging in protected activity. Notably, in *Ideal Dyeing*, the Board rejected the employer's argument that the discipline was lawful where there was no showing that the employer was aware that the employee was engaged in protected activity (Id.), citing the Supreme Court's observation that "[a] protected activity acquires a precarious status if innocent employees can be discharged for engaging in it, even though the employer acts in good faith." *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); see also, *Keco Industries*, 306 NLRB 15, 17 (1992) ("Where an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur").

In this case, Maldonado was disciplined (i.e., assessed an attendance point) on the false belief by the Respondent that she had called off for a non-protected and punishable reason for which a point could be assessed. But the Respondent's belief was inaccurate. And the fact that protected activity was occurring this day, and was being manifest through call-ins asserting it, was, indeed, known to the Respondent. Thus, Maldonado was engaged in the type of activity that the Respondent knew, on that day, was being utilized by some employees for protected and concerted activity. Under these circumstances, it must bear the cost of its mistake. For without regard to the Respondent's motive, to find otherwise would cause employees to reasonably fear that continued participation in union and protected and concerted activities would put them at risk of mistakenly being punished for this participation. *Ideal Dyeing*, supra. I find that the Respondent violated Section 8(a)(1), as alleged.[49]

VI. THE WAGE INCREASE AND INFORMING EMPLOYEES THAT WAGES ARE PERSONAL AND CONFIDENTIAL AND SHOULD NOT BE SHARED (COMPLAINT PARAGRAPHS 5(J) AND (L))

Facts

Susan Brunker is AP's direct of compensation, benefits, and HR. She has held this position since she started working for AP in June 2014. Her office is in AP's Blue Ash, Ohio office, which is approximately ten minutes away from AP's Cincinnati facility. Brunker has responsibility for the compensation and benefit programs and plans and HR information systems, for all of the AP locations, which include approximately 4000 employees.

Brunker testified that when she was hired in June 2014, there were several issues that needed to be addressed at AP. One of them was compensation. Wages were out of line with the market, as indicated by high turnover, particularly in the "protein" plants, and among those, particularly at the Enid, Oklahoma location. (The protein plants, which refers to the product mix, include a plant in Portland, four locations in Enid, Oklahoma, plus a distribution center, and the Cincinnati location.) Brunker's predecessor had told her that compensation had not been reviewed in many years for the protein plants.

To begin the wage restructuring process, Brunker worked with plant leadership and HR directors to become familiar with operations, the jobs, and market data. A plan was conceived to do a market study and when that was done, to compare the market to current pay grades. From there, Brunker planned to look at restructuring the pay program—AP had acquired many of the plants and they were all operating under their own historical pay practices. Brunker wanted to consolidate pay pro-

[48] Ramirez denied that this happened. She did not recall any conversation with Maldonado shortly after July 17, about getting a point. The dispute is not particularly material. There is no dispute that Maldonado was assessed a point. If I have to choose, I would credit Maldonado. I think she testified credibly, and the short amicable conversation would have been far more significant to her than to Ramirez. Maldonado did not argue with Ramirez or mention the strike. She testified that she "didn't want to argue" and figured it was "their word against ours." I find that to be believable conduct for an employee in her situation, given the circumstances. But it also might account for why Ramirez does not remember the encounter. From her end it was a brief, noncontentious, uneventful, middle-of-the workday question from an employee.

[49] Given the 8(a)(1) finding, it is unnecessary to decide whether, as alleged in the complaint, the discipline also violates Section 8(a)(3) of the Act, as it would not materially affect the remedy. *Ideal Dyeing*, 300 NLRB 303, 303 fn. 5; *Kingsbury, Inc.*, 355 NLRB 1195, 1195 (2010). I note, however, that on brief the General Counsel does not pursue an 8(a)(3) theory of violation.

grams across the entire company. Brunker was broadly discussing these plans and goals in teleconferences with corporate and other plant leadership in the summer and fall of 2014. However, other priorities meant that these wage plans were "backburnered."[50]

According to Brunker, the wage issue was returned to in "I would say February of 2015." Brunker's February 4, 2015 email to Chernock in Cincinnati, and to her counterpart for the Enid, Oklahoma plants, explained that with other matters nearing completion,

> I would like to fast track the evaluation of wages for the plants. I will guide the process but will count on you for the 'plant' perspective. Separately I will send you a meeting invite. In the meantime, below are my thoughts about the approach. If you have a moment, I would appreciate your ideas about how to approach.

The email went on to propose a timeline for work on the project that called for a final proposal to be submitted to Aardema and ultimately to the CEO of AP by March 2. However, that timeline did not prove realistic. Brunker testified that "we came to appreciate that the problem was more difficult than we had originally anticipated." The complicated job title system that had developed over the years made it difficult to fit titles with jobs and peg them to the relevant market data. Moreover, as a result of the 401(k) audit, Brunker continued to find it necessary to focus attention on centralizing benefits and solving life insurance overinsurance problems. As of May 17, Brunker was writing Aardema, Chernock, and Blanchard, and sending them an "analysis for the hourly compensation" that was "still a work in progress." Pursuant to this plan, the plant HR officials were to slot their plants' jobs into the proposed pay grades based on market data, and ensure that jobs matched and compare between plants how the jobs matched up. After that a cost impact analysis would be developed.

In an email two days later, May 19, Aardema referenced speaking with Mark Porter, identified by Brunker as "a high-ranking official in the company" to whom many of the plant managers report. As conveyed by Aardema, rather than having every plant slot their jobs into proposed pay grades, a "straw model" of pay grades and jobs would be developed with a smaller group that would then be a base model to be adapted for each plant. Aardema wrote that "[i]deally we can have a draft outline of all the above by the first week in June . . . and then be in a position to share it with the broader group for discussion." Brunker continued "working through the final analysis . . . from May, June, and July," making sure there was an "apples to apples" comparison between jobs at different plants so that "an appropriate market adjustment based on the market study" could be developed and finally the matter could be brought to all of the individual plants for meetings with plant leadership.

By mid-summer, Brunker testified that she was fending off "question[s] about why it was taking so long from the plant leadership because they were having difficulties running their operations, . . . with not having their wages in place." Those in leadership expressing concerns to Brunker included Aardema.

During this same time period, employees also had heard about the coming wage increase through the "rumor mill." Brunker explained that "[w]e had increased some of the starting wages for jobs in February as a stop gap until we could kind of finish the whole comprehensive project, and so the employees that had been with us that were above starting wages . . . had been told we were working on this; and so our employees, are asking, 'Well, what about us?' You know, 'where is our project that you keep telling us about.'"

In response to Aardema's concerns, on July 8, Brunker sent a long email to Aardema outlining the complexities involved with the restructuring, including "an un-manageable assortment of confusing and overlapping pay grades," the many years since the performance of the last analysis, and the continued independent management of pay systems for the companies acquired by AP in recent years. In her email, Brunker proposed that by September 1 "[a]ll jobs [would be] assigned to a pay grade based on market competiveness and internal equity." On July 10, Aardema reported this up the management chain, recognizing that "[w]hile not related to the union situation," an upcoming "communication on the new salary structure next week should provide a positive boost for those in the Cincinnati plant."

Brunker committed to this publicly in a July 15, 2015 memo directed to all employees in "Enid, Portland, and Cincinnati." In this memo, Brunker announced plans for a change in the wage structure that, effective August 30, would result in wage increases for many employees (and decreases for none). Brunker's memo stated:

> I want to take the opportunity to let you know about an extensive project we've been working on since late 2014 to evaluate the wage rates and pay programs for hourly associates in Enid, Portland, and Cincinnati. Since October of last year, I have been working with plant leadership to review the wage rates and pay practices for more than 2,000 associates and 450 job titles working in the protein plants and distribution center. This project was initiated as part of AP's strategy to align pay practices across all locations and ensure that our wages and benefits are competitive in our markets. AP is now ready to fulfill its commitment and will make a significant investment in hourly pay increases that will affect many of our hourly associates in these locations.
>
> In general, all of our positions are placed in wage ranges, or "grades ", that have a minimum and maximum hourly rate. Currently, these ranges and related pay processes are different in nearly every location, We have created a new APP wage structure that will apply to all protein locations and the DC. Every job has been reviewed and assigned to a grade within

[50] As Brunker explained, "there were quite a long list of things that needed to be addressed" when she joined AP. Staffing for her own department needed attention, and there were problems with data input and configuration generally for compensation. Brunker needed to hire a compensation and benefits analysis, and until that happened she was doing the work herself. Benefits work took precedence because benefits had to be arranged for open enrollment for 4000 employees in the October-January timeframe. There was a Department of Labor audit of the 401(k), as well as ongoing regular audits. The result was that the wage project got "backburnered."

this structure. The wage range for most associates will be changing as a result of this study.

What this means for you will depend on where your wage rate falls in your new grade today. If your current rate is below the minimum of your new grade; you will receive an increase so that your rate falls within the new range. Rates for many other associates will also be increased based on internal and external equity. Please note: If your rate is already above the maximum of the range, your wage rate will NOT be decreased. No associate will see a decrease in this current rate. Wage rate increases will be communicated through your local HR Manager on an individual basis. For those affected, increases will be effective on Monday [sic], August 30th and paid on paychecks dated September 11th. More information on this transition will be provided soon. We look forward to your support as we work through this transition.

A question and answer format sheet came with this, providing essentially similar information, although some of it adds to the foregoing. For the sake of completeness I reproduce the text of the question and answer sheet here:

Questions & Answers
New Hourly Pay Structure

The following questions and answers are being provided regarding t1PF's direction to change our wage structure for hourly associates in Enid, Portland, Cincinnati and the DC.

Why is AdvancePierre changing the hourly wage structure?
The structure is being changed to have a common approach to wages and pay processes across all locations in Enid, Portland, Cincinnati and the Distribution Center.

Will the new structure result in a wage increase for protein plant and DC hourly associates?
Many associates will receive an increase based on where they fall in their wage range, or "grade ". Here's an explanation:

- If an associate is being paid below the minimum rate of their new range; he/she would receive an. increase to the new minimum
- The rates for many other associates whose rate falls within the new range will be increased based on internal and external equity.
- If an associate is being paid at the maximum rate of their current range, and the maximum rate is increased in the new structure; the associate would be eligible for an increase on their next review date.

What other changes are under review with this new approach?
We will be working to have a consistent approach to shift differentials, weekend pay, the timing of when increases are paid, and other related considerations. These issues will be addressed separately and communicated at a later date,

Is it possible that my current wage rate could be less as a result of this new process?
No. There will be no decreases in wage rates as a result of this process.

When will this process be completed? How will the details be communicated?
Wage ranges and any associated increases will be effective on Monday, August 31st and paid on paychecks September 4th. Details will be communicated through individual letters and meetings at each location.

At the time this July 15 memo was distributed, the wage plan was not complete. Brunker testified that "at that point in time" "we were starting to do the cost analysis so we had some preliminary numbers that we were working with and they were finalizing the numbers." Brunker estimated "it was probably 80% done at that time."

On August 27, 2015, the following letter was sent to each employee. The text reproduced below is consistent with the template letter admitted into evidence. When sent to each employee, the individual employee's name, supervisor's name, current and new pay rate and percentage increase were inserted for each employee. The letter states:

August 27, 2015
Associate Name <Name>
Supervisor Name <Name>
Location <Location>

TO: <Associate Name>

FROM: Sue Brunker
Director, Compensation & Benefits

SUBJECT: **New Hourly Wage Structure**

In follow up to my letter to you in July, I want to share with you the results of the project started in late 2014 to evaluate the wage rates and pay programs for hourly associates in Enid, Portland, and Cincinnati. Together with plant and DC leadership, we have worked to align pay practices across all locations and ensure that our wage structure is competitive. We are pleased to announce that APE is making a significant investment in hourly pay increases for many of our associates, and that we've developed a consistent pay program across all locations.

With this new approach, wages for all associates will be reviewed as part of our merit process in February each year. We have also aligned pay grades across all APE locations This way, people performing similar functions are assigned to the same pay grade regardless of their location. In the situation where an associate's pay reaches the maximum rate of their grade, the annual merit review would be administered as a lump sum bonus in lieu of a merit increase.

As part of this new structure, certain associates are receiving a pay adjustment at this time. You are included in this group. Others who are recent hires, those at the maximum of their pay grade, or those who received recent pay adjustments will be eligible for a merit review in February 2016.

As a reminder, information about your pay is considered personal and confidential and should not be shared with other

associates. [Emphasis added.]

Here's what this means for you:

Your current base pay rate:	<$ >
New base pay rate:	<$ >
% increase:	<x.x %>
Effective date of new rate:	August 30, 2015
Pay date of new rate:	September 11, 2015

Please contact your HR Representative if you have any questions.

Almost all employees at the Cincinnati plant—approximately 588 of 596 received a wage increase under the pay increase announced August 27. Although there are no specifics in the record, Brunker testified that more money was paid in wage increases at the Enid, Oklahoma facilities than in Cincinnati as part of the wage plan. Because they were already paid above market, there were few wage increases made at the Portland plant.

Analysis

a. The wage increase

The General Counsel alleges that Brunker's August 30 announcement of the implementation of the wage increase violated Section 8(a)(3) of the Act. It further alleges that Brunker's July 15 letter announcing an upcoming wage increase violated Section 8(a)(1) of the Act.

The Supreme Court has held that the Act, "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of infringing upon their freedom of choice for or against unionization." *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964). Where such conduct is asserted to have violated Section 8(a)(3), the Board uses its *Wright Line* dual motive analysis to assess the evidence. *Clock Electric*, 338 NLRB 806 (2003).

Whether considered as an 8(a)(1) or 8(a)(3) violation, there is an assessment of the employer's motive. In *NLRB v. Exchange Parts*, the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. "Similarly, an employer cannot time the announcement of the benefit in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness." *Mercy Hospital Mercy Southwest*, 338 NLRB 545 (2002). "The lawfulness of an employer's conferral of benefits during a union organizing campaign depends upon its motive." *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). "The Board infers improper motive and interference with employees' Sec. 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason." Id.; *ManorCare Health Service-Easton*, 356 NLRB 202, 222 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011). Notably, the rule set out in *Exchange Parts* is also applicable to promises or conferral of benefits during an organizational campaign but before a representation petition has been filed. *Hampton Inn NY–JFK Airport*, 348 NLRB 16, 17 (2006).

In this case, AP clearly knew of the union organizing campaign when it formally announced, and then later implemented its wage increase. Given this, in terms of the 8(a)(3) implementation allegation, pursuant to *Wright Line*, there was union activity, employer knowledge, and, of course, the animus found in other parts of this decision. Thus, the burden is on the Respondent to show that it would have implemented the wage increase even in the absence of the union activity. In terms of the 8(a)(1) announcement allegation, the Board's analysis places the burden on the Respondent to show a legitimate business reason for promising the wage increases that overcomes the inference of improper motive and interference with Section 7 rights. *Vista Del Sol Healthcare*, supra.

In both cases, I believe that AP has made that showing. Brunker's testimony, corroborated by at least some documentation, demonstrates that the creation of a new pay and/or job structure at the protein plants was initiated soon after Brunker was hired in June 2014. However, this effort was "backburnered" for other work concerns. Brunker's testimony, corroborated by her February 4, 2015 email to Chernock and her counterpart in the Enid, Oklahoma facility, demonstrates that as of that date—months before any hint of a union campaign existed—Brunker internally announced plans "to fast track the evaluation of wages for the plants." Thus, the goal of reevaluating wages at the "protein plants" (not just in Cincinnati) was reactivated. At that point her goal was to submit a final proposal by March 2, again well before there was any hint of a union drive.

This timeline was not met, but that does not undercut the evidence that management desired, sooner rather than later, and before they knew of, and even before there was a union drive, to realign compensation, not only at Cincinnati but at the other AP protein plants. The record shows a steady effort to work on the matter through the spring and summer of 2015. This was a multiplant plan that was envisioned, designed, and implemented. The scope of the wage reevaluation plan bolsters its business legitimacy and cuts against the inference that the wage increase was for other than legitimate business reasons.[51]

Having said that, the record is also clear that by July, Brunker was receiving some pressure as to why it was taking so long to design and implement the wage increase. In part this pressure was from employees who had heard rumors of a coming wage increase and had seen some of the starting wages rise in February, as a stopgap measure that occurred, again, obviously,

[51] The General Counsel contends that while most Cincinnati employees received the wage increase, "only a fraction of employees throughout Respondent's several facilities received a raise at the end of August." There is no record support for the latter proposition, at least if by "fraction" the General Counsel is suggesting "few." Brunker's unchallenged testimony was that the wage increases were implemented across all the "protein" locations on August 30: Enid, Oklahoma, Portland, Oregon, and Cincinnati. Brunker allowed that there were not many wage increases paid at the Portland facility, because "[t]hey were actually already paid pretty well above market," but testified that "[w]e actually gave more money to Enid, Oklahoma" than was paid in Cincinnati. I found Brunker to be a credible witness.

before the union drive was initiated. But there was also pressure from "plant leadership," including Aardema, who recognized, as he wrote in a portion of a July 10 email reporting on the union, that "[w]hile not related to the union situation, the communication on the new salary structure next week should provide a positive boost for those in the Cincinnati plant."

While it seems likely—perhaps obvious—that the union was a reason that Aardema and other top management wanted the wage reevaluation completed and implemented earlier rather than later, the evidence points to legitimate business reasons as the motive for the timing and implementation. Brunker's lengthy July 8 email response to Aardema's questions about the pay raise process demonstrates both the complexity and scope of the endeavor. I read it as a rejoinder to any concerns expressed by Aardema as to the progress of the wage restructuring.

In any event, by July 8, Brunker was proposing to complete and implement the plan by September 1. This was consistent with her testimony, and the response to Aardema does not indicate a suspicious effort to speed up the project—a project that the Respondent has shown was begun, and then efforts redoubled, before the union drive began. In my view, the General Counsel's case would be much stronger had the Respondent, for instance, upon learning of the union drive, shelved the multiplant wage plan and moved immediately to implement a wage plan at Cincinnati only. But by all evidence that was not the case. Even after the union drive began, the Respondent continued working on the plan and nearly four months after the union drive became known to it, implemented the new wage plan across multiple plants. Under these circumstances, I find that the Respondent has demonstrated a legitimate business reason for the August 31 implementation of the wage increase, and thus, it does not violate the Act.[52]

Apart from the implementation of the pay increase, the General Counsel challenges as an unlawful violation of Section 8(a)(1), the July 15 announcement from Brunker to employees at the Cincinnati, Enid, and Portland plants, that there would be a new AP wage structure, including pay rates for many employees, at the end of August. The General Counsel calls the timing of this announcement "arbitrary," and points out that the details of the wage plan had not been finalized as of this date. That is true as far as it goes. There was work still to be done, and this announcement could have been made earlier or later. But given that the July 15 memo to employees accurately set forth the process to be followed in the end-of-August pay changes, I do not see how this changes the situation. As with the pay increase, this July 15 announcement was sent to employees at all the protein plants, not just Cincinnati, and it recounted the development of a process leading to the wage restructuring that had been in development since long before the Union was on the scene. It seems to me to be legitimate for the Respondent to prepare employees by informing them of a pay change that it was planning to implement in 45 days.

Here, it is relevant that there seems to be no cabining principle to the General Counsel's argument. Board precedent supports the General Counsel's view that a conferral of a benefit can violate the Act even where, as here, there is a union campaign but no representation petition filed. But in that case, it seems that the General Counsel takes the position that no time is the right time to announce a wage increase, long studied and planned, and no time is the right time to implement it. While the Board must be alert to a conferral of benefits timed to discourage union support, a union's organizing interest and campaign is not padlock on an employer's ability to update and revamp its operations, including its wage structure—changes it would have made in the absence of union activity. These are not necessarily easy interests to balance. But in this case, I believe the Respondent has demonstrated that its wage restructuring, including its announcement, was part of a long anticipated plan unrelated to its employees' union activity. I will dismiss these allegations of the complaint (complaint paragraphs 5(j) and 6(f)).[53]

b. Wage confidentiality

As discussed, Brunker sent a letter, dated August 27, announcing implementation of the new pay structure and explaining to each employee their new pay rate. After preliminary and general information about the new pay structure, and just before the letter turned to the effect of the restructuring on the individual's pay, the letter stated:

> As a reminder, information about your pay is considered personal and confidential and should not be shared with other associates.

The General Counsel alleges that this statement—made to each employee in the letter they received telling them their new wage rate—violates the Act.

As the Respondent concedes (R. Br. at 42), "this statement is not consistent with current Board law." Indeed, that has long been the case. See *Triana Industries*, 245 NLRB 1258, 1258 (1979) (unlawful to tell employees "[n]ot to go around asking the other employees how much they were making, because some of them were making more than others."); see, *Parexel Int'l, LLC*, 356 NLRB 516, 518 (2011) ("our precedents provide that restrictions on wage discussions are violations of Section 8(a)(1)"); *Coosa Valley Convalescent Center*, 224 NLRB 1288, 1289 (1976).

Further, it does not matter whether the directive is embodied

[52] I note that the General Counsel alleges that the wage implementation violates Section 8(a)(3) of the Act. However, its argument (GC Br. at 40–43) is devoted to an 8(a)(1) theory of unlawful interference. In any event, I reject both theories. As to an 8(a)(3) theory, alleged but unargued by the General Counsel except in a conclusory assertion (GC Br. at 43), for the reasons set out in the text I find that the evidence supports the conclusion, and I find that the pay raise would have been implemented even in the absence of union activity by the employees.

[53] I recognize and have considered that evidence of union animus in other unfair labor practices supports a finding that the motive for the wage increase was to interfere with the employees' Section 7 rights. *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). However, that animus does not disprove a legitimate business reason for the wage increase here. Nor does it undercut the evidence that the increase would have been promulgated in the absence of union activity. I find that even considering the employer's other antiunion animus, its protein-plant-wide wage restructuring, long in the works, does not violate the Act.

in a "rule the breach of which would imply sanctions." *Triana*, supra (overruling ALJ who found directive not to discuss other employees' pay lawful because it did not rise to the level of a "rule"). See also, *W.R. Grace Co.*, 240 NLRB 813, 816 (1979) ("as a supervisor's 'request' or expression of 'preference' that an employee comply with a policy of confidentiality nevertheless implies that employees run the risk of supervisory displeasure and possible adverse consequences for noncompliance to a degree sufficient to constitute interference, restraint, and coercion under the Act").

Accordingly, I find that this statement to employees violates the Act as alleged.

VII. SOLICITATION OF GRIEVANCES (COMPLAINT PARAGRAPH 5(K))

Facts

For years, AP maintained a suggestion box in the hallway. It contained suggestions unresponded to from as many as eight years ago.

On or about July 15, 2015, AP implemented "a new communication tool called C.A.T.s. (Communicating Answers Tracking System) as a way for you to express questions, concerns, thoughts, and ideas and to ensure that your requests are addressed in a timely manner."

A memo outlining the program was posted by the time clock in the production hallway. The memo stated in full:

> Last month during Petra [Sterwerf]'s business review meetings, we discussed a new communication tool called C.A.T.S. (Communicating Answers Tracking System) as a way for you to express questions, concerns, thoughts, and ideas and to ensure that your requests are addressed in a timely manner.
>
> Effective today, we are implementing CATS and forms can be found in the Production Office and in Human Resources.
>
> How does it work for you:
>
> - Complete a CATS form
> - Place it in the locked box in the hallway that currently says Job Bids
> - An HR representative will pull the CATS forms daily.
> - HR will deliver to the appropriate person to answer your question/concern /idea
> - The appropriate person or your supervisor will follow up with you within a designated amount of time.
>
> We truly value your contribution to AdvancePierre Foods and look forward to building stronger communication!

On July 16, 2015, Plant Manager Sterwerf sent a note to other managers saying,

> The supervisors are starting to push CATS to our team members . . . please make sure we are checking the box daily and getting the right people to respond to the questions.
> Definitely want to start strong!

Also on July 16, Stanford sent an email to supervisors with attached CATS:

> Attached [is] the following information to cover with your associates around a new communication tool called CATS that is being rolled out. . . . Show the associates the CATS form and walk them through how it is to be used.

Ramirez checks the CATS/job bids box daily. As Plant Manager Sterwerf explained, based on the subject of the inquiry or complaint Ramirez will "get it to the appropriate manager or subject matter expert, and then formulate a response to give back to the team member, so that we can close the loop on their concerns." Sonja Guzman testified that her supervisor first showed her the form and told her "that sheet was there where we could circle something on it, which we wanted to change" and "in 48 hours there would be a response."

Just a few days after the CATS announcement, on July 20, Ronnie Fox submitted the first CATS form, with a suggestion and comment about changing or eliminating the accumulation of attendance points. Sonja Guzman encouraged him to submit it, because she knew employees "were really worried about the points, that they were going to lose their jobs."

Upon receiving Fox's CATS form, Sterwerf sent a note to Ramirez, Chernock, Aardema and Ernie Hayes: "It's important that we log this and get a response back to Ronnie [Fox] in 48 hours or less to build credibility with this new program." Ramirez asked Aardema and Chernock, with a copy to Sterwerf and Hayes, "Can you please let me know if we have considered making any changes to the point system? I know we were getting feedback from other locations, but had not heard how that went." The last reference was to changes in attendance points policy that had been made at other plants. Ramirez contacted Fox and told Fox that "they're working on it" and they were trying to get in contact with other AP plants and have a "unified" system as to points and occurrences. To date, no changes have been made at AP's Cincinnati plant in response to Fox's CATS form.

A couple of weeks later, approximately August 4, a packet of 20–30 CATS forms stapled together were provided to Sterwerf by Ramirez. She had received them from employees Carmen Cotto and Charles Rogers. Most asked for a starting wage of $15 an hour, and had a union logo or legend added across the top. The one of these in evidence stated in the comments: "A Union For a Real Voice on the job!" Sterwerf and Ramirez met and "decided that, basically, we would not respond to these because they weren't our forms," due to their being "alter[ed]" with the union logo being added, and also "because as a plant manager, I don't have the ability to change the wages, the starting minimum wage anyway."

There have been additional CATS forms used by employees. Two CATS forms dated August 7, were received from the same employee, in which he complained (R. Exh. 21) about actions of a QC employee, whose name the CATS signer wrote as "Vioney," allegedly "looking the other way" about GMP violations committed by people "she is friends with or close to." These CATS complaints were referred to the QA manager for response. Sterwerf characterized this CATS complaint as a "Union GMP violation."[54] Some employees have used CATS

[54] The CATS form, submitted by employee Travis Waldorf, referred to "Vioney." Sterwerf testified that she assumed this referred to Vianey

forms to submit concerns about an occurrence point they received, and as a result of submitting the form were able to use a vacation day to avoid getting the occurrence.

Testimony was offered about the origins of the idea for the CATS system at AP. Plant Manager Sterwerf, who was hired at AP in September 2014, had previously worked for Hillshire Farms (previously Sara Lee), a unionized facility in Claryville, Kentucky. She had used the CATS system there. She testified that, dissatisfied with the communication at AP with employees, sometime "after Christmas, early Spring" she decided "in her [own] mind" that CATS would be beneficial to the AP plant. She talked to Stanford about bringing some "lean concepts and tools" that had been used at Claryville, and "CATS was one of those." Stanford testified he first used CATS about ten years ago when working for Sara Lee (then Hillshire). He testified that in approximately March 2014, he told Ramirez about CATS and told her "it was a great tool for employee involvement, employee engagement, and very good, that we should do something with it, you know, implement it." Ramirez testified that she talked to Stanford on March 12, and he mentioned "lean" and "continuous improvement" tools from Hillshire, including "a suggestion box" to which replies were made in 48 hours without using the specific term CATS. Ramirez did not testify that there was a plan to implement CATS in March.

In a "business review meeting" with employees at the end of May, around Memorial day, called to review performance and safety issues, Sterwerf talked about the CATS system. She described how it was used at her former facility, and examples of how it was used in conjunction with layoffs, among other things, at Hillshire. Sterwerf told the employees to "stay tuned."

On June 2, 2015, she sent an email to AP supervisors Fernando Chappell, Dwayne Stanford (operations manager) and Jeff Frazen (warehouse manager), all of whom had come from Hillshire too, asking, "Do any of you have a blank CATS form from Claryville or could you get me one? I would like to tailor it for our use here."

By email dated June 3, Sterwerf forwarded some examples of CATS forms used at Hillshire, presumably obtained from Chappell, Stanford, or Frazen, to Aardema and Chernock. Her email explained how the CATS system worked. She noted that at Hillshire, "[t]he problem was that many times we were not following up on issues that were brought up in passing to managers and supervisors on the floor," so Hillshire implemented this system that she noted was developed by Toyota. She wrote:

> The form notifies us of the concern, HR logs it into a database and we had 48 hours to get a response back to the team member. I then summarized the information and updated the team at my business review meetings. I would discuss our fill rate and then I would talk about key ideas that came from the process.
>
> It was powerful stuff . . . we did not intend for it to drop grievances but it did because the[ ] team saw they got a quicker response directly from a manager. [Ellipses in original].

After that, Sterwerf met with AP's "leadership team" and showed the forms to managers. Sterwerf testified that Ramirez "tailored the form a little bit," but, in fact, the form used is identical to one of the Hillshire forms that Sterwerf forwarded to Aardema and Chernock on June 3.

Analysis

The General Counsel alleges that the implementation of the CATS grievance system constitutes an unlawful solicitation of grievances and implied promise to remedy the grievances, in violation of Section 8(a)(1).

"Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act." (internal quotations omitted). *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000) (citing, *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. mem. 23 F.3d 399 (4th Cir. 1994)). "[I]t is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974); *Maple Grove Health Care Center*, supra ("it is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation"). "The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances." *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. Appx. 435 (6th Cir. 2006); *Blue Grass Industries*, 287 NLRB 274, 274 fn. 4 (1987); *Uarco, Inc.*, 216 NLRB at 2. "This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice." *Amptech, Inc.*, supra; *Maple Grove Health Care Center*, 330 NLRB at 775 ("the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances").

"[T]he fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved." *Maple Grove Health Care Center*, 330 NLRB at 775. "In connection with the solicitation of grievances, a statement that the employer is 'looking into' making changes desired by employees indicates that action is being contemplated and constitutes an implied promise of improvements." *Desert Springs Hospital Medical Center*, 363 NLRB No. 185, slip op. at 11 (2016); see also, *Purple Communications*, 361 NLRB No. 43, slip op. at 4 (2014) (statements that employer "looking into" "recalibrating" productivity standards are objectionable in representation election context).

Here, the Respondent introduced a new, formalized, and much touted solicitation-of-grievance program—the CATS system—in the midst of the union campaign. It was first mentioned to employees in a "business review" meeting near the end of May, at which time Sterwerf and the Respondent were very aware of and attuned to the union campaign. The CATS system was implemented July 15.

Guzman. Vianey Guzman, who testified in the hearing, is a union supporter and a QC inspector.

CATS was openly explained to employees in the introductory memo as a way to "express questions, concerns, thoughts, and ideas and to ensure that your requests are addressed in a timely manner." Previously there had been no procedure to solicit grievances—the hallway suggestion box had contained questions unanswered for eight years. The implementation of the CATS system constituted the institution of an entirely new program of solicitation of grievances, in the midst of an organizing campaign. Thus, there is a "particularly" "compelling inference" that the employer is promising to remedy grievances. *Amptech,* supra.

Here, there was no rebuttal whatsoever of this "compelling inference" that the Respondent was promising to remedy the grievances. Indeed, the response to the very first CATS complaint—submitted by Fox on July 20, and requesting a change in the attendance point system—was that "they're working on it." The implementation of CATS was a plain violation of the Act, under the controlling precedent.

The Respondent's defense is without force. It argues (R. Br. at 43) that "[t]here is no implicit (or explicit) *guarantee* that topics or suggestions raised through CATS would be implemented or remedied." (emphasis added). However, the lack of guaranteed redress is not the standard which the Board applies. Rather, the violation is demonstrated by commencing a new practice of soliciting employee grievances in the middle of a union campaign—as a matter of law, this raises the *inference* of an unlawful promise to remedy the grievances. *Amptech,* supra; *Maple Grove Health Care Center*, 330 NLRB at 775 ("the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved").

The Respondent also contends that the CATS system, like the wage increase, was in the works even before the union drive began. But neither the facts nor the precedent provide much of a defense here. Unlike the multiplant wage restructuring that had been worked on, on and off, for a year, Sterwerf vaguely dated the idea of having CATS at AP to the claim that "in her [own] mind" she had decided, between Christmas 2014 and Spring 2015, that the CATS system she used in her previous employment would be beneficial to the AP plant. Sterwerf talked with Stanford in the spring about bringing some "lean concepts and tools" used in their previous employment to AP, including CATS. And Stanford told Ramirez in the spring that CATS "was a great tool for employee involvement, employee engagement, and very good, that we should do something with it, you know, implement it." Whatever the credibility of this testimony, Ramirez did not testify that there was a plan to implement CATS in March. There was in fact, no documented plan or tangible steps taken to use CATS at AP until after the union drive was well under way. Indeed, as of June 2, Sterwerf was emailing her supervisors who had worked with her at the previous job and asking them if "any of you have a blank CATS from Claryville or could you get me one." As of June 3, Sterwerf was explaining in an email to her HR management, Aardema and Chernock, how the CATS system worked and explaining to them that "[i]t was powerful stuff . . . we did not intend for it to drop grievances but it did because the[ ] team saw they got a quicker response directly from a manager." One can look at this record and confidently conclude that the CATS program and the push for it was implemented as an antidote to the union drive.[55]

But more to the point, the Board precedent regarding solicitation of grievances is different than that involving the conferral of a discrete benefit, like a wage increase. As discussed above, with a unilateral conferral of a benefit, the Board looks for evidence of intent that the benefit was introduced to induce employees to oppose the union. Establishing that the benefit was planned to be implemented before the union appeared can support the contention that the benefit's intent had nothing to do with discouraging unionization and would have been implemented in the absence of union activity. However, the solicitation of grievances with the inference of a promise to remedy those grievances, is unlawful not for its intent but for the "compelling inference that [the employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). So while an employer's (pre-union drive) past *practice* of soliciting grievance meetings may undercut the inference that the employer's solicitation of grievances during a union drive carries an implicit promise to remedy the problems and make union representation unnecessary, here there was no past practice at all. The CATS system was introduced during the union campaign for the first time. The Respondent's effort to pre-date the *planning* for having a CATS system is beside the point.[56]

CONCLUSIONS OF LAW

1. The Respondent, AdvancePierre Foods, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act, from on or about May 13, 2015, to on or about June 10, 2015, by maintaining and enforcing an unlawful and overly broad solicitation/distribution policy.

3. The Respondent violated Section 8(a)(3) and (1) of the

[55] I discredit Sterwerf's self-serving conclusory statements to the contrary. (Tr. 727–728, 738).

[56] Finally, for reasons that elude me, the Respondent points (R. Br. at 43–44) to its refusal to even consider CATS grievances with prounion sympathies as evidence that the CATS program did not interfere with Section 7 rights. To the contrary, one would be hard pressed to find a more vivid illustration of the antiunion import of the CATs program. Contrary to the effort the Respondent put into timely answering most CATS complaints, CATS complaints with union markings went unanswered by the Respondent on the grounds that they were "altered" by the union and thus "weren't our forms." Moreover, when the forms contained a union legend, the Respondent suddenly found itself powerless to act on the matter. When a "union" CATS complaint asked for an increase in starting wages, Sterwerf testified that the Employer did not respond "because as a plant manager, I don't have the ability to change the wages, the starting minimum wage anyway." Obviously, there was going to be no hurried assurance to employees that "they're working on it" when a union-affiliated CATS request came in. This was a decidedly nonunion grievance procedure.

Act, on or about June 9, 2015, by issuing a verbal disciplinary warning to Carmen Cotto, Sonja Guzman, and Ronnie Fox, in retaliation for their union activities.

4. The Respondent violated Section 8(a)(1) of the Act, on or about June 9, 2015, by interrogating an employee about the union activity of a coworker.

5. The Respondent violated Section 8(a)(1) of the Act, on or about June 8, 2015, by engaging in surveillance of employees' union activity by searching their clipboards for union authorization cards.

6. The Respondent violated Section 8(a)(1) of the Act, on or about June 16, 2015, by engaging in surveillance of employees' union activity by searching for evidence of their union activity online and searching suspected union sympathizers' Facebook pages.

7. The Respondent violated Section 8(a)(1) of the Act, on or about June 17, 2015, by demanding that employee Diana Concepcion document her identity, in retaliation for her union activity.

8. The Respondent violated Section 8(a)(3) and (1) of the Act, on or about July 17, 2015, by suspending Diana Concepcion indefinitely for her failure to comply with an unlawfully motivated demand that she document her identity.

9. The Respondent violated Section 8(a)(1) of the Act, on or about July 17, 2015, by assessing employee Jessenia Maldonado an attendance point for her participation in protected and concerted activity.

10. The Respondent violated Section 8(a)(1) of the Act, on or about August 27, 2015, by instructing employees that their pay is considered personal and confidential and is not to be shared with other employees.

11. The Respondent violated Section 8(a)(1) of the Act, on or about July 20, 2015, and thereafter, by soliciting grievances and impliedly promising employees increased benefits and improved terms and condition of employment in order to discourage employees from supporting a union.

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

Remedy

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

The Respondent, having verbally warned employees Ronnie Fox and Sonja Guzman, must rescind the warning.[57] The Respondent having unlawfully assessed employee Jessenia Maldonado with an attendance point, must rescind the attendance point.

The Respondent, having unlawfully suspended Diana Concepcion, must offer her full reinstatement to her former job, or if that job no longer exists, to an equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. The Respondent shall make Concepcion whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspension of her. The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interested at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Concepcion for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 9 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.[58]

The Respondent shall also be required to remove from its files any references to the unlawful suspension of Concepcion, and the unlawful warnings to Cotto, Guzman, and Fox, and the unlawfully assessed attendance point against Maldonado, and to notify each of them in writing that this has been done and that the suspension, warning, or attendance point will not be used against them in any way.

The Respondent shall be required to rescind its implementation of the unlawfully implemented CATS grievance program.

The Respondent shall post an appropriate informational no-

[57] The record demonstrates that the warning to Cotto was rescinded; I do not consider Guzman's warning, which AP maintained it did not give, to have been clearly rescinded.

[58] The General Counsel contends that Concepcion should be reimbursed for all search-for-work and work-related expenses regardless of whether she receives interim earnings in excess of those expenses during any given yearly quarter or during the overall backpay period. As the General Counsel recognizes, under extant Board law those expenses are considered an offset to interim earnings. Such a change in Board precedent is a matter for Board consideration. The Board has yet to resolve the matter. *National Association of Professional Women*, 364 NLRB No. 19, slip op. at 3 fn. 1 (2016). I must apply extant Board precedent, and on that grounds I reject the General Counsel's proposed remedy. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied" (citation omitted). Accord, *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

The General Counsel additionally seeks a make whole remedy for Concepcion that includes reasonable consequential damages incurred as a result of the Respondents' unfair labor practices. In particular, and citing *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 152 (2002), the General Counsel contends that consequential damages are necessary to prevent the possibility of remedial failure, should the Respondent successfully argue in a compliance hearing that Concepcion is not entitled to a remedy that includes backpay and reinstatement. I find this argument entirely speculative. It can be raised in a compliance hearing in response to arguments of the Respondent. In any event, as with the search-for-work expenses, the request for consequential damages as part of the remedy does not reflect extant law, and as such, is for the Board to consider. *Goodman Logistics, LLC*, 363 NLRB No. 177, slip op. at 2–3, fn. 2 (2016).

tice, as described in the attached appendix. This notice shall be posted at the Respondent's facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision. As the Respondent has a large number of employees whose primary language is not English, the Respondent shall be required to post the notice in both English and Spanish, and any such other languages as the Regional Director determines necessary to fully communicate with employees.

The General Counsel also seeks (GC Br. at 49) a panoply of "additional remedies beyond the Board's standard remedies." He seeks an order requiring a reading of the notice, the publication of the notice in publications of general local interest, employer-paid training by Board agents for employees, supervisors, and managers about their rights under the Act, and an order that the employer periodically supply the union with employee contact and other information for a period of two years.

An argument for each of these remedies can be made in the abstract. However, one is left with the strong feeling that in the context of the Board's current remedial practices, the General Counsel's remedial demands are unwarranted based on the violations found.

While I have found that the Respondent engaged in a number of unfair labor practices, and they are by definition serious, the General Counsel's characterization of them exceeds their substance. This is not a case where the severity and scope of the employer's unfair labor practices demonstrates that traditional remedies are insufficient to redress the effects of the Respondent's unfair labor practices.[59]

Here, the plant-wide violations directly affecting every employee involve the implementation of the CATS grievance mechanism, the temporary (three to four week) maintenance of an unlawful solicitation/distribution policy, and the one-time written admonition to employees that pay rates are confidential and not to be shared. These are, for sure, serious violations of the Act, but none can be characterized as outrageous, likely to arouse fear, likely to persist after the application of traditional remedies, or otherwise likely to cripple employees' efforts to engage in organizational activity under the Act.

In addition, there were a number of unfair labor practices directed to individual employees. In an employee complement of 596 employees, three employees received a verbal warning (one was quickly rescinded), one employee was unlawfully asked about another employees' union activity, an employee received an attendance point for striking, there was an unlawfully motivated "clipboard audit" that affected an unknown number of employees on one day, and, most seriously, one employee has been suspended and subjected to unlawful scrutiny of her identify.

In all, there are a significant number of unfair labor practices. However, the unit is large. With the exception of the suspension, these unfair labor practices do not constitute "hallmark" violations. Other than the one suspension, these unfair labor practices do not constitute direct threats to the pay, benefits, or jobs of employees. There were no threats of plant shutdowns, or about the futility of unionization. No argument is made that the Respondent has a history of or proclivity to repeat these unfair labor practices. I do not find that the Respondent's conduct rises—or more aptly, sinks—to the level of egregious employer conduct that justifies the imposition of additional remedies. While the Respondent has engaged in unlawful conduct, these are not unfair labor practices that one would expect could not be remedied through traditional remedies. I conclude that under these circumstances, the General Counsel has failed to make its case that traditional remedies are insufficient to remedy the effects of the unfair labor practices. See, *Perry Brothers Trucking*, 364 NLRB No. 10, slip op. at 3 fn. 6 (2016) (denying General Counsel request that notice be read in case finding unlawful layoff and discharge, two instances of instructing employees not to discuss terms and conditions of employment, and unlawfully indicating that it was futile to engage in protected and concerted activity); *Checkers and Fast Food Workers Committee*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016) (denying General Counsel request that notice be read in case involving two unlawful discharges, threats of unspecified reprisals, and unlawful decreasing of employees' hours). See, by contrast, *OS Transport LLC*, 358 NLRB 117 (2012), relied upon by the General Counsel for the proposition that additional remedies may be appropriate when the impact and awareness of the unfair labor practices is unit-wide. However, that case involved many more severe and hallmark violations of the Act, conducted among a unit of 14 drivers. Here by contrast, the potential unit is nearly 600, and

[59] The General Counsel argues that publication of the notice is warranted because at rallies, in the media and on the radio, the union and employees pressed their case. However, the General Counsel cites no case in which the necessity for nontraditional remedies turns on the vigor with which the employees, unions, or their allies, publicize their struggle to the general public. Remedies should be based on the objective and reasonably likely—not the asserted actual or subjective—effects of the unfair labor practices being remedied.

the violations relatively limited in scope and severity.[60]

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted at the Respondent's facilities wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 13, 2015. When the notice is issued to the Respondent, it shall sign it or otherwise notify Region 9 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[61]

ORDER

The Respondent AdvancePierre Foods, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing an unlawful and overly broad solicitation/distribution policy.

(b) Discriminatorily disciplining employees in retaliation for their union activities.

(c) Interrogating any employee about the union activity of a coworker.

(d) Engaging in surveillance of employee union activity by searching clipboards for union materials.

(e) Engaging in surveillance of employee union activity by searching for employee union activity online and searching suspected union sympathizers' Facebook pages.

(f) Discriminatorily demanding documentation of employee identity in retaliation for union activity, and discriminatorily suspending any employee for failing to satisfy the unlawful demand.

(g) Disciplining any employee for an absence caused by participation in a lawful strike.

(h) Instructing employees that their pay rate is considered personal and confidential and is not to be shared with other employees.

(i) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting union organizational activity.

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

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

(a) Within 14 days from the date of this Order, offer Diana Concepcion full reinstatement to her job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Diana Concepcion whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension, in the manner set forth in the remedy section of this decision.

(c) Compensate Diana Concepcion for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension given to Diana Concepcion, and within 3 days thereafter, notify her in writing that this has been done and that the suspension will not be used against her in any way.

(e) Rescind the unlawful disciplinary warnings issued to Sonja Guzman and Ronnie Fox.

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[60] In support of its remedial argument, the General Counsel also emphasizes the claim that the "diverse make-up of Respondent's workforce renders traditional remedies insufficient" (GC Br. at 49) and that traditional remedies will not counter "the degree of chill on employee union activity engendered by the unlawful utilization of immigration related threats during an initial organizing campaign." (GC Br. at 55). In this case there is just one employee (out of nearly 600) for whom the employer engaged in an unfair labor practice that bears in any way upon immigration status. There is no evidence that the Respondent has generally targeted immigrants in the workforce, or used threats or language to stoke immigration-related fears in the workforce. I recognize—indeed, I agree—that even one unlawful suspension related to immigration issues could inhibit "even authorized employees [from] exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status" (*Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 1 fn.1 (2014) (noted by Member Schiffer). However, the recognition of this enduring problem does not amount to a showing of the inadequacy of traditional Board remedies and even less the advantage of the remedies advanced by the General Counsel. Rather, cases citing the vulnerability of an immigrant workforce as supporting special remedies treat with egregious employer misconduct. See, e.g., *Concrete Form Wall, Inc.*, 346 NLRB 831, 839 (2006), cited by the General Counsel, where the Board, in adopting a Gissel bargaining order and required the reading of the notice—but not its publication—relied in part on the fact that "[t]he Respondent's work force is comprised almost entirely of Spanish-speaking employees with questionable ability to work in the United States legally." *Concrete Form Walls* was a case studded with hallmark violations absent here, including the discharge of nearly 1/4 of the Hispanic unit employees and nearly 1/6 of the unit employees because they voted in a representation election. The Board recognized "a marked difference between the type of interference with the Section 7 right caused by a preelection discharge and that caused by a discharge resulting directly from an employee's exercise of that right. The former interferes with the employee's right to make a free electoral choice, while the latter represents a full frontal assault on the right to vote at all." The actions of the employer in *Concrete Form Wall* are of a different order of magnitude than what we confront here.

[61] 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.

(f) Rescind the attendance point unlawfully issued to Jessenia Maldonado for her participation in protected and concerted activities.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warnings given to employees Carmen Cotto, Sonja Guzman, and Ronnie Fox, and the unlawfully assessed attendance point against Jessenia Maldonado, and within 3 days thereafter, notify these employees in writing that this has been done and that the warnings or attendance point will not be used against them in any way.

(h) Rescind the implementation and maintenance of the CATS grievance program.

(i) Within 14 days after service by the Region, post at its facilities in Cincinnati, Ohio, copies of the attached notice marked "Appendix."[62] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be translated into Spanish, and any other languages that the Regional Director determines is appropriate, and the Spanish, other language, and English notices shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice in each appropriate language, to all current employees and former employees employed by the Respondent at any time since May 13, 2015.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 9 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.

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

Dated, Washington, D.C. June 27, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an overly broad solicitation/distribution policy that restricts you from the exercise of the rights set forth above.

WE WILL NOT discriminatorily issue disciplinary warnings to you in retaliation for your union activities.

WE WILL NOT interrogate you about the union activity of your coworkers.

WE WILL NOT engage in surveillance of your union activity by searching employee clipboards for union materials.

WE WILL NOT engage in surveillance of your union activity by searching for evidence of union activity online and searching suspected union sympathizers' Facebook pages.

WE WILL NOT discriminatorily demand documentation of your identity in retaliation for union activity and WE WILL NOT suspend you for failing to satisfy the unlawful demand for identification.

WE WILL NOT discipline you for an absence caused by participation in a lawful strike.

WE WILL NOT instruct you that your pay rate is considered personal and confidential and should not be shared with your coworkers.

WE WILL NOT solicit grievances from you and impliedly promise to remedy them in order to discourage you from organizing a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL offer Diana Concepcion full reinstatement to her job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Diana Concepcion whole, with interest, for any loss of earnings or other benefits suffered as a result of her unlawful suspension.

WE WILL remove from our files any reference to the unlawful suspension given to Diana Concepcion, and WE WILL within 3 days thereafter notify Diana Concepcion that this has been done and that her unlawful suspension will not be used against her in any way.

WE WILL rescind the unlawful disciplinary warnings issued to Sonja Guzman and Ronnie Fox.

WE WILL rescind the attendance point unlawfully issued to Jessenia Maldonado for her participation in protected and concerted activities.

WE WILL rescind the implementation and maintenance of the CATS grievance program.

WE WILL remove from our files any reference to the unlawful

[62] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

warnings given to Carmen Cotto, Sonja Guzman, and Ronnie Fox, and to the unlawful attendance point given to Jessenia Maldonado, and WE WILL within 3 days thereafter notify Carmen Cotto, Sonja Guzman, Ronnie Fox, and Jessenia Maldonado, in writing that this has been done and that their warnings and/or attendance point will not be used against them in any way.

ADVANCEPIERRE FOODS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-153966 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.

hp LaserJet 4350 printers

Job Storage Status page 1

Error: Unable to store job at printer
Reason: Insufficient disk space for this job

Solution: Delete some files from the disk before resending this job.