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**ImageFIRST and Laundry Distribution *and* Food Service Joint Board, Workers United, a/wW Service Employees International Union.** Cases 22–CA–161563 and 22–CA–181197

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On April 18, 2017, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The Respondent also filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by increasing the frequency and quality of food provided to employees after the beginning of the organizing drive in order to discourage support for the Union. As fully described in the judge's decision, the Union started an organizing campaign at the Respondent's Clifton, New Jersey facility in mid-July 2015. Shortly after the Respondent became aware of the Union's campaign, it revived and transformed its "Lunch with the Boss" program. While this program existed in the past, the Respondent did not provide any "Lunch with the Boss" meals in the months prior to the start of the organizing campaign. In addition, when it revived the program, it enhanced the benefit.

On July 20, after it learned of the organizing campaign, the Respondent's general manager, James Kennedy, conducted an employee meeting. At this meeting, Kennedy communicated the Respondent's opposition to the Union, announced the unlawful discharge of two unpopular supervisors, and unlawfully solicited employee grievances. Kennedy then announced that the Respondent would bring in Creole and Hispanic food that week, which he admitted was "probably a little bit different than what we have done in the past." The Respondent also provided Creole and Hispanic food for employees on a subsequent occasion, although Kennedy could not recall the specific date. Subsequently, the Respondent had additional meals delivered to its facility for employees to eat on the premises, allowing them to choose their

[1] Chairman Ring is recused and took no part in the consideration of this case.

[2] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) when Supervisor David Rivera initiated a confrontation with union representative Marcia Almanzar on August 6, 2015. There are also no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by stating, through its general manager James Kennedy, that it knew the Union was visiting employees' homes and calling employees on their cell phones, or by stating, through its owner Jeffrey Berstein, that bringing in the Union could result in delays in resolving employee grievances.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 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.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a handbook rule, written in English, stating that "discussion of payroll information" is a "serious offense" that "can result in immediate suspension or termination," we note that the Respondent does not dispute that the rule is unlawful on its face. Instead, the Respondent contends that the General Counsel did not establish that any employee at its Clifton, New Jersey facility had read or could read the rule, citing evidence that some employees' primary language is Spanish or Haitian Creole. We reject this contention. The Respondent cites no case, and we are aware of none, in which the burden has been placed on the General Counsel to prove not only that an employer maintains a challenged rule, but also that its employees can read it. We decline to do so here. Moreover, the Respondent's contention is limited to employees at a single facility, and on its face, the Respondent's "Associate Handbook" applies to employees at all the Respondent's facilities nationwide. Further, there is no evidence that any of its employees are unable to read English, even if English is not their primary language.

In finding this handbook rule violation, we do not rely on *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), cited by the judge, which was overruled by *Boeing Co.,* 365 NLRB No. 154 (2017). Member Kaplan notes that although this case does not implicate the issues addressed in *Boeing,* the Respondent's rule would be unlawful under the principles stated therein. Id., slip op. at 4 (unlawful to maintain a rule that prohibits employees from discussing wages or benefits with one another).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by discharging Supervisor Joe Ventura and Lead Employee Miriam Farez, Member Emanuel notes that this finding does not preclude an employer from discharging a supervisor during a union campaign. However, where, as here, the supervisors had not recently engaged in any misconduct and, prior to the start of the union activity, the Respondent was aware that employees had issues with the supervisors and failed to act on the complaints, it is clear that the discharges were intended to discourage union activity in violation of the Act. See *Burlington Times*, 328 NLRB 750 (1999) (finding that the termination of an unpopular supervisor in order to grant a benefit to discourage union activity violates Sec. 8(a)(1)).

[4] We shall modify the judge's recommended Order in accordance with our decision in *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

meals from a restaurant's menu. In addition, the Respondent took employees off-site for lunch on at least three occasions and allowed them to choose what they wanted to eat from a menu. Assistant General Manager Caesar Sanchez estimated that the lunches cost $10–$20 per person. The judge found that the Respondent did not give employees their choice of meals prior to the appearance of the Union, and the Respondent does not dispute this point.[5] The off-site lunches provided by Sanchez after the appearance of the Union were at the very least in stark contrast to the on-site lunches Ventura held with employees when he became a supervisor in early 2015, before the Union appeared, even accepting Kennedy's testimony that he had also taken employees off-site for lunch at some unspecified period in the past.

"The lawfulness of an employer's promise of benefits during a union organizational campaign depends upon the employer's motive. See *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964))." *Sisters' Camelot,* 363 NLRB No. 13, slip op. at 7 (2015). However, "[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992).

In agreement with the judge, we find that the General Counsel has shown that the Respondent resumed providing meals to its employees for the purpose of thwarting the union organizing campaign. As noted above, the Respondent reinstated, and expanded, its moribund practice of providing food to its employees only after the start of the union campaign. The meals started as early as the week of July 20, less than 2 weeks after the Respondent learned of the union organizing. One such meal was announced at a meeting called by Kennedy for the purpose of expressing the Respondent's opposition to the Union and during which he announced the unlawful discharges as an intended employee benefit and unlawfully solicited grievances with a promise to remedy them.

We also find that the Respondent has failed to establish a legitimate business justification for the employee meals. The Respondent contends that the meals were provided as a means for Sanchez, as a newly-hired manager, to get to know employees, but the record shows that the meals started in July, months before Sanchez arrived. Moreover, the Respondent's stated justification fails to explain why it transformed its prior "Lunch with the Boss" program into one in which employees were allowed to choose meals from a menu, and were taken off-site for lunch at a restaurant by Sanchez but not granted the same benefit earlier the same year with Ventura. Thus, the Respondent has failed to establish that its granting of lunches and revitalization of the "Lunch with the Boss" program was motivated by legitimate business reasons and not the union organizing campaign. See, e.g., *Register Guard*, 344 NLRB 1142, 1142 (2005).[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, ImageFIRST, Clifton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a)

"(a) Rescind the rule in its employee handbook that prohibits the discussion of payroll information, and furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision, or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Clifton, New Jersey, copies of the attached notice marked "Appendix A" in English, Spanish, and Haitian Creole, and within that same time period post at the rest of its facilities nationwide where its Associates Handbook is in effect copies of the attached notice marked "Appendix B" in English and whatever other language(s) the Regional Director deems appropriate, if any. Copies of the notices, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places

[5] To the contrary, the Respondent concedes on brief that "[u]nlike other managers, Sanchez allowed associates to choose the food they wanted to eat from a menu." R. Br. at 9.

[6] Our dissenting colleague contends that employees would view the lunches as no more than an opportunity to get to know Sanchez, consistent with the Respondent's past practice of offering meals as a way for new managers to interact with employees. For the reasons stated above, we respectfully disagree.

Our colleague also contends that there is no way to determine whether the quality of the food was significantly improved after the Union organizing campaign started, inasmuch as the judge did not find employee testimony to that effect "particularly helpful." In our view, the fact that employees were able to choose their meals, and even taken off-site for lunch, is sufficient to establish that the Respondent granted a benefit to employees under the circumstances of this case, which include the fact that the lunch program was moribund until the Union started organizing.

where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the 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 July 14, 2015."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2018

Mark Gaston Pearce, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

Contrary to the judge and my colleagues, I would dismiss the allegation that the Respondent violated Section 8(a)(1) by changing the "quality and frequency" of food provided to employees after the organizing campaign started.

The Respondent operates commercial laundries throughout the United States. The Union began an organizing drive at the Respondent's Clifton, New Jersey facility in mid-July 2015.[1] It is undisputed that the Respondent provided food to employees both before and after the start of the organizing drive through its "Lunch with the Boss" program,[2] which encouraged managers to have group lunches with employees in an attempt to get to know them on a personal level.

On September 1, almost 2 months after the start of the organizing drive, the Respondent hired Cesar Sanchez as assistant general manager. Shortly after his arrival, Sanchez took advantage of the "Lunch with the Boss" program and took some employees offsite for lunch on three occasions.[3] During the lunches, employees were allowed to choose from a menu. Following employee requests, Sanchez changed the lunches to "in house" and provided employees with their preferred meals at the facility. His practice of letting employees choose their own meals was apparently unprecedented. The lunches cost approximately $10–$20 per employee, and Sanchez never had lunch with any employee more than once.[4] The Union was never discussed during any of the lunches.

Relying on Sanchez' usage of the "Lunch with the Boss" program, the judge found that the Respondent changed the "quality and frequency of the food provided to employees after the organizing campaign started" and that the changes were "significant enough to constitute an illegal benefit motivated to discourage employees from supporting the Union."[5] I disagree.

The granting of benefits to employees while union organizing is taking place is not per se unlawful. *Daily Grill*, 364 NLRB No. 36, slip op. at 18 (2016) (citing *American Sunroof Corp.*, 248 NLRB 748, 748 (1980)), modified on other grounds 667 F.2d 20 (6th Cir. 1981); see also *Fresh Organics, Inc.*, 350 NLRB 309, 310 (2007). Rather, the question is whether the benefits were granted for the purpose of inducing employees to vote against the union. *Daily Grill*, supra (citing *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)). Unlike most 8(a)(1) allegations, this inquiry is motive-based. Id. (citing *Network Dynamics*, 351 NLRB 1423, 1424 (2007)). The General Counsel bears the burden of proving, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an at-

[1] All dates are in 2015 unless otherwise noted.

[2] As evidenced by the existence of a "Lunch with the Boss" section in a human resources document titled "Site Visit Checklist," the program existed before any organizing activity. While the program was a pre-existing program, it was used sporadically—usually on special occasions (employee awards/recognition) or after the arrival of a new manager.

[3] Upon Sanchez' arrival, General Manager and Vice President James Kennedy merely advised Sanchez about the program and told him that he should have lunch with employees to get to know them better. Kennedy did not tell him how to employ the program or that it had to be done in the same manner as other managers. While my colleagues compare Sanchez' and former Supervisor Joe Ventura's managerial styles when it comes to *how* they employed the "Lunch with the Boss" program, I do not think that the fact that two managers had lunch with employees in a different manner within the same year, at no drastic increase in cost, changed a past practice into an attempt to interfere with employee rights.

[4] It is unclear how many employees had lunch with Sanchez.

[5] In deciding this issue, the judge relied on the testimony of Vice President and General Manager James Kennedy and Assistant General Manager Caesar Sanchez, and reports from Human Resources Director Caitlin Payne. The judge explicitly noted that employee testimony, which varied "a great deal," was not "particularly helpful in determining the facts regarding this allegation."

tempt to interfere with or coerce them in their choice on union representation." Id. (finding that the General Counsel, who relied primarily on the timing of the benefit, failed to demonstrate that employees would reasonably view a service award as an attempt to interfere with or coerce them in their choice on union representation). If the General Counsel makes such an initial showing, the burden shifts to the employer to demonstrate a legitimate business reason for the timing of the benefit. Id. The employer may meet its burden by showing that the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra. These principles apply regardless of whether a representation petition has been filed. *Daily Grill*, supra (citing *Network Dynamics*, supra).

Contrary to my colleagues, I find that the General Counsel failed to meet his initial burden to prove that employees would reasonably view the increase in frequency of the lunches as an attempt to coerce them in their choice on union representation. There is no evidence that the employees would view the lunches as anything other than an opportunity to get to know Sanchez, the newly hired general manager. The lunches, consistent with past practice, and not in response to employee complaints, occurred shortly after Sanchez' arrival (almost 2 months after the start of the organizing activity) and did not include any mention of the Union. [6] Moreover, even if the General Counsel had met his initial burden, I find that the Respondent has demonstrated that the timing of its actions was governed by factors other than the organizing activity. Specifically, the Respondent established that the lunches were a part of its past practice, which it employed as a way for new managers to interact with employees.

As for the alleged increase in quality of the lunches, since the judge found that employee testimony on this issue varied "a great deal" and was "not particularly helpful," it is unclear what *type* of food was provided to employees in the past. While employees were given the opportunity to choose their meals, there is no evidence that they chose meals that were previously unavailable or were better or more expensive than those previously available. Consequently, there is no way to determine whether the *quality* of the food improved, much less that it had improved significantly.[7]

Dated, Washington, D.C. August 27, 2018

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX A

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 discharge unpopular supervisors and lead persons in order to discourage you from supporting the Union.

WE WILL NOT solicit grievances and impliedly promise to remedy those grievances in a manner different than we did prior to the start of the union campaign.

WE WILL NOT increase the frequency and quality of food provided to you in order to discourage support for the Union.

WE WILL NOT initiate confrontations with union representatives.

[6] While my colleagues argue that the "*meals* started in July, months before Sanchez' arrival" (emphasis added), what they fail to note is that the record reveals there was only one meal prior to Sanchez' arrival and it was a meal to recognize employees' successful efforts to stay on schedule while the facility experienced equipment issues. This sole lunch was unrelated to the "Lunch with the Boss" program and was consistent with past practice of recognizing special achievements with meals.

[7] In finding a violation, the judge cited a single case, *Caterpillar Logistics, Inc.*, 362 NLRB No. 49 (2015), enfd. 835 F.3d 536 (6th Cir. 2016). I find *Caterpillar Logistics* distinguishable from the instant case. There, the Board found that the employer violated Sec. 8(a)(1) when it announced and granted a $400 safety bonus to each employee during the critical period. Here, the "benefit" at issue was significantly less expensive—approximately $10–$20 per employee, was not conferred during the critical period (no election petition had been filed), and was part of the Respondent's past practice.

WE WILL NOT maintain an illegal rule in our employee handbook that provides for discipline for discussing payroll information.

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 rule in our employee handbook that prohibits the discussion of payroll information, and WE WILL either furnish you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision, or publish and distribute to our employees revised employee handbooks that (1) do not contain the unlawful provision or (2) provide a lawfully worded provision.

IMAGEFIRST

The Board's decision can be found at www.nlrb.gov/case/22-CA-161563 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.

## APPENDIX B

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.

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IMAGEFIRST

The Board's decision can be found at www.nlrb.gov/case/22-CA-161563 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.

*Eric B. Sposito, Esq.,* for the General Counsel.

*Christopher J. Murphy* and *Michael K. Taylor, Esqs. (Morgan Lewis & Bockius LLP),* of Philadelphia, Pennsylvania, for the Respondent.

*Cristina Gallo, Esq. (Kennedy, Jennix & Murray, P.C.)* of New York, New York, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Newark, New Jersey, on October 18–21 and November 29–30, 2016. The Laundry Distribution and Food Service Joint Board, Workers United, filed the initial charges in Case 22–CA–161563 on October 5, 2015. Four amended charges were also filed. Case 22–CA–181197 has been withdrawn. The General Counsel issued the complaint on May 31, 2016, and then an Order consolidating cases and amended complaint on September 21, 2016.

Subsequent to September 21, the General Counsel withdrew the allegations in paragraphs 6, 13, 23, 31, and 32 of the amended complaint and references to those paragraphs con-

tained in paragraph 33 of the complaint.

This case involves an organizing drive by the Charging Party Union at Respondent's Clifton, New Jersey facility. Many of the allegations in the complaint concern statements made or allegedly made by Respondent's regional vice-president and general manager, James Kennedy, and Respondent's president and owner, Jeffrey Berstein,[1] at meetings conducted for employees during the early part of the organizing drive.[2]

The General Counsel also alleges that Respondent violated the Act in discharging a supervisor and a lead person at the start of the organizing campaign in order to discourage employees from supporting the Union. The General Counsel further alleges that Respondent solicited grievances and impliedly promised to remedy those grievances and increased the frequency and quality of food provided to employees after the beginning of the organizing drive to discourage support for the Union. Finally, the General Counsel alleges Respondent, by supervisor David Rivera, violated the Act by engaging in a confrontation with a union representative outside the gate to Respondent's facility and by maintaining an illegal rule in its employee handbook.

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

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a corporation, operates commercial laundries at a number of locations throughout the United States. Its headquarters is located in King of Prussia, Pennsylvania. At the facility at issue in this case in Clifton, New Jersey, it annually purchases and receives goods valued in excess of $50,000 directly from points outside of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The Union began an organizing drive at Respondent's Clifton, New Jersey facility in mid-July 2015. Respondent became aware of this on Sunday, July 12, when union representatives visited the company's service supervisor, Andre Cherry, at his home. Cherry called company Vice President/General Manager James Kennedy that day to inform him of the visit. Kennedy is the highest ranking official of Respondent who is present at Clifton on a daily basis.

#### Allegedly illegal rule (complaint paragraphs 14 and 15)

Respondent maintains a rule in its employee handbook that makes the discussion of payroll information a disciplinary matter (Tr. 478). The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). As stated above, a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; and/or (2) that the rule was promulgated in response to protected activity and/or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).

In undertaking this analysis, I consider the fact that in *Lutheran Heritage* the Board retreated somewhat from its prior decisions in light of the decision of United States Court of Appeals for District of Columbia in *University Medical Center v. NLRB,* 335 F. 3d 1079 (D.C. Cir. 2003). In that case the Court declined to enforce the Board's decision at 335 NLRB 1318 (2001), regarding a rule prohibiting "disrespectful conduct." In *Lutheran Heritage,* the Board stated that it would not conclude that a reasonable employee would read a rule to apply to Section 7 activity simply because the rule *could* be so interpreted.

Respondent's maintenance of its rule against the discussion of payroll information violates Section 8(a)(1) regardless of why it was promulgated or whether it was ever enforced or disseminated. On its face it prohibits the discussion of wages, hours and benefits. There is no other "payroll information" to which a rank and file employee would be privy. A reasonable employee would interpret it to warn against discussing wages, hours and benefits, which they clearly have a right to do under Section 7 of the Act, with other employees and with others from whom they wish to enlist support in improving their working conditions.

#### James Kennedy's alleged conversation with Miriam Farez on July 13, 2015 (complaint paragraph 16)

Former lead person Miriam Farez testified that General Manager/VP James Kennedy called her into his office of July 13 and told her she was his eyes and ears at the plant. She testified that Kennedy asked her to report back to her which employees were in favor and which were opposed to the Union. Kennedy denies that any such meeting or conversation took place. Given the fact there are no witnesses to this alleged conversation and that Respondent fired Farez 2 days later, I find no reason to credit Farez over Kennedy. This citation allegation is dismissed.

#### James Kennedy's July 13, 2015 meeting (complaint paragraph 18)[3]

The next day, Kennedy held a meeting for all production employees[4] at the end of the first/beginning of the second shift. There is a great deal of conflicting testimony as to what Kennedy said at this meeting. His remarks were translated into Span-

[1] Mr. Berstein's name appears in the transcript incorrectly as Bernstein.

[2] Complaint par. 28 alleges that Respondent's Chief Financial Officer, Joseph Geraghty violated the Act in August 2015 by creating the impression that employees' union activities were under surveillance. The General Counsel appears to have abandoned this allegation.

[3] The complaint does not specifically mention Kennedy's July 13 meeting with production employees but I conclude that whether or not he violated the Act at that meeting was tried by consent.

[4] Production employees are distinguished from customer advocates, who drive trucks delivering clean laundry to customers and pick up dirty laundry.

ish and into Creole for the employees of Haitian background. It is undisputed that Kennedy told employees that he was aware that the Union was visiting employees at home.[5]

The General Counsel alleges that Kennedy created the impression that the employees' union activities were under surveillance. According to the General Counsel this is because Kennedy did not tell employees how knew of the union's home visits. Kennedy testified that he told employees that employees had notified management about the home visits.

I decline to credit the employee witnesses' testimony on this point and others regarding the meetings conducted by Kennedy and Owner Berstein—unless otherwise specifically credited.[6] As Respondent points out in its brief, there is no common theme to this employee testimony and much that is inconsistent and/or clearly erroneous. Carmen DeJesus, Nora Palasio, Maria Alacote, Carmen Gonzalez, and Claudia Ulloa testified through a Spanish interpreter. The recollection of the various meetings with Kennedy and Berstein was also the product of listening to someone translate Kennedy and Berstein's remarks from English into Spanish.

DeJesus testified that James Kennedy told employees they would be fired if they signed a union authorization card. No other witness corroborated DeJesus' testimony on this matter.

Several witnesses, Palasio, Alacote, and Claudia Ulloa, testified that Luis Betancourt translated for Kennedy at the July 13 meeting. This is clearly incorrect.

Alacote testified that Kennedy did not speak about home visits at the July 13 meeting. She also testified that Kennedy told employees to bring management their signed union authorization cards; no other witness so testified.

Exana Estellus and Marie Dorceliin testified through a Creole translator. Estellus testified that Jeff Berstein told employees they would lose their one month vacation if they selected union representation. No other witness so testified and I infer that Berstein's remarks at all the meetings he conducted on a particular day were virtually identical in content.

For these reasons I dismiss all complaint items alleging that James Kennedy created the impression that employees' union activities were under surveillance.

Jeffrey Berstein's July 14 meetings and the terminations of Miriam Farez and Joe Ventura (complaint paragraphs, 17, 21, 22, 25)

Respondent's president and owner, Jeffrey Berstein, who is based in King of Prussia, Pennsylvania, conducted 5 or 6 meetings with different groups of Clifton employees on July 14, 2015. When Spanish or Creole speaking employees were present, Berstein's remarks were translated. Berstein mentioned that some employees were being visited by the Union. He testified that he told employees that Kennedy had told him that Andre Cherry had informed Kennedy about the Union's visit to Cherry's home. Berstein also testified that he told employees that management had heard rumors that the Union had visited other employees (Tr. 678).

Berstein also asked employees if their bosses were treating them with respect. Some employees then complained to Berstein about production supervisor Joe Ventura and lead person Miriam Farez (Tr. 680–681). After the meeting Berstein instructed James Kennedy to terminate the employment of Ventura and Farez. Kennedy terminated Farez the next day and Ventura on July 20. The company did not apply its progressive discipline policy in making these termination decisions.

Employee complaints about Farez and Ventura were not new. Prior to his July 14 meeting with employees, Berstein was aware of written reports authored by human resource representative Caitlin Payne which discussed employees' complaints about both individuals (GC Exhs. 9 and 10, Tr. 676–677). General Manager James Kennedy was aware of complaints about Farez prior to April 1, 2015 (Tr. 623–624).

Payne made three visits to the Clifton facility prior to Berstein's July 14 meeting, April 13, May 27–29, and July 9, 2015. In her report of her May 2015 visit (GC Exh. 9), Payne recorded that employees complained that Ventura had an aggressive approach to supervision and yelled at them. Five employees in the garment department complained that lead person Miriam Farez was rude to them to the point that some did not want to come to work. They told Payne they had complained about Farez to supervisor Luis Betancourt but Farez' attitude had only gotten worse. Payne shared the complaints about Farez with General Manager James Kennedy (Tr. 623–624). Despite Kennedy's denial (Tr. 630), I find that Payne also shared the complaints about Ventura with Kennedy. It is highly unlikely that Payne reviewed the complaints about Farez with Kennedy, but not those about Ventura, whose behavior was as much a focus in Payne's May report as was the behavior of Farez.

In a report of her July 9 visit (GC Exh. 10), Payne noted that there was a big focus on Ventura's supervisory approach at all the meetings she had with employees. Employees characterized Ventura as very reactive and snappy. Employees complained that Ventura never thanked them. Payne was aware that higher level management had talked to Ventura about his supervisory style previously. No employees specifically complained to Payne about Farez during her July visit.

*Legal Analysis with regard to the terminations of Ventura and Farez*

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), 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 employees' protected right to organize. 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, *Curwood Inc.,* 339 NLRB 1137, 1147–1148 (2003), enfd. in pertinent part 397 F. 3d 548, 553-54 (7th Cir. 2005); *Network Dynamics Cabling,* 351 NLRB 1423, 1424 (2007). The termination of an unpopular supervisor in order to grant a benefit to discourage union activity violates Section 8(a)(1), *Burlington Times,* 328 NLRB 750 (1999).

[5] I discredit Kennedy's testimony at Tr. 536 that he did not know that Cherry's visitors were union representatives. Cherry's emails to Kennedy on July 12 and the morning of July 13 make it quite clear that he knew that Cherry's visitors represented a union, R. Exh. 7.

[6] After July 13, many of the meetings were conducted in smaller groups and separated by the language into which Kennedy and Berstein's remarks were being translated.

Respondent contends that all reported cases in which the Board has found the termination of an unpopular supervisor to violate the Act are cases in which the termination occurred in the critical period between the filing of a representation petition and the representation election. Thus, Respondent argues that since the Charging Party Union had not filed a representation petition before Farez and Ventura were terminated it did not violate Section 8(a)(1).

Regardless, the Board has made it clear that termination of an unpopular supervisor to discourage union activity is a 8(a)(1) violation. It has never stated that the termination must occur in the "critical period" in order to constitute a violation. In fact the *Burlington Times* case establishes that is not the case. The Administrative Law Judge rejected the contention of the General Counsel and Charging Party that the discharge of the Burlington's supervisor could not be relitigated in an unfair practice proceeding because it had been litigated in a prior hearing on objections, 328 NLRB 750, 754 fn. 15. The Board affirmed the Judge's rulings, findings and conclusions. It also found that the supervisor's termination violated Section 8(a)(1) without mentioning that he was terminated after a representation petition had been filed. Thus, as discussed below, the law as applied to the facts of this case establishes that Respondent violated Section 8(a)(1) by terminating Farez and Ventura.

At page 21 of its brief, Respondent suggests that since the Union in this case has not filed a representation petition, a finding that it violated the Act in terminating Ventura and Farez would prevent it from terminating any unpopular supervisor during an organizing campaign. That would not be the case if an employer terminated a supervisor for conduct during the organizing campaign that was not motivated by its desire to discourage its employees from organizing. In this case, the terminations of Farez and Ventura were not based on any conduct occurring after Respondent became aware of the organizing campaign. Employee grievances against Farez and Ventura predated the organizing campaign and Respondent was aware of those grievances before the campaign started. It is noteworthy in this regard that while Caitlin Payne's May report discussed complaints against Farez, Payne's July report did not mention Farez at all. There is no evidence that Farez did anything between July 12 and 14 to warrant her termination.

Although motive is usually irrelevant in analyzing 8(a)(1) allegations, analysis under *Exchange Parts* is motive based. I conclude that this record establishes that the terminations of Ventura and Farez were motivated by the unlawful purpose to restrain, coerce and/or interfere with union activity and thus violate Section 8(a)(1).

James Kennedy's meeting on July 15 (complaint paragraph 18)

James Kennedy met with employees again on July 15. He discussed the Union's visits to employees' homes. He testified that employees voluntarily shared information. The General Counsel's testimony is too unreliable to support a finding that Respondent, by Kennedy, violated the Act in any respect at this meeting. The testimony of Marie Dorceliin, one of the General Counsel's witnesses at transcript 348–349 tends to support Respondent's denials. It is very unlikely that Kennedy told some employees they were free to sign an authorization card and told others not to sign the cards or that they would be fired for doing so. Thus, I dismiss complaint paragraph 18.

James Kennedy's meetings with employees on July 20

James Kennedy met with Creole speaking employees on the first shift at 10:45; Spanish speaking first shift employees at noon; Creole speaking second shift employees at 3:45 and Spanish speaking second shift employees at 5. Kennedy testified that he read from a prepared text (R. Exh. 12), and that his remarks were translated for non-English speakers. Employee attendance at these meetings was mandatory.

Kennedy announced that Miram Farez and Joe Ventura had been terminated. He then told the employees that some employees had voluntarily shared with management the fact that the Union had visited their homes and called them on their cellphones.

His knowledge about the cellphone calls emanated from Luis Betancourt. Since Betancourt did not testify, the record is silent as to how he acquired this information, such as did Betancourt solicit this information from employees. However, the General Counsel did not present any evidence of interrogation or surveillance by Betancourt. Thus, I find no basis for concluding that Kennedy gave employees the impression that their union activities were under surveillance at the July 20 meeting.

Kennedy read verbatim from a document he prepared prior to the meeting (Tr. 549–555, Exh. R-12). This document shows that Kennedy solicited employee grievances and promised to remedy them. In addition to suggesting, (even with its significant redactions), that Ventura and Farez were fired due to the complaints solicited by Berstein on July 14, Kennedy's memo states as follows:

> As always your feedback is much appreciated. After further review of the feedback some significant changes have been made. I take full responsibility and share with each of you that I should have made those changes sooner…
>
> Please feel free to continue to voluntarily share any question that you may have and as promised we will continue to provide answers.

Kennedy conducted similar meetings on July 22 and afterwards at which the Union was discussed.

Jeffrey Berstein meets with customer advocates on July 21.

Owner Berstein met with 13 customer advocates (i.e., drivers) on July 21. Among the subjects discussed were some managers who were disliked and rumors that production associates were unhappy about having to work on Sundays.

Jeffrey Berstein meets with employees on July 28, August 4 and 11.

Berstein met with employees in 5-6 meetings on July 28; he addressed them using a Power Point Presentation (R. Exh. 18), which was translated into Spanish or Creole depending on the composition of the attendees. Berstein discussed the Union's home visits and their authorization cards. He told employees that the Union might, based on complaints made to the NLRB, pressure, lie, or even threaten them to sign authorization cards.

Berstein held similar meetings with employees on August 4 and 11 at which he again spoke from a Power Point (R. Exh. 19 and 20). Berstein told employees on August 11 that since the Union would not have a representative in the plant it would be unable to deal with employees' concerns in a timely fashion. He told employees that they would have to file a grievance and then wait weeks or months in the hope that the grievance would be resolved in the employee's favor. This statement regarding a long delay in resolving grievances appears not to violate the Act, *Pyramid Management Group,* 318 NLRB 607 fn. 3 (1995).

Owner Berstein has continued to meet with employees about the Union since August 2015.

Supervisor David Rivera's confrontation with organizer Marcia Almanzar outside Respondent's gate on August 6, 2015 (complaint paragraph 29)

Respondent stipulated that David Rivera had a physical confrontation with a union representative on August 6. It also stipulated that by this conduct Respondent coerced or restrained employees in the exercise of their Section 7 rights (Tr. 7). In its post-hearing brief, Respondent states that it does not contest the allegations contained in complaint paragraph 29.

The General Counsel introduced a video showing Rivera operating leaf blower inside Respondent's gate and then approaching union representative Marcia Almanzar who was standing just outside the gate with other union representatives. Almanzar testified about the incident; Rivera did not. Thus Almanzar's account is uncontradicted and credited. Rivera initiated the confrontation by calling Almanzar a whore and blowing debris on her. Almanzar began filming Rivera with her cellphone. Rivera disparaged the Union. Almanzar called Rivera a "boot licker." Rivera then tried to pry Almanzar's cellphone away from her. Rivera or another company official called the local police, who arrived on the scene after Rivera went back inside the plant.

Almanzar filed a criminal complaint against Rivera, who pled guilty. I do not credit the testimony of the General Counsel's witnesses as to the presence of employees when this assault took place. However, Rivera's assault of Almanzar violates the Act regardless of whether or not employees witnessed it, *McBride H.R. Construction Co.,* 122 NLRB 1634, 1635 (1959).

Respondent provides food to employees; General Counsel alleges that it increased the frequency and quality of the food (complaint paragraphs 25–27)

It is clear from the record that both before and after July 12, Respondent provided food to employees at the Clifton facility. The question now is whether the quality of the food and the frequency with which food was provided was significantly augmented after the appearance of the Union. The employees' testimony is not particularly helpful in determining the facts regarding these allegations. That testimony varies a great deal. However, Caitlin Payne's reports of her visits to the Clifton facility make clear that Respondent's "Lunch with the Boss" program was moribund during the months just prior to the start of the organizing campaign. From the testimony of James Kennedy and Caesar Sanchez, I conclude that the program was revived after July 12 (Tr. 511-512, 528–529).

The record also establishes that shortly after he was hired as an assistant general manager, Caesar Sanchez took employees off site for lunch on 3 occasions (different employees each time). Employees were asked to choose what they wanted to eat from a menu. On later occasions, Sanchez had employees choose what they wanted to eat and had it delivered to the plant. Respondent had not given employees such choices prior to the appearance of the Union.

I find that the change in quality and frequency of the food provided to employees after the organizing campaign started as compared to the months before the campaign were significant enough to constitute an illegal benefit motivated by a desire to discourage employees from supporting the Union. Thus, I find that Respondent violated Section 8(a)(1) as alleged in paragraphs 25–27, *Caterpillar Logistics, Inc.,* 362 NLRB No. 49 (2005), slip op. 1, fn. 4, enfd. 835 F. 3d 536 (6th Cir. 2016).

*Solicitation of employee complaints/offer of better working conditions by James Kennedy and Jeffrey Berstein*

Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains or coerces employees in the exercise of Section 7 activities. Solicitation of grievances is not unlawful but raises an inference that the employer is promising to remedy the grievances. Additionally, an employer who has a past policy of soliciting employees' grievances may continue such a practice during an organizing campaign. However, an employer cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation, *American Red Cross Missouri-Illinois Blood Services Region,* 347 NLRB 347, 351 (2006); *Carbonneau Industries,* 228 NLRB 597, 598 (1977), *Montgomery Ward & Co.,* 225 NLRB 112, 117–118 (1976).

First of all, on July 14, Jeffrey Berstein solicited employee's grievances by asking employees if they were being treated with respect. He already knew from Caitlin Payne's reports that he was likely to get complaints about Joseph Ventura and Miram Farez. Berstein not only impliedly promised to remedy the employees' grievances about Ventura and Farez, he did so by firing them both.

R. Exh. 12, discussed at page 7, establishes that James Kennedy solicited grievances and expressly promised to remedy them at his meeting with employees on July 20.

As set forth below, I find that Respondent repeatedly and materially altered its practice of soliciting grievances, impliedly remedying them and remedying grievances after the union organizing campaign began in other respects.

The General Counsel in paragraph 20 of the complaint alleges that Respondent by James Kennedy offered employees better working conditions in order to discourage employee support for the Union. Kennedy testified that he conducted about 10 "remarkable" meetings with employees in September and October 2015 (Tr. 578). At these meetings he routinely asked employees, "If you could wave a magic wand and could change anything about your job or work environment, what would it be?" (Tr. 578, R. Exh. 14). Respondent's solutions to concerns raised in these meetings were shared with employees at later meetings in September and October. Thus, I find that Re-

spondent not only regularly solicited employee grievances during the campaign and impliedly promised to remedy these grievances, it did so.

In response to a leading question from his counsel, Kennedy testified that this has been his business practice throughout his tenure with ImageFirst. There is no evidence to support this contention other than the self-serving testimony of Kennedy and Berstein. Respondent did not call any rank and file witnesses to establish that this solicitation was an established past practice. In this regard, Andre Cherry testified about several rank and file employees who were suspicious enough about the Union that they voluntarily told him about the home visits. Cherry shared this information with James Kennedy. However, Respondent did not call any of these employees, or any other rank and file employees to corroborate the testimony of Kennedy and Burstein that their practice with regard to solicitation and remedying grievances did not significantly change after the start of the union campaign. This omission leads me not to credit the testimony of Kennedy and Berstein on this point, *E-Z Mills, Inc.,* 101 NLRB 979, 987 (1952).

Counsel for Respondent inquired of witness Claudia Ulloa as to the company's practice of meeting with employees before the union campaign. Ulloa, who had worked for Respondent since 2012, testified that Respondent conducted meetings with employees in the morning, but they were not like the meetings conducted since the arrival of the Union. This is consistent with other evidence that Respondent's supervisors conducted daily "huddles" with employees (GC Exhs. 9 and 10, R. Exh. 11). Ulloa confirmed that managers asked how things were going and what employees needed to do their jobs. Sometimes, according to Ulloa, employees received what they asked for and sometimes they did not (Tr. 250–251). Unlike much other employee testimony, there is no employee testimony inconsistent with Ulloa's account of Respondent's pre-campaign meetings. Therefore, I credit her testimony.[7]

There is no credible evidence that indicates that employees were solicited by Kennedy and/or Berstein prior to the union campaign in the manner that they were afterwards.

On the other hand, the record establishes that after the beginning of the union campaign, Respondent markedly increased the frequency of its meetings with employees and its "lunches with the boss." Caitlin Payne noted in her reports of April 13 and May 27, their neither was taking place in the months prior to July 12 (GC Exhs. 9 & 10, R. Exh. 11).

Kennedy testified that Respondent conducted "remarkable" meetings in the third quarter of every year. Assuming this is so, there is no evidence as to what was discussed at these meetings prior to 2015. For example, there is no evidence that Respondent solicited grievances in the manner that it did in 2015.

James Kennedy authored an email (R. Exh. 13), which establishes the Respondent's supervisor Luis Betancourt solicited grievances Nadia DeJesus and promised to remedy them. From the lack of any disapproval in Kennedy's email, I infer that Betancourt was acting in accordance with Respondent's standard practice during the organizing campaign.

## Conclusions of Law

Respondent, ImageFirst, violated Section 8(a)(1) of the Act in the following respects

1. Discharging a supervisor and a lead person at the start of the organizing campaign in order to discourage employees from supporting the Union.
2. Soliciting grievances and impliedly promising to remedy those grievances in a manner different than it did prior to the start of the union campaign.
3. Increasing the frequency and quality of food provided to employees after the beginning of the organizing drive to discourage support for the Union.
4. By Supervisor David Rivera initiating confrontation with a union representative outside the gate to Respondent's facility
5. Maintaining an illegal rule in its employee handbook.

## Remedy

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

## ORDER

The Respondent, ImageFirst, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging unpopular supervisors and lead persons in order to discourage employees from supporting the Union.

(b) Soliciting grievances and impliedly promising to remedy those grievances in a manner different than it did prior to the start of the union campaign.

(c) Increasing the frequency and quality of food provided to discourage support for the Union.

(d) Initiating confrontations with union representatives.

(e) Maintaining an illegal rule in its employee handbook which provides for discipline for discussing payroll information.

[7] Some of Ulloa's testimony is not accurate. For example, she remembered that Luis Betancourt translated at the July 13 meeting. However, that is not a reason to discredit her testimony regarding Respondent's meetings with employees prior to July 13. I would note that Respondent's counsel spent some time examining Ulloa as to whether she knew who was the owner of ImageFirst, but did not ask her whether the owner (Berstein) or Kennedy made the same kind of grievance solicitations and implied promises before the Union showed up that it did afterwards. The testimony of Exana Estellus, although unreliable on many subjects, is probative as to the lack of credibility of Kennedy and Berstein's assertions that their solicitation of grievances after the union campaign was no different than it was before the campaign. Respondent also asked Marie Dorceliin about Berstein's visits to the Clifton facility prior the union campaign, but did not ask her whether Berstein solicited employee grievances before the campaign, Tr. 355–356.

[8] 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) 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 its handbook rule which provides for discipline for employees discussing payroll information.

(b) Within 14 days after service by the Region, post at its Clifton, New Jersey facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 14, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

## APPENDIX

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

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

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 discharge unpopular supervisors and lead persons in order to discourage employees from supporting the Union.

WE WILL NOT solicit grievances and impliedly promise to remedy those grievances in a manner different than we did prior to the start of the union campaign.

WE WILL NOT increasing the frequency and quality of food provided to you in order discourage support for the Union.

WE WILL NOT initiate confrontations with union representatives.

WE WILL NOT maintain an illegal rule in our employee handbook which provides for discipline for discussing payroll information.

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

IMAGEFIRST

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-161563 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.

[9] 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."