

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

NEWPORT MEAT SOUTHERN
CALIFORNIA, INC.

and

Cases 21-CA-209861
21-CA-214652
21-CA-217903

GENERAL TRUCK DRIVERS, OFFICE,
FOOD & WAREHOUSE UNION, LOCAL
952, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

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I. INTRODUCTION

This case is before Administrative Law Judge Amita B. Tracey (“ALJ”) pursuant to the Consolidated Complaint for Cases 21-CA-209861, 21-CA-214652, and 21-CA-217903 (“Consolidated Complaint”) issued on December 12, 2018.¹

Newport Meat Southern California, Inc. (“Respondent”) supplies high-quality meats to customers throughout Southern California, out of its facility in Irvine, California (“the Irvine facility”).

About July 2017, the General Truck Drivers, Office, Food & Warehouse Union, Local 952, International Brotherhood of Teamsters (“Union”) started a campaign to organize production and warehouse employees at the Irvine facility (“the petitioned-for unit”). On October 10, 2017, the Union filed a Petition for Election, and an election was scheduled for November 9, 2017.

In response to the Petition for Election, Respondent started a vigorous campaign to discourage employees from supporting the Union. From early October to early November 2017, almost weekly, Respondent held numerous captive-audience meetings where high-ranking officials of Respondent including Respondent’s Western Region Area President; President; Senior Resources Business Partner; Senior Director of Labor Relations for the Sysco Corporation; as well as two labor consultants spoke directly to employees in the petitioned-for unit.² The record will show that at these meetings, Respondent delivered many repetitive statements to employees that violated Section 8(a)(1) of the National Labor Relations Act (“the

¹ At the hearing, General Counsel moved to withdraw Paragraphs 16(a)(b), Paragraph 8(h), and Paragraph 13 of the Consolidated Complaint: hearing no objection, the ALJ granted the motion. Inasmuch as there is no evidence in the record to support Consolidated Complaint Paragraphs 6(f), 6(g), 8(c), 9(c), 10(e), 12(h), and 12(j), the General Counsel hereby requests to withdraw them and has advised Respondent’s Counsel and Union’s Counsel of its intentions.

² These titles reflect the correct titles of Respondent’s officials based on the testimony of Respondent’s witnesses.

Act”) as Respondent: solicited employees’ grievances; promised to address employees’ complaints and to provide benefits to employees; threatened that if the Union won the election, negotiations with the Union would start at zero; threatened employees that Respondent could replace them, their work could be transferred, or the Irvine facility could close down and employees would lose their jobs; and threatened to freeze employees’ regularly-scheduled annual performance reviews and raises.

The record will further show that Respondent violated Section 8(a)(1) of the Act by, at these meetings: distributing a document to employees which explicitly stated that employees in the petitioned-for unit would not receive reduced health-insurance costs promised to employees not in the petitioned-for unit; and by authorizing an employee to conduct a lunch meeting during working time where he told employees that Respondent was going to improve working conditions.

As a result of Respondent’s aforementioned conduct, the Union filed unfair labor practice charges that blocked the November 9, 2017 election. The record will show that even after the first blocking charge was filed, Respondent continued its violations of Section 8(a)(1) of the Act and, after the election was cancelled, conducted more captive-audience meetings where it distributed petitions soliciting employees to revoke their Union authorization cards.

Additionally, after these meetings, an employee distributed the same petition to employees as distributed by Respondent, during working time, and requested them to revoke their Union authorization cards.

The record will further show that Respondent violated Section 8(a)(3) of the Act by effectuating some of its promises and threats. Specifically, in response to employees’ complaints, Respondent removed from the Irvine facility a supervisor whom employees had

complained about for years prior to the organizing campaign. Additionally, Respondent froze the annual performance reviews and raises of employees in the petitioned-for unit who were scheduled to receive such reviews and raises during the months of October and November 2017, and withheld the reductions in health-insurance costs from all employees in the petitioned-for unit.

II. STATEMENT OF THE FACTS

A. Respondent's Business Operations

Respondent provides high-quality meat products to retail customers in Southern California from its Irvine facility. Approximately 80 meat-processing and warehouse employees cut and pack meat, maintain equipment, and perform other duties related to meat processing.³ (JX#1(b); GCX#15)

Mike Drury ("Drury") is currently Area President, Western Region overseeing seven companies within the Sysco Corporation⁴ in the western United States, including the Irvine facility.⁵ (Tr. 1101) Denise Van Voorhis ("Van Voorhis"), a 43-year employee of Respondent who has held a number of managerial positions, is currently President of Respondent's Irvine facility, overseeing the daily distribution of meat products to about 1600 restaurants and hotels in the western United States, as well as the day-to-day operations at the Irvine facility. (Tr. 1013)

³ The hearing transcript will be referred to as "Tr." followed by a reference to the page number. General Counsel's exhibits will be referred to as "GCX" followed by the appropriate exhibit number, Respondent's exhibits will be referred to as "RX" followed by the appropriate exhibit number, and joint-party exhibits will be referred to as "JX" followed by the appropriate exhibit number.

⁴ The record does not reveal the exact relationship between Respondent and the Sysco Corporation, but Respondent appears to be part of the Sysco Meat Group or Sysco family companies. (Tr. 939)

⁵ The Consolidated Complaint (hereinafter "Complaint") alleges that at all relevant times, Drury's title was Regional Vice President. However, at hearing, Drury testified that when he first started working for Respondent, he served as Vice President of Sales for 14 years, then as President for a couple of years, and that he has most-recently held the title of Area President, Western Region. (Tr. 1101) Accordingly, hereinafter, Drury's title will be referred to as "Area President."

Roberto Diaz Jr. (“Diaz”) is the Senior Resources Business Partner, a position he has held since October 2017: he acts as a “liaison” between Respondent and its employees.⁶ (Tr. 889)

John Mitchell (“Mitchell”) currently is the Vice President of Labor Relations for the Sysco Corporation (“Sysco”), and was Senior Director of Labor Relations for Sysco during the time period at issue in the instant case.⁷ (Tr. 958) At that time, Mitchell routinely negotiated collective-bargaining agreements – both initial and successor – for Sysco companies where employees were represented by a union. (Tr. 958) He also answered questions from these companies about the application of the collective-bargaining agreements and their respective provisions.⁸ (Tr. 858)

B. Employees’ Terms and Conditions of Employment

1. The Employees’ Duties

The production department at the Irvine facility consists primarily of meat cutters and trimmers who work a morning shift beginning at about 6:00 or 6:30 a.m. and continuing until the work is finished for the day. (Tr. 24,126, 305) There are also warehouse employees and “pack-off” workers who send the prepared meat product to the warehouse to be shipped out to the customers, as well as inventory-control and maintenance employees. (Tr. 247-248, 59)

⁶ The Complaint alleges that at all relevant times, Diaz’s title was HR Manager. However, at hearing, Diaz testified that his correct title is Senior Resources Business Partner. (Tr. 889) Accordingly, hereinafter, Diaz’s title will be referred to as “Senior Resources Business Partner.”

⁷ The Complaint alleges that all relevant times, Mitchell’s title was Director of Labor Relations. However, at hearing, Mitchell testified that during the relevant time period, his correct title was Senior Director of Labor Relations. (Tr. 958) Accordingly, hereinafter, Mitchell’s title will be referred to as “Senior Director of Labor Relations.”

⁸ Drury, Van Voorhis, and Diaz were admitted to being supervisors within the meaning of Section 2(11) of the Act. Respondent admitted that Mitchell is an agent of Respondent within the meaning of Section 2(13) of the Act. (GCX#1(gg))

There are two departments or “portions” in production: Department A, where meat with bone is prepared using saws; and Department B, which processes meat without bones, using knives. (Tr. 24, 126, 248)

Employee’s wages, based to some extent on performance, experience, position, and tenure, can vary between employees performing the same duties, although there is a defined range set forth in a rate-range grid. (Tr. 1034, 1122)

2. Appraisals/Performance Reviews

Respondent completes Performance Reviews for employees annually on the anniversary date of their hire by Respondent or within the pay period of that anniversary date, which may result in a merit increase in wages for an employee. (Tr. 1034-1035, 1122) There is no set formula for the amount of the merit increase, which is determined primarily by the employee’s supervisor in conjunction with the supervisor’s manager. (Tr. 1034-1035) Any merit increase is applied retroactively to the employee’s anniversary date. (Tr. 1035)

3. Health Insurance

Respondent makes available to its employees at the Irvine facility a number of health insurance plans, including an FSA, PPO, and an HMO. (Tr. 1020) The open enrollment period is generally in October or November of each year, which is when Respondent and the employees learn what the premiums for the coming calendar year will be. (Tr. 1021, 1109) Respondent does not control the amounts of the premiums charged by the respective health plans, which are negotiated on a national level. (Tr. 1133)

In about October 2015, Respondent was asked to join a standard benefit plan for its HMO insurance which would have resulted in a 90% increase in premiums for the employees.

(Tr. 1108, 1118) Not wanting to pass this increase on to the employees, Respondent (specifically Drury and Van Voorhis) worked with the benefits department at the Irvine facility to offer employees a subsidy to minimize the impact of the increase. (Tr. 1019, 1108) This subsidy, available only to those already in the HMO plan in 2015 and whose income was under \$70,000 per year, took effect for the first time on January 1, 2016. (Tr. 1019-1020, 1108) The amount of the subsidy is evaluated annually in October and changes year-to-year based on premium increases in the market, as well as on Respondent's earnings and budget for the year at issue.⁹ (Tr. 1019-1020, 1109) The subsidies are still currently offered to employees who meet the original criteria: the subsidy in 2017 was slightly less than that offered in 2016; however, the subsidy increased in 2018 due to significant increases in premium rates. (Tr. 1021, 1055, 1110, 1135, 1139)

As a result of receiving an increased subsidy from Respondent, an eligible employee would pay less for insurance costs than without the subsidy. (Tr. 1058-1059, 1135)

C. The Union Organizing Campaign

On about October 10, 2017, the Union filed a Petition for Election in Case 21-RC-207621 with Region 21 of the National Labor Relations Board (the Board) to represent Respondent's

⁹ Area President Drury testified that Respondent typically takes the healthcare rates as provided by healthcare providers, that healthcare rates are negotiated at a national level, and individual sites like Respondent do not get involved with such negotiations. He further testified that the subsidy is separate from the cost that the HMO sets, and that Respondent determines the amount of the subsidy it provides. (Tr. 1133)

production and warehouse employees.¹⁰ (JX#1(b)) The parties subsequently stipulated to have an election at the Irvine facility on November 9, 2017, for the petitioned-for unit.¹¹

Earlier that summer of 2017, several of Respondent's employees attended off-site Union organizing meetings, where they learned about and signed union authorization cards: many of them described these merely as "blue cards." (Tr. 25, 76, 127, 150, 248, 305, 463, 526, 591)

D. Respondent's Response to the Union's Petition for Election

Once Respondent learned the Petition for Election had been filed, its officials held a series of training sessions and meetings with groups of employees in the petitioned-for unit during the period between the filing of the petition in October 2017, and the scheduled election in November 2017. (GCX#15 pp. 2-3) Some employees attended as many as 10 or 12 meetings during that 30-day period. (Tr. 620)

Respondent also retained the services of two management consultants – Angel Cornejo ("Cornejo") and Simon Jara ("Jara") – who conducted sessions with employees in the petitioned-for unit to discuss the National Labor Relations Act ("the Act") and union rules and by-laws as well as the collective-bargaining process.¹² (Tr. 792, 859-860, 1103) All in all, they conducted between 15 and 20 small group sessions in October 2017 with employees in the petitioned-for unit, in addition to one-on-one conversations with them. (Tr. 793, 860) Cornejo did most of the

¹⁰ The petitioned-for unit, as described in JX#1(b), included: all full-time and regular part-time cutter, trimmer, meat packer, receiver, debagger, order selector, portion/packer, meat inspector, checker, stock clerk, shipping (shipper), warehouse, forklift driver, janitor, mechanic, maintenance, meat inspector, dispatchers and working foreperson. Excluded from the petitioned-for unit were all other employees, managers, supervisors, and guards as defined in the Act. (JX#1(b)) Respondent also employs drivers to deliver its meat products to customers: those drivers have been represented by Teamsters Local 848 since 1999 and are not at issue in the present case. (Tr. 1014; GCX#15 p.1)

¹¹ Although the election stipulation was not made a part of the record, the Notice of Cancellation of Election, as well as many other exhibits, refer to the election being scheduled on November 9, 2017. (JX#1(c); GCX#15 at p.2)

¹² Respondent admitted in its Answer to the Complaint that Cornejo and Jara were agents of Respondent within the meaning of Section 2(11) of the Act. (GCX#1(gg))

speaking at the meetings, and Jara observed and occasionally spoke to cover a point that Cornejo might have missed. (Tr. 853, 860)

1. On About October 11, 2017, Area President Drury and President Van Voorhis Met with Employees in the Conference Room of the Irvine Facility to Notify Them About the Petition

Area President Drury and President Van Voorhis became aware that the Union was organizing the production and warehouse employees at the Irvine Facility when they received a copy of the Petition for Election. (Tr. 1014, 1102; JX#1(b)) Neither had ever been involved in union-organizing campaigns before, and therefore they retained experienced consultants so that the employees could make an educated decision that would be beneficial to employees. (Tr. 1014-1015, 1102)

Van Voorhis and Drury confirmed that they held between three to five meetings with employees after the Petition for Election was filed, and specifically held several meetings in different departments to tell them about the petition.¹³ (Tr. 1015-1016, 1045, 1105) Roberto Diaz translated what they said at each meeting into Spanish.¹⁴ (Tr. 891, 1018, 1105, 1128) Several supervisors – about six to ten – also attended these meetings. (Tr. 1129)

Van Voorhis and Drury testified that a written script was utilized at this meeting entitled *“Speech to Employees During Week of October 9, 2017 by Mike Drury and Denise Van*

¹³ Although Van Voorhis stated that there were sign-in sheets at these meetings, Respondent, by counsel, in response to General Counsel’s Subpoena Duces Tecum Paragraph 16 requesting copies of any meeting sign-in sheets reflecting attendance at any meetings between Respondent and the petitioned-for unit employees, asserted that such documents did not exist.

¹⁴ Diaz confirmed that he provided Spanish-language translation to the best of his ability at most of the meetings at issue herein. However, Diaz generally denied that he translated any of the statements alleged to be unlawful in the Consolidated Complaint (hereinafter “Complaint”), or that he himself made such statements. (Tr. 915-920)

Voorhis.”¹⁵ (Tr. 1016, 1047, 1103-1104; GCX#9) The purpose of this script, according to Van Voorhis and Drury, was to ensure that their multiple presentations were consistent.¹⁶ (Tr. 1105)

Van Voorhis testified that she read verbatim from the prepared script, to which she added her own hand-written notes. (Tr. 1016-1017; GCX#9) Among the points covered in the script were the facts that even though the Teamsters represented employees in the transportation department at the Irvine facility, and Sysco had unions in some of their other locations, Respondent and Sysco preferred to operate on a “non-union and union-free basis” because this was best for the company and its customers. (GCX#9 p. 3-4) The script also reminded employees that unions represented less than 7% of American employees in the private sector, and that where there were no unions, there were no union dues and no possibility of a union strike. (GCX#9 pp. 4-5) Van Voorhis also read from the script that the employees who had signed union authorization cards made a big mistake that could end up “haunting” them for the rest of their working lives. This mistake, according to Van Voorhis’ script, could be remedied by voting against the Union in the NLRB election, for which election the final details had not been made. (GCX#9, p. 6) In closing, Van Voorhis told the employees that during the coming days and weeks, the company would take time to answer the employees’ questions and see that they were fully informed about the Union. (GCX#9, pp. 7-8)

Everardo (or Evarado) Jimenez (“Jimenez”),¹⁷ a day-shift meat cutter in Department A who testified in Spanish, attended one of these meetings regarding the Union Petition for Election, and recalled that Drury and Van Voorhis, utilizing Roberto Diaz as a translator, told the

¹⁵ Diaz confirmed that he also had a copy of this script in Spanish that he had prepared, and that he had translated GCX#17 to the best of his ability. (Tr. 892-893, 951; GCX#17) Other than translating, Diaz did not speak at this meeting. (Tr. 892)

¹⁶ Diaz confirmed that his translations of each meeting were consistent based on his script. (Tr. 892)

¹⁷ Based on Respondent’s exhibits which list Jimenez’s name as “Everardo Jimenez,” it appears that at hearing, Jimenez may have inadvertently incorrectly spelled his name. (Tr. 22-23).

employees that they were not aware of the situation in the company and that they wanted to help the employees.¹⁸ (Tr. 23-24, 30-31) One employee asked Drury and Van Voorhis why they waited until now to talk to the employees, and that employees had made a lot of complaints to managers and no one had paid them any attention. (Tr. 34) Jimenez confirmed on cross-examination that Drury told the employees present that it would be a “mistake for employees to bring in the Union.” (Tr. 83)

Employee Edith Gutierrez de Tirado (“Gutierrez de Tirado”) works in Department B, trimming and packing meat. (Tr. 523-525). Gutierrez de Tirado, who testified in Spanish, recalled a meeting with Drury and Van Voorhis – with Diaz translating – where Van Voorhis had a piece of paper that she indicated was a petition for the Union, and said she couldn’t understand why the employees wanted a union if the company was without a union, and that a union would not be beneficial to the company.¹⁹ (Tr. 523, 533, 568) She further recalled that Drury said he didn’t understand why employees would want a union or “why we were in this situation.” (Tr. 567)

Meat cutter Pedro Luna (“Luna”), who works in Department A, testified in Spanish through an interpreter that he also attended a meeting with 70 or 80 employees where Van Voorhis informed them that they had received a “request” or petition from the Union and that the company wanted to be free of a union because it was not good for the company or its clients.²⁰ (Tr. 124-126, 130-131, 212) He further recalled on cross-examination that Drury said he wanted to run the company free of problems caused by the Union. (Tr. 211) Osvaldo Valdivia

¹⁸ See Complaint Paragraph 9(a).

¹⁹ See Complaint Paragraph 9(a). Gutierrez de Tirado recalled that this meeting occurred on October 4, 2017; this meeting had to have been held after the Petition for Election was filed on October 10, 2017. (Tr. 530; JX#1(b))

²⁰ Luna testified regarding several meeting that he attended during October and November 2017, and explained his inability to recall specific dates to having been summoned to the meetings and not writing down the dates or what was said. (Tr. 179)

(“Valdivia”), a “pack off” employee who works in Department A, also attended this meeting, and confirmed that Drury and Van Voorhis²¹ spoke and Diaz translated and that Van Voorhis said the Teamsters had filed a petition and that the Union was not good for the company or its customers. (Tr. 247-248, 250-252) Valdivia further stated that Van Voorhis said she did not want any questions asked at this meeting. (Tr. 252, 278)

Meat trimmer Diego Mendoza (“D. Mendoza”), who testified in Spanish, recalled from the meeting that he attended that Van Voorhis, utilizing Diaz as Spanish-language translator, told the employees that the Union had filed a petition, and that she was going to bring in advisors to give the employees information about the Union. (Tr. 303, 307, 431, 433) D. Mendoza also confirmed that Van Voorhis said whatever questions the employees may have were not going to be answered at this time. (Tr. 307)

Trimmer Raul Mendoza (“R. Mendoza”), who works in Department B, testified in Spanish that he remembered that Drury appeared to read from a paper at this meeting, and that he said the Union was “no good.” (Tr. 588-90, 594) On cross-examination, R. Mendoza confirmed that Van Voorhis, reading from a paper, with Diaz translating, said that the Union had filed a petition, and that the Union was not good. (Tr. 627, 630)

Receiving-department employee Matthew Durkee (“Durkee”), called to testify by Respondent, confirmed that he attended a meeting in October or early November 2017, where Van Voorhis said that the Union was trying to come into the company, and that the company would be bringing in some consultants to inform employees about the Union. (Tr. 776)

Another receiving-department employee called by Respondent, Gabriel Cueva (“Cueva”), recalled attending a meeting conducted in English with Van Voorhis and Drury where Van

²¹ Valdivia originally testified that both Drury and Van Voorhis spoke, but later corrected himself to say that only Van Voorhis spoke at the meeting that he attended. (Tr. 277)

Voorhis said that the Union had presented its petition. (Tr. 877, 881) Cueva testified that the employees asked for help with the company's subsidy to lower the costs of insurance and some raises, to which Van Voorhis responded she couldn't promise anything about the cost of health insurance – which the insurers had recently raised – or give a concrete answer until the voting had occurred, but that she would look into the employees' requests.²² (Tr. 877-878)

Respondent also called inventory employee Leonardo Garcia (“Garcia”), who attended a meeting held by Van Voorhis, with Diaz translating, where Van Voorhis told the employees that the Union had filed a petition. (Tr. 1170-1171) Garcia further described Van Voorhis talking about the negotiation process of “give and take,” but did not recall any other specifics. (Tr. 1171-1172)

2. On About October 17 and 18, 2017, Consultants Angel Cornejo and Simon Jara Met with Employees in the Petitioned-for Unit to Review the Act

On or about October 17 and 18, 2017, Consultants Cornejo and Jara held about 15 or 20 group meetings with employees in the petitioned-for unit at Respondent's Irvine facility in either the big luncheon room or the conference room. (Tr. 793-794, 860; GCX#15 p.2) Consultant Cornejo did most of the talking, and Jara mostly observed and occasionally interjected something or answered a question directed to him. (Tr. 853, 861, 864) The initial 5 or 6 meetings held on about October 17 and 18, 2017, were attended by groups of between 8 to 15 employees from both the day and night crews and lasted between 30 to 60 minutes each. (Tr. 860, 867). These first meetings focused on the National Labor Relations Act, and the Consultants distributed copies of the *Basic Guide to the National Labor Relations Act* with certain portions highlighted for emphasis, which Cornejo read aloud. (Tr. 301-302, 794, 838-839, 848, 861, 868; RX#1)

²² See Complaint Paragraph 8(a).

The Consultants also utilized a Power Point presentation about 5 or 6 times entitled *National Labor Relations Act Overview – NLRA Training 2017* that referenced specific sections of the *Basic Guide* regarding Section 7 rights, authorization cards and the showing of interest, the voting process, and the collective bargaining process.²³ (Tr. 795, 801-806, 862; RX#3) Cornejo and Jara also explained to employees in the petitioned-for unit that the *Basic Guide* provides that the parties – the union and the employer – have to bargain in good faith and do not have to agree and that no one knows what the outcome of bargaining will be: wages and benefits could increase, stay the same, or decrease.²⁴ (Tr. 806-808; RX#1, RX#3 p. 8) Cornejo also explained that there are no time limits on the bargaining process. (Tr. 809, 842; RX#3 p. 11) The Power Point presentation utilized by the consultants also covered strikes, striker replacement, and impasse. (Tr. 811; RX#3 p. 13-14) Cornejo explained that implementation of a last, best, and final offer after impasse could result in wages going up, staying the same, or going down. (Tr. 811-812)

Cornejo stated that he did not elicit any questions from employees during these meetings because “emotions tended to run high,” and, in his view, most employees just wanted to vent. (Tr. 849) He recalled that some employees spoke up anyway, but he did not attempt to answer them since he was not that familiar with the Respondent’s practices.²⁵ (Tr. 849-850) He did, however, respond to questions about the presentation and the information contained therein. (Tr. 851-852)

²³ Cornejo testified that inasmuch as nearly half of Respondent’s employees spoke Spanish, he explained the Power Point Slides in both Spanish and English. (Tr. 840-841)

²⁴ Jara, who was present at these meetings, confirmed that Cornejo told employees they could actually lose in collective bargaining but denied, in response to a direct question by Respondent’s counsel, that Cornejo “threatened” employees with reduced wages or benefits. (Tr. 863-865) Jara further denied, also in response to a direct question by Respondent’s counsel, that he “threatened” employees with reduced wages or benefits. (Tr. 864) Other than this, Jara admitted that he had little recollection of what was said in these meetings. (Tr. 869-871, 873)

²⁵ Consultant Jara confirmed that although questions were not solicited from employees, some asked them anyway or attempted to explain to the consultants what their working conditions were like. (Tr. 873)

A number of employees who attended some of these meetings testified as to what they recalled the Consultants saying. Employee Jimenez attended an early-morning meeting with about 8 to 10 other employees in October 2017, conducted by Consultants Cornejo and Jara. (Tr. 26-27) Jimenez, testifying in Spanish through an interpreter, recalled that Cornejo began by asking the employees present why did they want the Union? to which the employees responded that it was so the company would respect them and provide them with better benefits.²⁶ (Tr. 28, 66) Jimenez also recalled that Cornejo said that he had been hired by Sysco, and that he was going to freeze wages while the Union was there.²⁷ (Tr. 29) Cornejo also told the employees that the Union was no good and that it wasn't worth it to the employees. (Tr. 28)

Day-shift meat cutter Moises Arreguin ("Arreguin") from Department A, who also testified in Spanish through an interpreter, attended a meeting with Consultants Cornejo and Jara in October 2017, with about 10 employees in the conference room where Cornejo told them that the Union was not good, that it just wanted to take the employees' money, and that employees should not give the Union that opportunity. (Tr. 352, 357) Cornejo then asked the employees how they were treated by the company and what they needed, to which an employee responded that they were treated unfairly by supervisors and that their salaries were not good.²⁸ (Tr. 358) According to Arreguin, employee Candelaria Patino told Cornejo that if they got along with a supervisor, they were treated well, and if they didn't, the treatment and the salaries were not good. (Tr. 358) Arreguin himself then spoke up and confirmed that they were treated badly and

²⁶ See Complaint Paragraph 6(b), which alleges this statement was made on or about the week of October 9, closer to when the petition was filed. However, Respondent admitted in its Statement of Position that these meetings took place October 17 and 18, 2017. (GCX#15)

²⁷ See Complaint Paragraph 6(c).

²⁸ See Complaint Paragraph 6(a).

not given a good raise if a supervisor did not like them.²⁹ (Tr. 360) Arreguin also recalled that Cornejo appeared to be writing down what the employees said. (Tr. 361)

Meat cutter Luna recalled attending at least two meetings held by Cornejo, whom he said explained things well in Spanish, to convince the employees present that it would be bad to have Union representation. (Tr. 212-213) Employee Valdivia, who testified in English said that he attended one of these meetings held by Cornejo and Jara, whom he referred to as “union busters.” Valdivia recalled that Jara said that if the parties negotiated in good faith, the employees would have to give something back and they would start at zero.³⁰ (Tr. 255) Valdivia further recalled that Cornejo said that employee benefits – like their 401(k) – could be frozen. (Tr. 256; 272)

Meat trimmer Gutierrez de Tirado recalled attending a meeting where Cornejo distributed the *Basic Guide* referred to above, and told employees that when a union becomes their representative, sometimes employees can get more, and sometimes less.³¹ (Tr. 564-565; RX#1)

Meat Trimmer R. Mendoza recalled that Cornejo said in Spanish the Union wasn’t any good and was just coming to steal and take dues from the employees. (Tr. 595-596, 631) On cross-examination, R. Mendoza recalled that Consultant Jara also said that he did not believe that the Union would benefit the workers, and that during this meeting, a co-worker complained that wages were too low, but that neither Cornejo or Jara responded. (Tr. 631-632)

²⁹ Arreguin confirmed that he was talking about Supervisor Raul Sanchez but did not specifically name him. (Tr. 360)

³⁰ See Complaint Paragraph 11.

³¹ On cross-examination, Gutierrez de Tirado admitted that with all the information given by the Union and the Respondent, it could be hard to separate what she actually heard from Respondent from what she heard from the Union or even fellow employees. (Tr. 567) However, Cornejo admitted that he made statements similar to those recalled by Gutierrez de Tirado. (Tr. 811-12)

Receiving-department worker Durkee, called to testify by Respondent, confirmed that he attended just one meeting with Cornejo where he discussed the collective-bargaining process and said that benefits and wages would be negotiated, and employees could gain or lose benefits or wages. (Tr. 780) Durkee stated that Cornejo did not say anything at the meeting he attended about anything being “frozen.”³² (Tr. 781)

3. During the Weeks of October 23 through November 3, 2017, Consultants Angel Cornejo and Simon Jara Met with Employees in the Petitioned-for Unit to Discuss Union Documents and Collective Bargaining

Consultants Cornejo and Jara met again with employees in the petitioned-for unit during the end of October and beginning of November 2017. (GCX#15 p.2) During these second series of meetings, they gave about five presentations to employees in the petitioned-for unit in either the lunch room/sitting area or the conference room: each meeting was attended by between 8 to 15 employees and lasted between 30 and 60 minutes. (Tr. 813-814, 843) This series of meetings focused on collective bargaining, and a Power Point presentation entitled “*Know the Facts – Collective Bargaining*” was presented at each of these meetings (Tr. 814, 868; RX#4) This lengthy presentation of approximately 38 slides was intended to aid employees in the petitioned-for unit in making an informed decision about the Union with regard to authorization cards, the secret-ballot election, the collective-bargaining process, and other issues. (Tr. 815-819; RX#4) Cornejo again reminded the employees who attended these sessions that the results of negotiations were not predictable, and that their wages and benefits could be increased, stay the same, or potentially go down as a result of the bargaining. (Tr. 818-819) He further reiterated that bargaining could take months or even years. (Tr. 820, 845) During the bargaining process,

³² Durkee confirmed that this meeting, attended by about 5 or 6 warehouse and processing employees, was held in English after Cornejo asked those in attendance if they spoke English, and no one translated anything Cornejo said into Spanish. (Tr. 782-783)

Cornejo explained, there could be no unscheduled unilateral changes and the Respondent had to maintain the *status quo* from the day the Petition for Election was filed. (Tr. 821; RX#4 p. 12)

Cornejo essentially admitted telling employees that their wages and performance reviews would be “frozen” in that he told them that during the bargaining process, everything had to remain “*status quo*.” (Tr. 836) Sensing that the employees might not be familiar with that term, Cornejo explained that their wages and benefits had to remain exactly the same after the petition was filed, and would continue unchanged if the employees chose the Union to represent them.³³ (Tr. 845-846) He further reiterated that no *unscheduled* unilateral changes could take place during that period, but did not explain what might happen to *scheduled* changes since no one asked him. (Tr. 847)

The consequences of going on strike were also discussed by Cornejo, who gave several examples of past strikes at Sysco companies. (Tr. 827; RX#4 p. 25-30) Cornejo also told the employees at these meetings that in the event of a strike, an employer would move work to other company locations or contract with other companies. (Tr. 830-831; RX#4 p. 31)

A number of employees who attended one of these series of meetings testified as to what they recall was said. Employee Arreguin attended a meeting in October or November 2017, or approximately a week after the first meeting he attended with the Consultants.³⁴ (Tr. 361) He recalled that Cornejo repeated that the Union was no good, and that if they came in, the employees would have their benefits, including floating days and sick days – taken away. (Tr. 362-363)

³³ See Complaint Paragraph 6(c).

³⁴ Arreguin recalled that Roberto Diaz was also present at this meeting, although he may be confusing it with a later meeting on a similar topic. (Tr. 362)

Employee Valdivia also attended one of the meetings where Consultants Cornejo and Jara talked about Union dues and rules. (Tr. 287) Valdivia recalled that Cornejo and Jara told the employees that when the parties sat down to bargain, they would do so in good faith. (Tr. 288) When asked on cross-examination whether they said that the contract when it began would be a blank piece of paper, Valdivia reiterated that they also said they were going to be “pulling aside from zero.”³⁵ (Tr. 288)

Meat trimmer D. Mendoza recalled that at the meeting he attended, Cornejo explained in Spanish how the Union works, and how they were going to come to an agreement between the Union and the company, and that sometimes the Union won, and the employees lost. (Tr. 313) D. Mendoza further recalled that Cornejo said that through negotiations, employees could end up with lower wages and benefits, and the employees would make less than they made now. (Tr. 314, 441)

Employee Gutierrez de Tirado likewise recalled that at a meeting she attended, Consultant Cornejo said in Spanish that when the parties did negotiations, that everything – including benefits – would be on the table and they were going to start from zero.³⁶ (Tr. 528-529, 570)

Gutierrez de Tirado recalled a similar meeting around this time with Cornejo and Diaz where Diaz, in Spanish, told the small group of employees present that he was new to the company in Human Resources, and that the employees should give him six months to be able to help them a little bit in terms of the salaries and medical insurance.³⁷ (Tr. 534-535) During this

³⁵ See Complaint Paragraph 6(e).

³⁶ See Complaint Paragraph 6(e). Gutierrez de Tirado testified that this meeting occurred in early October, but it would have to have taken place after the election petition was filed on October 10, 2017. (JX#1((b))

³⁷ See Complaint Paragraph 7(c).

same meeting, according to Gutierrez de Tirado's recollection, Cornejo spoke about the Union and said that everything would be "frozen," including the 401(k) plans. (Tr. 537)

Meat cutter Jose Contreras ("Contreras"), who works in Department B, recalled attending a meeting where Van Voorhis, using an unnamed "union buster" to translate into Spanish, told the employee that performance appraisals and "everything" would be frozen because of the Union, and that the company's "hands were tied."³⁸ (Tr. 462-463, 475-476)

4. During the Week of October 23 Through 27, 2017, Area President Mike Drury Also Met with Employees in the Petitioned-for Unit to Discuss and Answer Their Questions

Area President Drury confirmed that he held several meetings – between four and six – after the election petition was filed to address questions raised by the employees. (Tr. 1106, 1130-1131; GCX#15 p. 2) A Power Point presentation entitled "*Your Questions – Our Answers!!!*" was shown during these meetings with the intent of providing clarity about the process, what the ramifications would be, and to provide information: the content of the slides was based on what Respondent had heard or felt the employees needed to have explained. (Tr. 1106-1107; RX#6) Drury stated that he read each slide verbatim: Roberto Diaz translated what Drury said into Spanish but did not otherwise speak at these meetings. (Tr. 904, 1107, 1131-1132)

One of the slides that Drury read asks the question "*Is it true that in bargaining, negotiations start where the employees are and can only get better from there?*" and then answers the question by stating that when bargaining first starts, the contract is a blank sheet of paper, and nothing goes into the contract until both sides agree. It then states that "*The only way*

³⁸ See Complaint Paragraph 8(e). Although Contreras testified that this meeting occurred sometime after the meeting where Van Voorhis discussed health insurance, it appears that Contreras may be mistaken or confused regarding the sequence of the meetings he attended or the date of this meeting, given that he testified that he attended almost 20 meetings. (Tr. 464-465, 473).

you can guarantee that you will not lose pay or benefits as a result of good-faith bargaining is to make sure that a union never has the right to bargain for you. (RX#6 p. 12) (emphasis in original)

Another Power Point slide in this presentation read to the employees by Drury stated as follows:

*What does the company plan to do about the costs of medical insurance? (Cont.)
We have told you that a company is not allowed to make promises of what it plans to do or not do after a NLRB election, and we are not making any such promises.
The NLRB has rules which cover what we can say and do, and we abide by all of those rules. How those rules apply, however, changes after the election. If you decide to remain nonunion, which we believe is in your best interest, then there will be no legal prohibition against our implementing changes to the medical plan which can benefit all participants.*³⁹ (RX#6 p. 14)

A subsequent slide that Drury read stated:

*Under the law, we cannot make any promises or changes now, but we have been listening to you very intently and noting the concerns and issues which you have brought up. If you decide to vote against union representation and stay nonunion, there will be no legal prohibition after the election against our making the kind of changes and improvements which we have been discussing for the past few months.*⁴⁰ (RX#6 p. 20) (emphasis in original)

The slide immediately following read in relevant part:

If the company cannot promise anything, how can we be assured that the company will take action on the issues and concerns we have brought up if we vote against the Teamsters? (Cont.)

...
We are listening, we will continue to listen, and we want to work through your concerns with you. (RX#6 p. 21)

Drury generally denied that he told employees that they would lose their jobs if they voted for or supported the Union, that the Company would close or production would be sent somewhere else if the Union won, that their wages would be frozen or their review cancelled because of the

³⁹ See Complaint Paragraph 10(c).

⁴⁰ See Complaint Paragraph 10(c).

Union, that negotiations would start at “zero,” that employees would have better benefits and wages if they did not support the Union, or that Supervisor Raul Sanchez (“Sanchez”) would not be transferred back to the Irvine facility if employees rejected the Union. (Tr. 1125-1126) Drury further generally denied that he ever instructed employees to get their union authorization cards back from the Union, or that he instructed employee Jonathan Martinez to urge them to do so. (Tr. 1126)

Diaz confirmed that Drury told the employees present at these meetings that no unilateral changes could happen with regard to their merit wages or benefits during this time. (Tr. 904; RX#6)

Employee Valdivia testified that he attended a meeting where Drury spoke and Diaz translated, where Drury showed slides about the Union and said that if the parties negotiated in good faith, they were going to start at zero. (Tr. 262-263)

Meat trimmer R. Mendoza testified that Drury, utilizing Consultant Cornejo as a translator, showed a “graphic” in English about where Sysco had unions and didn’t have unions, and was critical of unions in general. (Tr. 316-317, 438) He further recalled that during this meeting, another employee named Candelaria, complained about how her supervisor, Raul Sanchez, had treated her and poorly managed her situation after she was injured at work. (Tr. 318, 439) Drury told her that he would “investigate.” (Tr. 440)

Employee Gutierrez de Tirado testified about attending a meeting where Drury, assisted by Consultant Cornejo as translator, showed a Power Point presentation about protests and strikes and what the Union does. (Tr. 545) She recalled that after the 10-minute presentation, Cornejo spoke and told the employees that this is what could occur if the employees went on strike, if there was no agreement between the company and the Union. (Tr. 545-546) She

further recalled on cross-examination that Drury, in response to a question from an employee about how the company would get the meat cut if there was a strike, responded that the workers would have to be replaced even if the quality of the replacement's work was not as good. (Tr. 577)

Gutierrez de Tirado also testified that she attended a meeting around this time with about ten other employees with Drury and Cornejo, where the Drury spoke using Diaz as a translator.⁴¹ (Tr. 540-541) Gutierrez de Tirado recalled that Drury said that he didn't understand why the employees were trying to bring in the Union, and that he felt very sad. (Tr. 541) He then said, according to Gutierrez de Tirado, that he was there to help them, and that he wanted to hear from all of them what problems they were having.⁴² (Tr. 542) She further recalled that in response, employee Arnolfo spoke up about the insurance and the problems employees were having with the supervisor that had not been taken into account. (Tr. 542) Drury responded that he didn't know about this. Gutierrez de Tirado then spoke up and told Drury that the employees had gone to the higher-ups to talk about the problems they had with their supervisor, but their complaints had not been taken into account.⁴³ Gutierrez de Tirado also reminded Drury that Respondent had used annual confidential questionnaires where employees talked about their supervisors and different things going on at the company that went to Sysco management, and asked how Drury could not know what was going on.⁴⁴ (Tr. 542-543) Drury responded to her that he was sorry,

⁴¹ Gutierrez de Tirado also described Van Voorhis as being at this meeting. It appears that this meeting was most likely one of the meetings that Drury held to show his Power Point presentation answering the employees' questions or perhaps she attended two meetings with Drury.

⁴² See Complaint Paragraph 10(a). See also Complaint Paragraph 6(d) where Gutierrez de Tirado attributes this statement to Consultant Cornejo, who was acting as translator for Drury at this meeting.

⁴³ Although it does not appear that Gutierrez de Tirado identified the supervisor as Raul Sanchez, Drury admitted that Sanchez was the supervisor of Department B at that time. (Tr. 1121)

⁴⁴ Drury also confirmed that the company conducted annual surveys. (Tr. 1164)

and that he was going to try to fix things, and to give him a year to accommodate these problems.⁴⁵ (Tr. 543, 575)

Meat trimmer R. Mendoza recalled that during the meeting he attended, Drury said that he was going to freeze all benefits including vacations, illness (sic) [sick leave], 401k, and raises if the Union came in.⁴⁶ (Tr. 598-599)

5. In October or November 2017, Respondent Removed Supervisor Raul Sanchez Because of Employees' Complaints

Raul Sanchez ("Sanchez") was a supervisor in Department B, who had been at the Irvine facility for over 20 years. (Tr. 1121) In October and November of 2017 he would have overseen about thirty employees, managing the flow of product, scheduling the cutting process, and ensuring the product was packed off correctly and moved out of the production room. (Tr. 1153) Sanchez also participated in employees' annual performance reviews, and could effectively recommend who should get a wage increase and who should not. (Tr. 1153) Several employees testified that they had complained to company management about the way Sanchez treated them, but without result. (Tr. 483-484)

Specifically, meat cutter Contreras testified that he had complained to his former manager about Supervisor Sanchez between 10 to 15 times, as well as to the previous President of the company whom he identified as "Tim." (Tr. 483-484) Employee Gutierrez de Tirado recalled attending a meeting with Senior Resources Business Partner Diaz on about October 12, 2017, where employees told Diaz that they were having problems with Sanchez, and Diaz responded that he would have an "answer" for them that afternoon. (Tr. 538) Later that afternoon, a meeting was held in the production area of Department B by Drury, Van Voorhis,

⁴⁵ See Complaint Paragraph 10(a).

⁴⁶ See Complaint Paragraph 10(b).

and Diaz: Drury spoke using Diaz as a Spanish-language translator and told the approximately 30 to 40 assembled employees that Sanchez was going to be sent to Palisades Ranch for an indefinite period of time to help that other Sysco company in the area.⁴⁷ (Tr. 539) Meat trimmer R. Mendoza recalls Drury telling workers, in response to their questions about what happened to Sanchez, that Sanchez would not be coming back, to which response his fellow coworkers appeared happy. (Tr. 603, 635)

Employee Jimenez recalled that sometime in October 2017, about 20 workers in Department B were gathered together in the department by their supervisor, Thomas Takayama, and told that Supervisor Sanchez would not be coming back to work at the company, that he had been sent to another company.⁴⁸ (Tr. 35, 63, 86)

Area President Drury, who oversees several facilities including the Irvine facility, admitted that he became aware during conversations with employees about the Union election petition that they had issues, and was surprised that some of these issues were specific to Supervisor Sanchez. Specifically, he said he had learned that some employees were unhappy with Sanchez's management style and/or the interactions they had with him.⁴⁹ (Tr. 1101, 1122, 1154-1156) Drury testified that Palisades Ranch needed additional "talent" at that time in their production room and so Sanchez went to work there, where he has remained for the last year or

⁴⁷ Palisades Ranch, to which there were many references made during the hearing, was inaccurately translated in Gutierrez de Tirado's testimony as "Palace." (Tr. 539) Although Mitchell testified that he thought Palisades Ranch was located in Northern California, Area President Drury confirmed that Palisades Ranch is located in Vernon, California – about 10 miles from the Irvine facility. (Tr. 1127)

⁴⁸ See Complaint Paragraph 18(a).

⁴⁹ On cross-examination, Drury asserted that he did not speak to any individual employee directly, but rather heard about these issues from the labor consultants – presumably Cornejo and Jara – who spoke with the employees. (Tr. 1130, 1155) He then, however, appeared to deny that he knew that Cornejo and Jara were holding meetings with employees. (Tr. 1130)

so.⁵⁰ (Tr. 1122) Drury confirmed that this was an “opportune” time to transfer Sanchez who possessed the appropriate “skill set” to work at Palisades Ranch.⁵¹ (Tr. 1156)

Meat trimmer D. Mendoza recalled that Van Voorhis, using Diaz as a translator, called to the employees in the production department area to come to Department B and told the employees that Sanchez had been transferred. (Tr. 327-328) According to D. Mendoza, the workers “screamed with joy” when Van Voorhis said this.⁵² (Tr. 329) Meat cutter Contreras confirmed that Sanchez “went to vacation and he never returned.” Contreras recalled Van Voorhis coming to his work area in Department B, and in response to an employee’s question if Sanchez was coming back, Van Voorhis confirmed that he was not coming back. (Tr. 485) According to Contreras, everyone was happy and laughing at this announcement.⁵³ (Tr. 486)

6. During the Week of October 30, 2017, Respondent’s Senior Director of Labor Relations John Mitchell Met with Employees in the Petitioned-for Unit to Compare Their Terms and Conditions of Employment with Those of Employees at Other Facilities

John Mitchell (“Mitchell”) was the Senior Director of Labor Relations for Sysco Corporation in October and November 2017. (Tr. 958) In that capacity, he routinely negotiated both initial and renewed collective-bargaining agreements for Sysco companies and also addressed issues regarding the application of those agreements. (Tr. 958) He was invited to the Irvine facility in response to the filing of the Petition for Election filed by the Union. (Tr. 959)

Mitchell held three or four meetings⁵⁴ with employees in the petitioned-for unit, in groups of 20 or 30 each over several days.⁵⁵ (Tr. 909, 959-960; GCX#15 p.3) Each meeting lasted

⁵⁰ See Complaint Paragraph 18(a).

⁵¹ Drury declined to describe exactly what that skill set consisted of. (Tr. 1156-1157)

⁵² See Complaint Paragraph 18(a).

⁵³ See Complaint Paragraph 18(a).

⁵⁴ Area President Drury, who attended these meetings, estimated them at between four and six meetings. (Tr. 1112)

⁵⁵ Although Mitchell could not recall what dates these meetings occurred, Respondent admitted they took place during the week of October 30, 2017. (Tr. 991; GCX#16 at p. 2)

about one hour or up to 90 minutes: Diaz was the Spanish translator for Mitchell, who spoke in English.⁵⁶ (Tr. 909, 960, 999, 1112)

During these meetings, Mitchell utilized a Power Point presentation (not created by him) entitled “*Newport Meat – Winners and Losers.*” (Tr. 716, 910, 961-962, 1000, 1009; RX#2) He did not read the slides word-for-word to the employees; rather, he reviewed the bullet points and discussed the general topics, following talking points prepared for him by an attorney.⁵⁷

(Tr. 952, 993; GCX #11) Diaz did not translate the slides verbatim, but instead stated what Mitchell had actually said. (Tr. 941)

The initial slides showed the bargaining status at several unionized Sysco Companies, including Sysco Alaska, Kansas City, Southeast Florida, FreshPoint South Florida, and Sysco Spokane, as well as some Sysco companies that had rejected a union. After discussing each situation, Mitchell would reiterate his theme that when a union won, Sysco employees lost. (Tr. 963, 965-966, 968, 970; RX#2 pp. 6-11) The slides that followed compared the wages of the employees at the Irvine facility with the lower wages of those at Palisades Ranch, a union-represented Sysco company in California: Mitchell explained that they might not necessarily get what the Palisades Ranch employees got – that this was what the Palisades Ranch employees got as a result of bargaining through a union.⁵⁸ (Tr. 971-972, 987, 1005; RX#2)

Subsequent slides compared the benefits, holidays, vacation, sick leave, and retirement of the Irvine facility and the Palisades Ranch employees. (Tr. 911, 973; RX#2 pp. 14-19) One slide in particular showed that the employees at Palisades Ranch had zero retirement through the

⁵⁶ President Van Voorhis testified that she attended one of the meetings held by Mitchell, and generally denied any of the alleged statements attributed to him in the Complaint. (Tr. 1040)

⁵⁷ Diaz confirmed that Mitchell covered all of the slides in the presentation but did not read them verbatim. (Tr. 913, 937, 939) Although Mitchell recalled that an attorney prepared the slides, he could not recall the attorney’s name. (Tr. 993)

⁵⁸ Palisades Ranch was chosen for comparison because it is in the same geographical area as the Irvine facility. (Tr. 911) RX#2 states that Palisades Ranch employees are represented by a union, but does not specify the union.

union, whereas the employees at the Irvine facility had a 401(k) plan. (Tr. 974; RX#2 p. 19) A following slide compared the wages and benefits of 25-year employees at the Irvine facility with those of 25-year employees at Palisades Ranch, followed by comparisons of those with 12-to-14-years tenure and with only 6-months tenure, the purpose being to show that the union workers at Palisades Ranch made less than the workers at the Irvine facility, with similar seniority.⁵⁹ (Tr. 911, 975-977; RX#2 p. 20-22) There were comparisons for different classifications, including meat cutter, meat packer, selector, and sanitation. (Tr. 978-979; RX#2 pp. 21-29) Similar comparisons were made with the union-represented employees at Fulton Meats, a Sysco company in Portland, Oregon.⁶⁰ (Tr. 980; RX#2 p. 30-31) In conclusion, Mitchell told the employees to vote “no” in November in order to guarantee they would not join the foregoing list of “losers.” (Tr. 981, 994; RX#2 p. 32)

Mitchell further explained during these meetings that should the employees select the Union to represent them, he had been invited to bargain the collective-bargaining agreement with the Union and the employees’ bargaining committee: he reiterated that he would represent the company and not the employees. (Tr. 983) In so doing, he explained, he would examine the market and particularly the similar work being done at Palisades Ranch in forming the company’s bargaining position and ensuring that the company continued to service its customers. (Tr. 983-984)

Mitchell also told them that when the parties sit down, there is no agreement and there aren’t any terms – there’s none – and both the parties put proposals on the table and as they are agreed upon they begin to populate a blank contract and that the only proposals that go into the

⁵⁹ Mitchell did not know if any employees in the petitioned-for unit at the Irvine facility had worked there for 25 years. (Tr. 997)

⁶⁰ Mitchell confirmed that inasmuch as he did not prepare these slides, he could not vouch for their accuracy. (Tr. 1001)

agreement are the ones both parties have agreed to. As was his customary practice, he held up a blank sheet of paper to illustrate a blank contract. (Tr. 720, 984-986, 1113) Diaz confirmed that Mitchell held a blank paper aloft, and recalled that he said the parties would start with a “blank agreement.” (Tr. 941) Diaz admitted, however, that he did not translate the word “blank” literally, saying instead that it would be a “contract with nothing on it.” (Tr. 941-942)

Mitchell then explained that one of the powers that the Union and the bargaining committee have is the economic power of striking, and that if the employees went on strike the company can and will continue to service its customers by hiring either temporary or in some cases permanent replacements to do the work. He went on to say that the other option was to move work from one company to another – like Palisades Ranch – and that the company could move percentages of work to Palisades Ranch and have that work done over there.⁶¹ (Tr. 721, 912, 985, 990)

Mitchell generally denied that he told employees at these meetings that he would “freeze” their wages or 401(k) plans. (Tr. 988)

Mitchell confirmed that during his presentations at these meetings, he followed most of the points contained in a script prepared for him entitled “*Points to be Made by John Mitchell,*” and that most of the comments he made during the Power Point presentation came from this document. (Tr. 993; GCX#11) For example, he acknowledged that some of the workers had said they could not be compared to Palisades Ranch or Fulton Meats since their product and productivity was better, and Mitchell told them, based on his script, that the company agreed with them, and this is part of the pride they had in being union-free. (Tr. 982, 993, 995; GCX#11) The fact that he would be the person conducting bargaining on behalf of Respondent

⁶¹ See Complaint Paragraph 12(d).

was also contained in this script of talking points, and Mitchell accordingly reminded the employees of this, and of his bargaining experience nationwide on behalf of Sysco. (Tr. 994-995) The talking points also state that if the employees decide to go with the Union, they will have made the choice to stand with others who voted for the Teamsters and ended up “losers.” (GCX#11) The points go on to say that before Mitchell sits down at the bargaining table, he will see the employees doing the same work as that being done at Palisades Ranch, and that it did not make good business sense to pay employees more for doing the same work – this was not personal but just smart business economics. (GCX#11)

Despite admitting that most of what he said at the meetings closely followed the talking points provided to him (sometimes verbatim), Mitchell denied reading the prepared script insofar as it stated:

“Today, we could shift 15-20% of your work to Palisades to be cut and packaged there and then returned to us. In a year’s time, that percentage could increase to 50%. After a year, it could all be downhill.” (GCX#11)

Rather, he claimed that he spoke about transferring work to Palisades Ranch in case of a strike or economic action, and could not recall if he used the word “today.” (Tr. 996) Mitchell admitted, however, that neither the prepared talking points or any of the Power Points talked about strikes at the Irvine facility. (Tr. 996) Mitchell did not recall if any employees spoke up or asked questions during his presentations. (Tr. 998)

Several witnesses who attended these meetings conducted by Mitchell testified about what they had heard. Employee Jimenez recalled that Mitchell told employees that “while the Union was there,” their salary raises would be frozen and that if they voted for the Union, the company would remove all the benefits they had. (Tr. 40) He also recalled that Mitchell said that if the employees voted in favor of the Union that he would start negotiations from zero and

lower their salaries and take away their benefits.⁶² (Tr. 41, 109-110) While viewing the slide show that showed the lowest salary at the Respondent's facility was \$14.50 an hour and the highest was \$21 an hour, Jimenez spoke up and said that he had worked at the Irvine facility for almost 20 years and did not make that high a salary, to which Mitchell responded that he could lower it to \$14 an hour.⁶³ (Tr. 42, 104)

Employee Luna also attended a meeting where Mitchell spoke and showed something on a screen. (Tr. 140-42) Luna recalled that Mitchell, with Consultant Jara translating,⁶⁴ told the employees at this meeting that negotiations could last for two years, and that during the negotiation period the company would freeze employees benefits, including raises and 401(k) plan contributions.⁶⁵ (Tr. 142-143) Luna further recalled that Mitchell said that negotiations were going to start as though all of them were new employees, and that they could end up making less money and lose sick days, floating days, or vacations.⁶⁶ (Tr. 143, 222)

Both employees Jimenez and Luna recalled that Mitchell said that if there was a strike, he would send the work to other companies and could close the plant if he wanted to.⁶⁷ (Tr. 41-42, 143)

Meat trimmer D. Mendoza testified that at the meeting he attended, Mitchell, using Senior Resources Business Partner Diaz to translate, said that he was the negotiator for the

⁶² See Complaint Paragraph 12(e).

⁶³ See Complaint Paragraph 12(e).

⁶⁴ Mitchell said he "believed" that Diaz translated for him at these meetings, but could not recall who else from the company was present. (Tr. 960, 999) Jara, who is fluent in English and Spanish, confirmed, however, that he attended at least one meeting that Mitchell gave, therefore it is possible that he translated for Mitchell at this meeting. (Tr. 867, 870)

⁶⁵ See Complaint Paragraph 12(a).

⁶⁶ See Complaint Paragraph 12(b). When pressed on cross-examination as to why some statements attributed to Mitchell did not appear in the affidavits that Luna provided to the Region, Luna explained that he had not written anything down at the time and remembered some statements later. He noted that many of his coworkers could barely read or write and therefore, they were not accustomed to keeping notes. (Tr. 199)

⁶⁷ See Complaint Paragraphs 12(f) and 14.

company and that he would sit down to negotiate the contract between the Union and the company, that they would start to negotiate from “zero” or from a “blank contract,” and that employees can lose sick days, vacation, and their 401(k).⁶⁸ (Tr. 323-324, 444-445) D. Mendoza recalled that Mitchell gave examples of other companies with unions, for example Kansas City, where they had been negotiating for four years and did not get their raises during that time. (Tr. 325, 447) He further recalled that Mitchell said a strike could last for two weeks and the workers would not get their salaries and could be replaced by Palisades (Ranch), or that the company could send 50% of the product to Palisades (Ranch) or even close the business if things went really bad.⁶⁹ (Tr. 325, 446, 449) D. Mendoza said that after Mitchell’s presentation, the employees felt intimidated because they thought they were going to lose their jobs. (Tr. 450)

Employee Gutierrez de Tirado attended one of Mitchell’s presentation along with Area President Drury and Roberto Diaz, where Mitchell was presented as the negotiator for the Company.⁷⁰ (Tr. 548) She recalled that Mitchell talked about the union negotiations that would happen after the election, and that during negotiations, if he saw something that was good for the company, he would grab it and if not, he would reject it. (Tr. 550, 581) He further said, according to Gutierrez de Tirado, that everything was going to be put on the table in terms of the negotiations – including wages, insurance, 401(k) plan, vacation, and sick days – and that the negotiations for them were going to start at zero, including everything that they had as benefits.⁷¹ (Tr. 551, 580) She also confirmed on cross-examination that he told the employees that their wages or benefits would be frozen.⁷² (Tr. 573) She recalled that he talked about union

⁶⁸ See Complaint Paragraph 12(b). Diego Mendoza apparently combined this meeting with the meeting where Drury and Van Voorhis discussed healthcare. (Tr. 321) No other witness testified that these three were present at the same meeting.

⁶⁹ See Paragraph 12(c).

⁷⁰ Gutierrez de Tirado combines this meeting with the one held by Drury and Diaz to explain health benefits.

⁷¹ See Complaint Paragraph 12(e).

⁷² See Complaint Paragraph 12(a).

negotiations in other states, like Kansas, and compared the wages of employees at the Irvine facility with those at Palisades Ranch, where the workers were unionized, but did not recall him showing any slides or Power Points at this meeting. (Tr. 550-551, 580)

Employee Arreguin attended a meeting conducted by Mitchell with Diaz and Consultants Cornejo and Jara present. (Tr. 371) Mitchell, with Diaz translating, said that he was there from the Sysco Corporation to negotiate on behalf of the company. (Tr. 547) Arreguin recalls that during the meeting, while discussing negotiations, Mitchell said that he did not care about employees' titles, that if it was possible, he was going to lower all of the employees' salaries to the minimum, and that if the Union came in, if it was possible, he would close the company.⁷³ Mitchell also said that during negotiations with the Union, everything was going to be frozen including the 401(k) benefits and interviews on anniversary dates [anniversary reviews], and there was not going to be anything for the employees.⁷⁴ (Tr. 373)

Meat trimmer R. Mendoza confirmed that Mitchell, utilizing Diaz as a Spanish-language interpreter, told the employees at the meeting he attended that he was there to negotiate the terms with the Union and would get the best deal for the company, and that negotiations would start from a "blank" contract.⁷⁵ (Tr. 598, 637) Mitchell also explained that during negotiations, employees could get lower wages and less holidays, vacation days, and 401(k) contributions, and then compared the Irvine facility to other facilities that brought in the Teamsters. (Tr. 638-639) According to R. Mendoza, when a coworker asked at this meeting if he would get his raise, Mitchell repeated that it was going to be frozen.⁷⁶ (Tr. 599, 602) R. Mendoza further recalled that Mitchell told them that 30% of the product was going to be sent somewhere else to another

⁷³ See Complaint Paragraph 14.

⁷⁴ See Complaint Paragraph 12(i).

⁷⁵ See Complaint Paragraph 12(g).

⁷⁶ See Complaint Paragraph 12(i).

company; on cross-examination, R. Mendoza recalled that Mitchell said if there was a strike, the company could have to close.⁷⁷ (Tr. 602)

Employee Contreras testified that during a meeting where the “negotiator” did most of the talking, the negotiator told employees that if the Union came in, everything would have to be negotiated, and that if employees went on strike, he was going to bring employees from other companies to do their jobs.⁷⁸ (Tr. 467-468) On cross-examination, Contreras further stated that during this meeting, the negotiator said that during negotiations “everything was going to be frozen.”⁷⁹ (Tr. 496, 504)

Employee Jonathan Martinez (“Martinez”), who was subpoenaed to testify by Respondent, testified that Mitchell said there would be a “blank contract” – that the parties would start from blank and that the person who translated for Mitchell used the Spanish word “blanco,” meaning blank. (Tr. 720, 768) Martinez also confirmed that Mitchell said that in case of a strike, it could send work to different companies to have it done. (Tr. 721) Martinez also stated that he spoke both English and Spanish, and that he was able to read the Power Point slides in English. (Tr. 716)

Respondent also called machine operator Angel Camacho who testified that he attended a meeting held by Mitchell with about 40 other employees where Diaz translated and Mitchell showed a Power Point presentation. (Tr. 1080; RX#2) Camacho recalled that Mitchell touched on the Power Points, and compared the Irvine facility to other “sister” companies that were union with regard to their respective benefits. (Tr. 1081) Camacho further recalled that Mitchell explained negotiations as “give and take,” and said that employees might, for example, have to

⁷⁷ See Complaint Paragraph 12(f).

⁷⁸ See Complaint Paragraph 12(d).

⁷⁹ See Complaint Paragraph 12(a).

give up vacation or sick days to get better health insurance. (Tr. 1082) On cross-examination, he further recalled that Mitchell said that no wage or benefit changes would go ahead while negotiations were in progress, and that negotiations could take a long time – maybe years.⁸⁰ (Tr. 1092)

Inventory employee Garcia (“Garcia”), also called by Respondent, testified about attending a meeting where Mitchell, through an unnamed translator, introduced himself as the general representative of the Sysco companies specially authorized for the negotiations. (Tr. 1176) Garcia recalled that Mitchell showed the approximately 60 employees present a map of all the Sysco companies where he was negotiating, and said negotiations go on a long time – maybe indefinitely. (Tr. 1177) Garcia paraphrased Mitchell’s description of the bargaining process as “I give you, but what are you giving me?” and gave an example of trading wages for vacations. (Tr. 1176-1177) Mitchell further said, according to Garcia, that if the parties did not reach an agreement in negotiations that a majority of the employees would go on strike, and, since the company had contracts to deliver merchandise, it would contract people during the strike. (Tr. 1178)

7. About November 3, 2017, Employee Jonathan Martinez Held a Luncheon Meeting with Employees and Solicited Them to Withdraw Their Support of the Union

Employee Jonathan Martinez works for Respondent as a portion-room expeditor, or warehouse utility worker, in charge of ensuring that the product from the warehouse is in the production cutting operation so that there is a constant flow of product for the cutters to keep up with orders. (Tr. 713, 1036) He also ensures the opposite: that the product exits back to the cooler and the inventory is put away. (Tr. 1037) It is undisputed that Martinez does not have the

⁸⁰ See Complaint Paragraph 12(a). Camacho could not recall whether Mitchell used the word “frozen” to describe the state of wages and benefits during negotiations. (Tr. 1093)

authority to hire or fire employees, nor does he possess any of the supervisory indicia enunciated in Section 2(11) of the Act. (Tr. 59-60, 217-218, 299-300, 450, 586-587, 651, 1037-1039, 1116)

Respondent frequently hosts luncheons at the Irvine facility for its employees, including quarterly employee-appreciation events, tenure milestones, family open houses, and the like. (Tr. 913, 1038, 1121) Martinez confirmed that he and another employee named Peter arranged to have a special luncheon at the Irvine facility in October 2017, by meeting with Area President Drury and explaining that they wanted to have a meeting to ascertain the employees' thoughts about the impending vote and to talk about the Union. (Tr. 722-23, 756) Drury was surprised at this request initially, and told Martinez that it would be better to have a meeting offsite outside the company, but Martinez explained that it would be hard to gather all the workers on their different shifts for such a meeting. (Tr. 724) According to Martinez, Drury told him that he would have to talk to Van Voorhis to see how it could be arranged. (Tr. 724) Drury admitted that he eventually approved their having the meeting at the company. (Tr. 726, 1117) Drury further admitted that he was aware that the purpose of this meeting was to talk about the Union and the Union organizing campaign, since Martinez made it clear to him and it was the "topic of the day." (Tr. 1148)

The meeting was attended by approximately 100 day-shift employees from Departments A and B, as well as warehouse employees. (Tr. 726) Drury spoke to the employees for about five minutes, with Roberto Diaz translating, before the luncheon meeting started, but left once the meeting began.⁸¹ (Tr. 754, 905, 1117-118) Drury confirmed that he used a one-page script entitled "*Talk by Mr. Mike Drury – Present: Denise Van Voorhis, Simon Jara, Angel Cornejo,*

⁸¹ In this case, Diaz translated directly from what Drury said, rather than preparing a Spanish-language version of the script in advance and reading that as he had at other meetings. (Tr. 930)

Robert Diaz – Lunch Meeting for Associates” for a guideline for what he wanted to say, which included the following remarks:⁸²

A few guys asked me if they could get a group together and talk among yourselves. I said sure and offered to make it easier by making a quick lunch available. The guys told me that there a (sic) a few people in portion who are dead set on voting union – regardless of the facts and regardless of how badly it hurts everyone else. But, the majority do not feel that way and wanted to talk it out among yourselves. ...

Whatever happens in this meeting after we managers leave is up to you. We will give you another 15-20 minutes to talk and then it will be time to get back to work. ...

I hope everyone in here decides to vote NO. You already know that warehouse and shipping are close to 100% NO vote. You know the changes which have already been made and the legal reason a significant change cannot be announced. (GCX#16)

Drury asserted that he did not say anything not reflected in the script.⁸³ (Tr. 1118) He further confirmed that he placed “rules” on the meeting insofar as he asked everyone to be respectful of one another. (Tr. 915, 1119; GCX#16)

President Van Voorhis confirmed that she had heard that after the Petition for Election had been filed, the employees had asked for a space where they could meet and talk amongst themselves, but that she was not involved, as it was being handled by Drury. (Tr. 1032) She was, however, aware that employee Martinez obtained permission to hold the meeting, and that management personnel opened up and started the meeting, but were not in the room while the employees were talking.⁸⁴ (Tr. 1034, 1066-1067) Van Voorhis stated that she believed that Martinez was in favor of the Union, initially.⁸⁵ (Tr. 1038)

⁸² Drury and Diaz confirmed that although all these people were listed as being present, it was actually only the two of them. (Tr. 906)

⁸³ Diaz, who translated what Drury said into Spanish, could not confirm whether Drury said anything that was not in the script, since he did not have a copy of the script at the time. (Tr. 931)

⁸⁴ On cross-examination, Van Voorhis asserted that managers “opened up” the meeting but did not speak, even though she conceded she did not attend the luncheon. (Tr. 1072-1073)

⁸⁵ When pressed on cross-examination, Van Voorhis was unable to explain why she held this belief, asserting first that unidentified supervisors made comments, and then stating that it was just a “gut” – a feeling that Martinez did not support the company at the beginning. (Tr. 1066) Martinez himself, however, asserted that he was never in favor of the Union, despite having attended Union meetings and signing a Union authorization card. (Tr. 714, 742)

After employees had eaten the Mexican buffet provided by Respondent, the discussion portion of the lunch extended about 15 or 20 minutes beyond the scheduled 30-minute lunch hour into working time, since Drury knew the employees would need extra time to talk after eating. (Tr. 752, 754, 1120, 1149) Martinez testified that several employees spoke at this discussion period and opined that the company should “be given a second chance,” although others did not agree. (Tr. 727) Martinez denied that he took the lead at this luncheon, and said he was only concerned about hearing from other workers and what was best for them. (Tr. 728) He did admit, however, that the employees present knew that he was the one who organized the meeting, since he was the one who told employees about it. (Tr. 757-758) Martinez denied that he indicated during this luncheon whether he supported the Union or not. (Tr. 730)

Employee Jimenez recalled attending this luncheon and Drury saying, through Diaz as translator, that he was tired of all these meetings, that he had headaches, and that the employees would have this opportunity to have Martinez talk to them about the Union and could decide if they were “going to finish with all this.” (Tr. 44, 115, 122) Jimenez further remembered that Martinez told them at the luncheon meeting that the company had reduced their insurance and fired Supervisor Sanchez, and that the employees should give the company an “opportunity.”⁸⁶ (Tr. 45) Jimenez stated that the employees did not speak because there was no time. (Tr. 115) Employee Luna recalled only that the company President spoke at the beginning, and then Martinez spoke at the luncheon and tried to convince the employees that the Union was not good. (Tr. 164, 214) Employee Luna further recalled that only Martinez and employee Francisco Sandoval spoke at this meeting. (Tr. 215)

⁸⁶ See Complaint Paragraph 15(a).

Meat trimmer D. Mendoza recalled that Drury spoke initially, with Diaz translating, and said he was “tired” of listening to so much information about the Union, and hoped the employees were also tired and frustrated with so much information from the company and the Union. After having said this, according to D. Mendoza, he left. (Tr. 330) Employee Martinez then began to speak, and said that the company had already done positive things, like moving Supervisor Sanchez and planning to reduce healthcare costs.⁸⁷ Martinez then said, according to D. Mendoza, that the employees should give Drury and Van Voorhis an opportunity to take care of the complaints the employees had, and that the employees didn’t need the Union, and to give the company a chance.⁸⁸ (Tr. 331, 453) D. Mendoza further recalled that an employee named Everardo asked Martinez if he was for or against the company, to which Martinez answered that he was “neutral.” (Tr. 453) After that, another employee named Francisco Sandoval said the employees should give the company a chance to address the complaints. (Tr. 454)

Meat trimmer R. Mendoza recalled attending this luncheon where Drury spoke after the employees had their regular half-hour lunch and then clocked back in. (Tr. 608-609) Drury, using Diaz to translate into Spanish, said that he “was tired. . . about the Union,” and asked what they were thinking in relation to the Union. (Tr. 609). After Drury spoke, according to R. Mendoza, Jonathan [Martinez] spoke in Spanish, and asked what they were going to do – if they were all going to go with a union or go with the company – and that this was an opportunity “for everything to get fixed.”⁸⁹ (Tr. 611, 646) Another employee named “Peter” opined that the Union was not good, and the employees should give the company a chance for a year. (Tr. 647)

⁸⁷ On cross-examination, D. Mendoza recalled that employee Jose Marroquin asked Martinez what guarantee employees had that the company would keep healthcare costs low and not bring back Supervisor Sanchez. (Tr. 454)

⁸⁸ See Paragraph 15(a).

⁸⁹ See Paragraph 15(a).

R. Mendoza recalled that a co-worker asked Martinez if he was with the company or with the Union, to which he responded that he was for “what was best for everybody.” (Tr. 611, 647)

After Martinez spoke, Diaz came into the lunch room and told everyone to go back to work. (Tr. 653-655)

8. On About November 1, 2017, President Denise Van Voorhis and Area President Mike Drury Met with Employees in the Petitioned-for Unit to Discuss Healthcare Subsidies for the Coming Year

On about November 1, 2017, President Van Voorhis and Area President Drury held three to five meetings with groups of employees in the petitioned-for unit to discuss healthcare subsidies for the coming year. (Tr. 1022, 1049, 1110) During this meeting, Van Voorhis read from a document, with Diaz translating, entitled “*NOTICE TO ALL EMPLOYEES IN THE VOTING UNIT (Election on Thursday, November 9.*” (Tr. 894, 1023, 1049, 1137; JX#1(e)) She did not say anything other than what was on this document in order to avoid saying anything that could appear to be unlawful.⁹⁰ (Tr. 1023)

The document that Van Voorhis read during these meetings provided in relevant part:

As you know, at this time of year we begin open enrollment for your medical plan options, including the HMO medical plan. We have begun that process with our office clerical, managerial and supervisory personnel. Ordinarily, you would be included.

Many of you have asked what the Company intends to do about the subsidy for HMO health insurance on January 1, 2018.

I regret to notify you that a decision on the amount of the new subsidy paid by Newport which reduces the insurance premium you pay every two weeks will have to be postponed for all employees involved in the pending Labor Board (NLRB) election.

This delay is required to avoid the appearance of vote-buying by Newport in view of the fact that the NLRB will hold an election on November 9. Our lawyers have advised us that announcing the amount of a new subsidy at this time might be considered to be illegal (an unfair labor practice) and that we should not take this risk. (JX#1(e) (emphasis in original)

⁹¹

⁹⁰ Diaz read from the Spanish-language version of this document that he had prepared. (Tr. 895; JX#1(e) (Spanish version) In these meetings, Van Voorhis read the entire document to the employees in one take, after which Diaz read the Spanish-language version. (Tr. 896)

⁹¹ Van Voorhis and Drury held another meeting on the issue on or about November 15, 2017, where a document similar to JX#1(e) was distributed: the only differences appear to be the deletion of the words “Election on Thursday

Employee Jimenez recalled that another document with Respondent’s letterhead, a heading that read, “Notice to All Personnel (Excluding Teamsters Local No. 848 represented employees and employees in the voting unit),” and signed by Van Voorhis, was distributed at a meeting around November 1, 2017, by Drury, who informed them that the company would be lowering the insurance rates and/or increase the subsidy provided by the company.⁹² (Tr. 18, 89-90; JX#1(d)) He also recalled that Drury said that if the employees voted against the Union, that the company would lower their insurance rates and give them salary increases.⁹³ (Tr. 38, 90-92)

Employee Luna also recalled the document identified by Jimenez being distributed at a meeting with Drury and Van Voorhis and Van Voohis stating that the company would be reducing their health insurance.⁹⁴ (Tr. 148-149; JX#1(d)).

The document itself reads in relevant part:

*Good news. We have spent several months reviewing ways to reduce your healthcare costs. Healthcare costs continue to increase year over year. Newport has decided to pay a much larger portion of your monthly HMO costs. We are please to announce on January 1, 2018, your new premium rates for medical insurance coverage will go into effect. Your cost for the HMO plan will decrease substantially from what you are currently paying.*⁹⁵
(JX#1(d)) (emphasis in original)

November 9” under the title and the substitution of the words “cost of healthcare in 2018” for the words “subsidy for HMO health insurance on January 1, 2018” in JX#1(e). (Tr. 1032; GCX#13) Van Voorhis confirmed that the November 1 document was prepared before the scheduled election, while the November 15 document was prepared after, but she was unable to explain why the language had been changed in the latter. (Tr. 1049, 1051) Diaz, who translated the document at this meeting, prepared his own version in Spanish beforehand, but was unable to explain why his version was dated November 10 (GCX#19), which the original was dated November 15. (Tr. 922-923; GCX#13) He further confirmed that the one document was prepared before the scheduled election and the other after the election had been cancelled. (Tr. 944) Diaz confirmed that he translated the English-language version (GCX#13) into Spanish (GCX#19) to the best of his ability. (Tr. 951)

⁹² Drury identified this document as the rate sheet that would typically be given to employees either by their supervisor, in their paystubs, or posted on a bulletin board. He could not recall how this particular document was distributed, however. (Tr. 1136)

⁹³ See Complaint Paragraph 10(c).

⁹⁴ See Complaint Paragraph 9(b). Van Voorhis, who signed this Notice, denied that it had been distributed to employees, but speculated that it might have been posted near the time clock. (Tr. 1059; JX#1(d)) She also denied having read it to employees. (Tr. 1058) However, Diaz confirmed that Van Voorhis read it at a series of meetings with employees and that he translated it based on the Spanish-language version that he had prepared beforehand. (Tr. 930; JX#1(d) (both pages))

⁹⁵ See Complaint Paragraph 10(d).

This text is then followed by a chart that compares the bi-weekly HMO rates in 2017, to those going to be charged in 2018: the amount of the actual subsidy provided by Respondent is not described in this document. (Tr. 1059) According to Luna, Van Voorhis confirmed that the 2018 subsidies would not apply to employees in the petitioned-for unit because of the Union campaign. (Tr. 1059)

Meat trimmer D. Mendoza recalled attending one of the meetings where health insurance was discussed by Drury and Van Voorhis. (Tr. 320-321) He also identified the same document that Jimenez and Luna described as having been distributed at this meeting in both Spanish and English. (Tr. 321-322; JX#1(d) (both pages)) On cross-examination, D. Mendoza also confirmed that the document identified as JX#1(e) dated November 1, 2017, was also handed out in Spanish. (Tr. 443, 460; JX#3(e) (second page in Spanish) D. Mendoza further testified that Drury, using Diaz to translate into Spanish, said that the company had been working for months to reduce the cost of insurance.⁹⁶ (Tr. 323)

Meat cutter Contreras attended a meeting where a “union buster” translated for Van Voorhis who said that the company had been looking for a way to lower the insurance premiums and that they would lower them by half for the office workers: when his coworkers at this meeting asked why, she responded that they were not the ones bringing in the Union.⁹⁷ (Tr. 473, 506) Contreras also confirmed that a document he identified as JX#1(d) was distributed at this meeting in conjunction with JX#1(e).⁹⁸ (Tr. 470-471; JX#1(d) (both pages))

⁹⁶ See Complaint Paragraph 10(d).

⁹⁷ See Complaint Paragraph 8(b). ⁹⁸ Contreras confirmed that he attended many captive-audience meetings in October and November 2017 – maybe 20 or 30 – and could remember some stuff and some meetings. (Tr. 476)

⁹⁸ Contreras confirmed that he attended many captive-audience meetings in October and November 2017 – maybe 20 or 30 – and could remember some stuff and some meetings. (Tr. 476)

Employee Gutierrez de Tirado recalled a meeting with Drury, Mitchell, and Diaz on about November 2, 2017, where JX#1(d) was distributed in Spanish and English. (Tr. 548; (JX#1(d) (both pages)) Drury said the rates there were just for the office employees, and that if the production employees were not in the Union, the rates would also be for them.⁹⁹ (Tr. 549) At this same meeting, according to Gutierrez de Tirado, JX#1(e) was distributed by Diaz, who said these rates would be for all the employee but since the production employees were getting the Union, this was only for the office employees. (Tr. 549)

Meat trimmer R. Mendoza recalled a meeting where Drury and Van Voorhis spoke, using Diaz to translate into Spanish. Drury said that the insurance would be lowered “if the Union came in.”¹⁰⁰ (Tr. 605) He confirmed that he saw the document identified as JX#1(d) posted in English near the bathroom close to the time of this meeting. (Tr. 607; JX#1(d)) On cross-examination, he further confirmed that the English version of JX#1(e) was distributed to employees. (Tr. 643-644; JX#1(e) (English only).

9. On About November 7 and 8, 2017, Area President Mike Drury and President Denise Van Voorhis Held Final Meetings with Employees to Discuss the Election Scheduled for November 9, 2017

On November 7 and 8, 2017, Drury and Van Voorhis held between three and five meetings with employees in the petitioned-for unit to discuss the election scheduled for November 9, 2017. (GCX#15 p. 3) They followed a prepared script entitled “*Final Presentation November 7 & 8, 2017 by Mike Drury, Denise Van Voorhis, and Roberto Diaz.*” (Tr. 908, 1024, 1062, 1115, GCX#10) Diaz translated for Drury and Van Voorhis at all the meetings but one, which was conducted in English. (Tr. 932-933)

⁹⁹ See Complaint Paragraph 10(d).

¹⁰⁰ See Complaint Paragraph 10(f). Based on R. Mendoza’s testimony throughout the hearing, it can reasonably be inferred that R. Mendoza intended to testify that Drury said insurance rates would be lowered if the Union did not come in.

Diaz spoke first, followed by Drury and then Van Voorhis. (Tr. 1025) Diaz followed his portion of the script, and gave a Power Point presentation in English and Spanish entitled “*NLRB ELECTION PROCEDURES*,” outlining the times, location, release schedule, and eligibility for the election scheduled for November 9, 2017, and urging everyone to vote.¹⁰¹ (Tr. 907, 932; RX#7 and #8) Following that presentation, Diaz introduced himself as part of the “Newport family,” and read the following from his script:

*While I’m not doing the same job as my dad did for ___ years, I know a lot about your work, your work environment, and the concerns you have and face each day. I am asking that you give me a chance to make your jobs easier. I know that I have the full support of Denise [Van Voorhis] and Mike [Drury]. I can hardly wait to get this whole union trouble behind us and have the chance to prove to you what Newport, you, and I, working together with Mike and Denise can accomplish.*¹⁰² (GCX#10 p. 2)

Employee Jimenez recalled that at the meeting he attended, Diaz said he had been hired by the company to resolve the problems that existed, and asked that employees give him the opportunity to address them.¹⁰³ (Tr. 35) Employee Valdivia confirmed that Diaz said the employees should give the company a “second chance,” and that if they could give him six months, he might fix everything, including issues of benefits and other problems the company had.¹⁰⁴ (Tr. 252-254)

After Diaz, Drury did most of the speaking at these final meetings, with Diaz translating, and followed the script pretty closely to ensure that he and the others were sending out a

¹⁰¹ At the sole meeting conducted in English, Diaz showed only the English-language version of the Power Points. At the others he showed only the Spanish-language version. (Tr. 932)

¹⁰² See Complaint Paragraph 7(c).

¹⁰³ See Complaint Paragraph 7(a). When pressed on cross-examination to recall more details about the meetings he attended in October and November 2017, and to explain why he could not remember more, Jimenez conceded that he did not remember everything that was said but stated “what hurts you, stays imprinted.” (Tr. 63)

¹⁰⁴ See Complaint Paragraph 7(b).

consistent message over the several meetings held.¹⁰⁵ (Tr. 1062, 1115, 1146) Drury's script read in relevant part:

*For a couple of weeks, it has been obvious that a large majority of the warehouse employees have committed to VOTE NO on Thursday. The warehouse employees said they were going to VOTE NO but couldn't win it all by themselves. Last week, in the Friday meeting, we understand that a majority of employees said they were willing to give Newport, Denise, Robert and me a chance... Let me tell you – I appreciate what you have said. Newport is a family and a great company. Newport can and will be much, much better. As soon as we get a NO VOTE on Thursday, we have our work cut out for us. Some improvements can be made and announced quickly. Other changes will take longer, but we start almost immediately.*¹⁰⁶ (GCX#10) (emphasis in original)

Drury testified that among the improvements that could be made following a “no” vote were wages and pay. However, Drury was unable to recall specifically what changes he was referring to in his speech, but speculated that they might include looking at job classifications which would take time to do comparisons and studies. (Tr. 1145-1146) Drury also explained that his statement that a vast majority would vote “no” was based on an impression or assumption based on the meetings held with the employees.¹⁰⁷ (Tr. 1147)

Van Voorhis, who spoke last of the three, read from the prepared script and added some hand-written notes. (Tr. 1025; GCX#10 pp. 8-10) Van Voorhis discussed the cost of medical insurance, noting that employees in the petitioned-for unit had asked if the company would be implementing the same insurance plan announced for the administrative and clerical employees if they voted against the Union. (GCX#10 pp. 8-9) Van Voorhis explained, according to the prepared script, that companies are not permitted to make any promises during union organizing

¹⁰⁵ Diaz confirmed that he had translated Drury's speech into Spanish, and read from that translation rather than translating what Drury said. (Tr. 933-934)

¹⁰⁶ See Complaint Paragraph 10(c).

¹⁰⁷ Drury's script indicates that a video was shown during these final presentations, which Drury described as a recap of the issues discussed to date, including the voting process and negotiations. (Tr. 1144) Drury confirmed that both he and Van Voorhis appeared in the video. (Tr. 1144-1145) Diaz did not remember the video at all. (Tr. 934-935)

campaigns, and they were not making any promises of what they might do or not do after the election. She went on to say:

You should know, however, that after a “NO” vote in the election, the legal issues which apply to us now will no longer apply, and there will be no legal prohibition against our implementing the same insurance program with processing and warehouse as we have announced for the admin/office. Here again, we are not making any type of promise of what we will do or not do after the election, and we are not implying that we will do or not do anything. Hopefully, this clears-up what seems to be a continuing question. (GCX#10 p.9) (emphasis in original)

Meat trimmer D. Mendoza recalled that at the meeting he attended, Van Voorhis, with Diaz translating into Spanish, said that while the Union petition was pending, the salaries were going to be “cancelled.”¹⁰⁸ (Tr. 309-311) According to D. Mendoza, an employee raised his hand and asked Van Voorhis what would happen with their performance appraisals, to which she replied that the reviews would be evaluated, but the employees would not get raises as long as there was a Union petition.¹⁰⁹ (Tr. 430)

Respondent called receiver Cueva who attended one of these final meetings and he recalled that Van Voorhis said that if the petition of the Union did not pass, she was going to see about the problems of the employees. Drury reiterated that he would get more involved in the decisions made by Van Voorhis.¹¹⁰ (Tr. 878-879)

Inventory worker Garcia, who also testified on behalf of Respondent, attended one of these final pre-election meetings with Van Voorhis and Drury, and recalled that Van Voorhis seemed to apologize, recognizing that the company had not been paying attention, but if the employees gave them another opportunity, they would try to help more with the medical benefits and performance reviews.¹¹¹ (Tr. 1172-1173, 1181-1182) At a subsequent meeting held before

¹⁰⁸ See Complaint Paragraph 8(d).

¹⁰⁹ See Complaint Paragraph 8(d).

¹¹⁰ See Complaint Paragraph 9(b).

¹¹¹ See Complaint Paragraph 9(b).

the election, Garcia recalled that Van Voorhis, through an unnamed translator, told the employees about the election procedure and the presence of a neutral person from the government during the balloting process, and told the employees to really think about what they were going to do but that they were free to vote for what they wanted. (Tr. 1175-1176)

10. After the Union Filed Unfair Labor Practice Charges Against Respondent and the Pending Election Was Blocked, President Denise Van Voorhis and Area President Mike Drury Held a Meeting with Employees in the Petitioned-for Unit and Encouraged Them to Withdraw Their Support of the Union

Based upon unfair labor practice charges filed by the Union, the petition for election was blocked and the election scheduled for November 9, 2017, was cancelled. (JX#1(c)) On the day the election was to have been held, Van Voorhis and Drury held between three to five meetings with employees. (Tr. 1027, 1029, 1064)

At these meetings, Van Voorhis read from the first page of a document entitled “*NOTICE TO PROCESSING AND WAREHOUSE*,” with Diaz translating into Spanish,¹¹² in relevant part as follows:

Today, November 9, you were supposed to be able to exercise your right to vote and to vote for or against representation by the Teamsters Union. The Teamsters, however, did not honor this right, and at the last-possible minute, they filed a charge with the NLRB to block the election. Unfortunately, the NLRB agreed with the Teamsters’ request and cancelled the election.

Many of you have expressed anger at the Teamsters’ moves, and you have asked us what we can do. You have a very-good and fully-legitimate reason to be angry. The Teamsters agreed in writing to have the election on November 9, and they showed their true colors when the Teamsters broke their agreement.

We agree with your well-placed anger, but as a practical matter, our hands are tied because the Teamsters were the ones who filed the election petition with the NLRB, and because they filed the petition, the Teamsters get to make the decisions concerning the petition as long as it remains filed.

Your hands, however, are not tied. The Teamsters relied on authorization cards, which some of you must have signed, in order to support the election petition. These cards are

¹¹² Again, Diaz read from the Spanish-language version of this document that he had prepared rather than translate what the speakers were saying. (Tr. 898-899, 907, 928; RX#5) Diaz confirmed that he translated the English-language version (GCX#2) to the best of his ability. (Tr. 950)

apparently currently in the NLRB's hands. Some of you have voluntarily said that you want to get your cards back or to cancel your cards, this will not work because the NLRB has your cards, and the NLRB will probably only return the cards to the Teamsters if the union asks for them back. But all is not lost, because there is something which may work. We cannot tell you what to do or not do when dealing with a union, but if we were in your position, we would write a letter to the Teamsters and ask, or even demand, that they pull our and leave all of us alone....

Here again, we cannot tell you what to do or not do, and we are not telling or asking you to do anything, but if we were you, we would send a letter, similar to the one attached, to the Teamsters. I would send a signed letter on my own, or I would get my fellow employees to sign a joint letter and send it. Perhaps, if the Teamsters get enough letters, they will finally honor your choice and your wishes and the Teamsters will pull their petition and leave us alone.¹¹³ (Tr. 1028; GCX#2 p.1) (emphasis in original)

Van Voorhis initially denied that anything was handed out at these meetings, or that she said anything other than that which appeared on the notice she read to the employees.¹¹⁴ (Tr. 1029) Drury confirmed that Van Voorhis read the top page to employees at these meeting, but said he had not seen pages 2 through 5 before testifying. (Tr. 1162, 1166) Van Voorhis generally denied having made any of the alleged statements attributed to her or any other supervisor in the Complaint. (Tr. 1040-1043)

There was considerable, and often contradictory, testimony regarding how many pages were part of this document and whether they were distributed by Respondent at these meetings. The document as proffered by the General Counsel and received into evidence consisted of five pages: the first page being the Notice that Van Voorhis read to the employees at the meeting on November 9. (GCX#2 p. 1) The second and third pages are sample letters in English and Spanish, respectively, addressed to Patrick D. Kelly, Secretary-Treasurer of the Union, advising that the employees at the Irvine facility were no longer interested in having the Union represent

¹¹³ See Complaint Paragraph 8(f).

¹¹⁴ Diaz, who testified that he read from his translation of this document, was unable to explain why he apparently omitted the sentence "I would send a signed letter on my own or get my fellow employees to sign a joint letter and send it." (Tr. 902, 928; RX#5) Based thereon, RX#5 does not appear to be a verbatim translation of GCX#2. (Tr. 903) Diaz admitted that some of his translation of documents he read to employees at the meetings at issue, including this one, were not literal, although he translated to the best of his ability. (Tr. 927)

them, and demanding either that the election be rescheduled or the election petition withdrawn. (GCX#2 pp. 2-3) The fourth and fifth pages, also addressed to Patrick D. Kelly at the Union, state that the employees at the Newport facility are no long interested in having the Union represent them, and had they been given the chance, they were going to vote overwhelmingly against the Union in the election that had been cancelled. This document, which contains multiple lines for employees' signatures, also demands that the Union either immediately reschedule the election or withdraw the election petition. (GCX#2 pp. 4-5)

Van Voorhis testified that she read only the first page consisting of the Notice, implying that there were no other pages. (Tr. 1064) On cross-examination, however, when asked to explain the reference in the final paragraph that reads in part "*We cannot tell you what to do or not do, and we are not telling or asking you to do anything, but if we were you, we would send a letter similar to the one attached, to the Teamsters,*" she said that she did not recall if there was anything attached to the Notice that she read, despite the above reference. (Tr. 1065)

Respondent's employee witness Jonathan Martinez clearly recalled attending one of the meetings with Van Voorhis and about 45-50 employees where she read the first page of GCX#2. (Tr. 738-740) In contradiction of Van Voorhis, he confirmed that the first page, along with the samples on pages 2 through 5 of the exhibit, were distributed at the meeting that he attended.¹¹⁵ (Tr. 740; GCX#2 pp. 1-5)

Employee Luna stated that he attended a meeting on this date with Drury and Van Voorhis on the work floor of Department A, with Diaz translating, where Van Voorhis read from a document, but he did not identify the document. (Tr. 153-154) On cross-examination by Respondent, however, he did confirm that Van Voorhis gave the employees a multi-page

¹¹⁵ See Complaint Paragraph 8(f).

document to review at this meeting and identified it as GCX#2, confirming that the contents were translated into Spanish. (Tr. 217; GCX#2 pp. 1-5) Likewise, meat cutter Contreras testified that he attended a meeting after the election had been cancelled where Van Voorhis distributed a document consisting of three or four pages. (Tr. 488-489)

Employee Valdivia also recalled that Drury, Van Voorhis, and Diaz came to his work area and showed him and other employees there a piece of paper to sign and demand their authorization cards back. (Tr. 264) According to Valdivia, Van Voorhis held up a paper that he identified as page 4 of GCX#2 and said they could demand their cards back.¹¹⁶ (Tr. 265-266; GCX#2 p. 4)

Employee Jimenez attended one of these meetings after the election was cancelled, and recalled Drury stating, through Diaz translating, that the employees had been “tricked” by the Union, and that he had some papers to sign so that the Union could return their authorization cards.¹¹⁷ Jimenez identified the first page of GCX#2, but was unable to recall if the other pages were attached. (Tr. 47, 116) He also confirmed that Drury told them that the company could not tell employees what to do, but if they were in employees’ shoes, they would send a letter to the Union asking for the cards back, and to sign the paper. (Tr. 117)

Employee Gutierrez de Tirado attended a meeting on about November 8, 2017, in the production room of Department B, where the employees were informed by Van Voorhis, Drury, and Diaz that there was not going to be a vote. (Tr. 552-553) The following day, November 9, 2017, another meeting was held in Department B’s production room with Van Voorhis, and Drury, utilizing Diaz as translator, where Van Voorhis read from a document and distributed some papers to the 30 to 40 employees present so that they could get their union authorization

¹¹⁶ See Complaint Paragraph 8(g).

¹¹⁷ See Complaint Paragraph 10(g).

cards back from the Union.¹¹⁸ (Tr. 555, 583) Gutierrez de Tirado identified all five pages of GCX#2 as being attached and distributed together at this meeting, and recalled that Van Voorhis told the employees to sign it and give them back to her to be able to get the cards back.¹¹⁹ (Tr. 555; GCX#2 pp. 1-5)

Meat trimmer R. Mendoza recalled attending a meeting in the production room, after the Union had “frozen” the election, conducted by Drury and Van Voorhis with Diaz translating into Spanish, where Drury said that although the company could not tell employees what to do or not do, they could send a letter to the Union and tell the Union to leave them alone. (Tr. 613, 648) At this meeting, Van Voorhis gave the approximately 60 employees present a paper to sign so that the Union would not come in.¹²⁰ (Tr. 613)

Respondent’s witness Durkee attended a meeting, after the election was cancelled, conducted by Van Voorhis, Drury, and Diaz, where Van Voorhis said that the employees had a choice to sign a petition to have the Union withdrawn. (Tr. 777-778) He confirmed that this meeting was held with 15 to 20 employees from only the warehouse.¹²¹ (Tr. 782)

Receiver Cueva, called by Respondent, also attended a meeting conducted by Van Voorhis with about 60 employees, held after the election was cancelled, where employees continued to ask about their insurance costs, to which Van Voorhis replied that they had to get another voting date first. According to Cueva, Van Voorhis also told the employees to ask the Union to get another date. (Tr. 880)

¹¹⁸ Gutierrez de Tirado confirmed that Van Voorhis stated, consistent with the script that Van Voorhis testified she used, that the company could not tell them what to do or not to do with respect to the Union, but they could write a letter to the Union asking for their cards back, and said that if she were in the employees’ shoes, she would send a letter to the Union. (Tr. 583)

¹¹⁹ See Complaint Paragraph 8(f).

¹²⁰ See Complaint Paragraph 10(h). R. Mendoza confirmed that the paper was in English and he was unable to read it.

¹²¹ See Complaint Paragraph 8(f).

11. After the Election Was Blocked, Employee Jonathan Martinez Solicited Employees to Withdraw Their Support of the Union

Jonathan Martinez did not dispute that he circulated a petition to other employees at the Irvine facility. (Tr. 763-764) He initially identified pages 2 through 4 of GCX#2 as letters that he and other employees found on the internet by looking for samples of how to stop a union. (Tr. 734) Martinez confessed that he did not type these letters, nor did he know who did. (Tr. 758) He then claimed that he saw a sample that a coworker named Randy showed him on his phone, but did not know how Union Secretary-Treasurer Patrick D. Kelly's name and the Union's address, as well as the company's name and the date of the election, came to be on the letters. (Tr. 759-760)

Martinez confirmed that he and the other employees conferred with Area President Drury about distributing the letters to employees, and that he was told that the company could not help them and they would have to do it on their own time. (Tr. 735-737, 771) Martinez admitted, however, that he passed the documents out during working time instead. (Tr. 737) With regard to the origins of the letters, Martinez claimed he did not know who gave him the finished letters, but then on further cross-examination claimed that other employees gave them to him and that they made copies.¹²² (Tr. 760-761) Also, Martinez did not know where the Spanish versions on pages 3 and 5 of GCX#2 came from. (Tr. 762)

Despite being unable to explain the origins of the documents, Martinez confirmed that he distributed pages 2 through 5 of GCX#2 to employees at the Irvine facility in either English or Spanish, depending on which they requested, and told them to read them and sign them and

¹²² Martinez identified these employees as Randy Ray and Peter from the Warehouse. (Tr. 761)

return them to him. (Tr. 763-764) He further confirmed that he distributed between 20 to 25 copies in Department A and some of Department B over several days after the election was cancelled during breaks and lunch and during work hours. (Tr. 765-766) When he gave these documents to employees, he told them “[t]hat we wouldn’t want to be . . . stopped with the Union” and try to “get another solution.”¹²³ (Tr. 766)

Several employees confirmed that Martinez approached them during working time with a petition.¹²⁴ All agreed that they were working at the time, and that Martinez was wearing his work clothes. (Tr. 161) Employee Valdivia stated that Martinez came to his working station during working time in the morning and told him if he wanted his authorization card back, to sign a piece of paper he had on a clipboard that Valdivia confirmed was the same paper that Van Voorhis held up at the earlier meeting on November 9.¹²⁵ (Tr. 266-267; GCX#2 p. 4) Valdivia declined to sign it, and observed Martinez move on to other employees – maybe five in all – and talk to them.¹²⁶ He did not see any of them sign the paper, however. (Tr. 268-269, 292)

Meat trimmer D. Mendoza recalled that Martinez talked to him about his authorization card on about November 13 or 14, after the election scheduled for November 9, 2017, had been cancelled. (Tr. 333-334) D. Mendoza testified that Martinez came to him in his work area while he was working and asked if he had already read the document so that the Union could return the authorization cards: D. Mendoza then identified GCX#2 p. 5 as the paper that Martinez showed him that had the signatures of coworkers, and Martinez asked him to sign.¹²⁷ (Tr. 334-336, 446;

¹²³ See Complaint Paragraph 15(b)-(f).

¹²⁴ Employee Jimenez testified that he saw Martinez approach others in his department and overheard him ask them to sign a letter, but Martinez did not speak to him directly. (Tr. 52) Employee Luna also stated that on about November 10, 2017, he observed Martinez speaking with other employees in his work area and was able to identify about 11 of them by name. (Tr. 159-161, 183)

¹²⁵ See Complaint Paragraph 15(f).

¹²⁶ Valdivia identified these employees as Gilbert, Diego, Enrique, Emilio, and Paulo Hernandez. (Tr. 291-292)

¹²⁷ See Complaint Paragraph 15(e).

GCX#2 p.5 (Spanish)) D. Mendoza said he would not sign and Martinez became annoyed, after which he approached two other employees and showed them the paper: D. Mendoza could not hear what he said to them, however. (Tr. 336-337) D. Mendoza confirmed that Martinez was dressed in work clothes at the time. (Tr. 337)

Employee Gutierrez de Tirado described Martinez coming to her work station while she was working and asking her to sign page 3 of GCX#2 so that he could get the Union authorization cards.¹²⁸ (Tr. 556-557; GCX#2 p.3 (Spanish)) After she declined to sign it, she saw Martinez go from place to place and ask more than five other employees if they had signed the piece of paper and, if not, if they would sign it: she was able to hear him say this to the employees closest to her. (Tr. 557) She confirmed that he was wearing work clothes (a white robe and hair cover) at the time. (Tr. 557)

Employee Arreguin testified that sometime after the meeting where Van Voorhis or Drury talked to employees about requesting their “blue cards” back, employee Martinez also talked to him about the “blue cards” in the locker area, sometime before or after lunch, but during working time. (Tr. 375-378) Nobody else was in the area. Arreguin saw that there were some papers in a folder, but he did not see what the papers were for. Martinez told Arreguin that he wanted Arreguin to sign one of the papers because he wanted to take the blue cards back.¹²⁹ Arreguin asked Martinez to give him a paper later, but Martinez never did. Arreguin never signed the paper. (Tr. 379-380)

Meat trimmer R. Mendoza recalled that sometime after the election had been cancelled, Jonathan [Martinez], wearing his regular work clothes, came to his work area while he was

¹²⁸ See Complaint Paragraph 15(d).

¹²⁹ See Complaint Paragraph 15(c).

working and told him in Spanish to sign a paper relating to the Union.¹³⁰ (Tr. 614, 617) After R. Mendoza declined, he saw Martinez go to two or three other co-workers on the line where they were working and ask them if they were going to sign the paper.¹³¹ (Tr. 615-616)

Respondent stipulated that an Employee Handbook was in effect at the Irvine facility for the calendar year 2017, and that it applied to all employees there except those in the transportation department represented by Teamsters 848. (Tr. 687; GCX#8) The handbook contains a Solicitation & Distribution policy that provides in relevant part as follows:

Unauthorized solicitation or distribution for any purpose on the Company's property is prohibited. Solicitation is defined as trying to obtain business of any type including the selling of products or services, requesting funds, political, or petitioner support of any kind. This also includes conducting opinion, investigatory, or other types of surveys or polls. Examples of solicitation can include: sending e-mails requesting charitable contributions of any kind or solicitation of any non-business related matter unless sent to the Employee Relations Department for review and approval. Distribution is described as giving out any type of literature, pamphlets, product samples, or other materials not approved by the President. Distribution of literature unrelated to job performance by associates is not permitted in working areas at any time. (GCX #8 p. 21)

Employees conceded that they were free to discuss a variety of topics during work time without restriction so long as the topics were not specifically “prohibited.” (Tr. 72-73, 75) Employees also testified – and Area President Drury largely confirmed – that they regularly collected money for employees in need or who had a death in the family, sold Girl Scout cookies, and also bought “squares” for the Superbowl during working time. (Tr. 117-118, 219, 1039, 1120) President Van Voorhis confirmed this was the practice so long as the employees had prior approval. (Tr. 1039; 1072) Drury further explained that collecting monies for

¹³⁰ See Complaint Paragraph 15(b). R. Mendoza testified that he was not able to see the paper that Martinez was asking him to sign. (Tr. 615)

¹³¹ On cross-examination, R. Mendoza confirmed that production room B can be noisy with the refrigerator, conveyor belt, band saw, and other machinery, but confirmed that he could hear Martinez talking to his coworkers because he was not using the band saw that day and his coworkers were only two or three feet away. (Tr. 649-653)

employees in need could be approved by a supervisor, but other activities – like sales of Girl Scout cookies – were limited and would have to be approved by their supervisor or Roberto Diaz. (Tr. 1151)

12. In October and November 2017, Respondent Withheld Regularly-Scheduled Annual Performance Reviews and Wage Increases

As noted above, Respondent completes Performance Reviews for employees annually on their hire anniversary date or within the pay period of that anniversary date which may result in a merit increase in wages, which is then awarded retroactive to the employee's anniversary date. (Tr. 1034-35, 1157)

President Van Voorhis confirmed that employees whose anniversary dates fell after the Union filed the Petition for Election did not receive their merit increases until around February 2018, and that raises were retroactive to the employee's anniversary date.¹³² (Tr. 1035-1036, 1067, 1069) She did not know why the merit increases were given in February or if there was any significance to that date.¹³³ (Tr. 1071)

Area President Drury stated that he believed employees in the petitioned-for unit whose anniversary dates fell in October and November 2017, received their annual performance reviews, but confirmed that they did not get merit increases during that time because Respondent had been advised that it might be construed as potentially influencing them. (Tr. 1160) He further confirmed that, based on a decision made by Van Voorhis, those employees so affected received their merit increases in the first quarter of 2018, which were retroactive to their anniversary dates.¹³⁴ (Tr. 1160-1161)

¹³² Van Voorhis asserted that she believed that the affected employees did receive their performance reviews on or near their anniversary date, but did not get their merit increases. She later testified that she did not know this to be a fact. (Tr. 1068-1069)

¹³³ See Complaint Paragraph 17(a).

¹³⁴ See Complaint Paragraph 17(a).

However, several employees whose anniversary or hire dates fell between the time the Union filed the petition in early October and the scheduled election in November, 2017, testified that they did not receive either their regularly scheduled review or raise. (Tr. 164-65) Employee Luna, whose anniversary date is November 29, stated that he did not get his annual review until February 2018, and got a raise of \$.75 an hour which he believed was retroactive to November 2017, but was not sure because he noticed only a little more money in his paycheck. (Tr. 166) Employee Valdivia, whose anniversary date is November 10, did not get a raise in 2017, but rather received it in February 2018, and was told it would be retroactive to his anniversary date. (Tr. 271) Employee Contreras, whose hire anniversary date is November 29, did not get either a performance appraisal or a raise in November 2017, but received both in February 2018: according to Contreras, he was told at that time by the managers completing his appraisal that they did not do the reviews the previous November because everything was “frozen,” but now “we got to continue with our life” so the company decided to do the reviews and raises.¹³⁵ (Tr. 481-482) Although Contreras was told that his \$.15 an hour raise would be retroactive to his anniversary date, this did not happen. (Tr. 482)

Documents provided by Respondent support employees’ testimony that they did not receive their regularly scheduled performance reviews or merit increases during the critical period between the filing of the petition on October 10, 2017, and the scheduled election on November 9, 2017.

For example, the performance appraisal provided for Jose Lopez-Contreras for his appraisal period ending November 27, 2017, shows that it was completed and signed on January 23, 2018. (GCX#14 p. 136-137; Tr. 481-482). The performance appraisal for Pedro Luna for

¹³⁵ See Complaint Paragraph 17(a).

his appraisal period ending November 30, 2017, shows that it was signed and completed on January 22, 2018. (GCX#14 p. 140-141; Tr. 166) Other examples would include meat trimmer Joel Gonzalez whose appraisal was completed on January 27, 2018, rather than near his anniversary date on November 27, 2017 (GCX#14 pp. 129-130); meat cutter Camilo Moreno who received his appraisal on January 24, 2018, instead of on his anniversary date of November 13, 2017 (GCX#14 pp. 146-147); and packer Candy Patino, whose appraisal was likewise done on January 24, 2018, rather than on October 29, 2017, at the end of her appraisal period.¹³⁶ (GCX#14 pp. 151-153)

In contrast, Jonathan Martinez, whose appraisal period ended on June 20, 2017 – before the election petition was filed – received his performance review on June 23, 2017. (GCX#14, pp. 144-145). Similarly, Everardo Jimenez testified that he timely received his appraisal that was due in June 2017. (Tr. 54)

13. Beginning January 1, 2018, Respondent Withheld Reductions in Healthcare Costs from Employees in the Petitioned-for Unit

Both Area President Drury and President Van Voorhis confirmed that employees in the petitioned-for unit did not receive the increased HMO insurance subsidy for 2018, but remained on the previous year's subsidy. (Tr. 1030, 1055, 1110) Drury explained that once the rates and subsidies were set, there would have been no mid-year adjustments in 2018. (Tr. 1138) Drury admitted that those employees not in the petitioned-for unit received an increased subsidy in 2018, resulting in a lower payment for their HMO coverage. (Tr. 1135) Drury did confirm,

¹³⁶ GCX#7, prepared by Respondent for this hearing, purports to show when raises for the petitioned-for unit employees were effective, but no direct evidence was adduced to show that affected employees were actually paid retroactively to the dates shown. Therefore, General Counsel urges that any make-whole remedies resulting from the denial of regularly scheduled raises be reserved for compliance.

however, that employees in the petitioned-for unit received the same subsidy for 2019 that the other employees received.¹³⁷ (Tr. 1139)

Employee Luna stated that his HMO premiums increased in January 2018, and did not decrease for the rest of the year.¹³⁸ (Tr. 170) Likewise, meat cutter Contreras testified that his HMO premiums increased in January 2018.¹³⁹ (Tr. 480)

Respondent's documents, namely GCX#6, which Respondent's HR Generalist Kelly Dailey explained as a chart listing the employees in the petitioned-for unit registered for the HMO health insurance plan (Tr. 669) for the years 2017 to 2019 and their bi-weekly health insurance plan costs, further confirms that starting in 2018, the costs for the petitioned-for unit employees' HMO plans were not those shown in the flyer Respondent distributed to employees, which listed the "new HMO rates (per bi-weekly period)" starting on January 1, 2018, for employees not in the petitioned-for unit.¹⁴⁰ (JX#1(d))

III. ARGUMENT

A. Credibility Issues Should be Resolved in Favor of General Counsel's Witnesses

Credibility findings may be based on relevant factors including the interests and demeanor of witnesses; whether their testimony is corroborated or consistent with documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. *Pacific Green Trucking, Inc.*, 368 NLRB No. 14, JD slip op. at 5 fn. 13 (2019) (citing *Daikichi Corp.*, 335 NLRB 622, 623 (2001),

¹³⁷ See Complaint Paragraph 19(a). The record is devoid of evidence, and Respondent failed to explain if, starting January 1, 2018, employees not in the petitioned-for unit paid the new reduced HMO rates reflected in JX#1(d).

¹³⁸ See Complaint Paragraph 19(a).

¹³⁹ See Complaint Paragraph 19(a).

¹⁴⁰ JX#1(d), dated November 1, 2017, states that starting on January 1, 2018, employees not in the petitioned-for unit will pay new reduced HMO rates of either: \$50.00; \$93.00; \$123.00; or \$150.00, depending on their coverage type. GCX#6 shows that starting 2018, employees in the petitioned-for unit registered for an HMO plan did not pay the aforementioned new reduced HMO rates reflected in JX#1(d).

enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997), cert. denied 522 U.S. 948 (1997)).

In the instant case with nearly 20 witnesses testifying about events that occurred nearly 20 months earlier, it is to be expected that testimony will vary and that witnesses may contradict each other on certain details. Furthermore, Respondent's witnesses have generally denied having made or taken the actions attributed to them by various employee-witnesses. Despite these disparities and denials, General Counsel's witnesses for the most part testified in a forthright manner and largely corroborated one another, and several company documents confirm these witnesses' recollections.

The Board has long recognized that the testimony of current employees that might be adverse to their pecuniary interests – a “risk not lightly undertaken” – is particularly reliable. *Kingspan Insulated Panels, Inc.*, 359 NLRB 248, 249 fn. 2 (2012) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)). Respondent's witnesses, on the other hand, generally testified in a self-serving manner, often evading responding to simple questions, and at times contradicting company documents in the record.

Much cross-examination of General Counsel's witnesses focused on their inability to remember exact dates and topics of the meetings they attended. In this regard, it should be noted that all of them attended many meetings – some as many as 20 – within a 30-day period and thus were understandably unable to keep the sequence and speakers completely straight. In fact, many of Respondent's own witnesses could not recall dates or sequences of events without the aid of company documents or leading questions.

The Board has long recognized that “[u]ncertain, incorrect, or inconsistent testimony regarding dates is common and frequently discounted in evaluating witness credibility,

particularly where the date would not have had any particular importance to the witness at the time.” *Pacific Green Trucking*, supra, slip op. at 1, JD slip op. at 5 fn. 13 (citing *Cojocari v. Sessions*, 863 F.3d 616, 622-23 (7th Cir. 2017) (“[D]ates and times [are] the sorts of minor details that are most vulnerable to the vagaries of human memory”)). One employee witness noted that his inability to remember precise dates and sequences of events was because he had not written anything down at the time of the events; this witness further noted that many of his coworkers could barely read or write and therefore were not accustomed to keeping notes. Thus, the credibility of General Counsel’s witnesses should be affirmed even where a witness possibly confused the dates of a relevant incident. *Id.* at slip op. at 1 fn. 3, JD slip op. at 5 fn. 13.

General Counsel’s witnesses should also be credited on their version of events, even where they may differ in some details. As noted above, employees attended many meetings during a short period of time. The Board in *Pacific Green Trucking*, supra, slip op. at 1, JD slip op. at 8 fn. 20 (quoting *Owino v. Holder*, 771 F.3d 527, 538 (9th Cir. 2014)) recognized that “[s]light differences in the recollection or perception of different witnesses are a common occurrence.” As one employee-witness astutely observed, when asked why he only remembered certain statements and not others from the meetings that he attended, he responded, “what hurts you, stays imprinted.” Clearly, employees who attended multiple meetings where they were confronted by a plethora of new information would be most likely to remember references to their terms and conditions of employment, like wages, health insurance, and the possibility of losing work, rather than other, more esoteric, details.

Also, the Board has long held that the mere passage of time may cause testimony to vary among witnesses. In *Sewell, Inc.*, 207 NLRB 325, 332 (1973), the Board affirmed an ALJ’s finding that a plant manager’s statement violated Section 8(a)(1) of the Act, noting that although

passage of time has a tendency to erode witnesses' memory to some degree, four separate witnesses testified that they all heard a plant manager say "essentially the same thing."

Moreover, given that Respondent held a series of small-group meetings, all employees did not attend the same meetings, and it is unlikely that exactly the same words were said by the consultants and/or company officials at each meeting on a given topic, or that some statements were made at one meeting but not another. This further supports the argument that General Counsel's witnesses' recollection of certain statements may be credited even though there are minor inconsistencies.

Finally, in making credibility findings, an ALJ may also consider language and translation issues. See *Pacific Green Trucking*, supra, slip op. at 1, JD slip op. at 3 fn. 3 (Board found no basis for reversing an ALJ's credibility findings where an ALJ took into account that witnesses testified through an interpreter). In the instant case, most of General Counsel's witnesses testified in Spanish utilizing an interpreter, and their testimony should not be discredited on that basis.

Furthermore, many or even most of the coercive statements attributed to Respondent were made in English and interpreted for the benefit of the Spanish-speaking employees. Although the company official who did most of the interpreting at many of the meetings testified that he translated what was said (or read) to the best of his ability, his multiple translations may have varied as well, contributing to variations in the employees' recollections of what was said. Moreover, this translator admitted on the record that he made mistakes and omitted some statements on several occasions.

Based upon the foregoing, any inconsistencies regarding dates, sequences, speakers, or exactly what was said, should be resolved in favor of General Counsel's witnesses.

B. Respondent Violated Section 8(a)(1) of the Act Through Numerous Instances of Coercive Statements and Conduct

The test for determining whether an employer's statements or conduct violate Section 8(a)(1) of the Act is whether under all the circumstances the statements or conduct "reasonably tend[] to restrain, coerce, or interfere with employees' rights guaranteed by the Act." *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *Mercy Hospital*, 366 NLRB No. 165, slip op. at 2 (2018). The Board applies an objective standard on whether the statement reasonably tends to coerce employees, rather than examining the intent of the speaker. *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004) (internal citations omitted).

When evaluating the coercive impact of violations, the Board also considers the sheer volume of violations. See *Evergreen America Corp.*, 348 NLRB 178, 180 (2006). In *Evergreen*, the Board affirmed issuance of a bargaining order where at the outset of an organizing campaign, in addition to a series of hallmark violations, the employer reacted with a series of 8(a)(1) violations over a three-month period including: 13 separate instances of unlawful interrogations; 15 instances of implied promises to remedy solicited grievances; 8 actual promises to remedy solicited grievances; and other unfair labor practice violations.

Recently, in *Sysco Grand Rapids, LLC*, 367 NLRB No. 111, slip op. at 1 (2019), a case involving similar parties—the International Brotherhood of Teamsters, Local No. 406 and Sysco Grand Rapids, an affiliate of Sysco Corporation—and a set of facts similar to the instant case, the respondent conducted an "intensive antiunion campaign" perpetrated primarily by high-level management officials in response to a union's organizing drive. The current Board unanimously adopted the ALJ's conclusions that the respondent engaged in coercive statements and conduct that violated Section 8(a)(1) of the Act by, *inter alia*, committing many of the same violations at

issue in the instant case, i.e., threatening employees with loss of wages, benefits, and jobs; threatening plant closure; and soliciting grievances with a responsive grant of benefits. *Id.*

The evidence shows that Respondent likewise violated Section 8(a)(1) of the Act in numerous instances when it engaged in the statements and conduct set forth below.

1. Respondent Solicited Employees' Grievances and Promised to Remedy Them

The Board has long held that an employer violates the Act by soliciting employee grievances and impliedly promising to remedy those grievances because employees could reasonably infer that respondent solicited their complaints with the intent to resolve them, in order to dissipate employees' enthusiasm, or at least perceived need, for the union. *Alamo Rent-A-Car*, 336 NLRB 1155, 1155 (2001). In *Alamo*, the Board found such a violation where the highest-ranking local official of the company called an unusual mandatory meeting of unit employees days after the petition for representation was filed and asked employees why they were unhappy with their work situation and what complaints they had. *Id.*¹⁴¹

The Board has even held that in some circumstances, "the mere solicitation of grievances, by itself, is coercive and violates the Act without the necessity of evidentiary proof that the Employer had indeed made explicit or implicit promises to adjust grievances," particularly when the employer does not have a regular practice of soliciting employees' complaints. *Ken McKenzie's Inc.*, 221 NLRB 489, 490 (1975).¹⁴²

¹⁴¹ Compare *Uarco Inc.*, 216 NLRB 1, 2 (1974), where the Board found the inference of promise to correct grievances was rebutted where employer repeatedly told employees it could make no promise regarding the grievances raised, there was no showing of union animus, and there was no evidence that the employer's pre-election activities were conducted in the context of other unfair labor practices. No such evidence appears in the instant record to rebut the inference that Respondent impliedly promised to resolve the grievances and complaints it solicited from employees.

¹⁴² In *Ken McKenzie's Inc.*, the owners invited all employees to attend a brunch at a nearby restaurant on the day before the scheduled election. During the brunch, one of the owners discussed the election and stated that he would listen to any employee grievances. In response, employees raised their complaints, amongst others, about their manager's unfair treatment of them – a major reason why employees sought union representation. The Board stated

In *Sysco Grand Rapids, LLC*, supra, slip op. at 1, the Board affirmed the ALJ's finding that the employer unlawfully solicited employee grievances and promised to remedy them when the employer's vice president of operations, while encouraging employees to voice their issues and comments, explained that employees' concerns would have to go through the union if the union won, and as a result, he would be unable to communicate employee concerns to top management as he does now, that "when a third party gets involved, it doesn't become, hey, how – what can we do for the employees? It becomes how do we stop this thing right here." Id. at JD slip op. at 20. The Board affirmed the ALJ's finding that the employer unlawfully solicited employee grievances by making such statements where there was no evidence that the employer previously addressed employee concerns to such extent, and the employer's statements constituted a promise to remedy employees' grievances. Id. at slip op. at 1, JD slip op. at 26.

a. Drury and Van Voorhis' Statements (Complaint Paragraphs 9(a) and 10(a))

The Board has repeatedly recognized the particularly coercive effects of statements made by high-ranking officials to employees noting the principle that, "[w]hen the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *Michael's Painting, Inc.*, 337 NLRB 860, 861 (2002), enfd. 85 Fed.Appx. 614 (9th Cir. 2004); see also *Aldworth Co.*, 338 NLRB 137, 149 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004). In the instant case, there is ample corroborated evidence that the company President and

that in a circumstance like this, where the employer had no prior practice of soliciting grievances, "the mere solicitation of grievances, by itself, is coercive and violates the Act without the necessity of evidentiary proof that the Employer had indeed made explicit or implicit promises to adjust grievances." Id.

Area President directly solicited employees' grievances and either impliedly or explicitly promised to remedy them.

At the meetings with employees on the very first day the petition was filed, company President Van Voorhis and Area President Drury told employees that the company was not aware of the situation in the company and that they wanted to help.¹⁴³ Although Van Voorhis asserted that she strictly followed her prepared script and Diaz said he translated it to the best of his ability, employee testimony to the contrary was clear and explicit, even recalling how the employees responded to Van Voorhis when they asked why she waited until now to talk to them when they had complained for so long with no results. There is additional testimony that at an employee meeting with Drury and Van Voorhis, Van Voorhis, referencing the Petition for Election, told employees that she could not understand why employees wanted a union, thereby inquiring about employees' need for the Union and soliciting their grievances.¹⁴⁴

Area President Drury likewise asserted that he adhered to his prepared script during these initial meetings, but an employee recalled that he said that he didn't understand why employees would want a union or "why we were in this situation."¹⁴⁵ This implied solicitation is close enough to Van Voorhis' statements to lend credence to the employees' testimony that company officials were genuinely surprised by the Union campaign. In this regard, both Van Voorhis and Drury admitted that they had never been involved in a union-organizing campaign before, and therefore they might reasonably inquire why their employees had sought out the Union. Moreover, the Board has noted that where an employer with no prior practice of soliciting employee grievances or complaints adopts such a practice during a union-organizing campaign,

¹⁴³ See Complaint Paragraph 9(a).

¹⁴⁴ See Complaint Paragraph 9(a).

¹⁴⁵ See Complaint Paragraph 10(a).

“there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise that the combined program of inquiry and correction will make union representation unnecessary.” *Evergreen America*, 348 NLRB at 215 (citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972)). Thus, the initial inquiries by Van Voorhis and Drury asking why employees wanted the Union and offering to help them sent the clear message to the employees that the company was going to address their issues without the need for a union.

Based on the foregoing, Van Voorhis and Drury violated the Act when they solicited employee grievances and promised – both impliedly and explicitly - to remedy them in order to discourage employees from supporting the Union.¹⁴⁶

b. Cornejo’s Statements (Complaint Paragraphs 6(a), 6(b), and 6(d))

The testimony shows that Labor Consultant Cornejo solicited employee grievances during the 15 to 20 captive-audience meetings he held with unit employees in the first weeks after the election petition was filed.

Specifically, employees testified that during the meeting they attended in October 2017, Cornejo began the meeting by asking the employees present how they were treated by the company and what they needed and why did they want the Union?¹⁴⁷ Another employee recalled that Cornejo said he was there to help them and that he wanted to hear from all of them what problems they were having.¹⁴⁸ One employee testified that after the workers voiced their

¹⁴⁶ See Complaint Paragraph 9(a).

¹⁴⁷ See Complaint Paragraphs 6(a) and 6(b).

¹⁴⁸ See Complaint Paragraph 6(d).

complaints, Cornejo appeared to write them down, giving the impression that he would relay this information to company officials who had hired him.¹⁴⁹

Statements soliciting employee grievances during an organizing campaign violate Section 8(a)(1) because such statements “raise[] an inference that the employer is promising to remedy the grievance ...” See *Sysco Grand Rapids, LLC*, supra, JD slip op. at 26 (citing *Garda CL Great Lakes, Inc.*, 359 NLRB 1334, 1334 (2013), quoting *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004)). Thus, by merely asking employees why they wanted the Union and asking how they were treated, Cornejo, acting as an agent for Respondent, implied that the employees’ issues would be addressed and resolved.

c. Diaz’s Statements (Complaint Paragraph 7(b))

There is credible corroborated testimony that Senior Resources Business Partner Diaz solicited employee grievances and impliedly promised to resolve them. Several employees testified that Diaz said that he had been hired to resolve their problems and that they should give the company a “second chance” or give him the opportunity to address them.¹⁵⁰ Such a solicitation, particularly from a high-ranking official who had not previously addressed employees about their issues, combined with an implied promise to resolve them, violates Section 8(a)(1) of the Act. See *Ken McKenzie’s Inc.*, supra, at 490.

2. Respondent Promised to Improve Employees’ Terms and Conditions of Employment

During and after the initial meetings immediately following the filing of the Petition for Election, Respondent continued soliciting grievances from employees and began more explicitly promising to remedy them.

¹⁴⁹ This impression was later confirmed by Drury, who admitted that he became aware of employees’ complaints through the consultants, including Cornejo.

¹⁵⁰ See Complaint Paragraph 7(b).

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Supreme Court established the standard for permissible language with respect to an employer’s view of unionism: an employer’s communications must not contain a “threat of reprisal or force *or promise of benefit.*” (emphasis added). Unlike most 8(a)(1) allegations, analysis of a claim that benefits were promised, announced, or granted to coerce employees in their choice of bargaining representative is motive-based. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964)). To establish such a claim, the General Counsel must first prove, by a preponderance of the evidence, “that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice of union representation.” *Grill Concepts Services*, 364 NLRB No. 36, JD slip op. at 18 (2016) (quoting *Southgate Village*, 319 NLRB 916, 916 (1995)).

a. Van Voorhis’ Statements (Complaint Paragraphs 8(a) and 8(b))

An employee-witness called by Respondent¹⁵¹ credibly testified that during the meeting immediately after the Petition for Election was received by Respondent, several employees asked for help with health-insurance costs and raises, to which President Van Voorhis said she could not promise anything or give a concrete answer until after the election, but said she would “look into” the employees’ requests.¹⁵² In *Styletek, Div. of Pandel-Bradford, Inc.*, 214 NLRB 736, 747 (1974), the Board affirmed an ALJ’s finding that an employer violated Section 8(a)(1) of the Act by promising benefits where the senior foreman told employees he “would see what he could do” about their request for a schedule change during the pendency of a union-organizing campaign. Van Voorhis’ statement that she would “look into” employees’ issues after the Union election

¹⁵¹ See Statement of Facts referencing employee-witness Gabriel Cueva’s testimony.

¹⁵² See Complaint Paragraph 8(a).

unambiguously promised that employees would receive what they wanted if they rejected the Union.

During the series of meetings around November 1, 2017, Van Voorhis advised workers that the company had been looking for ways to reduce insurance costs and would lower them by half for the office workers. When asked why only office workers would be getting this benefit, Van Voorhis responded that “they were not the ones bringing in the Union.”¹⁵³ This statement by the highest-ranking on-site official of the company sent the message to employees that they too would receive this benefit if they abandoned their support for the Union. Thus, this statement violates Section 8(a)(1) of the Act because employees would reasonably view it as “an attempt to interfere with or coerce them in their choice of union representation.” See *Grill Concepts Services*, supra, slip op. at 18.

b. Drury and Van Voorhis’ Statements (Complaint Paragraph 9(b))

In other group meetings around November 1, 2017, Van Voorhis and Drury discussed the reduction in healthcare costs due to increased subsidies that were available for employees not in the petitioned-for unit.

Respondent’s witnesses testified that at these meetings with Van Voorhis and Drury, Van Voorhis apologized for not paying attention to employees’ concerns and said that if the employees gave Respondent another opportunity it would address issues with medical benefits and performance reviews. Another of Respondent’s witnesses testified that at a meeting with Van Voorhis and Drury, Van Voorhis said she was going to address employees’ problems, and Drury added that he would get more involved with Van Voorhis’ decisions. Yet another

¹⁵³ See Complaint Paragraph 8(b) and 9(b), noting that some witnesses attributed this statement to Drury and others to Drury and Van Voorhis, since the two of them spoke together at so many meetings.

employee witness testified that at a meeting with Van Voorhis and Drury, Van Voorhis said Respondent would be reducing health-insurance costs. Such statements by Van Voorhis and Drury, asking employees to give Respondent an “opportunity” link a promise of improved benefits for employees in exchange to rejection of the Union.¹⁵⁴

Employees further testified that after distributing documents explaining the reduced rates, Drury said the company had been working for months to reduce the cost of insurance, and reiterated that the rates on the documents were only for office employees, and said that if the production employees were not “in the Union” or “getting the Union,” the rates would also apply to them.¹⁵⁵ As noted above, such a statement links the promise of a potential benefit given to others to the abandonment of union support, and sent the message to employees that if they rejected the union, they too would receive reduced insurance costs. Such a statement was designed to interfere with or coerce employees in their choice of union representation. See *Grill Concepts Services*, supra, slip op. at 18.

c. Drury’s Statements (Complaint Paragraphs 10(c) and 10(f))

Drury admitted that in a series of later meetings he held with employees during the weeks of October 23 through 27, 2017, designed to answer employees’ questions, he read from a prepared Power Point presentation which stated: “*Under the law, we cannot make any promises or changes now, but we have been listening to you very intently and noting the concerns and issues which you have brought up. If you decide to vote against union representation and stay nonunion, there will be no legal prohibition after the election against our making the kinds of changes and improvements that we have been discussing for months.*”¹⁵⁶ The following slide

¹⁵⁴ See Complaint Paragraph 9(b).

¹⁵⁵ See Complaint Paragraph 9(b).

¹⁵⁶ See Complaint Paragraph 10(c).

was even more explicit in posing the hypothetical question how the employees can be sure that the company will take action on their issues and concerns once they vote against the Union and then responding: “*We are listening, we will continue to listen, and we want to work through your concerns with you.*”¹⁵⁷ Such a statement explicitly promising employees that their terms and conditions of employment would be improved if they voted against the Union was clearly designed to coerce employees in their choice of union representation, and therefore violates the Act. See *Grill Concepts Services*, supra, slip op. at 18.

During later meetings around November 1, 2017, an employee testified that Drury went on to make explicit promises to improve employees’ benefits, as he told employees that health-insurance costs would be lowered if employees rejected the Union.¹⁵⁸

Finally, on the day before the Union election was to be held, Drury participated in a series of last-minute meetings, along with Van Voorhis and Diaz, to persuade the employees to vote against the Union. Drury admitted that he read from a script that told employees that he appreciated what they told him, and that as soon as the Union was defeated, the company could make some changes immediately and others later. The presentation referred back to the complaints and issues solicited from the employees and told employees that as soon as they voted NO in the upcoming election, the company could make changes in wages and pay either immediately or soon after the election. Again, such a promise that employees would receive benefits as soon as they voted against the Union was intended to restrain employees in their

¹⁵⁷ This statement, although not specifically alleged in the Complaint, supports the allegation that Drury earlier made similar statements. See Complaint Paragraph 10(a). Also, inasmuch as Drury conceded that the contents of his Power Point presentation were based on what he had learned of the employees’ issues from the Consultants and what they had gleaned in their small-group meetings, this supports the earlier assertions by employees that they observed Cornejo writing down or taking notes of their responses to his solicitation of their complaints.

¹⁵⁸ See Complaint Paragraph 10(f).

choice of union representation and violates Section 8(a)(1) of the Act. See *Grill Concepts Services*, supra, slip op. at 18.

d. Diaz’s Statements (Complaint Paragraphs 7(a) and 7(c))

Diaz himself admitted that he read from a prepared script at the meetings held on November 7 and 8, 2017, immediately before the scheduled election, and that the script contained the following statement: “I know a lot about your work, your work environment, and the concerns you have and face each day. I am asking that you give me a chance to make your jobs easier.” Such a statement implies that Diaz knows the employees’ grievances, and that, given time, he will be able to address them.¹⁵⁹ Additionally, Diaz said that he was new to the company and that employees should give him six months to be able to help them in terms of salaries and medical insurance, thereby promising to improve employees’ benefits and employment terms.¹⁶⁰ Moreover, Diaz referred to himself as part of the “family,” adding more coercive effect to his suggestion that employees do not need the Union but can rely on him to resolve their issues. *Michael’s Painting Inc.*, supra at 861.

An employee also confirmed that Diaz said that he had been hired by the company to address existing problems, and asked employees for an “opportunity” to do so, thereby, again, promising to improve employees’ terms and conditions of employment.¹⁶¹ *Styletek, Div. of Pandel-Bradford, Inc.*, 214 NLRB at 747.

¹⁵⁹ See Complaint Paragraph 7(c).

¹⁶⁰ See Complaint Paragraph 7(c).

¹⁶¹ See Complaint Paragraph 7(a).

3. Respondent Threatened that if the Union Won the Election Negotiations with the Union would Start at Zero

The record is replete with company officials threatening employees during various captive-audience meetings that should the Union win the election, bargaining or negotiations with the Union would start at “zero” or begin with a “blank slate.”

The Supreme Court has held that to determine whether speech is threatening, “any balancing of [an employer’s speech rights and employees’ right to associate freely] must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications on the latter that might be more readily dismissed by a more disinterested ear.” *Gissel*, 395 U.S. at 617. However, “[i]t is well settled that an employer’s statements to employees during an organizing campaign, that bargaining will start from ‘zero’ or from ‘scratch’ are ‘dangerous phrase[s]’ which carry with them the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.” *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003), *enfd.* 400 F.3d 920 (D.C. Cir. 2005) (citing *Economy Fire and Casualty Co.*, 264 NLRB 16, 21 (1982) quoting *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977)); see also *Earthgrains Co.*, 336 NLRB 1119, 1120 (2001), *enfd.* *Sara Lee Bakery Group, Inc. v. NLRB*, 61 Fed.Appx. 1 (4th Cir. 2003). In evaluating whether statements to the effect that bargaining “begins from scratch,” “starts at zero,” or “starts with a blank page,” are unlawful, the Board examines the statements in context to determine whether they threaten employees with loss of their current benefits and generate the impression that what employees may ultimately receive is what the union can induce the employer to reinstate, or, conversely, whether the statements indicate that a reduction in wages or benefits will occur only as a result of the normal course of bargaining. 340 NLRB at 255; *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

In *Auto Nation, Inc.*, 360 NLRB 1298, 1298 (2014), enfd. 801 F.3d 767 (7th Cir. 2015), the Board affirmed the ALJ's finding that an employer violated Section 8(a)(1) of the Act by implicitly threatening employees that it would be futile to select the union. In affirming this finding, the Board agreed with the ALJ's rationale that the employer's comments effectively communicated that if the union won, the consequences would be years of delay and frozen benefits during negotiations. *Id.* The Board noted that to drive this point home, the vice president commented about employees at one of the employer's other dealerships, who voted for union representation, "I can bring those people up here that have been living that nightmare for almost 3 years now *without one bargaining session, not one contract negotiation*" (emphasis in original). *Id.* The Board's finding was bolstered by the employer's additional comments threatening loss of existing benefits, in particular the vice president's statement that during bargaining, "[W]e sit down and we start from scratch, we start from scratch. We don't start with what you guys are making today. Everything goes to zero." *Id.* at 1298 fn. 5. The Board found that those statements threatened employees that "their wages and benefits were endangered, not because of the uncertainties of the collective-bargaining process, but simply because they selected the union as their collective-bargaining representative." *Id.* (citing *Federated Logistics & Operations*, *supra*, at 255).

In *Federated Logistics & Operations*, at meetings held four and two days before the election, the employer's high-ranking officials discussed with employees what would happen to their wages and benefits if the union won the election and stated that "we would start from zero and would negotiate from that," that the union would strike, and that if a strike occurred the operation could be shut down and moved to another of the employer's facilities in three days, and that employees would lose their 401(k) plan. 340 NLRB at 255. The Board found that such

statements constituted threats in violation of Section 8(a)(1) since such statements did not accurately reflect the obligations and possibilities of the bargaining process. *Id.* at 256.

a. Cornejo and Jara’s Statements (Complaint Paragraphs 6(e) and 11)

Several employees who attended the numerous sessions explaining the collective-bargaining process held by Labor Consultants Cornejo and Jara testified that both of them said that bargaining with the Union would start at “zero.” Some recalled that Cornejo said that “everything – including benefits – would be on the table and they were going to start from zero” or that the parties would “pull aside from zero.”¹⁶² Others testified that Cornejo also said that through negotiations, employees could end up with lower wages and benefits and make less than they do presently. Another recalled that Jara told them that if the parties negotiated in good faith, the employees would “have to give something back and they would start at zero.”¹⁶³

As noted above, in evaluating whether statements to the effect that bargaining “begins from scratch,” “starts at zero,” or “starts with a blank page,” are unlawful, the Board examines the statements in context to determine whether they threaten employees with loss of their current benefits and generate the impression that what employees may ultimately receive is what the union can induce the employer to reinstate, or, conversely, whether the statements indicate that a reduction of wages or benefits will occur only as a result of normal course of bargaining. *Plastronics, Inc.*, *supra*, at 156. By linking starting from “zero” with the possible reduction of wages and benefits, the Labor Consultants succeeded in generating the impression that employees would suffer a reduction in wages and benefits as a result of bargaining through the Union. Therefore, Respondent violated the Act by making these statements.

¹⁶² See Complaint Paragraph 6(e).

¹⁶³ See Complaint Paragraph 11.

b. Mitchell's Statements (Complaint Paragraphs 12(b), 12(e), and 12(g))

Employees who attended the presentations by Respondent's Senior Director of Labor Relations, John Mitchell, all agreed that he told them that he was in charge of negotiating for the company and that negotiations would start at "zero" or from a "blank contract."¹⁶⁴ They further confirmed that he said "everything [would] be put on the table" during negotiations – including wages and benefits – and that the negotiations would start at "zero."¹⁶⁵

Many employees also recalled that Mitchell said that through negotiations, employees could end up making less money and losing sick days, floating days, or vacations, and negotiations would start "like they were new employees."¹⁶⁶ To enforce this statement, Mitchell showed many Power Point slides that compared the wages and benefits at Respondent's Irvine facility with the lower wages and benefits at other Sysco companies where employees had voted for the union, implying that the same fate could befall the employees at these meetings.

Mitchell admitted, and several employees confirmed, that during his presentations on the collective-bargaining process, he told employees that both parties would put proposals on the table and that he held up a blank sheet of paper to demonstrate that the parties would start with a "blank contract." He generally denied that he used the word "zero," however.¹⁶⁷

In *Sysco Grand Rapids, LLC*, a recent case involving similar parties, the Board found a violation under similar circumstances to the instant case where, during captive-audience meetings held over a two-month span after a union filed a petition for election, the company

¹⁶⁴ See Complaint Paragraph 12(g)

¹⁶⁵ See Complaint Paragraph 12(e).

¹⁶⁶ See Complaint Paragraph 12(b).

¹⁶⁷ Senior Resources Business Partner Diaz, who translated for Mitchell at some of these meetings, admitted that he did not translate the word "blank" literally, but said it would be a "contract with nothing on it." Respondent's witnesses contradicted this, however, by confirming that Diaz used the Spanish word "blanco" for "blank" during his translations. Thus, Diaz's testimony in this regard should be discredited.

president repeatedly warned employees that bargaining over wages would essentially start from scratch by referring to a blank sheet of paper and adding that negotiations could go up or down from there. 367 NLRB 111, JD slip op. at 24. In that case, the company's high-ranking officials elaborated by using similar language regarding predictions about where negotiations would start, including: they would "put nothing on the table" and start from a "blank page," "clean sheet," "clean slate," "blank sheet of paper," or "ground zero," and "build from there." Id. The current Board affirmed the ALJ's finding that the company's predictions about the effects of unionization on wages violated Section 8(a)(1) of the Act, given the context of the company's other unfair labor practices, explicit threats about the bargaining process, and comments including the "blank page," and similar statements which communicated the company's intention to punish employees for selecting the union. Id. at slip op. at 1, JD slip op. at 24.

Applying that rationale to the instant case, Respondent violated the Act regardless of whose version is credited: whether Mitchell said negotiations would start at "zero" as the employees asserted, or whether he referred to a "blank slate" or even held up a blank sheet of paper, Respondent was predicting that the effect of unionizing would be the employees' relinquishing their current wages and benefits.

Moreover, Mitchell conceded that his presentation showed comparative – and lower – wages and benefits for those employees at Sysco's unionized facilities, but asserted that he explained that the employees at the Irvine facility might not necessarily get those lower wages, which were the result of bargaining with the union. This statement, even if credited, was not sufficient to rebut the impression that the reduction of wages and benefits would occur as the result of normal collective bargaining. See *Plastronics, Inc.*, supra, at 156. Looking at the overall context of his statements and his repeated insistence that employees who selected a union

to represent them were “losers,” the clear intent was to convince the employees at the Irvine facility that they too would “lose” wages and benefits if they chose the Union to represent them. As noted above, by linking starting from “zero” with the possible reduction of wages and benefits, Mitchell succeeded in generating the impression that the employees would suffer a reduction in benefits as a result of bargaining through the Union. Therefore, Respondent violated the Act by making these statements.

4. Respondent Threatened to Replace Employees, Transfer Work, and Plant Closure

The Board has emphasized that threats of plant closure and other types of job loss are “among the most flagrant of unfair labor practices and are likely to affect the election conditions negatively for an extended period of time.” See *Cardinal Home Products*, 338 NLRB 1004, 1011 (2003) (internal quotations omitted).

As the Supreme Court established in *Gissel*, supra, although an employer may make a prediction with respect to a union’s effects on its company, “the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control, or to convey a management decision already arrived at the to close the plant in case of unionization.” 395 U.S. at 618 (citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 fn. 20 (1965)).

The instant record is replete with statements of replacement and/or transfer of work and plant closure which were not based upon objective fact, but were rather intended to restrain and coerce employees in their choice of Union representation by implying that support for the Union would result in job loss.

a. Mitchell's Statements (Complaint Paragraphs 12(c), 12(d), 12(f), and 14)

Employees who attended the sessions held by Respondent's Senior Director of Labor Relations, John Mitchell, recalled his showing slides and telling them that the Union could call them out on strike if there was no agreement reached during negotiations. One employee recalled that Mitchell said that a strike could last for two weeks, during which the workers would not get their salaries and could be replaced by workers from "sister" Sysco company Palisades Ranch, or that the company could send 50% of its product to Palisades Ranch or even close the business if things "got really bad."¹⁶⁸ Other witnesses agreed that Mitchell told them that if there was a strike, he would send the work to another company and could close the plant if he wanted to¹⁶⁹ or that he would bring in employees from other companies to do their jobs.¹⁷⁰ These witnesses' recollections should be credited, since they closely mirror the prepared script that Mitchell admitted he followed during his presentations that stated: "Today, we could shift 15-20% of your work to Palisades to be cut and packed there and then returned to us. In a year's time, that percentage could increase to 50%. After a year, it could all be downhill." (emphasis added)¹⁷¹

One employee testified that during a meeting with Mitchell and Diaz, Mitchell said he was negotiating on behalf of Respondent, he did not care about employees' titles, that if it was

¹⁶⁸ See Paragraph 12(c).

¹⁶⁹ See Complaint Paragraph 12(f).

¹⁷⁰ See Complaint Paragraph 12(d).

¹⁷¹ See Paragraph 12(c). Although Mitchell's script does not mention plant closure (See GCX#11), the clear inference that things could "all go downhill" after half the work is sent to another facility can reasonably be interpreted to say that all of the work will eventually be sent there, implying that the employees would be out of work or that company will close the facility. Mitchell's denial that he read this part of his script should not be credited, since he testified that he closely followed the other talking points in the script during his presentations. Moreover, several employee witnesses specifically recalled him saying that percentages of their work would be sent to Palisades Ranch and that the company would close.

possible, he was going to lower all of employees' salaries to the minimum, and that if the Union came in, if it was possible, he would close the company.¹⁷²

Thus, based upon witnesses' corroborated testimony and Mitchell's own admissions, the evidence shows that Mitchell, during the course of his meetings with employees, threatened to replace them, transfer their work, or to even close the plant.

The Board has long held that an employer violates Section 8(a)(1) of the Act by threatening employees with job loss if they select the union as their bargaining representative. In *Rankin & Rankin, Inc.*, 330 NLRB 1026, 1026 (2000), the employer conducted a group meeting for employees during the initial stages of an organizing campaign where the chief executive officer told employees, *inter alia*, that if the union demanded higher wages, and the employer disagreed, the union could call a strike and employees could be replaced by new employees who would be hired for less money. *Id.* In that case, the Board found "ample basis" for concluding that the CEO's statements about replacing workers would be "fairly understood as a threat of reprisal against employees" in light of the employer's earlier unlawful activity. *Id.* (quoting *Eagle Comtronics*, 263 NLRB 515, 515-516 (1982) where the Board found that a statement informing employees that they are subject to permanent replacement in an economic strike is unlawful if it may be fairly understood as a threat of reprisal against employees or is coupled with such threats).

Similarly, in *Mack's Supermarkets*, 288 NLRB 1082, 1091 (1988), the employer's vice president unlawfully told an employee that the employee could be replaced in the event of a strike, without further telling him about his reinstatement rights: the employee was told that if the union got in and if there was a strike, he could stand on the picket line all summer, fall, winter,

¹⁷² See Complaint Paragraph 14. The Complaint attributes this statement to either Drury or Mitchell, however, at hearing, the witness recalled that Mitchell made this statement.

and spring, but if he did not leave the picket line and return to work he would be replaced. *Id.* at 1090 – 1091. The Board affirmed an ALJ’s finding that these statements violated Section 8(a)(1) of the Act because the statements were made in the context of other threats—namely, of store closures, layoffs, and other retaliations – and the employee could have reasonably understood the comments to have constituted a threat that if he participated in a strike against the employer, he would lose his job permanently. *Id.* at 1082, 1092-1093.

In *Sysco Grand Rapids, LLC*, an earlier case involving similar parties, the Board found that the employer violated the Act by showing a slide presentation which depicted the likelihood of a strike resulting from failure to reach a contract agreement with a union and conveyed the impression that employees could be permanently replaced by new hires. 367 NLRB No. 111, JD slip op. at 24. Additionally, the employer also sent a letter to employees from the company’s president and vice president of operations which stated in relevant part that that an employee could “LOSE EVERYTHING YOU HAVE BY BEING PERMANENTLY REPLACED IN AN ECONOMIC STRIKE CALLED BY THE UNION OVER ITS DEMANDS AT THE BARGAINING TABLE.” *Id.* at JD slip op. at 19 (emphasis in original). The Board affirmed the ALJ’s finding that the slides and letter violated Section 8(a)(1) of the Act as they constituted impermissible threats of job loss.¹⁷³ *Id.* at slip op. at 1, JD slip op. at 24. Under the rationale of these cases, the statements by Mitchell on behalf of Respondent are unlawful because he told employees that they would be replaced if they supported the Union and unsuccessful negotiations resulted in a strike.

¹⁷³ The slides found to be unlawful in *Sysco Grand Rapids* stated, *inter alia*: “If There is No Agreement What is the Union’s Only Weapon: STRIKE!” and “Economic Strikers Can Be Permanently Replaced!” See 367 NLRB No. 111, JD slip op. at 19 fn. 57 (emphasis in original).

Mitchell's threats of plant closure are also unlawful because they impermissibly link union support with job loss.

In *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 3 (2016), enfd. in rel. part *S. Bakeries, LLC v. NLRB*, 871 F.3d 811, 823 (8th Cir. 2017), the Board held that the employer made unlawful threats of plant closure at a captive-audience meeting when the employer's general manager delivered several captive-audience speeches to groups of unit employees in which he made statements including that "unions had 'strangled' companies in several industries across the country 'to death'"; and that the union at issue's strike "resulted in loss of over 18K jobs, the liquidation of 33 bakeries and over 500 bakery stores . . . [t]hat is one of the reasons we do not want a union here." Id. at slip op at 4. The Board found that the statements were not "carefully based on the basis of objective fact" to convey the general manager's belief "as to demonstrably probable consequences beyond his control." Id. (citing *Gissel*, supra, at 618). The Board further found that the general manager did not merely state his opinion that the union at issue caused a company to go out of business, and that the plant manager accused a union without evidence to support his assertions. The Board noted that the company did not merely describe historic events, but rather described a causal relationship between unionization and plant closure. Id. at slip op at 4.

Although Mitchell did not expressly reference closures or bankruptcies of other companies as a result of employee strikes, he did, similarly to the statements in *Southern Bakeries, LLC*, supra, link the closure of the Irvine facility resulting from transferring the work to other companies to employees' efforts to bring in the Union. This created the nexus between unionization and plant closure, without any other objective evidence, that the Board has found to be unlawful.

5. Respondent Threatened to Freeze Employees' Benefits Including Annual Performance Reviews and Raises

It is undisputed that Respondent conducts annual performance reviews on or near the anniversary date of each employees' hire date, which could result in raises based on supervisors' recommendations. Many employees testified that during the captive-audience meetings held in October and November 2017, several company officials told them that their benefits, including annual performance reviews and raises, would be "frozen" during the Union campaign and even thereafter if the Union won the election and the parties were negotiating.

In *Gould, Inc.*, 260 NLRB 54, 59 (1982), the employer therein likewise had a policy of annually conducting evaluations for employees in August, and of granting merit increases to employees at any time of the year based on the recommendations of management. In that case, the Board affirmed an ALJ's finding that the employer's threats that employees' wages and benefits would be "frozen" during negotiations, when coupled with statements that negotiations with a union could exceed one year, were coercive and violated Section 8(a)(1) because the statements threatened loss of a present benefit of eligibility for merit increases at any time. *Id.*; see also *Travis Meat & Seafood Co.*, 237 NLRB 213, 217 (1978) (Board found that statements in letters distributed to employees, "Companies are not free to give wages increases or other benefits as long as Unions are on the scene" and "a Company is not free to give wage increases or other benefits as long as the Union organizational drive is going on" violated Section 8(a)(1) of the Act as the employer blamed the union for its alleged inability to grant wages increases or other benefits).

a. Mitchell's Statements (Complaint Paragraphs 12(a) and 12(i))

Mitchell generally denied that he told employees who attended the meetings he held that he would "freeze" their wages or 401(k) plans. Mitchell's denial should be discredited in view

of the testimony of many employees who testified to the contrary: several employees testified that Mitchell, during the meetings they attended with him, told them that certain benefits would be frozen, and one recalled that Mitchell said that during negotiations everything would be frozen. One witness stated that Mitchell said that negotiations with the Union could last two years, and that during that period the company would freeze employees' benefits, including their raises and 401(k) plan contributions.¹⁷⁴ Another employee corroborated the testimony that Mitchell said that their wages or benefits would be "frozen,"¹⁷⁵ and yet another employee recalled that Mitchell said that during negotiations with the Union, everything was going to be frozen, including the 401(k) benefits and the annual performance reviews.¹⁷⁶ Another employee testified that after an employee at the meeting he attended asked Mitchell if he would get his raise, Mitchell said that it would be "frozen."¹⁷⁷ Other employees did not attribute the term "frozen" to Mitchell, but recalled that he said that no wage or benefit changes would go ahead while negotiations were in progress.

As noted above, threats that employees' wages and benefits would be "frozen" during negotiations, when coupled with statements that negotiations with a union could exceed one year, are coercive and violate Section 8(a)(1) because the statements threaten loss of a present benefit, i.e., annual performance reviews and raises which are part of employees' wages. See *Gould, Inc.*, supra, at 59. Moreover, by stating everything would be frozen during negotiations with the Union, Respondent linked the loss of benefits – albeit temporary – to employees'

¹⁷⁴ See Complaint Paragraph 12(a). The term "benefits" is used in the broad sense to include all benefits including wages, raises, and appraisals.

¹⁷⁵ See Complaint Paragraph 12(a).

¹⁷⁶ See Complaint Paragraph 12(i).

¹⁷⁷ See Complaint Paragraph 12(i).

support for the Union, leading them to conclude that such support was responsible for this “freeze.” See *Travis Meat & Seafood Co.*, supra, at 217.

b. Drury’s Statements (Complaint Paragraph 10(b))

Several employees confirmed that Area President Drury reiterated Mitchell’s threats that certain benefits, including raises, performance reviews, and 401(k) plans would be “frozen.” One employee who attended the information sessions that Drury presented testified that Drury said he was going to freeze all benefits including vacations, sick leave, 401(k)’s, and raises if the Union came in.¹⁷⁸ For the reasons stated above, this statement violates Section 8(a)(1) of the Act by implying that the reason that employees would not be receiving these benefits was because of their support for the Union. See *Gould, Inc.*, supra, at 59.

c. Van Voorhis’ Statements (Complaint Paragraphs 8(d) and 8(e))

Several employees testified that company President Van Voorhis also spoke about raises and performance reviews during the final meetings held just before the scheduled election. According to one employee, after Van Voorhis said that companies were not permitted to make any promises during union organizing campaigns, she said that salaries would be “cancelled.” This witness further recalled that, in response to an employee’s question about what would happen to their performance appraisals, Van Voorhis responded that the reviews would take place but that the employees would not get raises as long as the Union’s Petition for Election was pending.¹⁷⁹ Another employee recalled that Van Voorhis said at a meeting he attended that performance appraisals and “everything” would be frozen because of the Union, and that the company’s “hands were tied.”¹⁸⁰

¹⁷⁸ See Complaint Paragraph 10(b).

¹⁷⁹ See Complaint Paragraph 8(d).

¹⁸⁰ See Complaint Paragraph 8(e).

As in testimony regarding the statements made by Mitchell and Drury, employees clearly recalled the word “frozen” being used with regard to the fate of their benefits. Even though Van Voorhis may not have used the word “frozen” in each instance, the implication was that Respondent was unable to grant regularly scheduled benefits – performance appraisals and raises – because of employees’ support for the Union. Therefore, these statements, in context with the other unlawful statements made during the Union campaign, violate Section 8(a)(1) of the Act. See *Gould, Inc.*, supra, at 59.

d. Cornejo’s Statements (Complaint Paragraph 6(c))

An employee who attended one of the early meetings held by Labor Consultant Cornejo stated that Cornejo, after he solicited employees’ grievances, told employees that he was going to “freeze” wages while the Union was there.¹⁸¹ Cornejo admitted that he told employees that everything had to remain “status quo” during the bargaining process that could last for months or even years, and explained that this meant their wages and benefits had to remain exactly the same after the Petition for Election had been filed and would continue to remain unchanged if the employees selected the Union to represent them. He then further explained that no unscheduled changes could take place. Regardless of whether he actually used the word “frozen,” his statements are still unlawful: the Board has held that threats that employees’ wages and benefits would be “frozen” during negotiations, when coupled with statements that negotiations with a union could exceed one year, were coercive and violated Section 8(a)(1) because the statements threatened loss of a present benefit of wage increases because of the employees’ support for the union. See *Gould, Inc.*, supra, at 59.

¹⁸¹ See Complaint Paragraph 6(c).

6. Respondent Distributed a Flyer Stating that Employees in the Petitioned-for Unit Would Not Receive the Benefit of Paying Reduced Health-Insurance Costs (Complaint Paragraph 10(d))

Respondent stipulated that it distributed a flyer which states that employees in the petitioned-for unit would not receive a reduction in healthcare costs offered to employees not in the petitioned-for unit.

Respondent distributed this flyer, executed by a company official, during a critical period, just a few days before the scheduled November 9, 2017 Union election. Respondent's flyer explains the company's review of ways to reduce healthcare costs, and purports to deliver "[g]ood news": the reduction in employees' health-insurance costs starting on an impending date. By distributing the flyer, Respondent made it clear to employees in the petitioned-for unit that the new lower HMO rates effective January 1, 2018, applied to all personnel "[e]xcluding Teamsters Local No. 848 represented employees and employees in the voting unit [the petitioned-for unit]." (emphasis added). As if the written message on a company-official document was not clear enough, to further stress this message, President Van Voorhis read this document at Respondent's employee meetings, and Diaz translated it into Spanish.¹⁸² As the Supreme Court stated in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967),¹⁸³ [t]he Act of [conferring benefits] to one group of employees while announcing [deprivation] of the same benefits for another group of employees who are distinguishable only by their participation in [union] activity surely may have a discouraging effect on either present or future [union] activity."

¹⁸² Although President Van Voorhis denied reading JX#1(d) to employees in the petitioned-for unit, her testimony is not credible as Senior Resources Business Partner Diaz confirmed that Van Voorhis read this document at a series of meetings and that he translated the document based on the Spanish-language version of JX#1(d) he prepared.

¹⁸³ In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. at 35, the Supreme Court found that an employer violated Section 8(a)(3) of the Act by withholding vacation benefits from striking employees while at the same time announcing that it intended to pay those benefits to employees not involved with the strike.

Moreover, President Van Voorhis admitted that at employee meetings held on about November 1, 2017, she read verbatim from a separate flyer which states in relevant part, “*I regret to notify you that a decision on the amount of the new subsidy paid by Newport which reduces the insurance premium you pay every two weeks, will have to be postponed for all employees involved in the pending Labor Board (NLRB) election. This delay is required to avoid the appearance of vote-buying by Newport in view of the fact that the NLRB will hold an election on November 9. Our lawyers have advised us that announcing the amount of a new subsidy at this time might be considered to be illegal (an unfair labor practice) and that we should not take this risk.*” (emphasis in original). Respondent stipulated that it also distributed this separate flyer at employee meetings on about November 1, 2017. This separate flyer further emphasizes that Respondent unequivocally informed employees in the petitioned-for unit that it was going to withhold a reduction in health-insurance costs from them due to their participation in the upcoming Union election.

In *Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 190, 200 (2000), just a few days after a petition for an election was filed, the employer announced to employees, except those who worked at stores including the store where employees in the petitioned-for unit worked, that it was going to restore employees’ preferred healthcare plan. The employer then issued a letter to employees who worked at stores, including the store where employees in petitioned-for unit worked, which read in relevant part:

We regret that no change can be made for you at this time. We have been advised by our lawyer that any changes for crew members who may be involved in the NLRB case would create legal risk at this time. The law is quite clear that we are not allowed to change wages, benefits, or do anything else that could be considered “buying” your votes in a possible election. Please understand that we have taken this action solely to avoid any risk of improper influence on any upcoming election.

Id. at 190. The Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(1) and (3) of the Act by withholding restoration of the preferred healthcare plan from employees in the petitioned-for unit, while at the same time restoring the healthcare plan for all other employees working at other stores. Id. The Board noted that the employer failed to provide employees in the petitioned-for unit with assurances that the withholding of the healthcare plan at their store was only temporary and that the healthcare plan would be restored retroactively to them following the election, irrespective of the election's outcome. Id. at 191.

Notably, the letter the employer issued in *Noah's Bay Area Bagels, LLC*, supra, is almost identical in message to the separate flyer that Respondent distributed, and Van Voorhis read, to employees in the petitioned-for unit on about November 1, 2017, in that both documents communicate the company's failure to provide a benefit to employees in a voting unit, and explain the company's conduct by attempting to avoid the appearance of "vote buying."

Employee testimony supports that both of Respondent's flyers were distributed together at the meetings on about November 1, 2017. Respondent may argue that, by distributing the latter flyer, it provided a proper explanation for withholding a reduction in healthcare costs from employees in the petitioned-for unit, and that Respondent's conduct was therefore cured. However, as the Board in *Noah's Bay Area Bagels, LLC*, supra, found, Respondent's purported effort fell short of its legal requirement to "make (it) clear" that employees in the petitioned-for unit would also enjoy the benefit of paying reduced HMO plan costs, "regardless of the election results." *Earthgrains Co.*, 336 NLRB at 1126-1127 ("When an employer decides to postpone the granting of wages or benefits that decision must advise employees that the action was taken only to avoid interference with the election. Thus, the employer must assure the affected employees that (1) the benefits will be granted regardless of the election results, (2) the 'sole

purpose’ of the postponement ‘is to avoid the appearance of influencing the election outcome,’ and (3) the ‘onus for the postponement’ is not placed upon the union.”); see also *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991) (quoting *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), “an employer may postpone such a wage or benefit adjustment so long as it ‘[makes] clear’ to employees that the adjustment would occur whether or not they select a union and that the ‘sole purpose’ of the adjustment’s postponement is to avoid the appearance of influencing the election’s outcome”). To the contrary, Respondent’s flyers placed the “onus” of Respondent’s failure to provide a reduction in healthcare costs to employees in the petitioned-for unit, on the Union. *Earthgrains Co.*, supra, at 1127.

Based on the aforementioned, Respondent violated Section 8(a)(1) of the Act by distributing a flyer stating that employees in the petitioned-for unit would not receive the benefit of paying reduced health-insurance costs starting January 1, 2018.¹⁸⁴

7. Respondent Authorized Employee Jonathan Martinez to Conduct a Lunch Meeting on Company Time Where He Solicited Employees to Reject the Union by Telling Them that Respondent was Going to Improve Benefits and Had Improved Employees’ Terms and Conditions of Employment (Complaint Paragraph 15(a))

a. Martinez is an Agent of Respondent

The Board applies common law principles when examining whether an employee is an agent of the employer. *Southern Bag Corp.*, 315 NLRB 725, 725 (1994). The test is whether, under all the circumstances, the employees “‘would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.’” *Waterbed World*, 286 NLRB 425, 426-27 (1987) (internal citations omitted).

¹⁸⁴ See Complaint Paragraph 10(d).

Here, it is undisputed that Respondent authorized employee Jonathan Martinez to hold a lunch meeting during company time to discuss the Union, as both Area President Drury and Respondent's witness Martinez admitted that Drury approved of Martinez holding the luncheon.

Multiple credible employees testified similarly regarding the content of Martinez's statements at the meeting: Martinez reminded employees of the improvements that Respondent had already made to their working conditions by removing Supervisor Sanchez from the Irvine facility, stated that Respondent was going to improve benefits by reducing healthcare costs, and asked that employees give Respondent an "opportunity" by rejecting the Union. One employee witness testified that he also attended this luncheon where Martinez asked employees if they were going to support the Union or Respondent and said that this was an opportunity "for everything to get fixed."

The sequence of events leading up to, and at the luncheon, would certainly give employees the impression that Respondent and Martinez worked together to effectuate the luncheon. First, Martinez admitted that employees knew he organized the luncheon as he was the one who told employees about it. Although Martinez initiated the idea of the luncheon, Respondent provided food for employees and even allotted an additional 15 to 20 minutes of work time for employees to discuss the Union campaign.

Furthermore, although the luncheon was organized under the premise that it was a space for employees to share their thoughts about the impending Union election, Drury opened the meeting with a prepared script focused on the Union. Thereafter, Martinez spoke and reiterated statements made at earlier meetings by Senior Resources Business Partner Diaz, discussed above, where Diaz asked employees for an opportunity to fix things and thereby promised to improve employees' working conditions. Martinez's statements are also consistent with the

promises that President Van Voorhis made at earlier meetings about lower health-insurance costs. When determining whether an employee is an agent of a company, the Board will consider whether the alleged agent's actions are consistent with the actions or statements of company representatives. *New England Confectionary*, 356 NLRB 432, 441 (2010) (internal citations omitted). Under the circumstances surrounding the lunch meeting, employees would reasonably believe that Martinez was acting and speaking on behalf of Respondent at the luncheon. *Waterbed World*, supra, at 426-27.

Moreover, although Drury claimed that he set "rules" for the lunch meeting, he only described one rule: asking meeting attendants to be respectful of one another. Insofar as Drury knew that the Union campaign was going to be discussed at this meeting organized by Martinez, and set no restrictions on the statements Martinez could make at the meeting with respect to the Union campaign, Respondent failed to disavow Martinez's statements. *New England Confectionary*, supra, at 440 (citing *Haynes Industries, Inc.*, 232 NLRB 1092, 1099-1100 (1977) (An inference of apparent authority may also be drawn from an employer's knowledge of, and failure to disavow an alleged agent's conduct)).¹⁸⁵

b. Martinez Told Employees that Respondent Was Going to Improve Benefits and Had Improved Working Conditions

Martinez's reminder to employees that Respondent removed Supervisor Sanchez and made plans to reduce health-insurance costs was an unlawful promise that employees' work conditions were bound to improve as employees would no longer have to deal with the unpopular Supervisor Sanchez, and would save money on healthcare costs. Furthermore,

¹⁸⁵ Furthermore, to the extent that Respondent argues that its failure to disavow Martinez's statements is excused because it believed that Martinez was in favor of the Union when he requested to hold this luncheon, such argument lacks credibility. Although President Van Voorhis claimed that she believed Martinez was in favor of the Union, on cross-examination she was unable to explain the basis of her belief; rather, she explained it as a mere "gut" feeling. Additionally, Martinez himself confirmed that he was never in favor of the Union.

Martinez's statements that employees should give Respondent an "opportunity" to fix things at the company, and that employees did not need a union, were coercively motivated to convince employees that they should reject the Union because Union representation was not necessary since Respondent was going to continue making improvements to employees' work conditions. See *Network Dynamics Cabling, Inc.*, 351 NLRB at 1424.

For the foregoing reasons, Respondent violated Section 8(a)(1) of the Act, through Martinez, by soliciting employees to reject the Union, and by telling employees that Respondent was going to improve benefits and had improved terms and conditions of employment.¹⁸⁶

8. Respondent Distributed and Circulated a Petition Soliciting Employees to Revoke their Union Authorization Cards

It is well settled that an employer may not solicit employees to revoke their authorization cards. *Vestal Nursing Center*, 328 NLRB 87, 101 (1999). The Board has held that employer solicitation or encouragement to employees to withdraw their authorization cards is a *per se* violation of Section 8(a)(1) of the Act, whether accomplished by means of distributing instructions or forms to enable the employees to withdraw their support. *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991).

It is undisputed that immediately after the Union election scheduled for November 9, 2017, was blocked and subsequently cancelled, Respondent held a number of meetings with employees where, after announcing that the election had been cancelled, Area President Drury and President Van Voorhis, utilizing Diaz as translator, solicited employees to write to the Union and demand the return of their authorization cards.

¹⁸⁶ See Complaint Paragraph 15(a).

a. Van Voorhis' Statements (Complaint Paragraphs 8(f) and 8(g))

Van Voorhis admitted that she read from a prepared statement encouraging the employees to contact the Union to revoke their Union authorization cards and demand that the Union leave them alone.¹⁸⁷ Van Voorhis testified that she read the statement verbatim in its entirety, including the paragraph which read:

We cannot tell you what to do or not do when dealing with a union, but if we were in your position, we would write a letter to the Teamsters and ask, or even demand, that they pull out and leave all of us alone....

Here again, we cannot tell you what to do or not do, and we are not telling or asking you to do anything, but if we were you, we would send a letter, similar to the one attached, to the Teamsters. I would send a signed letter on my own, or I would get my fellow employees to sign a joint letter and send it. Perhaps, if the Teamsters get enough letters, they will finally honor your choice and your wishes and the Teamsters will pull their petition and leave us alone. (emphases added)

Also, when asked on cross-examination about what was attached pursuant to the statement in the above speech, Van Voorhis professed to not remember. Van Voorhis denied that anything was distributed at this meeting where she read the above statement.

However, several employees who attended these meetings testified that her speech was distributed and that there were attachments, although they did not all agree on which attachments. Jonathan Martinez, an employee witness called by Respondent,¹⁸⁸ confirmed that the speech, along with four pages of attachments was distributed at the meeting he attended: he specifically identified these documents as consisting of a letter addressed to Patrick D. Kelly, the Union's Secretary-Treasurer, advising that Respondent's employees were no longer interested in having the Union represent them and demanding that the election be rescheduled or the Petition for Election be withdrawn (in English and Spanish) ("letters"); and a petition also addressed to

¹⁸⁷ See Complaint Paragraph 8(f).

¹⁸⁸ This is the same Jonathan Martinez who conducted the earlier luncheon meeting with employees in the petitioned-for unit.

Kelly with the same verbiage as the letters but with lines for several employee signatures (also in English and Spanish) (“petitions”).

Moreover, other employee witnesses also contradicted Van Voorhis and confirmed that a copy of her speech and certain attachments were distributed at the meeting that they attended on about November 9, 2017. Two employees recalled that the speech and four pages of attachments consisting of those identified by Martinez, along with the same documents in Spanish, were distributed at the meeting that they attended: one of those employees recalled that after Van Voorhis read her speech, she told employees to sign the documents and return them to her in order to get their authorization card back from the Union.¹⁸⁹ Another employee recalled a document consisting of three or four pages being distributed, but did not specifically identify them. Yet another employee recalled Van Voorhis and Drury coming to the production area and holding up the English version of the petition described above with the lines for multiple signatures and telling employees that this was a paper they could sign to demand their authorization cards back.¹⁹⁰ One employee confirmed that Van Voorhis gave the employees a “paper to sign” at the meeting he attended, but that the paper he saw was in English and he could not read it.

Based upon the foregoing, the testimony of the employee witnesses that documents, including various letters and petitions, were discussed and distributed at the meetings held after the election was cancelled should be credited over Van Voorhis’ equivocal failure to recollect any such documents. First of all, the prepared speech that she gave several times simply makes no sense otherwise, since it specifically suggests that employees send a letter similar to the one

¹⁸⁹ See Complaint Paragraph 8(f).

¹⁹⁰ See Complaint Paragraph 8(g).

attached to the Union.¹⁹¹ To repeat this language at three to five successive meetings without providing a sample letter strains credulity.

Furthermore, several employees who attended these meeting were able to identify the documents shown to them: at least two of them stated that two sample letters addressed to the Union – in Spanish and English –were attached to the copy of Van Voorhis’ speech, as well as two sample petitions in Spanish and English addressed to the Union. Significantly, one of these witnesses, Jonathan Martinez, was called by Respondent to talk about the letters and petitions that he later admittedly circulated to other employees.¹⁹² Other witnesses confirmed that they recalled certain – but not all – of the documents being distributed at the meetings they attended.

Finally, the employees’ testimony about the documents should be credited notwithstanding the fact that not all of them could identify all four attachments. This may be because not all of them were distributed at each of the three to five meetings held, or simply that the employees’ recollections have eroded over time. See *Sewell, Inc.*, 207 NLRB at 332. The Board has recognized that slight differences in perception among different witnesses (such as that of the employee witness who could not read the document in English) is a common occurrence and does not justify rejecting their testimony. See *Pacific Green Trucking*, 368 NLRB No. 14, JD slip op. at 8 fn.20.

Crediting the testimony of the employee witnesses, Respondent violated Section 8(a)(1) of the Act when Van Voorhis suggested that they withdraw their authorization cards and tell the Union to leave them alone, and distributed forms to help them accomplish this. See *Escada (USA), Inc.*, 304 NLRB at 849.

¹⁹¹ See GCX#2.

¹⁹² As discussed, *infra*, Martinez confirmed that the letters and petitions he circulated were the same as the ones distributed by Respondent at these meetings.

In *Escada (USA) Inc.*, the director of distribution in charge of a warehouse distributed to warehouse employees a notice which read:

We have heard that some of you who signed Union authorization cards would like to withdraw those cards, but don't know how to go about it. If you want to withdraw, you may send a letter addressed to both then (sic) and the National Labor Relations Board, telling them you wish to withdraw your card. You have that right.

A sample letter that you may send to both the Union and the Labor Board is attached. You have the legal right to sign a card, but you also have the same legal right to withdraw it. Remember, whether or not you choose to get an authorization card returned is SOLELY YOUR DECISION. You may want to retain copies of the letters that you send for your records.

The sample letter attached was addressed to the union and requested withdrawal of authorization cards and advised the union that the employee no longer wanted any union to represent them. *Id.* The Board affirmed the ALJ's finding that the employer's advice to employees regarding how to rescind their authorization cards, coerced employees in the exercise of their rights. *Id.* at 845, 849.

In *Kut Rate Kid and Shop Kwik*, 246 NLRB 106, 106 (1979), the Board found that respondent violated Section 8(a)(1) of the Act by soliciting employees to repudiate their union authorization cards. In that case, the store manager admitted that she initiated the idea of employees preparing letters, but claimed that she simply provided stationery and asked employees to write down, one way or another, if they wanted to join the union. *Id.* at 112. However, employees testified that the store manager asked them to write a "retraction to [their] union card" and that the store manager even told them that the employer would close if the union became employees' representative, and that the only way employees could prevent this was to write a retraction statement saying employees did not want the union. *Id.* at 113.¹⁹³

¹⁹³ Also, in *Kut Rate*, similar to the instant case, an employee whom the store manager asked to prepare a retraction letter, asked other employees to sign a retraction letter. *Id.*

In *Kut Rate Kid and Shop Kwik*, the Board affirmed the ALJ's finding that "[w]hile it is not a *per se* violation of the Act for an employer to advise employees that they can revoke their signatures on authorization cards, it is a violation for an employer to initiate such action, particularly in the context of other unfair labor practices, as in the instant case." *Id.* at 106, 119. Moreover, the ALJ noted that the solicitation of the letters was accompanied, "at least in some instances, by words of farewell if the letters were not prepared." *Id.*

The facts of the instant cases are similar to the cases cited above in that there is corroborated testimony that Van Voorhis suggested that the employees contact the Union to retrieve their authorization cards and tell the Union that they are no longer interested in being represented by them; and that Van Voorhis also supplied sample letters and petitions to the employees.¹⁹⁴ Despite the assertion in Van Voorhis' speech, there is no independent evidence in the record that some employees "voluntarily said" that they wanted to get their cards back or cancel their cards: thus, the evidence shows that Respondent initiated this action.

Rather, based on the totality of the evidence and consistent with the holding in *Kut Rate Kid and Shop Kwik*, *supra*, at 106, the statements by Van Voorhis, combined with the sample forms, should be found to violate Section 8(a)(1) of the Act, particularly having been done in conjunction with other unfair labor practices including threats of plant closure.¹⁹⁵

¹⁹⁴ Although the sample letters and the petitions provided by Respondent do not specifically reference the revocation or return of signed authorization cards, the accompanying speech read and distributed by Van Voorhis refers to the cards which are "apparently in the NLRB's hands," and states that employees cannot get them back since the NLRB will probably return the cards to the Teamsters. Van Voorhis then advises that "all is not lost," and suggests that the employees write to the Union and ask the Union to "pull the petition."

¹⁹⁵ Cf. *University of Richmond*, 274 NLRB 1204, 1204 (1985) where the Board held that an employer may lawfully assist employees in the revocation of their authorization cards, when employees initiate the idea of withdrawal and have the opportunity to continue or stop the revocation process without interference or knowledge of the employer.

b. Drury's Statements (Complaint Paragraphs 10(g) and 10(h))

Several witnesses also testified that Area President Mike Drury made statements similar to those made by Van Voorhis described above, and also circulated sample letters and petitions. One witness recalled that at the meeting he attended after the Union election had been cancelled, Drury told the employees that that they had been “tricked” by the Union, and that he had some papers for them to sign so that the Union could return their authorization cards. Although this witness could not identify any particular papers, he did recall that Drury said that if he “were in their shoes, he would send a letter to the Union asking for the cards back, and to sign the paper.”¹⁹⁶ Another employee recalled that at the meeting in the production room around this time, Drury, with Diaz translating, told the employees that although the company could not tell employees what to do or not to do, they [the employees] could send a letter to the Union and tell the Union to leave them alone. This latter witness confirmed that Van Voorhis presented the employees at this meeting with a paper to sign, but this witness could not read it because it was in English.¹⁹⁷

This testimony is largely consistent with that of the statements by other witnesses attributed to Van Voorhis at these meetings, and closely follows the script that Van Voorhis said she read at these meetings. Thus, the testimony of these witnesses should be credited, and the Respondent should be found, based on the rationale set forth above, to have violated Section 8(a)(1) of the Act by initiating and providing advice to employees on how to revoke their

¹⁹⁶ See Complaint Paragraph 10(g).

¹⁹⁷ See Complaint Paragraph 10(h).

authorization cards and withdraw their support from the Union.¹⁹⁸ See *Escada (USA), Inc.*, 304 NLRB at 849.

9. Respondent Authorized Employee Jonathan Martinez to, During Working Time, Circulate the Same Petition Soliciting Employees to Revoke their Union Authorization Cards (Complaint Paragraphs 15(b) – 15(f))

Martinez admitted that he circulated the same documents that were distributed at the meeting where Van Voorhis spoke, discussed above, consisting of the letters addressed to the Union (in English and Spanish), and petitions with multiple lines for employees' signatures (in English and Spanish).¹⁹⁹

Area President Drury was aware of employee Martinez's intent to distribute the letters and petitions to employees as Martinez admitted that he informed Drury about it. Although Martinez claimed that Drury responded by advising that Respondent could not help him with the distribution, and that Martinez would have to do it on his own time, Martinez also admitted that he circulated the letters and petitions during working time. There is no indication that Drury, or any of Respondent's officials, tried to prevent Martinez from distributing the documents.

In *Sewell, Inc.*, 207 NLRB at 332, a plant manager testified that he learned about the circulation of an antiunion petition approximately a week before an impending union election, and admitted that he knew who was responsible for its circulation, but he did not instruct an end

¹⁹⁸ Like Van Voorhis at these meetings, Drury equated the sample letters provided with asking the Union to give their authorization cards back.

¹⁹⁹ Martinez offered inconsistent testimony regarding the origins of the letters and petitions, in that he testified that he and other employees searched the internet for samples of letters to stop the Union, but he did not know who typed the letters, that he saw a sample of the letters which a co-worker showed him on his phone, but he did not know how the Union Secretary-Treasurer's name and the Union's address came to appear on the letter. Nevertheless, Martinez ultimately provided the most plausible explanation regarding the origins of the letters and petitions – he testified that the documents were distributed at a meeting conducted by Van Voorhis. Martinez and other employees' testimony that the letters and petitions were distributed at a meeting conducted by Van Voorhis, and Van Voorhis' admission that at employee meetings she read verbatim from the first page of GCX#2 which references "a letter similar to the one attached," help establish that Martinez obtained the letters and petitions—the same documents he solicited employees to sign—from Respondent.

to the circulation of the petition nor did he tell employees not to sign it. The Board affirmed an ALJ's finding that the employer, in knowingly allowing the circulation of the anti-union petition among employees during work time, coupled with the failure of the employer's supervisors to disavow any connection of the employer with the petition, and the plant manager's statements to employees during a meeting acknowledging the petition, made the individuals circulating the petition agents of the employer for that purpose, and the circulation of the petition a violation of Section 8(a)(1) of the Act. *Id.* at 325, 332.

Like *Sewell, Inc.*, *supra*, Respondent herein knowingly allowed Martinez to distribute an anti-union petition during working time, failed to disavow any connection between Respondent and the petition, and acknowledged the petition during Respondent's employee meetings, thereby suggesting that Martinez was an agent of Respondent for the purpose of circulating an anti-union petition. *Sewell, Inc.*, *supra*, at 332.

Additionally, in light of Respondent's Solicitation & Distribution Policy, and Drury's admission that any form of solicitation—outside of regular activities at the Irvine facility like collection of monies for deaths in the family, sale of Girl Scout cookies, or Superbowl “squares”—would have to be approved by a supervisor or Senior Resources Business Partner Diaz, it is established that Respondent had knowledge and tacitly approved of Martinez's distribution of the letters and petitions. Furthermore, there is no indication that Respondent made efforts to “disavow any connection with the petition” as President Van Voorhis referenced and distributed the same letters and petitions, at employee meetings and asked employees to sign them. *Id.* Under these circumstances, where Martinez solicited employees to sign the same letters and petitions that the company President had previously asked them to sign, employees

would reasonably believe that Martinez took actions consistent with Respondent's policies and acted and spoke on behalf of Respondent. *Waterbed World*, 286 NLRB at 426-27.

Martinez distributed about 20 to 25 copies of the letters and petitions, in English and Spanish, depending on employees' requests, in both Department A and B, during both working and non-working time, over several days after the November 9, 2017 election was cancelled.

Employees offered similar unrebutted testimony regarding Martinez's statements to them when he requested their signatures on the letters and petitions, and Martinez's conduct thereafter. A number of employees testified that Martinez approached them at their work area, during working time, dressed in work clothes, and asked them to sign a document to revoke their Union authorization cards.²⁰⁰ Some employees testified that after they declined to sign, they watched Martinez approach other employees in their work areas; two employees heard Martinez ask these other nearby employees to sign the documents. One employee, testified that Martinez approached him in the locker area, and asked him to sign some papers to request employees' "blue cards" back.²⁰¹

Martinez's solicitation of employees' signatures on this anti-union petition, and concurrent statements informing employees that by signing the petition, he would be able to retrieve their authorization cards from the Union, equated to a direct request that employees denounce their Union support by revoking their authorization cards. Martinez employed a coercive tactic by individually approaching employees during working hours to solicit their signature on this anti-union petition. See *Haynes Industries, Inc.*, 232 NLRB at 1100 (Board

²⁰⁰ See Complaint Paragraphs 15(b), 15(d), 15(e), and 15(f). Although one employee-witness testified that Martinez asked him to sign a paper related to the Union, and he did not describe in detail what the paper related to the Union was for, based on Martinez's consistent pattern with respect to the statements he made to employees each time he approached them to request their signatures, it can reasonably be inferred that Martinez also told this employee that he should sign the document so that Martinez could obtain employees' authorization cards. In asking employees to sign the letters and petitions, Martinez essentially asked employees to reject the Union.

²⁰¹ See Complaint Paragraph 15(c).

affirmed a finding that the circulation and request for signatures of the anti-union petition was interference, restraint, and coercion of employee rights, and therefore constituted a violation of Section 8(a)(1) of the Act).

The coercive effect of Martinez's conduct is highlighted by the fact that prior to Martinez individually approaching employees, President Van Voorhis publicly solicited employees to sign the same petition. Moreover, employees could draw an association between Martinez and Respondent, as employees were aware that Martinez had earlier organized a luncheon where Area President Drury spoke about the Union, and where Martinez echoed the same statements that Respondent's officials made at previous employee meetings to discourage Union support. Thus, Martinez's suggestion to employees regarding how to rescind their authorization cards, would naturally have a coercive effect on employees in the exercise of their rights. *Escada (USA), Inc.*, 304 NLRB at 849.

Based on the foregoing, Respondent violated Section 8(a)(1) of the Act by, through Martinez, soliciting employees to revoke their Union authorization cards by circulating an anti-union petition.²⁰²

C. Respondent Violated Section 8(a)(1) and (3) of the Act

1. Respondent Improved Employees' Terms and Conditions of Employment by Removing Supervisor Sanchez from its Facility (Complaint Paragraphs 18(a) and 18(b))

The granting of a benefit to employees shortly before a scheduled election constitutes a violation of Section 8(a)(3) of the Act where the conduct stems from improper motivation, interferes with employee free choice, and an employer is unable to establish a legitimate reason for the timing of the benefit. See *Holly Farms Corp.*, 311 NLRB 273, 274 and 283 (1993). The

²⁰² See Complaint Paragraphs 15(b)-15(f).

requirements for an 8(a)(3) violation set forth in *Holly Farms Corp.*, are all satisfied in the present case.

Several employees testified regarding employees' long-standing complaints about Supervisor Sanchez, including how Sanchez: treated employees; poorly managed an employee's report about an injury; and did not grant employee raises if he did not like an employee. Despite employees' complaints about Sanchez to Respondent's management, employees felt that Respondent failed to address their issues. Area President Drury admitted to learning about employees' complaints about Supervisor Sanchez from Labor Consultants Cornejo and Jara, and claimed to be surprised that some of employees' issues centered around Sanchez.

Respondent admitted that it transferred Supervisor Raul Sanchez to Palisades Ranch where he has remained for approximately the past year.²⁰³ By removing Supervisor Sanchez, Respondent unlawfully conferred a long-awaited benefit upon employees. *Burlington Times, Inc.*, 328 NLRB 750, 751 (1999) (Board found that the employer violated the Act by terminating a very unpopular supervisor, in order to grant a benefit to discourage union activity); *Ann Lee Sportswear, Inc.*, 220 NLRB 982, 983 (1975), *enfd.* *Ann Lee Sportswear, Inc. v. NLRB*, 543 F.2d 739 (10th Cir. 1976); see also *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000) (Board found that the employer violated the Act by promising to terminate a manager if it would stop the union effort as this statement constituted an unlawful offer to improve working conditions for employees).

²⁰³ Although the Complaint does not allege that Supervisor Sanchez is a supervisor pursuant to Section 2(11) of the Act, Supervisor Sanchez's supervisory status is not in dispute. Area President Drury testified that Sanchez was a "supervisor" who oversaw about 30 employees, and employees testified that they considered Sanchez a supervisor. Moreover, Drury admitted that Sanchez performed supervisory duties including participating in employees' annual performance reviews and recommending which employees should and should not receive a wage increase. See *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999) ("[t]he possession of even one of [the supervisory status indicia] is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in merely a routine or clerical manner").

Moreover, given Respondent’s knowledge of employees’ complaints about Sanchez, the timing of Respondent’s decision to transfer Sanchez to Palisades Ranch indicates its improper motive: to discourage Union support. “[I]n view of all the facts and circumstances . . . particularly the timing[,]” it is reasonable to find that this benefit—removal of Supervisor Sanchez—was conferred “in response to the Union campaign and was therefore, violative of [the Act].” See *Honolulu Sporting Goods Co., Ltd.*, 239 NLRB 1277, 1280 (1979), *enfd.* *Honolulu Sporting Goods, Inc. v. NLRB*, 620 F.2d 310 (9th Cir. 1980), cert. denied 449 U.S. 1034 (1980).

While Drury asserted that Respondent transferred Sanchez because Palisades Ranch needed additional “talent” and Sanchez possessed the appropriate “skill set” to work at Palisades Ranch, Drury’s testimony lacks credibility. On cross-examination, when pressed to explain the “skill set” that Sanchez possessed, Drury failed to describe what those skills were, nor did he explain the suspect timing of Respondent’s decision to transfer Sanchez. Rather, Drury merely stated that this was an “opportune” time for the transfer, suggesting that there was no legitimate reason for the timing of this transfer, and thereby suggesting that it was improperly motivated. *Holly Farms Corp.*, *supra*, at 274.

Respondent’s decision to hold special meetings to announce Sanchez’s transfer is also indicative of its improper motive. “[A]n 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 Hospital*, 338 NLRB 545, 545 (2002). Several employees testified that in about October 2017, after the Petition for Election was filed, Respondent conducted special meetings, some with Area President Drury and President Van Voorhis, to announce that Supervisor Sanchez would no

longer be working at the Irvine facility.²⁰⁴ Moreover, employees demonstrated that they considered Sanchez's removal from the Irvine facility as an improvement to their working conditions by cheering after Respondent's announcement at the pre-election meetings.

Respondent had capitalized on the knowledge that it acquired regarding employees' complaints during the pre-election meetings, and announced Sanchez's removal from the Irvine facility as a solution to employees' problems with the intent to discourage Union support. See *Newburg Eggs, Inc.*, 357 NLRB 2191, 2192 (2011) (Board found that respondent violated the Act when the CEO announced to employees that respondent hired a bilingual human resource manager to improve work place conditions. In announcing the hiring, the CEO discussed lack of communication as a problem employees experienced at work and stated that the bilingual HR manager's hiring was a solution to the problem as employees would be able to communicate with managers).

Thus, Respondent "interfer[ed] with employee free choice" by removing Sanchez from the Irvine facility. *Holly Farms Corp.*, supra, at 274. Employee Martinez perceived Sanchez's removal from the Irvine facility as a benefit to employees; he stressed this to employees in the petitioned-for unit to discourage Union support when he spoke to them at a lunch meeting on about November 3, 2017, and asked employees to give Respondent an "opportunity" since the company had already taken affirmative actions to improve their working conditions by removing Supervisor Sanchez.

Based on the aforementioned, Respondent violated Section 8(a)(1) and (3) of the Act by removing Supervisor Sanchez from the Irvine facility.²⁰⁵

²⁰⁴ Notably, one employee testified that one of these meetings was held in the afternoon, and that earlier that same day, Senior Resources Business Partner Diaz conducted a meeting where employees told Diaz that they had problems with Sanchez and Diaz said he would have an answer for them that afternoon.

²⁰⁵ See Complaint Paragraphs 18(a) and (b).

2. Respondent Withheld Performance Reviews and Raises from Employees in the Petitioned-for Unit (Complaint Paragraphs 17(a) and 17(b))

As a general rule, “an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer’s course of action is prompted by the union’s presence, then the employer violates the Act whether he confers benefits or withholds them because of the Union.” *The Great A&P Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967) (internal citations omitted). The Board has specifically held that an employer violates Section 8(a)(3) of the Act by suspending regularly-scheduled performance reviews and pay increases during the pendency of a union campaign. *United Rentals*, 350 NLRB 951, 951 (2007); see also *Olney IGA Foodliner*, 286 NLRB 741, 750 (1987) (Board found that respondent violated Section 8(a)(1) and (3) of the Act by failing to award employees’ regular wage increases).

Respondent concedes that it normally completes employee performance reviews annually on employees’ hire anniversary date or within the same pay period as their anniversary date, and that performance reviews may result in a wage increase. The “law is clear, (that) an employer has a legal duty during a union campaign to proceed with the granting of benefits that could otherwise have been granted to employees in the normal course of the employer’s business, just as it would have done had the union not been on the scene.” *Olney IGA Foodliner*, supra, at 750. Despite its legal obligation, the record shows that during the pendency of the Union campaign, Respondent unlawfully deviated from its normal practice when it failed to provide employees with the benefit of performance reviews and related raises. President Van Voorhis and Area President Drury both admitted that Respondent did not provide employees whose anniversary dates fell in October and November 2017, merit increases during that critical time period but

testified that Respondent provided such employees with their performance reviews. Drury further admitted that Respondent did not provide such merit wage increases because it was advised that doing so could be construed as potentially influencing employees during the Union campaign.

Respondent's alleged concern about potentially influencing employees if it provided merit raises is unfounded and does not cure Respondent's unlawful failure to provide wage increases.²⁰⁶ See *United Rentals*, supra, at 951 and 968 (Board affirmed an ALJ's findings and conclusions that, *inter alia*, the employer violated Section 8(a)(3) of the Act by suspending annual performance evaluations and pay raises during the pendency of a union campaign, where an ALJ rejected the employer's argument that performance evaluation meetings could be construed as bribery). Furthermore, Drury's admission that Respondent failed to provide employees' merit wage increases because of a potential influence during the Union campaign, supports a finding that Respondent's motivation for failing to provide merit raises was employees' involvement with the Union. This is further supported by evidence that outside the period between the filing of the Petition for Election in October 2017, and November 2017, Respondent regularly completed employees' performance reviews and provided related raises.

Furthermore, Drury and Van Voorhis' testimony that Respondent provided employees whose anniversary dates fell within October and November 2017, with timely performance reviews is contradicted by Respondent's own documents and by credible employee testimony. Notably, Respondent provided performance reviews for several employees which show the

²⁰⁶ To the extent that Respondent may argue that wage increases were discretionary, and, therefore, Respondent's failure to provide employees with wage increases did not constitute a violation, such argument lacks merit. See *United Rentals*, supra, at 951 and 968 (Board affirmed an ALJ's finding that the notion that pay raises were discretionary was a "hollow one," since the employer's custom and practice was to award raises to employees with good or satisfactory performance evaluations).

employees' hire date and the date that the performance review was completed and signed by a supervisor. The performance reviews for the employees whose anniversary dates fell in October and November 2017, during the Union campaign, were not completed and signed by a supervisor until sometime in late January 2018. Additionally, credible witnesses whose anniversary dates fell in October or November 2017, testified that they did not receive a performance review or raise until 2018; their testimony was corroborated by their performance reviews. Moreover, even President Van Voorhis recanted her testimony that employees timely received their performance reviews as she later testified that she did not know this to be a fact.

Additionally, the record is devoid of any evidence that in October or November 2017, Respondent clearly communicated to employees that they would receive their performance reviews and raises irrespective of the outcome of the Union election. *Earthgrains Co.*, 336 NLRB at 1126-1127. To the contrary, as discussed above, the record shows that during Respondent's meetings with employees in the petitioned-for unit, Respondent's officials and agents continuously stressed to employees that their performance reviews and raises would be "frozen" because of the Union.

Based on the above, Respondent violated Section 8(a)(1) and (3) of the Act by freezing the annual performance reviews and raises of employees in the petitioned-for unit.²⁰⁷

3. Respondent Withheld a Reduction in Health-Insurance Costs from Employees in the Petitioned-for Unit (Complaint Paragraphs 19(a) and 19(b))

As discussed above, the general rule is that an employer violates the Act if it withholds benefits from employees because of a union's presence. *The Great A&P Tea Co.*, supra, at 29 fn. 1 (1967). Specifically, the Board has held that an employer violates Section 8(a)(1) and (3)

²⁰⁷ See Complaint Paragraphs 17(a) and (b).

of the Act by providing healthcare benefits to some employees while withholding the same healthcare benefits from employees in a voting unit during a critical pre-election period. *Noah's Bay Area Bagels, LLC*, 331 NLRB at 190.

Here, the record shows that after Respondent distributed and read flyers to employees in the petitioned-for unit, explicitly announcing that Respondent was going to withhold a benefit—paying reduced costs for HMO plans—from them, and Respondent proceeded to do so. Both Area President Drury and President Van Voorhis admitted that employees in the petitioned-for unit did not receive the increased HMO subsidy for 2018, resulting in such employees paying higher costs for HMO plans. Drury further admitted that employees not in the petitioned-for unit received an increased subsidy in 2018, resulting in lower payments for their HMO coverage. Furthermore, one of Respondent's own documents²⁰⁸ shows that starting in 2018, employees in the petitioned-for unit did not pay the reduced costs for HMO plans reflected in the flyer Respondent earlier distributed to employees, which stated that employees not in the petitioned-for unit would pay reduced healthcare costs starting January 1, 2018.²⁰⁹ Moreover, as discussed above, Respondent failed to provide employees in the petitioned-for unit with any assurances that it would provide them the benefit of reduced healthcare costs following the election,

²⁰⁸ See GCX#6 which Respondent admitted was created for this litigation.

²⁰⁹ Respondent initially appeared to make a distinction between the terms “rate”/“cost” and “subsidy” which were separately referenced in the documents dated November 1, 2017, JX#1(d) and JX#1(e), respectively. However, Respondent used the terms “cost” and “subsidy” interchangeably in GCX#13, a document dated November 15, 2017, that Respondent distributed to employees, which is almost identical to JX#1(e), except for deletion of the words “Election on Thursday November 9” and substitution of the words “subsidy for HMO health insurance on January 1, 2018” (in JX#1(e)) with “cost of healthcare in 2018” (in GCX#13). Respondent could not explain the reason for its substitution of these words. Even assuming a difference in the meaning of the terms “rate”/“cost,” and “subsidy,” the evidence shows that Respondent took affirmative actions with respect to each: it failed to provide employees in the petitioned-for unit with the reduced rates promised in JX#1(d), and it failed to provide employees in the petitioned-for unit with the increased subsidies referenced in JX#1(e). Under each situation, the result was the same – Respondent withheld a reduction in healthcare costs from employees in the petitioned-for unit.

irrespective of the election outcome. *Noah's Bay Area Bagels, LLC*, supra, at 191; *Earthgrains Co.*, 336 NLRB at 1126-1127.

Based on the foregoing, Respondent violated Section 8(a)(1) and (3) of the Act by withholding a reduction in healthcare costs from employees in the petitioned-for unit that it provided to employees not in the petitioned-for unit.²¹⁰

IV. CONCLUSION

For all the foregoing reasons, the evidence establishes that Respondent violated Section 8(a)(1) of the Act by: soliciting employees' grievances and promising to remedy such grievances; promising employees improved terms and conditions of employment; threatening that if the Union won the election, contract negotiations with the Union would start at zero; threatening to freeze employees' benefits, including annual performance reviews and merit-pay increases; distributing a flyer stating that employees in the petitioned-for unit would not receive reduced health-insurance costs; conducting a lunch meeting where employee Martinez solicited employees to reject the Union by telling employees that Respondent was going to improve benefits and had improved working conditions; and distributing and circulating an anti-union petition soliciting employees to revoke their Union authorization cards and/or to reject the Union. The evidence further establishes that Respondent violated Section 8(a)(1) and (3) of the Act by: improving employees' terms and conditions of employment by removing a supervisor from the Irvine facility; withholding employees' performance reviews and raises because of their support for the Union and/or employment in the petitioned-for Unit and/or to discourage their

²¹⁰ See Complaint Paragraphs 19(a) and (b). The record contains no evidence that, and Respondent failed to explain if, starting January 1, 2018, "personnel" employees not in the petitioned-for unit, paid the new reduced HMO rates reflected in JX#1(d). Nevertheless, Drury admitted that in 2018, employees not in the petitioned-for unit received an increased subsidy resulting in lower payments for HMO coverage.

support for the Union; and withholding a reduction in health-insurance costs from employees in the petitioned-for unit that it provided to employees not in the petitioned-for unit.

V. REMEDY

It is respectfully submitted that the appropriate remedy is the following:

The Respondent Newport Meat Southern California, Inc., its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:
 - (a) Soliciting employees' grievances and promising to remedy them in order to discourage employees from supporting the General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters (the Union);
 - (b) Promising improved terms and conditions of employment if employees refrain from supporting the Union;
 - (c) Threatening employees by telling them that wages, benefits, and/or other terms and conditions of employment will start at zero during contract negotiations if they choose to be represented by the Union;
 - (d) Threatening employees with job loss, plant closure, or loss of wages, benefits and/or other terms and conditions of employment, including frozen performance reviews and merit pay raises, if they choose to be represented by the Union;
 - (e) Distributing flyers stating that employees in the petitioned-for unit will not receive benefits promised to employees not in the petitioned-for unit;
 - (f) Distributing and soliciting employees to sign an anti-union petition;

- (g) Providing support or assistance to employees who are soliciting other employees to reject the Union, or to distribute and collect signatures for an anti-union petition;
- (h) Making improvements to employees' working conditions to discourage employees from supporting the Union by removing unpopular supervisors;
- (i) Discriminating against employees by withholding performance reviews and merit-pay increases because of their support for the Union or employment in the petitioned-for unit;
- (j) Discriminating against employees by withholding benefits including a reduction in health-insurance costs, because of their employment in the petitioned-for unit; and
- (k) 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 actions necessary to effectuate the purpose of the Act:

- (a) Make whole all employees in the petitioned-for unit who did not receive a timely annual performance review, and who would have received a merit-pay increase during the period October 2017, to November 2017, and any subsequent dates,²¹¹ for wages and other benefits they lost as a result of

²¹¹ The General Counsel maintains that a determination regarding whether Respondent's conduct solely affected employees whose anniversary dates were in in October and November 2017, and whether these employees were made whole by Respondent, should be reserved for a compliance proceeding.

their support for the Union and/or their employment in the petitioned-for unit, including interest and excess-tax liability;

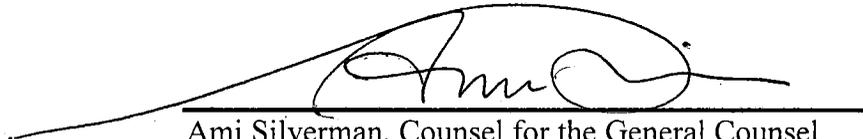
- (b) Resume its practice of timely issuing annual performance reviews and merit-pay increases;
- (c) Make whole all employees in the petitioned-for unit who did not receive a reduction in HMO health-insurance costs, for the loss of benefits that they suffered as a result of their employment in the petitioned-for unit, by reimbursement for excess costs paid, plus interest, and excess-tax liability;
- (d) Within 14 days after service by the Region, post at Respondent's facility in Irvine, California, in the bulletin board area near the time clock, and all other places where notices to employees are generally posted, copies of an appropriate Notice to Employees ("Notice"), in both English and Spanish,²¹² after being signed by the Respondent's authorized representative, maintained free from all obstructions and defacements;
- (e) Within 14 days after service by the Region, hold meetings at Respondent's Facility in Irvine, California, scheduled to ensure the widest possible attendance of each shift, at which a responsible management official of the Respondent will read the Notice in English and Spanish, in the presence of a Board Agent. Alternatively, a Board agent will read the Notice in English and Spanish in the presence of employees and management officials. The readings will take place at a time when Respondent would customarily hold meetings and must be approved by the Regional

²¹² A Spanish-language notice is warranted because a substantial number of Respondent's employees are Spanish-speaking.

Director. The announcements of the meetings will be in the same manner Respondent normally announces meetings and must be approved by the Regional Director;²¹³ and

- (f) Within 21 days of the issuance of the ALJ's Order, notify the Regional Director of Region 21, in writing, the manner in which Respondent complied with the terms of the Order, including how and where they have posted the documents required by the Order.

Respectfully submitted,



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Edith Castañeda, Counsel for the General Counsel
National Labor Relations Board, Region 21
312 North Spring Street, 10th Floor
Los Angeles, CA 90012

DATED at Los Angeles, California, this 3rd day of September, 2019.

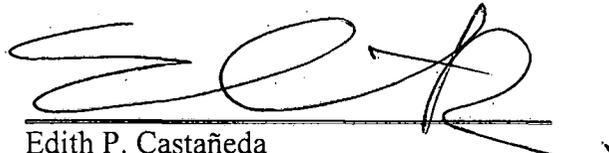
²¹³ The public reading of a notice has been recognized as an “effective, but moderate way to let in a warming wind of information and, more important, reassurance.” *U.S. Service Industries, Inc.*, 319 NLRB 231, 232 (1995), *enfd.* 107 F.3d 923 (D.C. Cir. 1997). *See also Concrete Form Walls, Inc.*, 346 NLRB 831, 841 fn.3 (2006) (Member Schaumber, dissenting in part) (notice-reading remedy “gives teeth to other notice provisions” that the respondent must also announce). By imposing such a remedy, the Board can assure the respondent’s “minimal acknowledgment of the obligations that have been imposed by the law. The employees are entitled to at least that much assurance that their organizational rights will be respected in the future.” *Federated Logistics & Operations*, 340 NLRB at 258 fn.11. A notice reading is especially warranted in the present case, considering Respondent’s numerous violations of the Act during the pendency of the Union campaign.

STATEMENT OF SERVICE

I hereby certify that a copy of the **BRIEF OF COUNSEL FOR THE GENERAL COUNSEL** in Cases 21-CA-209861, 21-CA-214652, and 21-CA-217903 was submitted by E-filing to the National Labor Relations Board, Division of Judges, San Francisco Branch on September 3, 2019. The following parties were served with a copy of the same document by electronic mail:

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DATED at Los Angeles, California, this 3rd day of September, 2019.