

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21**

**NEWPORT MEAT SOUTHERN
CALIFORNIA, INC.**

Employer

and

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

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

Charging Party

NEWPORT MEAT SOUTHERN CALIFORNIA, INC.'S POST HEARING BRIEF

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I. INTRODUCTION

Before your Honor is the unenviable tasks of sorting through the proverbial kitchen sink of alleged Section 8(a)(1) violations that have become the unfortunate byproduct of union attempts to deprive employees of their right to a secret ballot election. Fortunately, an analysis of the record before your Honor reveals the following irrefutable facts that establish your Honor must dismiss the Counsel for the General Counsel's ("CGC") allegations.

Preliminarily, the CGC's need to dismiss almost a dozen allegations because it failed to present any supporting evidence creates a clear prism through which one should view this case. While the CGC's belated recognition of its fundamentally flawed case is laudable, the fact the CGC issued a Complaint containing this many baseless allegations is significant. Indeed, the CGC clearly understands that it cannot pursue groundless allegations, which means that it was deceived by its own witnesses for a considerable period of time. That these same witness did not outright recant or failed to testify consistent with their prior statements to the CGC with respect to every allegation does not remove the significant credibility problems highlighted by their willingness to force your Honor, the CGC and Respondent to expend unnecessary money (including taxpayer dollars) and time on baseless allegations. This is particularly the case where, as here, the CGC's witnesses presented dubiously emphatic and similar testimony regarding only the alleged unlawful statements as opposed the entire presentations and they could not remember key details like the meetings' dates and attendance.

Moreover, the CGC failed to present any evidence establishing that any of its witnesses ever attended the same meeting, which leaves the myriad of allegations uncorroborated. In stark contrast, Newport Meat Southern California, Inc. ("Newport" or "Company") presented credible testimony from multiple witnesses that attended the lawful group meetings it conducted in an attempt to equip its employees with the ability to make an informed vote. Thus, the CGC not only failed to establish any Newport representative made any of the alleged unlawful statements, but it left completely unclear what allegation each witness was even purporting to address in violation of the Company's due process rights. As a result, your Honor must dismiss the alleged 8(a)(1) statements as explained further below.

Similarly, the allegations that the Newport illegally failed to grant subsidy and wage increases are contrary to Board precedent and without merit. Indeed, as explained below, Board law supports each act Newport took regarding the insurance subsidy and wage increases.

Board precedent also establishes that Newport's transfer of supervisor for legitimate business reasons does not violate the Act. Thus, the CGC should not have pursued, and cannot establish the validity of, its claim that Newport legitimate personnel decision violated the Act.

Finally, the un rebutted testimony shows that Jonathan Martinez ("Martinez") acted of his own volition when he solicited that employees revoke their authorization cards. Accordingly, the CGC is unable to establish that Martinez (who was exercising his rights as a rank-and-file employee under the Act) was the Company's agent.

In sum, the record before your Honor and applicable precedent mandates the dismissal of the pending allegations about Newport.

II. GENERAL FACTS

A. Newport Provides High End Meats to Customers Throughout Southern California.

Newport supplies high quality meats to customers throughout Southern California and beyond and utilizes drivers represented by represented by Teamsters, Local 848 ("Local 848") to deliver its products. Local 848 and Newport have had a collective-bargaining relationship since 1999, with their latest collective-bargaining agreement spanning from February 29, 2016, to February 28, 2019. The Company concentrates on what it considers the true value to customers, and that is a product based upon yield, appearance, and taste. Vital to this approach is Newport's meat processing and warehouse employees that cut, process, and package meat and maintain the related.

B. On October 10, 2017, Local 952 Filed a Representation Petition.

On October 9, Teamsters, Local 952 ("Teamsters," "Union," or "Local 952") notified Newport of its intention to file a representation petition to represent all full-time and regular-part time meat processing and warehouse employees. The parties eventually stipulated to hold an election on November 9, 2017, from 10:00 a.m. to 1:00 p.m. and 4:00 p.m. to 7:00 p.m. *Id.* Unfortunately, that election did not occur.

III. SPECIFIC FACTS

A. During the Week of October 9, Denise VanVoorhis Discussed the Petition With Newport's Employees.

Beginning about the week of October 9, Newport President Denise VanVoorhis ("VanVoorhis") and Regional Vice President Mike Drury ("Drury") informed Newport's

employees that the Teamsters filed a petition and provided them some information about the election process. Tr. 1016:14–22; 1103:21–1104:22. This process was new to VanVoorhis and so she utilized a script during the multiple meetings she conducted. Tr. 1016:16–18, 1016:23–1017:22. VanVoorhis explained that she would read from the script because she’s “not an expert in labor law, and I did not want to say anything that could be perceived as unlawful.” Tr. 1018:15–16. Drury read from a script for similar reasons. Because many of Newport’s employees are fluent Spanish speakers, Drury and VanVoorhis utilized Newport’s Human Resources Manager Roberto Diaz (“Diaz”) to translate at their meetings. Tr. 891:25–892:11; GCExs. 9, 17. The script for the first meeting stated as follows¹:

By Mr. Drury:

Denise and I have a very important matter to discuss with you today (this evening). [Hold up copy of NLRB election petition]. This is a petition which we received this week from the NLRB – the National Labor Relations Board. The petition was filed by Teamsters Local 952 out of Orange. By filing the petition, the union has asked the NLRB to conduct an election here so that our warehouse and processing employees can decide if they want to be represented by Local 952.

As you can probably tell, I am referring to notes while we make my presentation, and Denise will do the same. This is not our normal style, and we don’t like to do business this way anymore [sic] than you would. However, when we discuss the subject of unions, we are discussing a very important and serious matter, and it is essential that we have a record of the points we cover so that we can make sure that everything we cover with you is not only truthful but legal. We want to make sure that you understand that even though we are reading from notes, we mean everything we say, and we stand behind everything covered.

Denise is going to cover some additional, important information about the election and about what you will be voting on. I want to make sure that you understand that I believe it would be a mistake for you to vote to bring a union into our processing and warehouse operations, and I firmly believe that once you fully understand what you could be getting yourself into, you will agree with me that it is not in your best interest to bring in a union.

By Ms. Van Voorhis:

Thank you, Mike.

¹ Complaint paragraph 9(a) alleges that on October 9, 2017, Drury and VanVoorhis solicited grievances and promised benefits. The General Counsel offered no testimony to suggest that any unlawful statements occurred at this meeting.

Before you give any consideration to getting involved with the Teamsters Union or any other union, I think it is a good idea that you know what Newport Meat's and Sysco's position is on unions. Even though we have the Teamsters Union in our Transportation Department and Sysco has unions in some of their other locations, both Newport Meat and Sysco prefer operating on a nonunion and union-free basis because we believe that operating nonunion works in the best interest of our employees. We know that operating nonunion is best for the company and for our customers. Companies, however, do not make the decision on whether or not an operation is union or nonunion; employees – like you – make that decision.

If we had our preference, we would be operating totally nonunion here, and Sysco would be operating totally nonunion at all of their locations. As I said, operating nonunion is best for the company and our customers. More importantly, we feel strongly that operating nonunion is also in the best interest of our employees. We have come to this conclusion because of our long history with dealing with unions and union operations. We believe that Sysco employees, who are nonunion and union-free, are as well off, if not better off, than unionized Sysco employees.

Why do we say that we believe you will be better off staying non-union. Some of you may have the mistaken idea that unions represent a majority of Sysco employees and a high percentage of American workers. The fact is union-represented employees are in the minority in America. According to the US Department of Labor, unions now represent less than 7% of American employees in the private sector. That's not less than 70% - but 7%. In other words, over 93% of Americans have decided to think, talk, and act for themselves without a union. What about Sysco? Less than 20% of Sysco employees are represented by unions – over 80% are like you and are union free. 93% and 80% can't be wrong. All of these employees could vote to have a union represent them, but they have decided that they are better off without a union just like we believe you will be.

We have seen how unionized Sysco houses work, and we are convinced that there is simply no good reason any of you should have to pay your hard-earned money to a union or risk a potential union strike for the privilege of working for Newport Meat and Sysco. It is a simple fact that where there are no unions, there are no union dues and no possibility of a union strike.

The Teamsters have already gotten a few of you involved with the union by getting you to sign union authorization cards. When you signed a card, you signed a legal document giving the union the power and authority to think, talk, and act for you. As Mike said, we believe that those of you who signed cards made a big mistake – a mistake which can end up haunting all of you for the rest of your working lives. All is not lost, and all of you will be given a second chance if, and when, the NLRB holds an election here. Any mistakes you have made up until this point can be undone by voting against the union in a NLRB election.

No final details about the election have been made. We will be working with the NLRB during the next week to try to come up with a date which gives each of you ample time to learn as much as you can about what it can mean to have the Teamsters represent you. We fully understand that this is a new subject for most of you. Most employees have misconceptions and misunderstandings about what unions are all about and what unions can and cannot do. It has been our experience that Sysco employees, who are well informed about unions, decide for themselves that it is not in their best interest to have a union. Between now and any election, we will do our best to make sure that you are in the group of Sysco employees who are well informed about unions and how they operate.

We feel certain that you have many questions about the Teamsters and what they can do or not do for you. At this meeting, we cannot accept your questions because we will be meeting with all processing and warehouse employees, and time constraints limit us. However, during the coming days and weeks, we will expend whatever time is necessary to make sure that all of your questions are answered. We have nothing to hide when dealing with unions, and we are confident that once you are fully informed about the Teamsters, you will have no interest in bringing them in here.

Thank you very much for your attention. Our intent is to make sure that you are well informed about unions – so if you have any questions, please communicate those questions to your direct supervisor or any other member of management, so that we can respond accordingly. Again, thank you for your time.

GC Ex. 9.

B. Angel Cornejo Provided Employees A General Overview of the National Labor Relations Act and Bargaining.

1. Cornejo provided specific testimony regarding the meeting he conducted and his message to employees.

Following this initial meeting, Newport utilized consultant Angel Cornejo (“Cornejo”) to share information regarding the National Labor Relations Act (“NLRA” or “Act”) and collective-bargaining with employees. Tr. 792:14–793:13. Specifically, Cornejo discussed, in both group and one-on-one conversations,² the Act, collective-bargaining, and union related documents. Tr. 793:9–13; 792:24–793:3.

Cornejo first spoke with associates about the Act in group meetings that lasted approximately 30 minutes. Cornejo provided the employees copies of *The Basic Guide to the*

² The Complaint contains no allegations regarding alleged one-on-one conversations.

National Labor Relations Act and used an accompanying PowerPoint presentation (not a script). Tr. 794:10–795:4; REXs 1, 3; Tr. 795:12–14; Tr. 795:15–23. Cornejo, in fact, had no need for a script, testifying that he had given this presentation “well over 100 times.” Tr. 795:24–796:1.

During this first presentation, Cornejo started by telling employees that during the campaign process they will hear a lot of information and should ask themselves, who should they believe? Cornejo further explained that he would introduce associates to the National Labor Relations Act which was passed by Congress and governs both unions and employees and encouraged them to rely on facts when making a decision. Tr. 796:2–14; 796:15–18.

After introducing the Act, Cornejo explained Section 7 rights. Tr. 797:7–19. He also told employees that he has learned that through this process employees become very animated and he requests that everyone stay respectful throughout. Tr. 797:20–24. After explaining Section 7 rights, Cornejo discussed union authorization cards with employees. Tr. 801:25–802:24. He explained to employees that an authorization card authorizes a union to be the employee’s exclusive representative for purposes of collective-bargaining. Tr. 802:12–14. He further explained to employees “should employees choose to unionize at that point, they lose the ability to negotiate with the company directly.” Tr. 803:3–5.

Beyond this, Cornejo explained to employees that the union needs 30% of the associates signed authorization cards in order to have an election. Tr. 803:8–17. He also let employees know that authorization cards constitute “legally binding documents” that “becomes the union’s property.” Tr. 803:13–14.

Following the explanation of the authorization cards, Cornejo explained the voting process. Tr. 804:7–25. He told associates that a vote would occur at a mutually agreed location, which is usually on site. *Id.* A Board agent would conduct the election to ensure “that everything is on the up and up, that nobody does any funny business, and to ensure that the employees have a right to, you know, cast their vote in a secret way and in a way free of intimidation.” Tr. 804:13–16. He also emphasized employees cast secret ballots because “it’s a majority of those that participate that day, not a majority of – or not a total amount of voters that are eligible to participate. The – the winner will be decided by those that go and participate that day.” Tr. 804:21–25.

After discussing what decides an election, Cornejo then discussed collective-bargaining. He asked those in attendance to turn to Page 6, Paragraph 2, of Exhibit 1 and he would read:

Collective bargaining. Collective bargaining is defined by the Act. Section 8(d) requires an employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must confer in good faith with respect to wages, hours, and other terms or conditions of employment, the negotiation of an agreement, or any question arising under an agreement.

Respondent's Exhibit 1; Tr. 805:1–25.

Cornejo then explained “how three parties at the bargaining table, you know, sit down and talk about things.” Tr. 805:21–23. He told employees “[t]here’s the company, there’s the employees, and then there’s the union.” Tr. 805:25–806:1. Cornejo explained that “[t]he company, when they come in and they come to negotiate, they come and they bring your policies, their procedures, their company, and they come and they put that on the table.” Tr. 806:2–4. Cornejo made sure employees understood their role in the bargaining process, telling them that they “bring something of monetary value as well, which is – their wages, their benefits, their working conditions are all put on the table.” Tr. 806:5–8. He further told them “[e]verything, good, bad, or indifferent, that they are currently getting from Newport will be negotiated on this session.” Tr. 806:8–10.

Cornejo then explained the union’s role in the bargaining process, “if the company brings their money, the employee bring their money, what does the union do?” Tr. 806:10–11. He explained to employees “what they do is they come and they bargain collectively, these things that have been on the – on the table.” Tr. 806:11–14. Cornejo testified that he told associates “the company and the union do have to sit down, they have to negotiate, they have to bargain in good faith. The law does state that they do not have to agree.” Tr. 806:20–23.

Following this discussion, Cornejo would change PowerPoint slides and discuss mandatory subjects of bargaining. Tr. 807:5–18. He explained that people think this process brings respect, job security, a voice in the workplace, or a solution to a lack of communication. *Id.* He then directed employees to the mandatory subjects of bargaining, which basically encompasses “wages, benefits, and working conditions.” Tr. 807:13–14. Cornejo then relied on *The Basic Guide to the National Labor Relations Act* to point out that “both parties have to sit down, they have to negotiate, they have to confer in good faith, but neither side has to agree.” Tr. 807:15–18. For this portion of the presentation Cornejo told employees “about the possible outcomes, that nobody knows what will be, but essentially, you know, it – your wages and benefits could absolutely

increase during this process, they could stay the same, or they could go down.” Tr. 807:24–808:2. Simon Jara (“Jara”), another consultant present during these meetings, supported this testimony explaining that Cornejo said “in negotiations everything they currently have goes on the table and that’s where the risk is there at the negotiations table. Because from what we understand, what we know about the law, is you can actually lose in collective bargaining.” Tr. 864:18–23.

Cornejo discussed management rights after the mandatory subjects of bargaining. Tr. 808:6–19. He explained that “employers have a right to hire, fire, promote, demote, transfer, lay off, or call to work, set the standards of productivity, the services to be rendered.” *Id.* He also told employees “[e]ssentially as long as – as long as a company operates within the confines of the law, they have a right to run their business any way they see fit.” Tr. 808:13–16. To emphasize this point, Cornejo challenged employees to show him a contract that does not have a management rights clause. Tr. 808:16–19.

After a discussion on management rights, Cornejo discussed bargaining further by directing the associates to slide 11 of REX 3. Tr. 808:23–809:17. Cornejo talked about wages and directed associates to Page 6, Paragraph 3 of *The Basic Guide to the National Labor Relations Act*. He again explained that “a company has to sit down, has to negotiate, but the obligation does not however compel either party to agree.” Tr. 809:4–7. He continued explaining that “[d]uring this collective-bargaining process” associates need to understand that “both parties have a legal right to say no, essentially what can happen is the interchanging of this.” Tr. 809:8–11. He also stated “should, you know, party one ask party two, can we have this, party two has a legal right to say yes, no, maybe, or interchange the things that are being negotiated.” Tr. 809:11–14. Cornejo further let employees know “[d]uring this process, there is no time limit to negotiations. Negotiations can go on for months, years. Nobody really knows.” Tr. 809:14–16.

Following this discussion Cornejo transitioned to slide 12 from REX 3 and discussed union dues and he also directed associates to Page 3, Paragraph 2, of REX 1. Tr. 809:19–801:16. He told employees that union security “can be negotiated, and it ultimately becomes a condition of employment for employees. You have to pay to keep your job, essentially.” Tr. 809:25–810:2. Cornejo told employees that dues check-off involves a company taking money from employee’s pay checks and sending the money to the union. Tr. 810:3–810:16. He continued stating “during this time, it’s very possible that the union could give something up that’s on the table to try to get these things.” Tr. 810:14–15.

Cornejo proceeded to the next slide, which was slide 13 of the REX 3 and discussed strikes. He explained to employees that the law controls the conduct of both the union and the company. Tr. 810:21–811:15. Cornejo would direct employees to Page 4, Paragraph 10 of REX 1 and explain that economic strikers “retain their status as employees and cannot be discharged, but they can be permanently replaced by their employers.” Tr. 811:6–8. Cornejo further explained that “there’s risk on both sides here, and the reality is that the – again, employees have a right to know.” Tr. 811:9–11.

Cornejo transitioned from slide 13 to slide 14 of REX 3 and discussed impasse. He explained to employees that “impasse is essentially when both parties try to negotiate, they’ve gone through the whole process, they’ve exhausted all avenues, and at, you know, that point, further negotiations are fruitless.” Tr. 811:20–23. When negotiations reach that point, Cornejo explained “a company is well within their right to – to vet or implement what’s called the last, best, and final offer.” Tr. 811:24–25. He elaborated to associates “[i]t’s the company saying this is what we’re going to give you. You guys have an opportunity to take it or leave it. And the reality is is this can conclude – reduce wages and benefits again during this process.” Tr. 812:2–6. He further told employees as he had previously “[a]nd your benefits can go up, they can stay the same, or they can go down.” Tr. 812:7–8.

The final slide offered associates the opportunity to ask questions, make any comments, or express any ideas they have. Tr. 812:11–13.

2. The CGC’s witnesses offered little specifics regarding statement from Cornejo.

The CGC offered Everardo Jimenez (“Jimenez”) to testify regarding Cornejo’s meetings. He could not identify the date of the meeting nor did he testify regarding who else attended the meeting with him. He claimed, however, that Cornejo asked “why did we want the Union?” and said that “he was going to freeze the – the raises while the Union was there.” Tr. 28: 14, 20–21. On cross, however, Jimenez then completely changed his story and now claimed that Cornejo said “he was going to increase the raises.” Tr. 66:14. He further admitted that Cornejo used a PowerPoint and went through multiple slides, but he said that Cornejo did not talk about labor laws. Rather, he claimed that the meeting consisted of Cornejo saying “he was Angel Cornejo, and that he was there on behalf of Sysco.” Tr. 67:18–19. He further claimed that Cornejo supposedly did not talk about bargaining, but he told employees they would have to pay dues. Tr.

71:1–6. He obviously failed to remember many details of the meeting and could not articulate what occurred.

CGC witness Moises Arreguin (“Arreguin”) further testified regarding what Cornejo allegedly said at this meeting. He claimed that Cornejo asked employees “what was needed,” but when asked “[w]hat do you mean by that” he testified Cornejo “asked about how we were treated at the Company.” Tr. 358: 1–4. He further buttressed Cornejo’s testimony confirming that he told employees that Newport would sit at the bargaining table, employees could lose benefits during bargaining, explaining that the Union could trade benefits during bargaining. Tr. 405:3–406:20

Another CGC witness Edith De Tirado (“De Tirado”) testified that during a meeting on October 4, 2017, which isn’t even identified in the complaint, Cornejo explained that “that all of our benefits would – were going to – were going to be put on the table for negotiations.” Tr. 529:6–7. De Tirado further testified that during a meeting on October 12, 2017,³ Cornejo spoke and De Tirado phrased it as follows, “[h]e spoke about the – about the Union and that – that he was going to – how do you – in other words, everything was frozen, and also the 401K.” Tr. 537:3–5. Here, De Tirado clearly does not quote Cornejo, but rather paraphrases something when she says “in other words.” Furthermore, she can remember nothing else from an informational meeting, but two sentences, which must cause one to approach her testimony with extreme skepticism. All this testimony requires skepticism. None of the witnesses suggested they attended the same meetings as the other, but the CGC tries to imply that each witness corroborates the other. When, in fact, this boils down to Cornejo’s recollection of his presentation to self-serving CGC witness testimony. In the end, your Honor must credit Cornejo.

C. During the Week of October 17, Mike Drury Addressed Employee Questions Posed After the Petition.

After the initial October 9 meeting, Drury meet with employees again. Tr. 1105:16–21. Drury used Respondent’s Exhibit 6 to address questions that came up after the filing of the petition. Tr. 1105:22–1106:2. This PowerPoint presentation reviewed multiple questions that arose during the campaign such as:

- If Teamsters Local 952 get in, will we get more money and better benefits?
- Is it true that under the law, Newport Meat will have to agree to a union contract?

³ This corresponds to complaint allegation 6(f).

- The Teamsters supporters say that because Newport Meat already has a contract with the Teamsters covering the drivers, Newport will have to agree to the same contract terms covering processing and warehouse employees! Is this true?
- Why does Newport Meat oppose the union?
- Is it true that in bargaining, negotiations start where the employees are and can only get better from there?
- What does the company plan to do about the costs of medical insurance?
- Will the union be able to get me better and less-expensive medical insurance?
- Union organizers and union supporters have told us what the Teamsters will do for us if we vote union. When is the company going to tell us what the company will do if we stay nonunion?
- 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?

Drury would review each of these questions one by one and read the slides, with the answers, to the employees. Tr. 1107:2–3, 13–15.

Based on the testimony, it seems that the CGC will try to use De Tirado to claim that Drury solicited grievances during this October 17 meeting. One must first note that despite this being a group meeting where multiple employees attended, the CGC could only muster one witness to establish its allegations. One cannot also miss that De Tirado claimed another witness “Arnolfo” was present at this meeting which begs the question why the CGC did not call this individual. Tr. 542:6.

De Tirado claimed that Drury said “[t]hat he was there to help us, and that he wanted to hear from all of us what – about the problems we were having.” Tr. 542:1–2. She further claimed that Drury stated “he was sorry” and that “he was going to try and fix things. He didn’t say what things. But he asked us to give him a year to be able to – to accommodate these problems.” Tr. 543:14–17. Even though De Tirado testified this meeting lasted “an hour approximately” she claims she could only remembered thirty seconds of the meeting.

During cross-examination she explained that Drury only asked to “give him a chance.” Tr. 575:12–13. De Tirado also confirmed that Drury “didn’t promise to fix anything specific.” Tr. 575:15–16. Rather, “he was just talking generally about wanting a chance.” Tr. 575:17–20.

The Complaint also alleges that on or about October 17, 2019, Newport’s consultant Jara threatened that the Company would reduce employees’ existing wages and benefits by stating that negotiations would start at zero if employees selected the Union as their collective-bargaining representative. Despite multiple people attending this meeting where Jara allegedly made this threat, only one witness, Osvaldo Valdivia (“Valdivia”), testified regarding this.

He said that Jara told employees the following:

That the Union is no good, that – that – that why are you – that why are we going to pay a copay for – you know – you know, the payment, you know, pay – pay the Union if it’s – if it’s no good? And if they negotiate in – in good faith, that he need to – we – we are going to give back – something back to them and start at zero.

Tr. 255:18–24.

The CGC’s convoluted attempt to lead Valdivia’s testimony and establish the validity of the allegations regarding Jara demonstrate Valdivia’s lack of credibility:

Q: Do you recall anything else Simon said at this meeting?

A: I cannot – I can’t remember, ma’am.

Q: Can you remember if he said anything about your benefits?

A: Well, he told us that that is – that – well, that it – that he – that they can freeze our – or benefits.

Q: Did he specify which benefits they could freeze?

A: Well, the 4 – well, the 40K (sic). Like in order for us to receive something, we’ve got to give something back. And he told us that we could – we could lose the 41K (sic).

Tr. 255:25–256:8.

Jara testified that Cornejo presented at all the meetings and he would answer questions. Tr. 863:23–25. He further confirmed that he did not threaten any employees with reduced wages, reduced benefits, or that negotiations would start from zero. Tr. 864:3–11. He further testified that when speaking to employees about potentially losing in collective-bargaining, he would have told them “should you decide to go down that route, at that point everything becomes negotiated – negotiable and is on the table. So there is a risk, again, that you could potentially lose.” Tr. 865:4–7.

D. During the Week of October 30, Newport Provided Employees An In-Depth Review of the Collective-Bargaining Process.

1. John Mitchell discussed the realities of collective-bargaining with employees and the Teamsters' history bargaining with Sysco.

During the week of October 30, Newport reviewed collective-bargaining with employees. The record leaves beyond dispute that John Mitchell, Sysco Senior Director of Labor Relations, discussed bargaining with employees.⁴ Mitchell visited Newport to discuss the “realities of bargaining” with associates. Tr. 959:11–16. He testified that he presented about three or four meetings, but could not remember the exact amount, over about two days. Tr. 959:17–24. Anywhere from 20 to maybe 30 employees would attend the meetings that Mitchell conducted in the conference room. Tr. 959:25–960:10. During the meetings, Mitchell used a presentation entitled: Newport Meats, Winners and Losers. *See* REX 2.

Mitchell would speak at these meetings and Diaz would translate.⁵ Tr. 960:11–16. Mitchell would begin the presentation explaining that he worked in labor relations for Sysco. Tr. 961:14–19. He would then review the slides. He explained that he did not read the slides word-for-word, but rather he would see the bullet points and then discuss it. Tr. 962:13–963:9.

Mitchell first discussed a Sysco location in Alaska. Tr. 962:23–965:8. He explained that the Teamsters won an election in 2010, obtained a contract within a year, but three-and-a-half years later the employees sought decertification. *Id.* The Teamsters, however, blocked the election by filing unfair labor practice charges. *Id.* Mitchell explained to employees what blocking charges meant and the allegations that the Teamsters used to block the election. *Id.* He then explained to employees that the Teamsters blocked the election for 8 months and then walked away from the

⁴ This section addresses Complaint allegations 12(a)–(j).

⁵ Complaint paragraph 10(b) alleges that about October 23, 2017, Drury threatened to freeze employees benefits. Mendoza’s testimony places some of his testimony in or about this time. One cannot determine with any specificity the dates of Mendoza’s testimony. He first testifies of a meeting in October 2017, then says another meeting happened a week later, and another meeting happened a week after that. Tr. 592:8–12; 594:18–21; 597:1–4. He claims that in a meeting with Mitchell Drury said “that he was going to freeze all the benefits.” Tr. 598:21. One can hardly credit this testimony when nothing corroborates any meeting where Drury and Mitchell provided any substantive information to employees together. Furthermore, on cross-examination regarding this issue Mendoza admitted that Drury said “with the Union coming in that raises would not change until the issue with the Union got resolved.” Tr. 633:15–17. While maybe lacking in some precision, certainly that does not rise to the level of a violation of the Act in light of the consistent record testimony that Newport told employees it did not want to give the perception it purchased votes and would pay raises once petitioned got resolved. Tr. 415:17–22; 505:6–9.

voting group before voting. *Id.* Mitchell explained to employees that rather than just walking away in the first place, like the Teamsters could, it collected employees dues instead during that time. *Id.*

Following the Alaska example Mitchell talked to employees about Kansas City that voted in the Teamsters in 2011. Tr. 965:21–966:6. He further explained that the parties negotiated a contract for one year with no agreement and increase in pay or benefits. The slide at this juncture in the presentation states “[d]rivers went **one year** with **no change** in pay or benefits because it can be illegal for a company to unilaterally give unionized employees a pay increase or change their benefits.” REX 2, Page 7, Fourth Bullet Point.

At the end of each example, Mitchell would also read the tag line, “Teamsters win equals Sysco employees lose.” He did so after each example to emphasize the purposes of examples. Tr. 965:9–18.

Following the Kansas City discussion, Mitchell discussed Sysco South Florida. Tr. 966:22–967:23. He explained that in Florida the Teamsters demanded the union pension and health plan. *Id.* Sysco said no to each one of those demands. Mitchell explained that the parties reached an agreement, but that agreement did not have either the union pension or health plan. *Id.* He further explained that following the contract these Sysco associates receive the lowest pay out of all the Florida market operating companies. *Id.*

Mitchell next discussed FreshPoint South Florida. Tr. 967:24–968:12. Mitchell explained that in 2016 these associates choose the Teamsters to represent them. *Id.* The parties have been in negotiations since then. *Id.* He explained that, like in South Florida, the Teamsters demanded a pension and health plan and Sysco rejected those proposals. *Id.* He told employees that the parties still do not have a contract at that location and the non-union employees received a pay increase in September, but the Teamsters represented employees did not. *Id.* He, again, concluded with “Teamsters win, the Sysco employees lose again.” *Id.*

Mitchell then told associates about Sysco Spokane. Tr. 968:17–969:25. He explained that on March 2, 2017, employees voted in the Teamsters. *Id.* At bargaining the Teamsters demanded the pension and the health plan and in response Sysco said “**NO.**” *Id.*; REX 2, Page 11. He explained that the parties still do not have an agreement and Sysco can say no as long as it likes. *Id.* He also told employees “where these end up is anybody’s guess. But so far, the Teamsters haven’t delivered any of the promises that they made to those associates. And again, the usual pay

increases that happen in September did not happen there.” *Id.* He concluded with “Teamsters win, Sysco employees lose, again.” *Id.*

Mitchell then explained that Teamsters have seven wins and associates zero. Tr. 969:22–25. Mitchell also concluded telling employees that other Sysco employees rejected the Teamsters and they have not lost any pay or benefits as a result of negotiating with the Teamsters. Tr. 970:16–21. He testified that he told employees “they have a big decision, right, on the vote. Base your decision on the facts.” Tr. 970:25–1.

After Mitchell talked about the specific examples of collective-bargaining at other Sysco operating companies, Mitchell compared wages of the Newport associates to Palisades Ranch associates. Tr. 971:17–24. Mitchell explained that he would discuss the wage rates that the associates in a certain classification earned at Newport against the wage rates employees in the same classification at Palisades Ranch earned. Tr. 971:17–972:14. He testified that he told employees “this is not to say what Palisades has you get. This is to say this is what you have currently. And, this is what, through collective-bargaining, Palisades associates negotiated for themselves with the help of the Teamsters.” Tr. 972:10–14.

Mitchell covered an in-depth comparison of each classifications’ pay “because, obviously, in the audience are not just meat cutters, there are different classifications of associates who may be interested in their circumstance.” Tr. 973:13–15. Following the discussions of the pay, Mitchell “talk[ed] about the benefits, holidays, vacation, sick leave and retirement.” Tr. 973:21–25. He explained that he “would go through these pretty quickly, saying look, on the left is what you get at Newport. On the right is Palisades gets, right, eight holidays verses seven; on the vacation, the max five weeks, where the max four weeks over in Palisades; sick leave; five days verses four days.” Tr. 974:1–10. He further highlighted that Newport associates have “401(k) and Palisades has no retirement.” Tr. 974:6–7. Mitchell did this “to draw the distinction between what they were able to negotiate through collective-bargaining and what you currently have before any of that happens.” Tr. 974:8–10. Indeed, Mitchell painstakingly compared and contrasted the benefits of associates in different classifications and of different tenures at Newport and Palisades Ranch. Tr. 975:11–980:5.

After reviewing the Newport associates compared to Palisades Ranch, Mitchell used Fulton Meat company, another unionized Sysco operating company in Portland, Oregon, to show the difference between bargained wages and benefits to Newport’s potential benefits. Tr. 980:6–

981:14. Fulton Meat associates constituted two of the thirty-two PowerPoint slides. At the conclusion Mitchell did state he read verbatim the final bullet point on Page 32 of REX 2 that reads “to guarantee you’ll not join the list of losers above on November 9th – VOTE NO!. . . .” Tr. 981:10–16.

Mitchell closed the presentation with some final words that did not appear on the PowerPoint. He explained “I do this all the time, I’ve been invited by the Company. In the event that you do choose the Union to represent you, I’ve been invited to come in and bargain that collective-agreement with the Union and your bargaining committee.” Tr. 983:14–17. He then made clear to associates, “when I do that I represent the company. I do not represent you.” Tr. 983:17–18.

Mitchell presented a tough straightforward message to employees that disabused them of the belief that just because they may be the best meat cutters that does not mean Newport cannot function without them. Indeed, Mitchell told employees, “[a]nd so when I sit across the table from you, I’m not interested in all the things about the best and – all those kinds of, you know – those kinds of things. I see a market of meat cutters and selectors and trimmers.” Tr. 983:19–22. He continued on this subject, stating “I see a market and I have to evaluate the market and I have to decide as part of the strategy how am I going to bargain a collective-bargaining agreement with the Union, knowing what I know about the market.” Tr. 983:22–25.

Mitchell informed employees “when I’m evaluating the market, I look at places like Palisades, it’s another Sysco company, and they were able to hire people there and pay them what we pay them pursuant to the contract, and it – and so informs the company’s position when we go to bargain collectively.” Tr. 984:1–5. He continued telling employees, “I know that you do the same exact work, we sit down and we bargain as if, you know – what is going to take to ensure that the company continues to service the customers.” Tr. 983:6–9.

This message continued informing associates about what, if any, contract exists at the time of an initial agreement. Mitchell told associates “look, and when we do that, when we do that sitting down, you know, there is no collective-bargaining agreement, it’s an initial agreement, you know, the terms are here, there’s none.” Tr. 984:12–15. Holding a blank piece of paper up, Mitchell told associates “[b]oth parties put proposals on the table and as those – you know, as those proposals are agreed to, they begin to populate what was a blank contract, and it develops into a contract.” Tr. 984:16–18; 1113:14–21. Mitchell did explain collective-bargain clearly to

employees saying “[n]ow, the only ones that get to go into the contract are the ones that both parties agree to.” Tr. 984:19–20; 1113:4–11.

After explaining that employees do not have a contract upon certification and that they indeed must bargain that, Mitchell explained the realities of parties not agreeing. He told associates “one of the powers that the Union and the bargaining committee and associates have is the economic power of striking. And in the event that you’re not satisfied with what we are proposing and we’re not moving and you’re not moving, you have the ability to strike.” Tr. 984:21–985:1.

Mitchell continued this unvarnished message about collective-bargaining, telling associates that “[a]nd if you do, the company can and will continue to service customers. The company – and will do that either by hiring temporary or in some cases permanent replacements to do the work. And the other option is to move work from one company to another company. . . .” Tr. 985:1–6. Indeed, he made this point completely clear by explaining “in this case Palisades, the company can move percentages of work from Newport to Palisades, have the work done over there, and it can be moved back to Newport and then continue to process.” Tr. 985:6–9. At the end of the presentation associates understood, “to the extent that we can’t hire enough associates to do the work, we can move the work elsewhere.” Tr. 985:10–11.

No doubt this message shocked employees. The Teamsters certainly did not take the time to explain the realities of collective-bargaining to employees. Diego Medrano (“Medrano”), a witness for CGC, left this point entirely clear:

Q: Okay. Now, in or about late November, employees heard this meeting from John Mitchell, right?

A: Yes.

Q: So for you that was pretty hard to hear that in negotiations I can lose wages and benefits, right?

A: Yes.

Q: The Teamsters didn’t tell you that could happen, right?

A: No, they hadn’t told us.

Tr. 449:12–19.

Likewise, on cross-examination, CGC Witness Raul Mendoza (“Mendoza”) plainly answered “yes” when asked “did you believe that John delivered a pretty strong message?” Tr. 636:14–16. Furthermore, on cross he confirmed that it “was a difficult thing to learn about the possibility of being able to lose so many benefits during collective bargaining.” Tr. 642:14–15. Indeed, Mendoza confirmed that Mitchell told employees the following:

- He would be negotiator;
- “he would come and meet with the Union to bargain”;
- “he was only interested in pursuing the best interests of the company”;
- “he wanted to get the best deal for the company”;
- “everything was going to be on the table for negotiations”;
- “the Union and the company would come to the table to bargain”;
- “they would start with a blank contract that didn’t have anything in it”;
- “in order for something to get into the contract, the Union and the company had to agree to it”;
- “the Union could ask for things, and the company could say, we’re not prepared to give you that”;
- “in collective bargaining you can receive less benefits”;
- “during collective bargaining it was possible for employees to receive less holidays”;
- “employees went over a year with no change in pay” during collective-bargaining at another Sysco facility;
- Employees “went over a year without any change in benefits” during collective-bargaining at another Sysco facility;
- “during collective bargaining nobody could predict how long it would take to negotiate a contract”;
- “there had been locations that have been negotiating for years”;
- “sometimes parties during collective bargaining cannot come to an agreement”;
- When parties cannot agree “sometimes a strike is a possibility”;
- A strike “would not be good for employees” and a strike “wouldn’t be good for the company either”;

- “if there’s a strike, it was possible to bring in replacement workers”;
- “if the strike got so bad and the effects were so bad, the company could even have to close”; and,
- “if there was a strike and it was necessary, the company could send work to other locations to ensure that they can operate the business during the strike.”

Tr. 636:14–642:17.

Finally when asked “that was everything that was said during that meeting with John Mitchell” Mendoza answered “correct.” Tr. 642:18–20

2. The CGC’s witnesses failed to offer sufficient evidence that Mitchell made any unlawful statements.

The CGC first presented Jimenez to discuss Mitchell’s meetings. On direct examination he testified that “the salary raises would be frozen, and if we voted for the Union, they were going to start removing all the benefits we had.” Tr. 40:5–7. He further continued, stating that “while the Union was there, that he was going to be negotiating. And if we voted in favor of the Union, he was going to start from zero, start lowering our – our salaries, and to take away for [sic] benefits.” Tr. 40:17–20. Finally, on direct, without providing any real further context to this testimony, Jimenez testified that Mitchell told employees “if there was a strike, that he was – he was going to send the work to other companies, and that he had the right to close the Company if he wanted to.” Tr. 41:24–42:1.

Cross examination shed a totally different light on Mitchell’s meeting with employees and Jimenez’ testimony. Jimenez reviewed the PowerPoint that Mitchell undoubtedly used with employees and admitted he used it. Jimenez confirmed that Mitchell talked about the Sysco operating companies in Alaska, Kansas City, South Florida, Spokane, and Palisades Ranch. Tr. 96–112. He testified that Mitchell discussed multiple locations that did not get better health insurance or a pension after organizing with the Teamsters. *Id.* He further confirmed that Mitchell explained to employees that through collective-bargaining employees can end up with lower wages than they currently have. Tr. 104:21–105:6.

Jimenez, like other employees, were shocked to learn what Mitchell explained to them. Indeed, he testified that “I didn’t know that they can lower the salary,” even though that is a legitimate possibility of collective-bargaining. Tr. 109:15. He further testified that he “found it

hard to believe” that “through this process employees could end up with less than they have now.” Tr. 109:21–24.

In addition, while Jimenez claimed on direct examination that Mitchell stated that they would start from zero, he admitted as follows during cross examination:

Q: So he told you that you were going to start with a blank contract during bargaining, right?

A: Yes.

Tr. 112:4–6.

Another CGC witness, Moises Arreguin, testified that Mitchell said “he didn’t care about the titles of the people that were working at Newport, that if it was possible, he was going to lower all our salaries to the minimum, and if the Union came in, they could send meat to other companies if it was possible.” Tr. 373:1–5.

Arreguin continued, stating that Mitchell said “during the negotiations with the Union, everything was going to be frozen, the 401 – the 401(k) and the interviews on the anniversaries, and there wasn’t going to be anything for the employees.” Tr. 373:12–15.

CGC Witness Pedro Luna (“Luna”) testified that at one of Mitchell’s meetings he allegedly told employees negotiations could take up to two years and that during that time Mitchell allegedly said that the Company would freeze their benefits. Tr. 142:18–24. He further claimed that Mitchell told them he could “dictate the production of cutting out to other companies. And he also said that he could even close the company if we didn’t have an agreement.” Tr. 143:8–10.

This testimony, in light of the clearly established facts, speaks volumes to Luna’s credibility. He remembered that Mitchell used a PowerPoint and talked about other Sysco locations, but he could not remember the locations themselves, or the undisputed discussion regarding bargaining or Palisades Ranch and other locations. Tr. 202:6–18; 202:24–204:7; 210:15–19. Your Honor simply cannot credit this testimony.

Another CGC witness, Jose Martin Lopez Contreras (“Contreras”), offered testimony consistent with Mitchell’s testimony. Contreras stated that Mitchell told employees “if the Union’s coming in, everything had to negotiating.” Tr. 467:25–1. He further stated that Mitchell told employees “if we go out on strike, he’s going to bring people another companies to do our jobs.” Tr. 468:4–5. Contreras continued stating that Mitchell told employees “everything going to – it had to be negotiated or negotiate.” Tr. 468:8–9.

On cross-examination Contreras confirmed that Mitchell explained that bargaining could take “years.” Tr. 494:21. He also told employees how the Teamsters makes bargaining requests and the Company said “no.” Tr. 495:2–5. Contreras also confirmed that Mitchell said he cannot “make changes without coming to an agreement with the Union.” Tr. 496:7–10. Mitchell, according to Contreras, further told employees that he “would negotiate as long as it takes to get a contract.” Tr. 496:13–19. He also explained to employees that they can strike, but Company can hire replacements and continue to run the business. Tr. 497:2–12.

De Tirado also testified regarding a meeting with Mitchell. She explained that he said Newport would negotiate the contract. She claims that he said “everything that was going to be put on the table in terms of – the negotiations for us was going to start at zero, included – that included benefits and everything that – that we had as benefits.” Tr. 551:2–6. This was the only main statement that De Ttirado could remember on direct even though Mitchell’s meeting allegedly lasted an hour. Tr. 551:10–11.

On cross-examination, De Tirado admitted that Mitchell said during negotiations everything would be on the table, wages, insurance, 401(k), vacation days, sick days, floating holidays, employees could lose benefits during negotiations, and negotiations could take a long time. Tr. 580:15–581:11, 581:25–582. Mitchell also told employees that they could strike, but the Company would have to cut meat and they would hire replacements if necessary or send the work to Palisades Ranch. Tr. 582:6–16.

The CGC will likely reference the testimony of Medrano to claim that Mitchell threaten employees with plant closure. Tr. 325:4–16. The CGC will also almost undoubtedly cite Medrano’s testimony to claim that Mitchell told employees that bargaining would start from zero. Tr. 324:4–8. However, Medrano’s testimony on cross-examination provides great clarity to the brief claims he made on direct examination.

On cross-examination, Medrano testified that during negotiations everything is put on the table. All employees wages and benefits. The Company would come with the things that it wants and the Union would come with the items that it wants. The parties start with a blank contract and items only get put into the contract when they agree to an item. Sometimes parties cannot come to an agreement and when that happens the Union can strike. If a Union strikes, the Company has the ability to hire replacement workers or move the work elsewhere. Tr. 444:14–446:13.

In explaining life with potential negotiations, Mitchell, according to Medrano, also told employees about other Sysco locations. Medrano remembered Kansas City where they negotiations occurred over four years and employees did not get wage increases. Medrano testified that he understood that to mean that could happen at Newport. He did not, however, offer any testimony that Mitchell said that would happen at Newport. Tr. 447:5–448:22.

E. In or About Late October or Early November, Van Voorhis Spoke With Employees About the Health Insurance Subsidy.

In October 2015, Newport needed to join the standard benefit plan for HMO. Tr. 1018:23–1019:10; 1108:2–8. A move to the standard benefit plan would have resulted in approximately a 90% increase for those employees on the HMO. Tr. 1018:23–1019:10; 1108:2–8. VanVoorhis did not want to pass on that increase to employees and consequently in 2015, with help from Drury, invented a subsidy for those employees on the HMO plan. Tr. 1018:23–1019:10; 1108:2–8. Newport would deduct the cost of the insurance from employees’ paychecks, but add money back on to employee paychecks to minimize the price increase. Tr. 1018:23–1019:10; 1108:2–8.

In determining the amount of the subsidy, Newport would consider the health rate, the health rate program, look at the increase costs to the HSA, PPO, and other insurance plans, and market fluctuations. Tr. 1019:16–23; 1108:23–1109:4. Newport further considered the Company’s earnings. *Id.* By considering these different matters, the subsidy rate changed each year. Tr. 1019:24–1021:7; 1109:5–8. Indeed, the subsidy changed in 2016, 2017, and 2018. *Id.* Usually these decisions occurred in October and November of each year. Tr. 1021:12–17.

Thus at ending of October and beginning of November 2017, VanVoorhis held a meeting with employees to discuss the subsidy for the upcoming year.⁶ Tr. 1021:18–1022:16. Like her

⁶ Complaint allegation 8(d) alleges that VanVoorhis threatened to cancel salary increases and reviews if the employees selected the Union as their collective-bargaining representative. The testimony of Diego Medrano best corresponds to this allegation. He, however, admitted “I don’t remember the date” of the meeting and only recalled it happened in “October.” Tr. 309:12–17. He claimed that during a meeting in the kitchen in October that VanVoorhis said “the salaries were going to be cancelled.” Tr. 311:12–13. In response to an employee questions about performance reviews during this same meeting, VanVoorhis said “[t]hat his review was going to be evaluated but that she was not going to talk about the salary.” Tr. 311:21–13. Despite the meeting lasting twenty-minutes, Medrano only managed to remember like thirty seconds of any specific comments. Tr. 312:10–13. In light of the script that VanVoorhis used during these meetings, your Honor can hardly credit this testimony as these statements have no connection to the meeting and Medrano admitted that he remembers his thoughts and impressions from meetings, but did not remember specific statements word-for-word. Tr. 427:17–428:1. As to these specific allegations, Medrano admitted that VanVoorhis actually told employees “that employees would not get raises *at that time*, because the Company did not want to influence the results of the election.” Tr. 438:5–8. He further added “[a]s long as there was the Union

previous meetings, VanVoorhis used a script. Tr. 1022:17–19. With Diaz translating to Spanish, VanVoorhis read Joint Exhibit 1(e), which reads:

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.

As you know, Newport prides itself on providing, and always has provided, top quality medical coverage as affordably as possible for this area and our business. With or without a union, we intend to follow this policy. There has never been a need for any person from the outside to put pressure on us to have the best, most affordable insurance coverage and the best total compensation we can.

This is a serious issue. Our lawyers have also advised that any questions about this issue must be directed to and answered by a very few people so no one hears a different answer. Therefore, if you have questions, please see either of us (Denise or Mike). Our supervisors have been instructed NOT to discuss this specific issue with anyone and to invite you to speak with us.

TR. 895:2–24; 1022:20–1023:18.

VanVoorhis testified she only read from the script “[b]ecause I didn’t want to say anything that would be appearing to be unlawful.” Tr. 1023:13–15. Diaz similarly testified that he only read from the script. Tr. 895:22–24. Like the other meetings, VanVoorhis held this meeting multiple times to ensure to attempt to reach the maximum amount of employees. Tr. 1023:19–22.⁷

petition,” which reinforces the message Newport presented: the Company did not want to unduly influence the election by the differing wage amounts. Tr. 438:10.

⁷ Contreras testified that during this meeting VanVoorhis stated “they can lower by half for value – for the people – in the office. And some are asking why and she say we’re not the ones bringing the Union.” Tr. 473:10–12. This

Multiple CGC witnesses further confirmed that the Company held this meeting and distributed Joint Exhibit 1(e) and some also testified to receiving Joint Exhibit 1(d) too. *See* 148:2–8;⁸ 441:11–23; 548:11–549:12;

De Tirado made clear that Drury “said he can’t give you a number because it would be against the law. . . .” Tr. 578:17–19. She further confirmed that, consistent with the Company’s attempt to avoid the appearance of buying votes, that “the Company told you that because of the Union election it couldn’t decide what it was going to do with respect to your insurance costs.” Tr. 578:18–21.

F. A Couple Days Before November 9, 2017, VanVoorhis and Drury Spoke With Employees About the Upcoming Election.

A couple of days before November 9, 2017, VanVoorhis meet with employees again to speak with them before the election. Tr. 1024:3–8. Diaz testified that he translated this meeting for VanVoorhis and Drury and read from a script that he prepared, which translated VanVoorhis’ English script. Tr. 896:7–899:8. Diaz opened the meeting with the following:

Thursday is a big day for all of us. Before Mike and I have a few last words, I am going to go over the voting procedure which will be followed on Thursday.

[Diaz reviewed Respondent’s Exhibit 7]

As you know, I grew up part of Newport. My dad, many of you know him as Don Roberto, worked with Newport for _____ years. Don Roberto retired _____ years ago in 20____.

I am very proud to be with Newport and to step into my father’s shoes. I’m another Roberto Diaz -- part of the Newport family - - working to help make the future of our company a great one. While I’m not doing the same job as my

single fragmented statement from a 45 minute meeting hardly represents credible evidence of VanVoorhis’ statement. Indeed, at the beginning of his testimony Contreras admitted he had not heard this information regarding the union before, he cannot remember everything said at the meetings, he can remember the thoughts or impressions in his head, but he cannot separate what he actually heard from what his co-workers told him. Tr. 491:13–492:16. In this regard, one must credit VanVoorhis and Diaz on these meetings rather than a witness that can only remember alleged small fragments of statements and also admits he remembers his thoughts or impressions rather than what a speaker actually said.

⁸ While Pedro Luna testified that he received Joint Exhibit 1(d), he testified very broadly that Van Voorhis allegedly “talked to us about the benefits” and that “they were going to be reducing our medical insurance.” When asked the motivation that VanVoorhis explained to the employees, Luna could not remember and as said “[j]ust to help, I guess,” even though VanVoorhis read from Joint Exhibit 1(d) and he admitted to receiving it. Tr. 149:7–12.

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 and Mike. This whole union campaign process has put my learning about you and your concerns and issues into overdrive. I am fortunate to be here at this time — if everything were perfect her, then there would be no reason for me to be here. 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 really accomplish.

Thank you. I am asking for your vote against the Teamsters because I know that will be the best vote for you and a “NO” vote will give me the best opportunity to show you what I can do for and with you. Now, I will turn the meeting over to Mike.⁹

Tr. 906:13–907:8; GC Ex. 10.

Drury likewise testified that he read from a script at this meeting. Tr. 1115:5–12; GC Ex.

10. Following Diaz, he read as follows:

Thank you, Roberto. We are happy to have you on the Newport team. When we get the union vote behind us and there is a big NO VOTE, you will finally be able to do your job the way we know you want to.

At this time, we want to take a few minutes to show you a video which pulls together some of the points we have made over the past few weeks. A copy of the video was sent to each of your homes, and hopefully, you were able to view it with your family. For those of you who have already seen it, this will be somewhat repetitive, but some important points are made in the video, and we wanted to show it again.

[Show Video]

Now, we are in the last couple of days before the election. This week, on Monday and Tuesday, Denise and I have met with every employee we possibly could. The meetings occurred because several people said they still had questions, particularly about the big reduction in the medical insurance premium which was announced last week for the administrative group. Also, last week, there was a meeting which I called on Friday. Some of you wanted to have a chance to discuss the union issue among yourselves and reach a consensus on what you were going

⁹ The record demonstrates that this is only time that Diaz conveyed a message from him rather than translated the message for another speaker.

to do in the election. This meeting happened among the day shift, mainly the portion department employees.

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. The message I got from many of you after that meeting and on Monday and Tuesday of this week is that you do not want to take a chance on losing in bargaining the way other Sysco employees have when they made the Teamsters their bargaining agent. You told me that you didn't want to risk everything you have now and put in jeopardy your future with Newport.

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 can start almost immediately.

*One last thing. I have learned a lot more about you and what some of the conditions you face day in and day out during the last 5 weeks than in the last 5 years. We should have not been that far out of touch with you, and I wish we had not gotten to this point. We can't change the past, but we can learn from our mistakes, and we can move forward from here. We can move in a better direction in the future. The first step is yours -- give us a chance by a big NO VOTE on Thursday, and, then, I will lead the way with Denise and Robert, the rest of the way.

Thanks for your support, and I ask you to VOTE NO for me, for yourselves, and for your families to protect your pay and benefits and for our future together.

** It's clear that a majority of you have decided to VOTE NO, and I am truly humbled by that. I know we have to earn your trust and confidence every day; I'm committed to doing just that.

At the same time, I have been told there are a few who are determined to be for the Teamsters. I want to say a few words to those employees. I really want you to reconsider your position. You have seen and heard the facts we have presented. I think you know that the union has not told you the truth and would like nothing better than for you to stop listening. I hope you don't do that. Your friends and co-workers have seen and heard the same facts you have, and they have decided to give me -- us -- a chance.

No one will know how you vote. Please - do what is right for yourself and your families, and VOTE NO. Nothing you have said or done up until this point has irreversibly committed you to the Teamsters -- everyone -- and that includes those of you who may still somehow believe that having the Teamsters in here will be in your best interest --has the right to vote “NO”.

VanVoorhis concluded the meeting tell employees:

In our meetings yesterday, we had several employees who asked about the cost of medical insurance. Specifically, they asked if the Company plans to put in the same insurance plan, which we just announced for the admin/office, if the vote is against the Teamsters. This is an issue which continues to be misunderstood.

As we have said on multiple times, companies -- like Newport -- are not permitted to make any promises during union organizing campaigns, and we are not making any promises of what we will do or not do after the election. 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.

On behalf of all management, we thank you for the attention which you have given to this most-important matter, and we urge you to vote “NO” against the Teamsters in the NLRB election tomorrow. This is the last opportunity we have to talk to you about the union in a group setting, but if you have any additional questions about the union, the Company, or the election, we will be glad to meet with you on an individual basis right up until the time you are scheduled to vote.

Tr. 1024:9–1025:6, 1025:13–14, GCEx10.

G. On November 9, 2017, VanVoorhis Spoke With Employees About the Teamsters Blocking the Petition.

On November 9, 2017, after the Teamsters filed blocking charges, VanVoorhis spoke with employees again. Tr. 1027:4–12. Just as she had done in all her previous meetings, VanVoorhis read from a script and Diaz translated. Tr. 1027:10–1028:12. VanVoorhis told employees.

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. Those cards are 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 probably 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 out and leave all of us alone. The Teamsters had their chance to legitimately win your support in an election, but they chose to disrespect you and your rights and to drag this matter out as long as they can. The Teamsters know that, if they allowed the election to take place, you were going to vote overwhelmingly "NO" union. The Teamsters' answer to your decision to vote' against them — no election.

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, wewould 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.

GCEx. 2

Again, VanVoorhis explained that she read from this script "[b]ecause I did not want to say anything that was unlawful or anything that could be viewed as an unfair labor practice." Tr. 1029:19–21.

In regards to this meeting, Arreguin testified only that “we have to ask them – ask for them back in order to reject the Union.” Tr. 376:15–18. De Tirado testified that VanVoorhis told employees “she was going to give these papers to – so we could receive our blue cards, that so that we would sign it.” Tr. 555:7–10. On cross-examination, however, De Tirado admitted that VanVoorhis said she “can’t tell you what to do or not do with respect to the Union, but that you could write a letter to the Union asking for your card back.” Tr. 583:16–19. She also said that VanVoorhis said she’s “not asking you to do anything or telling you to do anything.” Tr. 583:20–24.

H. On or About November 15, 2017, Newport Addressed the Insurance Subsidy With Employees Again.

Ultimately, the employees in voting group did not receive the subsidy at the time because Newport wanted to avoid the appearance of buying votes. Tr. 1030:1–13; 1110:24–1111:6. Newport consistently tried to inform employees about these issues and VanVoorhis held another meeting after the Region blocked to election to speak with employees about this issue. Tr. 1030:14–1031:7. She read from a script, with Diaz translating, that read:

As you know, at this time of year we being 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 cost of healthcare in 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 in the voting unit.

This delay is required to avoid the appearance of vote-buying by Newport in view of the fact the NLRB ***will no doubt reschedule the election for a later date.*** Our lawyers have advised us that announcing the amount of a new subsidy at this time might be considered illegal (an unfair labor practice) and that we should not take this risk.

As you know, Newport prides itself on providing, and always has provided, top quality medical coverage as affordably as possible for this area and our business. With or without a union, we intend to follow this policy. There has never been a need for any person from the outside to put pressure on us to have the best, most affordable insurance coverage and the best total compensation we can.

This is a serious issue. Our lawyers have also advised that any questions about this issue must be directed to answered by a very few people so no one hears a different answer. Therefore, if you have questions, please see either of us (Denise or Mike). Our supervisors have been instructed NOT to discuss this specific issue with anyone and to invite you to speak with us.

Id.; GCEX 13 (emphasis added).

I. Martinez Did Not Act as an Agent for Newport.

Jonathan Martinez (“Martinez”) worked at Newport for about thirteen years at the time of the events at issue. Tr.713:18–19. Like other employees, Martinez attended multiple union meetings and even signed a union authorization card. Tr. 714:10–21. At some point during the organizing drive, Martinez wanted employees to have the ability to get together and speak. Tr. 722:7–723:7. Martinez and a co-worker wanted to allow all employees to come together and “have everybody’s thought.” Tr. 722:24–723:7.

Martinez spoke with Drury in his office to discuss having an all employee meeting. Tr. 723:8–25. Drury suggested that the employees hold the meeting off Company property, but Martinez explained “that it was hard” to gather “outside the company, which is – we have different shift.” Tr. 723:21–23. Drury testified similarly stating, “I encouraged him if he wanted to have a meeting, feel free to have the meeting, but have it off site. He said that he – he didn’t think that they would be able to get the employees together. Once work happens, people scatter.” Tr. 1117:6–13. After explaining the difficulty, Drury told Martinez he would consider it. Tr. 724:1–5. At no time during this meeting did Martinez tell Drury anything about this union support. Tr. 724:14–24. Drury did not know whether he did or did not support the union either. Tr. 1116:25–1117:2.

Drury explained that “after for – some thought, we allowed him to have the meeting, pull the meeting together on site.” Tr. 1117:11–13. Drury told Martinez that they could have a meeting that would last 15 to 20 minutes. Tr. 725:10–21.

Employees met on the second floor to discuss their positions on the petition. Tr. 725:22–25. At the beginning of the meeting, Drury addressed the group and left. Tr. 1117:14–17. Drury read from a script that stated as follows:

May I have your attention please?

I will not give a speech or take up too much time. Please continue serving yourself and eating, so we can get back to work at a reasonable time.

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 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.

Evidently, you guys are the ones who have an open mind and are willing to decide on the facts and what is best for each and every one of you.

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 want to remind you, as I have many times before — don't vote one way or the other because someone tells you do so, do what is in your own best interest. If you vote for the union because someone told you to and there is strike which lasts for a month or two or even longer, I think you know that "someone" will not pay your bills or feed your family.

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. And you know that your vote is SECRET and the secrecy is guaranteed by the federal government.

Finally, be respectful to one another. Don't let just one or two people be the only ones who speak in your meeting.

Any questions (pause)?

Okay, no questions, Denise, guys let's leave. Please wind this up guys in 15-20 minutes.

Tr. 1117:18–1118:4; GC Ex. 16.

The record makes clear that multiple employees attended the meeting, that Martinez spoke at the meeting, and that other employees voiced support for and against the union at the meeting. Tr. 725:22–727:11. Martinez never received any agenda from management for this meeting. Tr. 727:14–728:13; 1118:18–1119:6. The meeting lasted about 20 minutes. Tr. 730:3–5; 1119:13–21. The record completely lacks any evidence that Newport limited what employees could say at this meeting. Tr. 1119:3–4.

While the employees discussed the union at the meeting, Martinez explained that he did not circulate any documents at this time. Eventually, however, Martinez did circulate documents. Martinez found letters on the Internet that stated the following:

Dear Mr. Kelly:

I am an employee of Newport Meat Company, and I was scheduled to vote in the NLRB election on November 9. As I understand it, you are the Teamster official who filed the election petition, and I assume you are one of the Teamsters who made the decision to block the election and not allow us to exercise our right to vote.

We the employees of Newport Meat are no longer interested in having the Teamsters represent us, and had we been given the chance, we were going to vote overwhelmingly against the Teamsters in the election.

We demand that the Teamsters honor our choice and our wishes and do whatever is necessary to immediately reschedule the election. If you cannot get the election rescheduled immediately, we demand that you withdraw the election petition.

GCEX2; Tr. 734:6–13.

Martinez explained that he searched on the Internet for “ways to stop the union” and that “we find out that this is – there were samples that you can sign and send.” Tr. 734:12–17. Once Martinez and two other employees found these letters, they passed them out. Tr. 734:18–24. Martinez stated specifically he passed them out “when I had the opportunity.” Tr. 734:25–735:2.

After Martinez and others started to pass out the letter they told Drury about what they found and wanted to do. Drury told Martinez that the Company could not help him and they had to pass those out on their own time. Tr. 735:3–736:15. Drury also told Martinez that the employees had to pass out the letters on their own time. Tr. 736:17–737:9. Martinez further confirmed that neither VanVoorhis nor Drury asked Martinez to collect signatures. Tr. 737:22–25. He also confirmed that no one from management asked him to distribute the letters. Tr. 737:18–19. The CGC could not offer any witnesses that had any first knowledge of any such direction, but rather only offered witnesses that stated they had no first-hand knowledge that

J. Newport Lawfully Postponed Granting Wage Increases During the Pendency of the Election.

No dispute exists that Newport annually performed performance reviews and during that time employees could receive wage increases. Tr. 1034:14–1035:5; 1122:4–1122:9. The record

also makes clear that employees did not all receive performance reviews at the same time. Tr. 1034:17–20; 1035:6–14. Rather, Newport endeavored to give employee performance reviews during the pay period of the person’s hire anniversary date. Tr. 1034:14–20, 1035:6–14.

At the time of the employee’s performance evaluations, their performance review and the supervisor’s assessment, and sometimes the supervisor’s manager, would determine the employee’s performance review. Tr. 1034:21–1035:5; 1122:18–21. Indeed, Newport did not use a specific formula to determine employee merit increases. Tr. 1034:21–22.

One CGC witness, Diego Mendoza, testified that he worked at Newport for ten years and received a performance evaluation every year. Tr. 435:19–25. He further testified that he would regularly get a raise. Tr. 436:1–2. He made clear, however, that the raise varied every year and that the performance evaluations influenced the wage increases. Tr. 436:3–4; 436:14–23. He further explained that supervisors and their performance evaluations differed. Tr. 436:437:18. Mendoza succinctly stated supervisors “do not evaluate the same way.” Tr. 437:18–6.

Another CGC witness, Jose Contreras (“Contreras”), testified that he had worked at Newport for 25 years. Tr. 501:10–16. Contreras testified that for 25 years he received a performance evaluation and during those 25 years he had “gotten a different wage increase every year.” Tr. 501:17–24. In fact, he said “[y]ou can get anything.” Tr. 502:2–3. He even confirmed “you might even get nothing.” Tr. 502:4–5. Contreras confirmed that this wide variation of merit increases “is all based on the performance evaluation.” Tr. 502:6–8.

Because of the wide variations in increases, Newport sought to avoid the appearance of buying votes after the Union filed the election petition. Arreguin confirmed that Newport told employees “while this process was playing out, that it couldn’t make changes, like increasing wages or giving better benefits because it didn’t want to appear to like it was trying to buy your vote.” Tr. 415:17–22. Contreras also testified that VanVoorhis told employees that with petition pending “we can’t do something that’s going to look like we’re trying to buy your vote.” Tr. 505:6–9. Likewise, VanVoorhis testified that they did not give wage increases in close proximity to the election “so that it didn’t look like we were buying votes.” Tr. 1069:5–6.

In fact, after the Union blocked the election and it became clear that an election would not occur any time in the near future, Newport resumed granting wage increases and retroactively paid those employees that did not receive pay increases before the previously scheduled election. Tr. 1035:20–1036:11.

K. Newport Lawfully Transferred Raul Sanchez.

Raul Sanchez (“Sanchez”) worked at Newport as a supervisor in one of its portion rooms. Tr. 1121:10–14. In that position, he oversaw employees in the portion department. After the petition Newport received complaints about Sanchez. Drury testified that Newport was “surprised about some of it specific to Raul.” Tr. 1121:21–22. At the same time, Drury, Area President over multiple facilities, knew another one of his companies sought “additional talent to help them with their production room and – and portion cutting.” Tr. 1121:25–1122:1. Drury explained “[s]o there was an opportunity for me to – to have Raul work with Palisades.” Tr. 1122:1–2. As a result, Drury took the opportunity to have Sanchez work at Palisades and fill a need within his market. Tr. 1156:3–12.

L. Newport Lawfully Withheld Granting A Subsidy Increase to Employees.

In October 2015, Newport joined a standard benefit plan for HMO. Tr. 1018:19–1019:10. Joining that benefit plan would result in a 90% cost increase to employees on their HMO plan. *Id.* VanVoorhis did not want to pass that cost on to employees nor did Drury. *Id.* After exchanges with the benefit department, Newport determined that it could stop passing on a 90% increase to employees through a subsidy. *Id.* Employees would pay the cost of the insurance, but Newport could add an “addback as a payroll deduction” on employee paychecks to minimize the increase on the insurance rates. *Id.* Only employees on the HMO at 2015 would receive this benefit. *Id.* Any new hires starting after January 1, 2016, would not receive the subsidy and if an employee had not already selected the HMO plan they did not receive the subsidy. Tr. 1020:23–1021:2.

From year to year, starting January 1, 2016, Newport then determined the subsidy. For instance, Newport considered the cost of the plan, increased costs on their other health insurance options, market costs for health insurance, and Newport’s earnings. Tr. 1019:16–1020:1. In or about October of each Newport would take this information and determine the subsidy amount. Tr. 1021:12–17. The subsidy contribution has changed from year to year. Tr. 1020:2–4. For example, the subsidy contribution for 2017 decreased slightly from 2016. Tr. 1020:13–18. In 2018, the subsidy increased. Tr. 1021:6–7.

On or about January the 2018 subsidy went into effect. Tr. 1054:23–105:5. All the office staff received the subsidy increase. Newport did not pay the subsidy increase to voting unit employees because it did not want to appear that it attempted to buy employee votes. Tr.1030:1–13; 1110:24–1111:6.

Newport never told employees that they would not receive the subsidy increase. Rather, Newport informed employees that it delayed the decision until after the election. Specifically, the Notice to employees said:

As you know, at this time of year we being 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 cost of healthcare in 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 in the voting unit.

This delay is required to avoid the appearance of vote-buying by Newport in view of the fact the NLRB will no doubt reschedule the election for a later date. Our lawyers have advised us that announcing the amount of a new subsidy at this time might be considered illegal (an unfair labor practice) and that we should not take this risk.

As you know, Newport prides itself on providing, and always has provided, top quality medical coverage as affordably as possible for this area and our business. With or without a union, we intend to follow this policy. There has never been a need for any person from the outside to put pressure on us to have the best, most affordable insurance coverage and the best total compensation we can.

This is a serious issue. Our lawyers have also advised that any questions about this issue must be directed to answered by a very few people so no one hears a different answer. Therefore, if you have questions, please see either of us (Denise or Mike). Our supervisors have been instructed NOT to discuss this specific issue with anyone and to invite you to speak with us.

GCEX 13.

IV. LEGAL ARGUMENT

A. Cornejo Lawfully Described Bargaining and the Realities of Unionization to Employees.

1. Cornejo did not solicit employee grievances and promise benefits if employees refrained from selecting the Union.

Newport has over 100 employees and the record testimony makes clear that all of those employees attended these meetings with Cornejo, but only two could offer testimony regarding

alleged solicitation of grievances. Jimenez claimed that Cornejo asked “why did we want the Union?” Tr. 28. But, he offers no testimony that statement included a promise to increase benefits if employees refrain from unionization. Jimenez’ testimony contained serious credibility issues.

For example, Jimenez admitted that Cornejo used a PowerPoint, but did not talk about labor laws even though the record leaves beyond doubt that Cornejo distributed *The Basic Guide to the National Labor Relations Act* and discussed the law regarding collective-bargaining with employees. In addition, while the meeting with Cornejo lasted about 30 to 45 minutes, Jimenez can remember very little about the actual substance of the meeting other than some key phrases for the CGC.

The CGC also seemingly tried to elicit testimony from Arreguin on this issue, but he only said that Cornejo asked how employees “were treated at the Company.” Tr. 358:1–4. He also offered no testimony that Cornejo promised to correct any of the issues. As the Board has noted, “[I]t is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful.” *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

Simply put, the creditable testimony does not show that Cornejo solicited grievances. He certainly spent a lot of time presenting to employees and discussing the National Labor Relations Act. Cornejo rejected any claims that he solicited grievances and asked employees to tell him what was wrong. Rather, he offered that frequently employees just shared frustrations and that happened here. The evidence does not demonstrate that Cornejo solicited grievances during any meeting and you Honor should dismiss Complaint paragraphs 6(a), (b), and (d).

2. Cornejo did not threaten to freeze employee raises and performance reviews because of the Union.

One CGC witness testified that Cornejo told employees that raises and performance reviews would be frozen. De Tirado stated that Cornejo “spoke about the – about the Union and that – that he was going to – how do you – in other words, everything was frozen, and also the 401K.” Tr. 537:3–5. Yet, she further testified that Cornejo told employees “that all of our benefits would – were going to – were going to be put on the table for negotiations.” Tr. 529:6–7. Again, the record evidence demonstrates that all the Newport employees attended these meetings with Cornejo yet the CGC could muster a single witness to offer evidence regarding Cornejo’s statement that Newport would freeze benefits. Such a failure, compared against Cornejo’s testimony, demonstrates the CGC’s failure to carry their burden regarding alleged unlawful

statements at a group meeting. Cornejo provided an in-depth explanation regarding a presentation that he has done over a 100 times. Tr. 794:23–796:1. He clearly testified that he presented from *The Basic Guide to the National Labor Relations Act* and he reviewed the PowerPoint that corresponded to this book and he also presented using another PowerPoint that covered bargaining. Tr. 794:12–795:18.

In assessing the legit question did Cornejo accurately testify regarding the freezing of raises and performance reviews or did De Tirado, one must credit Cornejo. De Tirado could only remember literally seconds of speaking from the meeting while Cornejo could provide an in-depth explanation of what he said, what material he referred to when he said it, and how he said what he said. He rejects any claim that he told employees raises and performance reviews would be frozen. Your Honor must dismiss Complaint allegation 6(c).

3. Cornejo did not threaten to reduce employee wages and benefits by telling employees negotiations would start at zero.

“An employer can tell employees that bargaining will begin from “scratch” or “zero” but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union.” *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 823 (1994). Indeed, in *Coach & Equipment Sales Corp.* the Board emphasized that one must read the statements in context. 228 NLRB 440, 440–41 (1977). Here, nothing suggests that the Company unlawfully conveyed to employees that the Company would deprive employees of their benefits. Like the previous allegation, the CGC offers a single witness despite the potential presence of scores of employees regarding this allegedly unlawful statement. Tr. 528–29, 357. The one witness only claims that Cornejo said bargaining would start from zero, but any such claim occurred in the context that Newport would bargain and that bargaining involves give and take between the Company and the Union.

Indeed, the Company made clear that all benefits become subject to bargaining should employees decide to follow that path and it is possible to lose benefits in bargaining. In *Taylor-Dunn Mfg. Co.*, the Board made clear that bargaining from scratch comments or start from zero comments do not violate the Act “when other communications make clear that any reduction in wages or benefits will occur as a result of the normal give and take of negotiations.” 252 NLRB 799, 800 (1980). Any alleged comments that Newport would bargain from zero only ever occurred in the context of Newport telling employees that the parties put everything on the table during

bargaining. Cornejo explained that to employees. His testimony, as corroborated by employee testimony, confirms that. Cornejo shared a lawful message and the alleged statements regarding starting from zero does not violate the Act. *La-Z-Boy*, 281 NLRB 338, 340 (1986) (adopting judge’s dismissal of complaint and finding that, “[the manager] did nothing more than point out that in the bargaining process wages and benefits can go up, down, or stay the same”); *Clark Equipment Co.*, 278 NLRB 498, 499–500 (1986) (finding lawful statement that “bargaining starts from scratch”). Your Honor must dismiss Complaint allegations 6(e).

B. Diaz Served As A Translator and Accurately Conveyed The Lawful Messages of Other Speakers During the Organizing Drive.

As it concerns Complaint allegations 7(a) and 7(b), Diaz only translated the messages of VanVoorhis, Drury, and Mitchell during this time frame. The evidence demonstrates that during this time period he only translated the message of other speakers. Thus, an evaluation of these paragraphs turns on whether any one of those individuals allegedly said anything unlawful. Indeed, multiple English and Spanish bilingual witnesses testified that they listened to the speakers in English and Diaz’ Spanish translation and he accurately conveyed their message. Tr. 1084:23–1085:1.

Diaz only spoke independently during the final meeting on or about November 9, 2017. *See* Section III.F *supra*. During that message he asked employees to give him a chance. *See* Tr. 906:13–907:8; GCEx 10. Likewise, the testimony of the CGC witnesses also stated that Diaz asked that they give him a chance. Tr. 253–54; 534–35. An employer can lawfully ask for another chance. *See e.g. Pickering & Co., Inc.*, 254 NLRB 1060, 1065 (1981) (finding no violation based on appeal by company president to, “Vote NO on Thursday – give us and give yourselves a chance....Give us a chance”). Any “give us a chance” appeal does not violate the Act and represents a lawful exercise of Newport’s right to freedom of speech, protected by Section 8(c) of the Act. Your Honor must dismiss paragraph 7(c) of the Complaint.

C. VanVoorhis Consistently Read From A Script and Did Not Make Any Statements that Violate the Act.

1. VanVoorhis never promised employees improved terms and conditions of employment if they refrained from supporting the Union.

VanVoorhis’ testified consistently that she read from scripts when she addressed groups of employees. Specifically, she testified that did this “[b]ecause I did not want to say anything that

was unlawful or anything that could be viewed as an unfair labor practice.” Tr. 1029:19–21. Here, VanVoorhis testified she used CGC’s Exhibits 10 and 2 as scripts that she read verbatim. Neither document contains any potential promise of improved terms and conditions of employment.

VanVoorhis also read from CGC’s Exhibit 1(e) and 13. These scripts discuss the status of the insurance subsidy. None of these scripts make any promises regarding benefits. In fact, both scripts specifically state that Newport would not announce the status of the insurance subsidy to avoid the appearance of vote buying. Furthermore, VanVoorhis testified that she did not promise employees better benefits if they did not support the Union and she did not hear anyone promise employees better benefits if they did not support the Union. Tr. 1041:25–1042:10, 21–25. Your Honor must dismiss paragraphs 8(a) and 8(b) of the Complaint.

2. VanVoorhis never threatened to cancel employee salary increases and reviews if they selected the Union.

Only CGC Witness Medrano offered any testimony that VanVoorhis allegedly stated Newport would cancel wage increases and performance reviews. Medrano stated that he attended a meeting that lasted “[t]wenty minutes, something like that.” Tr. 312:15. During a meeting that lasted twenty minutes, he remembered very little. The CGC asked Medrano what did VanVoorhis “say first at this meeting” and Medrano responded “[s]he said that that while the Union petition was – that the salaries were going to be cancelled.” Tr. 311:12–13. He also testified that another employee asked a question about what would happen with employee performance reviews and VanVoorhis responded “that his review was going to be evaluated but that she was not going to talk about the salary.” Tr. 312:8–9. The CGC asked if VanVoorhis “say why she was not going to talk about the salary” and Medrano claimed, “[n]o, that’s just all she said. That’s it. That I what I remember about that.” Tr. 312:10–13.

On cross-examination Medrano actually made clear what VanVoorhis said. The questioning proceeded as follows:

Q: Okay. And Denise told you that during these meetings, performance evaluations would continue, right?

A: Yes.

Q: And she did say that employees would not get raises at that time, because the Company did not want to influence the results of the election, right?

A: Yes.

Tr. 438:2–8.

Board precedent has long held that an employer may withhold a raise increase to avoid the appearance of trying to influence the election so long as it communicates that to employees. *Uarco, Inc.*, 169 NLRB 1153 (1968); *Heckerthorn Mfg. Co.*, 208 NLRB 302, 306 (1974). VanVoorhis maintains that she did not tell employees that she would cancel their increases if they selected the Union. Any such testimony from the CGC on that subject further fails to substantiate that claim. Specifically, as shown above, Medrano admits that VanVoorhis explained that employees did “would not get raises *at that time*, because the Company *did not want to influence the result of the election.*” Tr. 438:5–8 (emphasis added). Such statements did not violate the Act. *Uarco, Inc.*, 169 NLRB 1153 (1968); *Heckerthorn Mfg. Co.*, 208 NLRB 302, 306 (1974). Your Honor must dismiss paragraph 8(d) of the Complaint.

3. VanVoorhis never threatened to freeze employee terms and conditions because of the Union.

VanVoorhis testified unequivocally that she did not tell employees that Newport would freeze benefits. Tr. 1041:1–12. Only CGC Witness Contreras testified that VanVoorhis allegedly said that performance reviews would be frozen. Your Honor simply cannot credit this testimony. Contreras testified as follows:

Q: Do you remember if [VanVoorhis] said anything about your performance reviews?

A: Well, everything was frozen *they* said because it’s the Union – they said their hands were tied.

Q: Did she say this at the meeting?

A: During the meeting I think.

Q: Now, you said you just – you attended many meetings, correct? Do you remember all of the meetings you attended?

A: In total? *There was so many meetings, I can’t – I just remember some stuff and some meetings and some from the other meetings.*

Tr. 475:24–476:9 (emphasis added).

Here, Contreras clearly did not identify precisely that VanVoorhis made any specific comment regarding freezing wages. Then, he makes clear that he cannot remember what was said at the meetings. Cross-examination highlighted his confusion.

On cross-examination, Contreras stated that VanVoorhis did not make any statement regarding performance reviews being frozen.

Q: But you had – you heard your employees – your co-workers talk about the word frozen, correct?

A: Not the co-workers. I – I heard the – the negotiator say that.
[. . .]

Q: Okay. But you just said you can't remember Denise talking about the word frozen.

A: No. You say about wages.

Tr. 504:11–21.

Contreras testified in a scattered gun manner. He failed to answer questions and had to receive orientation from both questioners multiple times to keep his answers responsive to the question presented. This testimony above clearly highlights that and shows that he did not identify VanVoorhis as making any comments regarding freezing wages. This represents yet another allegation from the CGC that lacked any evidence to support it. Your Honor must dismiss paragraph 8(e) of the Complaint.

4. VanVoorhis lawfully explained to employees their ability to request the Union returns their authorization cards.

An employer may advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing so or seeks to monitor whether employees do so nor otherwise creates an atmosphere wherein employees would tend to feel peril in refraining from the revoking. *R. L. White Co.*, 262 NLRB 575, 576 (1982). In *Mid-Mountain Foods*, the Board refused to find a violation when an employer explained to employee their right to revoke authorization cards. 332 NLRB 229 (2000). In that case, the employer committed only a few isolated unfair labor practices in a 200-employee unit over a 4-month period, informed employees how to revoke their authorization cards, and made sample language available for employees to solicit revocation of their authorization cards, but “neither tracked whether employees availed themselves of their right to revoke their union authorizations nor assisted them in the revocation

process beyond simply telling them about the forms.” *Id.* In light of the relatively few unfair labor practices and the little help the employer provided, the Board dismissed the allegation that the employer unlawfully solicited employees to revoke their authorization cards.

Here, the facts require the same conclusion regarding any allegation about soliciting revocation of union authorization cards. First, the discussion regarding revocation of authorization did not have any accompanying unfair labor practices. Second, and importantly, when VanVoorhis provided employees information about the ability to revoke their authorization cards she specifically told employees “[w]e cannot tell you what to do or not do when dealing with a union. . . .” GCEX. 2. She continued telling employees “we cannot tell you what to do or not do, and we are not telling or asking you to do anything. . . .” *Id.* Indeed, Newport provided the information without any suggestion of reprisal for failure to do so. The CGC also offered no evidence that Newport did anything to track who did or did not sign attempt to revoke their authorization cards. The discussion regarding revocation of the authorization cards also did not occur in the context of substantial and pervasive unfair labor practices. Your Honor must dismiss paragraphs 8(f) and 8(g) of the Complaint in light of the evidence presented.

D. VanVoorhis and Drury Did Not Solicit Grievances and Promise Employee Better Benefits and Improved Terms and Conditions of Employment for Rejecting the Union.

As mentioned above, it is nearly impossible to find testimony that corresponds to each complaint paragraphs because the CGC’s witnesses rarely could place dates on meetings, they struggled to identify during what part of a month a meeting even happened, sometimes they could not even remember the speaker, and usually they could only testify to generally what someone allegedly said rather than any specific statements word-for-word. Here, the allegations in paragraphs 9(a) and (b) demonstrate why this represents such a problem.

It is not clear from the record what testimony, if any, that together VanVoorhis and Drury solicited grievances and promised employees better benefits if they refrained from supporting the union. As explained above in Sections III.A, E, F, VanVoorhis and Drury read from scripts. They did not solicit grievances. Furthermore, they did not promise employee better benefits from rejecting the Union either. Importantly, the CGC offered no testimony that demonstrates that they did this together during any meetings. Your Honor must dismiss paragraph 9 of the Complaint.

E. Drury Consistently Read From A Script and Did Not Make Any Statements That Violate the Act.

1. Drury did not solicit grievances or promise employees better benefits from rejecting the Union.

Drury testified that he was not a labor professional. Tr. 1102:11–16. As a result, he would stick to the scripts during each meeting to ensure that he complied with the law, he concisely shared his message, and he shared the same message across meetings. Tr. 1103:16–1105:7; 1107:6–22. Drury testified that he used GC Exhibit 9, GC Exhibit 10, and Respondent Exhibit 6, to speak with employees.

Only one employee testified regarding Drury allegedly soliciting grievances or making promises. De Tirado testified that Drury allegedly told employees that he was there to help them, that he was there to help them, and that he wanted to hear from all employees. Tr. 541:21–542:2. According to De Tirado “he asked us to give him a year to be to – to accommodate these problems.” Tr. 543:15–16.

During cross-examination, De Tirado admitted that Drury “didn’t promise to fix anything specific” and he was “talking generally about wanting a chance.” Tr. 575:15–20. As the Board has noted, “it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful.” *Uarco, Inc.*, 216 NLRB 1, 2 (1974). In addition, an employer can lawfully ask for another chance. *See e.g. Pickering & Co., Inc.*, 254 NLRB 1060, 1065 (1981) (finding no violation based on appeal by company president to, “Vote NO on Thursday – give us and give yourselves a chance....Give us a chance”) (emphasis added).

Here, De Tirado offers no evidence that Drury made any promise to fix any specific item or take any specific action. Rather, he merely asked for a chance. Any alleged solicitation by Drury and any “give us a chance” appeal, under the current facts, does not violate the Act and represents a lawful exercise of Newport’s right to freedom of speech, protected by Section 8(c) of the Act.

To the extent the CGC argues that Drury’s use of a script during a November 9, 2017 meeting allegedly violates the Act and makes unlawful promises, that contention fails too. Ambiguous statements do not violate the Act. *Mastercraft Casket Co.*, 289 NLRB 1414, 1416 (1988) (finding no violation where plant manager said he was going to “clean house and throw out

a few people”); *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 2-3 (2007) (reversing ALJ’s finding of a violation based on question of, “Well, Dave, [did] you take care of our union problem yet?”). Ambiguity dooms the CGC’s allegation regarding alleged unlawful promises because the lack of clarity precludes it from overcoming the burden of proof. *Mastercraft Casket*, 289 NLRB at 1416.

Your Honor must dismiss paragraphs 10(a), 10(c), and 10(f) of the Complaint.

2. Drury never threatened to freeze employees’ benefits.

Yet again, the CGC only offered one witness to substantiate an 8(a)(1) statement, even though the statement occurred in a group meeting. CGC Witness Mendoza alleged on direct examination that Drury said “[t]hat he was going to freeze all the benefits.” Tr. 598:21. Yet, on cross-examination, Mendoza admitted that Drury did not threaten to freeze benefits, but rather explained that “with the Union coming in that raises would not change until the issue with the Union got resolved.” Tr. 633:15–18. These statements comply with the Act as they do not amount to threats, but comport with a lawful Company message that it would delay raises to avoid the appearance of trying to influence the election. *Uarco, Inc.*, 169 NLRB 1153 (1968); *Heckerthorn Mfg. Co.*, 208 NLRB 302, 306 (1974). Your Honor must dismiss paragraph 10(b) of the Complaint.

3. Newport distributed Joint Exhibit 1(d) to employees.

On or about November 1, 2017, Newport distributed Joint Exhibit 1(d) to Newport employees that worked in the office. The Petition did not cover those employees. On that same day, Newport distributed Joint Exhibit 1(e) to employees in the voting unit.

The CGC asserts that Joint Exhibit 1(d) violates the Act, but one simply cannot read that document in isolation from Joint Exhibit 1(e). In *Uarco, Inc.*, the employer paid employee wage increases between April 1 and 6 for the seven years prior to the critical period. 169 NLRB 1153 (1968). A union filed an election on December 8 and the election did not occur until May 26. *Id.* During the critical period the employer paid wage increases to other employees not covered by the election petition, but the plant manager distributed a notice to employees that said:

I regret to notify you that the April 1 adjustments in wage rates and benefits will have to be postponed for all employees involved in the pending NLRB cases which do not concern office and preparatory department employees. This delay is required to avoid the appearance of vote-buying by the company in view of the possibility that the NLRB will hold elections. Our counsel has advised us

that wage increases at this time might be considered to be an Unfair Labor Practice, and that the Company should not take this risk.

Id.

The employer in *Uarco* further told employees:

. . . . We are now paying and have always paid the going wage rate in the area, with or without a union. This is what we did in the Press Union Contract and what we are doing in all other departments in the plant. We feel our present policy of paying area rates is fair, and this is the policy we intend to follow, with or without a union. . . .

Id.

Here, Newport's acts did not differ from *Uarco's* act. In *Uarco* the employer paid wage rates to other employees outside of the voting unit. Just like Newport, *Uarco* announced those rates to employees. Joint Exhibit 1(d) is no different than *Uarco* announcing wage rates to employees that would not vote in the pending election. Just as the Board found in *Uarco* that the announcement and message did not constitute objectionable conduct, so to should your Honor find that this announcement coupled with the explanation to employees in Joint Exhibit 1(e) does not violate the Act and thus dismiss paragraph 10(d) of the Complaint.

4. Drury lawfully explained to employees their ability to request that the Union return their authorization cards.

Any claim that Drury unlawfully discussed revocation of authorization cards fails for the same reasons discussed in Section III.G. To the extent the CGC tries to claim that Drury varied from the script, CGC Witness Mendoza's testimony reinforces the evidence that Drury followed a script. Indeed, he confirmed that Drury "said, we can't tell you what to do or not do, when dealing with the Union." Tr. 647:20–22. Your Honor must dismiss paragraphs 10(g) and 10(h) of the Complaint.

F. Jara Did Not Threaten To Reduce Employees Wages and Benefits By Telling Employees Negotiations Would Start At Zero.

The Complaint alleges that about October 17, 2019, Jara threatened Newport would reduce employees' existing wages and benefits by stating that negotiations would start at zero if employees selected the Union as their collective-bargaining representative. The CGC only mustered one witness to testify about a group meeting. This witness, Valdivia, offered a vague testimony regarding what Jara said. He made clear that Jara explained bargaining involved a give and take and allegedly specifically said Newport would bargain in "good faith" and that employees

may need to “give back” in exchange for a benefit. Tr. 255:18–24. He claimed that Jara said “[I]ike in order for us to receive something, we’ve got to give something back. And he told us that we could – we could lose the 41K (sic).” Tr. 255:25–256:8.

Valdivia provided disjointed testimony regarding what Jara said about bargaining, but Valdivia left completely clear that Jara did explain bargain involved a give and take of benefits. Jara rejected any claim he start bargaining would start from zero. Tr. 864:3–11. He did state that he would have told employees “should you decide to go down that route, at that point everything becomes negotiated – negotiable and is on the table. So there is a risk, again, that you cold potentially lose.” Tr. 865:4–7.

“An employer call tell employees that bargaining will begin from “scratch” or “zero” but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union.” *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 823 (1994). Here, even if your Honor decides to credit Valdivia’s testimony, Jara’s statements do not violate the Act. Any alleged statement relates directly to the fact that should employees chose a union representative, that triggers collective-bargaining, which involves a give and take. Such statements do not violate the Act, even if a person states that bargaining starts at zero. *Id.*; *see also Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980)(stating that bargaining from zero “statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.”). Your Honor must dismiss paragraph 11 of the Complaint.

G. Mitchell Lawfully Communicated the Facts of Bargaining to the Newport Employees.

1. Mitchell did not threatened to freeze employee benefits.

The CGC presented some testimony that claimed Mitchell told employees that benefits would be frozen. Mitchell flatly rejected that claim that he told employees Newport or he would freeze benefits. Rather, Mitchell explained to employees what happened in Sysco Kansas City and FreshPoint South Florida. Rex. 2. There, employees did not receive raises for multiple years. Tr. 965:19–966:6; 967:24–968:9.

Mitchell certainly provided examples where locations did not receive benefit increases during bargaining, but he only provide accurate statements of other Sysco locations. Accurate of fact do not violate the Act. *Oxford Pickles*, 190 NLRB 109 (1971).

While Newport employees undoubtedly struggled with Mitchell's message because the Union never told them that they could lose benefits in bargaining (Tr. 109:1–110:6) and the employees did not know that bargaining occurred as Mitchell explained, that does not constitute a violation of the Act. He used factual real life examples to inform employees about the possibilities during bargaining. Your Honor must dismiss paragraphs 12(a) and 12(i) of the Complaint.

2. Mitchell did not tell employees that bargaining would start from zero.

Newport disputes that Mitchell told employees that bargaining would start from zero. Even if your Honor credits this testimony over Mitchell's, his statements still do not violate the Act. "An employer call tell employees that bargaining will begin from "scratch" or "zero" but the statements cannot be made in a coercive context or in a manner designed to convey to employees a threat that they will be deprived of existing benefits if they vote for the union." *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 823 (1994).

Here, Mitchell testified, and multiple CGC witnesses confirmed, that Mitchell told employees that bargaining starts with a blank contract. Tr. 112:4–6; 288:7–9; 445:13–15; 717:23–718:2; 719:17–22; 766:23–767:9; 983:9–984:18. Mitchell and multiple other witnesses testified that Mitchell also explained that all employee benefits go on the table and that the Union and the Company would bargain to determine what benefits the Union and the Company agree to and what benefits the Union and the Company do not agree too. Contreras stated that Mitchell told employees "if the Union's coming in, everything had to negotiating [*sic*]." Tr. 467:25–1. This same witness testified that Mitchell said he "would negotiate as long as it takes to get a contract." Tr. 496:13–19. Another witness, De Tirado, testified that Mitchell told employees that everything was going to be on the table. Tr. 580:15–581:11, 581:25–582. Another witness Medrano testified that during negotiations everything is put on the table: all employees' wages and benefits. The Company would come with the things that it wants and the union would come with the items that it wants. The parties start with a blank contract and items only get put into the contract when they agree to an item. Tr. 444:14–446:13.

All of this testimony hardly conveys to employees that they will lose existing benefits. Rather, this testimony conveys the truth of collective-bargaining: the parties start with a blank contract. All employees benefits become available for negotiations and the employees only receive what the parties agree to. The credited testimony undoubtedly demonstrates Mitchell conveyed that message and did not provide a coercive explanation, but a simple explanation of the truth and the possibilities of bargaining. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980)(stating that bargaining from zero “statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.”); *see, e.g., Wild Oats Markets, Inc.*, 344 NLRB 717, 717 (2005) (finding lawful a flyer asking, “Would you sign a blank check?” and stating, “in collective bargaining, you could lose what you have now”). Accurate statements of law and facts cannot amount to implied threats. *Oxford Pickles*, 190 NLRB 109 (1971). Your Honor must dismiss paragraphs 12(b), 12(e), and 12(g) of the Complaint.

3. Mitchell did not threaten employees with job loss or plant closure.

The record lacks a single witness that testified Mitchell simply threatened employees would lose their jobs or that he would close the plant. Rather, witnesses testified that Mitchell explained that during a strike, Newport could hire replacement workers or send meat to other locations. Tr. 325:4–16; 446:1–13; 497:6–9; 912:8–15; 984:24–985:16. He further explained that should the strike create sufficient damage it could cause the plant to shut down. Tr. 446:14–17. The cumulative testimony leaves these facts clear. These statements do not violate the Act. Employers’ rights to replace striking employees have been well-established for 80 years. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Furthermore, Section 8(c) of the Act allows an employer to discuss the law with employees. As the Board explained in *Tri-Cast*, 274 NLRB 377 (1985):

The Employer’s first comment is couched in terms of what might happen “if” certain events occur. We construe this comment as nothing more than the Employer’s permissible mention of possible effects of unionization. Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes can lead to lost business and lost jobs...Making these reasonable possibilities known to employees does not constitute objectionable conduct.

Id. at 378 (emphasis in original). *See also Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982) (finding employer’s conduct lawful where it told employees they could be permanently replaced in the event of a strike, even though employer did not fully inform employees of their right to be placed on a preferential hiring list; the Act does not require a party to “explicate all the possible consequences” of an action). These accurate explanations of Newport’s ability to hire replacements workers or stop operating during a strike do not violate the Act. Your Honor must dismiss paragraphs 12(c), 12(d), and 12(f) and 14 of the Complaint.

H. The CGC Failed to Present Sufficient Evidence to Show that Martinez Acted As A 2(13) Agent Under the Act.

The CGC’s argument related to Martinez basically amounts to the fact that he did not want the Union, he solicited employees to revoke their authorization cards, which means he must be an agent of the Company. That reasoning simply fails.

Certain facts are undisputed. Martinez did not have the authority to hire, fire, or discipline employees. Tr. 59:23–60:19. Employees did not view Martinez as their superior or a person from whom they would receive direction.

The record is further undisputed that Martinez took the initiative to speak with the Company about holding a meeting because he thought it would be good for employees to come together and speak. This meeting was nothing new as the Company had previously allowed employees to use this area to watch sports and conduct other social activities. Tr. 218:24–219:12. The CGC will point to the fact that Newport provided food during the meeting, but Newport regularly provides food for employees. Tr. 218:15–219:1. Ultimately, the employees held their meeting and employees voiced their opinions for and against the Union.

Following the meeting and after other internet research, Martinez started to speak with employees about their ability to revoke their authorization cards. Again, the record demonstrates that Newport did not ask Martinez to do this. Indeed, Martinez and Drury testified to such. CGC witnesses all stated that they had no first-hand knowledge that anyone from the Company asked Martinez to solicit employees to revoke authorization cards.

Board law demonstrates that under the circumstances Martinez did not act as an agent for Newport. In *Knogo Corp.*, an employee that transmitted work orders to employees solicited employees to revoke authorization cards. 265 NLRB 935 (1982). Even though according to the Board the company entrusted this employee with nonsupervisory lead authority, that employee did

not act as an agent for that company when he solicited employees to revoke authorization cards. *Id.* at 936. The Board pointed out that, like here, the employee did not attend management meetings and did not direct employee meetings on behalf of management. *Id.* In addition, the employee did not have authority to hire, fire, or discipline employees. *Id.* Similarly, in *Division of Plessey Material Corporation*, the Board found an employee did not act as an agent of the Company when he solicited authorization cards, pointing out that the petition originated with the rank-and-file employees, as occurred here. 263 NLRB 1392 (1982). *See also The Great Atlantic & Pacific Tea Company*, 167 NLRB 776 (1967)(finding employee did not act as agent of Company when employee solicited revocation of authorization cards).

Here, like the cases cited above, Martinez did not have authority over employees; employees did not view him as someone to direct their work or give them any direction; he did not attend management meetings; he did not direct employee meetings on behalf of management; and, he did not have the authority to hire, fire, or discipline employees either. Indeed, Martinez merely wanted to work in an environment without union representation. That does not make him an agent of the Company. That merely makes him an employee that – of his own volition – attempted to exercise his Section 7 rights to refrain from unionization and now the CGC seeks to restrain that. Your Honor must dismiss all the allegations of paragraph 15.

I. Newport Did Not Unlawfully Freeze Employees Annual Performance Reviews and Raises.

The Board has long held that an employer may postpone a wage or benefit increase during the critical period if it informs the employees that it would occur whether or not they select the union and the employer only seeks avoid the appearance of influencing the election. *Sam's Club*, 349 NLRB 1007 (2007); *see also Grass Valley Grocery Outlet*, 332 NLRB 1449, 1451 (2000); *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968). As it concerns the wage increase, vital facts remain beyond dispute. First, not all employees would receive wage increases during the critical period. Tr. 1034:14–20. Second, employee wage increases depended on supervisor evaluations. Tr. 436:1–437:18; 502:6–8; 1034:14–1035:9. Third, employees had different supervisors that evaluated employees differently. Tr. 1034:25–1035:5. Fourth, wage increases varied year over year and each employee did not receive the same wage increase. Tr. 436:1–437:18; 501:17–502:3; 1034:23–1031:1. Fifth, Newport did not have a set wage increase formula that it used to determine wage increases. Tr. 1034:21–22.

Against this undisputed background for wage increases, one can easily see Newport's precarious position and how easily an employee could view granting a certain wage increase as an attempt to buy a vote. As a result, Newport informed employees that it would postpone granting wage increases until after the union election because it did not want to appear to buy votes. Tr. 1030:6–16; 1069:1–6. Multiple CGC witnesses confirmed this point. Tr. 415:17–22; 505:6–9. The record further made clear that after the Union blocked the election and it became apparent no election would occur for the foreseeable future, Newport granted the wage increases employees would have otherwise received and further received retroactive pay too. Newport's statements and acts complied with the law. *Sam's Club*, 349 NLRB 1007 (2007); *see also* *Grass Valley Grocery Outlet*, 332 NLRB 1449, 1451 (2000); *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968). Your Honor must dismiss paragraph 17 of the Complaint.

J. Newport Decision to Allow Sanchez to Pursue Another Opportunity at Palisades Ranch Does Not Violate the Act.

The Board has consistently held that it is lawful for an employer to transfer an employee if it has a "legitimate and substantial business justification" for doing so. *El Paso Natural Gas Co.*, 193 NLRB 333, 333 (1971). Transferring an employee to a different location because that location has a specific need that the employee can fill is a legitimate business reason. *See, e.g., FiveCAP*, 331 NLRB 1165, 1203 (2000) (employer's transfer of an employee to a different facility because there "was a greater need for her at that facility" did not violate the Act). Here, Newport transferred Sanchez to its Palisades facility because that facility needed an employee who could assist with production and portion cutting. Newport determined that Sanchez could fill that need and decided to transfer him to Palisades. The CGC offered no evidence to rebut this explanation. A legitimate business reason supported Newport's decision and it did not violate the Act. Your honor must dismiss Complaint paragraph 18.

K. Newport Did Not Unlawfully Withhold Reduced Healthcare Costs From the Voting Unit.

Newport did not unlawfully withhold reduced healthcare costs. The Board has specifically addressed this issue and the exact language involved in the pending unfair labor practice charge. Board precedent has long held that an employer may withhold a benefit increase to avoid the appearance of trying to influence the election so long as it communicates that to employees.

Uarco, Inc., 169 NLRB 1153 (1968); *Heckerthorn Mfg. Co.*, 208 NLRB 302, 306 (1974). Newport acted consistent with this precedent.

The Company distributed Joint Exhibit 1(e) to inform employees the reason employees in the voting unit did not receive a change to their health care cost during the election. In *Uarco, Inc.*, the employer paid employee wage increases between April 1 and 6 for the seven years prior to the critical period. 169 NLRB 1153 (1968). A union filed an election on December 8 and the election did not occur until May 26. *Id.* During the critical period the employer paid wage increases to other employees not covered by the election petition, but the plant manager distributed a notice to employees that said:

I regret to notify you that the April 1 adjustments in wage rates and benefits will have to be postponed for all employees involved in the pending NLRB cases which do not concern office and preparatory department employees. This delay is required to avoid the appearance of vote-buying by the company in view of the possibility that the NLRB will hold elections. Our counsel has advised us that wage increases at this time might be considered to be an Unfair Labor Practice, and that the Company should not take this risk.

Id.

The employer in *Uarco* further told employees:

. . . . We are now paying and have always paid the going wage rate in the area, with or without a union. This is what we did in the Press Union Contract and what we are doing in all other departments in the plant. We feel our present policy of paying area rates is fair, and this is the policy we intend to follow, with or without a union. . . .

Id.

Here, Newport's acts did not differ from *Uarco's* act. In *Uarco* the employer paid wage rates to other employees outside of the voting unit. Just like Newport, *Uarco* announced those rates to employees. Joint Exhibit 1(d) is no different than *Uarco* announcing wage rates to employees that would not vote in the pending election. The language Newport used almost follows the *Uarco* language verbatim. Just as the Board found that announcement and message did not constitute objectionable conduct, so to should your Honor find that this announcement and actions coupled with the explanation to employees in Joint Exhibit 1(e) does not violate the Act and thus dismiss the allegations of paragraph 19.

V. CONCLUSION

For the reasons stated, Newport respectfully requests that your Honor dismiss the Complaint in its entirety.

Respectfully submitted this 3rd day of September, 2019

/s/ Daniel A. Adlong

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2019, this **NEWPORT MEAT SOUTHERN CALIFORNIA, INC.'S POST HEARING BRIEF** was filed electronically and service copies sent via electronic mail to:

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