

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

In the matter of:

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

Before NLRB ALJ Randazzo

**RESPONDENT BOAR'S HEAD PROVISIONS CO. INC.'S POST-HEARING BRIEF TO
THE ADMINISTRATIVE LAW JUDGE**

Respectfully Submitted by:

ALANIZ LAW & ASSOCIATES, PLLC
Attorneys for Respondent, Boar's Head
Provisions Co., Inc.

/s/ Richard D. Alaniz
Richard D. Alaniz, esq.
Tex. Bar No. 00968300
ralaniz@alaniz-law.com
Brett Holubeck, esq.
Tex. Bar No. 24090891
bholubeck@alaniz-law.com
Scott Stottlemire, esq.
Tex. Bar No. 24098481
sstottlemire@alaniz-law.com
20333 State Hwy. 249, Ste. 272

Houston, TX 77070

Table of Contents

| | |
|--|----|
| A. At No Time Did Mr. Habermehl Use the Term “Bargaining From Scratch” in an Employee Meeting. He made Lawful Statements about What May Happen in a Union Campaign. | 10 |
| B. Mr. Guadalupe Rodriguez Spoke About His Experiences as a Member of a Union. He Lawfully Questioned Walter Aguilar | 14 |
| C. Mr. Rurka Did Not Solicit Any Grievances at the August 24 Meeting Nor Did He Discuss Negotiations or Make Any Unlawful Threats About Negotiations. | 18 |
| D. Brad Rurka Did Not Hold a Meeting In September 2017. The Only Meeting Held was the August 24, 2017 Meeting Where Negotiations Were Not Discussed. | 20 |
| E. Larry Helfant Engaged In Boar’s Head Well-Established Practice of Seeking Employee Concerns at the August 29, 2017 Meeting. The Board Has Consistently Found that Such Past Practices May be Lawfully Continued During Union Organizing. At No Time Did He Make Promises to Employees to Deter Them From Supporting the Union. | 22 |
| F. Larry Helfant Made Lawful Statements About What May Happen in Negotiations at the August 29, 2017 Meeting. At No Time Did He say that Negotiations would Start from Zero or the Minimum Wage. ... | 24 |
| G. At No Time Did Larry Helfant Make Any Promises at the August 29, 2017 Meeting. In Fact, He Stated that He Was Not There to Fulfill Promises and No Decision Had Been Made On the Vacation and Attendance Policies. | 25 |
| H. Boar’s Head has had Suggestion Boxes for More than Twelve Years. It Lawfully Continued Its Past Practice of Soliciting Grievances Through Methods that Preexisted the Union Campaign. | 26 |
| I. The Handout Entitled “Boar’s Head Brand” Made Lawful Statements Regarding Negotiations. The Words “Bargain from Scratch,” as Alleged in the Complaint, do Not Even Appear in the Handout. | 28 |
| J. Boar’s Head Lawfully Suspended Walter Aguilar to Conduct an Investigation and Issued a Written Warning to Mr. Aguilar for Encouraging People to Engage in a Workplace Slowdown. | 29 |

K. At No Time on October 11, 18, 25, or November 16, 2017 did Boar’s Head Employees or Members of Management Engage in Surveillance on Employees Passing Out Union Literature in the Parking Lot. Board Law is Clear that Employers May Observe Open Union Activity of Employees that is Conducted on or Near Company Property. 40

L. Larry Helfant did Not Engage in Surveillance at the Holland Facility on October 25, 2017 as He was Not in the Parking Lot when Mr. Castillo, the Union Organizer and Witness, Alleged that He Was There and He Arrived Alone to the Facility Contrary to Mr. Castillo’s Testimony. 49

M. Vicente Nunez Made No Promise of Benefits To Employee Norma Chacon For Her To Refrain From Supporting The Union. 52

N. Ms. Mendoza Did Not Interrogate Employees, threaten Employees or State that Employees Would be Disloyal in a Meeting in October 2017 on the Beef Trim Line. The Line is too Loud to Have a Conversation with All Employees and One of the Alleged Witnesses to the Meeting Named by the GC’s Witness on the Issue Denied that Meeting Ever Occurred. 56

O. Carlos Giron Lawfully Mentioned to an Employee Having Seen a Public Facebook Post. Board Law is Clear that Such Action is Lawful and Does Not Create an Impression of Surveillance. 60

P. Maria Mendoza Never Interrogated Mr. Rios in a Meeting on or About December 6, 2017 regarding His Union Activity, Threatened Him with Enforcing Work Rules More Strictly, or Stated that Selecting the Union Would be Futile. 65

Q. Ms. Mendoza Solicited Employee Grievances in a Meeting on or About December 24, 2017 in Accordance with Boar’s Head Past Practice of Soliciting Grievances Prior to the Union Organizing Campaign. These Forms of Solicitation are Lawful. 66

R. Boar’s Head Maintains a Lawful Rule Regarding Wearing Badges and Other Items on Exterior Garments in Food Production Areas to Prevent Contamination of the Food it Produces. Employees are Free to Wear Such Items in Non-Production Areas and this Rule is a Lawful Rule under Board Law. 68

S. Boar’s Head Raised Nelson Langarita’s Wages Because He Was Performing Job Duties that Deserved a Promotion. His Union Activities had No Effect on the Decision. In Fact, Not Promoting Him Because of His Union Activities Would have Violated the Act. 70

T. Ms. Apollonia Rios’s Pay Adjustment on or About October 2, 2017 Was Done in Accordance with Boar’s Head Past Practices and Was Lawful. Her Union Affiliation Played No Role in the Decision and Refusing to Adjust Her Pay in Accordance with Past Practices Because of Her Union Affiliation Would Have Violated the Act. 73

U. The Changes to the Attendance and Vacation Policies Were Proposed and In the Process of Being Approved Before the Union Organizing Began in 2017. There is No Basis or Evidence to Support the Allegation that Union Activity Played Any Role in the Decision to Improve these Benefits..... 77

V. Boar’s Head Made a Lawful Business Decision to Provide Tools to Employees to Make Its Policies Consistent 86

W. If Merit is Found, Reading of a Notice is Not an Appropriate Remedy in this Case. 89

Table of Authorities

Cases

| | |
|---|----------------|
| <i>Associated Press vs. NLRB</i> , 301 U.S. 103 (1937) | 35 |
| <i>Avondale Industries</i> , 329 NLRB 1064 (1999)..... | 64 |
| <i>Centralia Fireside Health</i> , 233 NLRB 139 (1977)..... | 83 |
| <i>Computer Peripherals, Inc.</i> , 215 NLRB 293, 293-294 (1974)..... | 29 |
| <i>Decca LP</i> , 327 NLRB 980 (1999) | 63 |
| <i>Delchamps, Inc.</i> , 588 F. 2d 476; <i>NLRB v. Gotham Indus.</i> , 406 F. 2d 1306 (1st Cir. 1969)..... | 83 |
| <i>Durham School Services, L.P.</i> , 361 NLRB 470 (2015) | 63 |
| <i>Dynacor Plastics and Textiles</i> , 218 NLRB 1404 (1975)..... | 83 |
| <i>Essex Int’l, Inc.</i> , 216 NLRB 575 (1975) | 83 |
| <i>Fred’K Wallace & Sons</i> , 331 NLRB 914 (2000)..... | 54 |
| <i>Hayes-Albion Corp., Tiffin Div.</i> , 237 NLRB 20 (1978)..... | 83 |
| <i>Hearthside Food Solutions</i> , No. CA-46342, ALJ Decision (2012)..... | 15 |
| <i>Herbert Halperin Distributing Corp.</i> , 228 NLRB 239 (1977)..... | 29 |
| <i>Holiday Inn – JFK Airport</i> , 348 NLRB 1 (2006) | 15 |
| <i>Hotel Employees Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985)..... | 54 |
| <i>In re Gordonsville Industries, Inc.</i> , 252 NLRB 563, 575 (1980)..... | 88 |
| <i>In re Wilhow Corp.</i> , 244 NLRB 303 (1979)..... | 83 |
| <i>Johnson Technology, Inc.</i> , 345 NLRB 762 (2005)..... | 19 |
| <i>Longview Fibre Paper & Packaging, Inc.</i> , 356 NLRB No. 108 (2011) | 19 |
| <i>Mandalay Bay Resort & Casino</i> , 355 NLRB 529, 529 (2010)..... | 19 |
| <i>Manor Care Health Services – Easton</i> , 356 NLRB 202 (2010)..... | 75 |
| <i>Medline Industries, Inc.</i> , 218 NLRB 1404 (1975)..... | 83 |
| <i>MEMC Electronic Materials, Inc.</i> , 342 NLRB 1172, 1174 (2004)..... | 88 |
| <i>Michigan Roads Maintenance Co.</i> , 344 NLRB 617 (2005)..... | 54, 63 |
| <i>Midwest Stock Exchange v. NLRB</i> , 635 F.2d 1255, 1267 (7th Cir. 1980)..... | 54 |
| <i>Nalco Chemical Co.</i> , 163 NLRB 68 (1967) | 83, 85 |
| <i>National Hot Rod Association</i> , 368 NLRB 26, 27 (2019)..... | 63 |
| <i>NLRB v. Circo Resorts</i> , 646 F. 2d 403, (9th Cir. 1981), <i>enforcing as modified</i> 244 NLRB 880 (1979) | 83 |
| <i>NLRB v. Exchange Parts</i> , 375 U.S. 405 (1964)..... | 75 |
| <i>NLRB vs. Jones & Laughlin Steel Company</i> , 301 U.S. 1 LRRM 703 (1977) | 35 |
| <i>NLRB, ALJ Decision, Transcare New York, Inc.</i> , No. RC-11762, 2010 BL 464113 (2010) | 47 |
| <i>Nordstrom, Inc.</i> , 264 NLRB 698, 700 (1982) | 69 |
| <i>Pergament United Sales, Inc.</i> , 296 NLRB 333 (1989)..... | 41 |
| <i>Poultry Packers, Inc.</i> , 237 NLRB 250 (1978)..... | 83 |
| <i>Promedics Health Systems, Inc.</i> , 343 NLRB 131 (2004)..... | 64 |
| <i>Quicken Loans, Inc.</i> , 367 NLRB 112 (2019)..... | 54 |
| <i>Roadway Package System</i> , 302 NLRB 961 (1991) | 47 |
| <i>Rossmore House</i> , 269 NLRB 1176 (1984)..... | 15, 16, 17, 54 |
| <i>Rossmore House</i> , 269 NLRB 1176, 1177 (1984)..... | 16 |
| <i>Schrement Bros, Inc.</i> , 179 NLRB 853 (1969) | 63 |
| <i>Schulte’s IGA Foodliner</i> , 241 NLRB 855 (1979)..... | 83 |
| <i>Smithfield Packing Co., Inc.</i> , 344 NLRB 1, 190 fn.20..... | 69 |
| <i>Southgate Village Inc.</i> , 319 NLRB 916 (1995) | 75, 76 |
| <i>Southwire Co.</i> , 277 NLRB 377, 378 (1985)..... | 47 |
| <i>Sprain Brook Manor Nursing Home</i> , 351 NLRB 1190, 1191 (2007)..... | 47 |
| <i>Springfield Jewish Nursing Home for the Aged</i> , 292 NLRB 1266 (1989)..... | 83 |
| <i>Stumpf Motor Company, Inc.</i> , 208 NLRB 431 (1974)..... | 28 |

| | |
|---|----|
| <i>Taylor-Dunn Mfg. Co.</i> , 252 NLRB 799, 800 (1980) | 28 |
| <i>The Boeing Company</i> , 366 NLRB 128 (2018) | 69 |
| <i>TNT Logistics N. Am., Inc.</i> , 345 NLRB 290 (2005)..... | 20 |
| <i>Town & Country Supermarkets</i> , 244 NLRB 303 (1979)..... | 83 |
| <i>TRW-United Greenfield Division</i> , 245 NLRB 147 (1979)..... | 28 |
| <i>Villa Sancta Anna Home for the Aged</i> , 228 NLRB 571 (1977)..... | 83 |
| <i>Vista Del Sol Healthcare</i> , 363 NLRB 135 (2016)..... | 75 |
| <i>VT Hackney, Inc.</i> , 367 NLRB No. 15 (2018)..... | 19 |
| <i>Wal-Mart Stores</i> , 340 NLRB 637, 640 (2003)..... | 19 |
| <i>Wal-Mart Stores</i> , 348 NLRB 274 (2006)..... | 83 |
| <i>Westwood Health Care Center</i> , 330 N.L.R.B. 935, 163 LRRM 1225 (2000)..... | 17 |
| <i>Wright Line Div.</i> , 251 NLRB 1083, 105 LRRM 1109 (1980), enforced, 662 F. 2d 899, 108 LRRM 2513 (1 st Circuit 1981) cert. denied 45505989, 109 LRRM 2799 (1982)..... | 34 |

Other Authorities

| | |
|--|----|
| Advice Memorandum from the NLRB Office of the Gen. Counsel to Director J. Michael Lightner, Regional Director of Region 22, MONOC, No. 22-CA-29008, <i>et al.</i> , 2010 WL 4685855, at *2 (May 5, 2010)..... | 63 |
| Discriminating against employees because of their union activities or sympathies (Section 8(a)(3) https://www.nlr.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union , accessed 9/3/2019) | 35 |

I. Preliminary Statement

This case had its genesis in an organizing campaign conducted by the United Food and Commercial Workers (UFCW) among the production and maintenance employees at the Boar's Head, Holland, Michigan facility. Boar's Head Provisions Co., Inc. is one of the premier producers of delicatessen meats and cheeses in the United States. It adheres to time-honored recipes that call for hand-trimmed meats and the use of spices from all parts of the world. Its products, distributed throughout the United States, are recognized as the very best available to their customers.

Boar's Head operates seven facilities in addition to the Holland, Michigan manufacturing plant at issue in this matter. The company's two facilities in New York as well as the two in Virginia have long had the UFCW as the exclusive bargaining representative of their employees. The relationship has always been amicable, with the Director of Human Resources, Scott Habermehl, serving as an employer trustee on a joint employer – UFCW trust fund for many years.

The company first became aware of UFCW organizing at the Holland plant on August 9, 2017. The plant had been the target of a similar UFCW organizing campaign in 2016 as well as sporadic organizing efforts in 2015 and 2014. In both 2016 and 2017 Boar's Head responded to the union organizing by conducting a series of educational employee meetings on unions conducted by Scott Habermehl. Over the fifteen years or so that Mr. Habermehl has been at Boar's Head he has conducted similar meetings at the Holland facility and other company plants dozens of times.

Several of the charges alleged in the Consolidated Complaint in this case relate to claims that Mr. Habermehl engaged in unlawful threats during the course of the employee meetings held on August 21 and 22, 2017. At those meetings Mr. Habermehl, who has over 30 years of professional human resources experience, used a PowerPoint presentation that he has used

countless times in similar presentations before. Since the vast majority of the Holland plant's employees are Spanish-speaking, the PowerPoint slides are in English and Spanish. In addition, since Mr. Habermehl does not speak Spanish, a translator was used at each of the meetings. Senior Human Resources Coordinator Vicente Nunez served as the translator for the first meeting on August 21, 2017 and Human Resources Coordinator Rodolfo Rodriguez served as the translator for all subsequent meetings.

A variety of other conduct or actions in addition to Mr. Habermehl's comments are also alleged to constitute violations of either Sections 8(a) (1) or Sections 8(a) (1) and (3). The allegations range from threats of loss of benefits and promises of increased benefits for refraining from supporting the union, to grants of increased pay and vacation benefits for the same reason. Changes for legitimate business reasons to the vacation and attendance policies which applied to all company non-union facilities and which were in process long before the company had knowledge of union organizing at the Holland plant were alleged to be unlawful.

The reoccurring and allegedly unlawful phrase of "bargaining from scratch" was alleged to have been used at virtually every meeting where employees were in attendance as well as in a company bulletin board posting. It became the underlying theme of the General Counsel's Consolidated Complaint. It was alleged to have been used in meetings where nothing more than a prepared speech never mentioning the union or negotiations was read verbatim to the employees. Those same words were alleged to be the basis for finding a bulletin board posting as unlawful despite the fact that they do not appear anywhere in the posting.

The granting of a wage increase to properly compensate an employee performing additional duties and who demanded the increase by threatening to leave his job for another, and to an employee who was being incorrectly paid and who asked that her pay be reviewed, were also

alleged to be unlawful. In fact, the Consolidated Complaint in this case includes allegations of the type of classic violations routinely committed by an employer inexperienced in responding to union organizing. Over the years various Boar's Head's non-union facilities, including the Holland plant, have been the target of UFCW organizing efforts. The Forrest City, Arkansas plant has been a perennial target since their employees rejected union representation in an NLRB-conducted election in 2006. Boar's Head is fully aware of the legal parameters of responding to union organizing and has never violated them. Yet the investigation of the charges here appear to have been viewed through a one-sided prism of an over-reactive and inexperienced employer.

In recognition of a total lack of supporting evidence, the General Counsel withdrew several of the allegations at the conclusion of trial, including one that consumed a substantial part of the trial testimony, the alleged denial of access. Throughout the trial, witnesses including some testifying for the General Counsel, contradicted the allegations. Numerous managers, supervisors and unbiased hourly employees credibly testified in support of the company's position on the allegations. In the end, Boar's Head feels certain that a thorough review of the trial testimony, documentary evidence, and legal authority will support the conclusion that Boar's Head's actions throughout were lawful.

II. ULP Allegations & Legal Analysis

- **Respondent by Scott Habermehl, in the employee cafeteria at Respondent's Holland facility:**
 - **About August 21, 2017, threatened its employees with loss of benefits by telling employees that negotiations would start from scratch if they select the Charging Party as their representative.**
- A. At No Time Did Mr. Habermehl Use the Term "Bargaining From Scratch" in an**

Employee Meeting. He made Lawful Statements about What May Happen in a Union Campaign.

Meetings were held with employees on August 21-22, 2017 concerning the union organizing campaign by the UFCW. (Scott Habermehl Tr. 51:22-52:3). Each meeting was conducted by Scott Habermehl and lasted approximately one hour. (Scott Habermehl Tr. 1504:2-3). Senior Human Resources Coordinator Vicente Nunez translated the first meeting on August 21st and Human Resources Coordinator Rodolfo Rodriguez translated the remainder of the meetings on the first day and all of the meetings on the second day. (Scott Habermehl Tr. 53:7-9; Scott Habermehl Tr. 54:11-14). During the course of the meetings Mr. Habermehl briefly discussed negotiations with the union and what could happen during negotiations. Mr. Habermehl testified that he said, “that the Union may start off by proposing a starting wage of \$50 per hour, and we may counter with minimum wage.” (Scott Habermehl Tr. 57:3-8; 74:1-6). “I said that when it was all said and done, that we would find a place in the middle and that employees may have less or more than they have now.” (Scott Habermehl Tr. 74:3-6.) This was confirmed by Human Resources Business Manager Shannon VanNoy who attended all of the meetings, as well as by Human Resource employees Leah Cochran, Vicente Nunez and Rodolfo Rodriguez, along with several employee witnesses. (Shannon VanNoy Tr 795:20-25; Leah Cochran Tr. 1068:22-1069:6; Vicente Nunez Tr. 1124:7-14). He demonstrated this process by holding one hand up high and the other hand low, and bringing his hands together when discussing how negotiations proceed. (Gabriella Esquivel Tr. 1404:10-14).

Mr. Habermehl did not say negotiations would start from zero or scratch, from the minimum wage, or bargain from zero to minimum. (Scott Habermehl Tr. 74:1-6; 1503:1-9; 1509:1-1510:5. Leah Cochran Tr. 1066:6-17; Leah Cochran Tr. 1068:4-15; Vicente Nunez Tr. 1122:16-1123:20.; Abigail Forsten Tr 1158:11-18; Jorge Torres Tr. 1184:14-22; 1185:20-23; Gabriela Esquivel

1388:15-23.) Nor did he say the words “minimum allowed by law.” (Scott Habermehl Tr. 1595:5-7). He said that no one knows what the outcome of negotiations would be; employees may get more or less; no one knows. (Shannon VanNoy Tr 796:19-23; Jorge Torres Tr. 1197:1-6). At no point did he say that the company would propose the minimum wage if the union came in. (Leah Cochran Tr. 1069:12-15). He did not say that wages or benefits would be reduced or frozen if the union came in. (Leah Cochran Tr.1069:15-22; Vicente Nunez Tr. 1125:16-1126:4; Rodolfo Rodriguez Tr. 1231: 4-9; Scott Habermehl Tr. 1511:11-15). Mr. Habermehl along with numerous witnesses, testified that no such words were spoken at any of the meetings.

Gabriela Esquivel, an hourly employee, testified that while she never heard the phrase “bargain from scratch” in either English or Spanish, that she would have understood it to mean start from the bottom if it had been used. (Gabriela Esquivel Tr. 1401:4-14). Abigail Forsten, another hourly employee, credibly testified that “if somebody were to tell me that my pay could possibly start from zero or scratch, I’d be pretty upset about it.” (Abigail Forsten Tr. 1168:23-25). Mr. Jorge Torres, yet another hourly employee, also testified that if Mr. Habermehl had actually said that negotiations would start from zero, then the “whole company would have gone crazy” and everyone would have been talking about it. (Jorge Torres Tr. 1209:20-25).

This testimony contradicts the less-than-convincing testimony of General Counsel witnesses and union supporters Apollonia Rios, Ascension Rios and Walter Aguilar. Ms. Rios claimed that Scott compared the salaries and said that if the union came then the employees in Holland would start making or start at zero. (Apolonia Rios Tr. 395:7-9). Walter Aguilar said that the union would “on entering the workplace, that they will be negotiating from zero to the minimum, and that a lot of benefits will be lost -- could be lost.” (Walter Aguilar Tr. 117:21-24). Mr. Aguilar also testified that Mr. Habermehl’s comments about contract negotiations lasted “maybe 20, 25 minutes.” (Walter

Aguilar Tr. 150:9-12). He further claimed that half of the meeting was about negotiations. (Walter Aguilar Tr. 150:13-17). Mr. Aguilar additionally claimed that he specifically heard the term “bargain from scratch” and those were the words that were translated by the interpreter. (Walter Aguilar Tr. 151:2-7). His testimony is not credible.

Senior Human Resources Coordinator Rodolfo Rodriguez testified that while he did not translate the first meeting, he was present and translated at all other meetings. (Rodolfo Rodriguez Tr. 1224:18-24). In no meeting, did Scott use the words “bargain from scratch”. (Rodolfo Rodriguez Tr. 1227:5-12). Walter Aguilar’s claim that Scott spent 20 to 25 minutes talking about negotiations, was equally contradicted. (Scott Habermehl Tr. 1508:12-17). Scott spent approximately two to three minutes on negotiations. (Rodolfo Rodriguez Tr. 1227:20-22). That portion of the presentation occurred around the last 5 minutes of the presentation. (Scott Habermehl Tr. 1503:24-1504:8). Human Resource Business Partner Shannon VanNoy in her testimony also confirmed that the discussion of negotiations lasted less than 5 minutes and was near the end of the presentation. (Shannon VanNoy Tr 795:10-15; 853:23-25). General Counsel witness Apolonia Rios testified to having heard Scott say that Boar’s Head would “bargain from scratch or zero” in the presentation. (Apolonia Rios Tr. 395:7-10). However, she admitted on cross-examination that she left the meeting early for an appointment. (Apolonia Rios Tr. 452:16-19). The discussion of what happens in negotiations occurred in the last 5 minutes of the presentation. It is therefore apparent that she was not even present when the issue of negotiations was discussed. (Apolonia Rios Tr. 452:17-19; 453:23-25; 454:6-8) Of even greater significance is the fact that, Rodolfo Rodriguez testified that at the time of the meetings he did not know how to translate “bargain from scratch” into Spanish. (Rodolfo Rodriguez Tr. 1228:25-1229:4). It is an idiomatic expression and thus does not translate well into Spanish. He testified that if Scott had spoken those words he would have had to stop him

and ask what he meant because he does not know what that phrase means. (Rodolfo Rodriguez Tr. 1250:6-10). He only learned what “bargain from scratch” means from counsel as he was preparing for trial. Rodolfo Rodriguez Tr. 1229:1-14 He also did not translate “bargain from zero or the minimum”. (Rodolfo Rodriguez Tr. 1229:15-19).

There is substantial evidence that Mr. Habermehl did not threaten employees with loss of benefits by telling them that negotiations would start from scratch or the minimum wage if they select union representation. As a trained and experienced human resources professional for approximately 30 years, Mr. Habermehl is fully aware of what is lawful and what is unlawful when discussing a union with employees. Mr. Habermehl has made similar presentations on union issues including collective bargaining to employees using the same or similar PowerPoint well over 100 times. (Scott Habermehl Tr. 1494:21-24). The very same presentation was made to these same employees in 2016 when the UFCW was seeking to organize them. No such charges were filed at that time. The testimony of General Counsel’s witnesses in support of the allegations was repeatedly contradicted and is not credible. The allegation is not supported by the evidence and should be dismissed.

About August 24, 2017, Respondent, by Supervisor Lupe Rodriguez, on the work room floor. at Respondent’s Holland Facility:

- **Threatened its employees with loss of benefits by telling them negotiations would start from scratch if they select the Charging Party as their bargaining representative.**
- **Interrogated its employees about their union activities and sympathies.**

B. Mr. Guadalupe Rodriguez Spoke About His Experiences as a Member of a Union. He Lawfully Questioned Walter Aguilar

The Consolidated Complaint asserts that a workplace conversation between employee Walter Aguilar and Boxing Department Supervisor Guadalupe Rodriguez constituted a threat of loss of benefits and interrogation in violation of Section (8)(a)(1). The allegations lack merit. In determining whether the questioning of an employee would reasonably tend to coerce the employee in the exercise of Section 7 rights, the Board applies a “totality of the circumstances” analysis. *Holiday Inn – JFK Airport*, 348 NLRB 1 (2006); *Rossmore House*, 269 NLRB 1176 (1984); *Hearthside Food Solutions*, No. CA-46342, ALJ Decision (2012).

The August 2017 conversation between Walter Aguilar and his direct supervisor Lupe Rodriguez on the production line contained no unlawful threats and was not a coercive interrogation within the meaning of the Act. There was no credible threat of reprisal or promise of benefit. While Aguilar less than credibly testified that Mr. Rodriguez threatened that “bargaining would start from scratch or zero” if the union came in, Mr. Rodriguez denied making that comment or anything similar. (Guadalupe Rodriguez Tr. 906:16-20). He freely admitted to informing Mr. Aguilar that in negotiations it is possible to lose existing benefits. He specifically cited bonuses and the company picnic. (Guadalupe Rodriguez Tr. 914:1-18). He based his comments on his prior experience in being a union member in a former job. (Guadalupe Rodriguez Tr. 914:17-20).

No one from Boar’s Head management asked Rodriguez to speak with Aguilar nor did anyone talk with him about the conversation. (Guadalupe Rodriguez Tr. 902:7-21). Rodriguez did not take any action against Aguilar nor did he report him to management because of his union affiliation. (Guadalupe Rodriguez Tr. 905:7-12). The conversation was friendly and Rodriguez did not imply or tell Aguilar that he would be punished for supporting the union. (Guadalupe Rodriguez Tr. 908:10-12). Aguilar specifically testified that “he [(Guadalupe Rodriguez)] never threatened

me.” (Walter Aguilar Tr. 166:9-13). They had been friends for almost 8 years, and Rodriguez had been his supervisor for six of those years. (Guadalupe Rodriguez 899:7-11; 902:24-25). They knew each other well.

Both Mr. Aguilar and Mr. Rodriguez testified that they routinely engaged in informal conversation while working. (Guadalupe Rodriguez Tr. 899:20-900:11 Walter Aguilar Tr. 165:2-7) Mr. Aguilar said that they talked on a daily basis. (Walter Aguilar Tr. 165:2-7) The conversation occurred on the production line while Mr. Rodriguez was relieving an employee on a bathroom break. (Guadalupe Rodriguez Tr. 99:13-15) He credibly testified that the question of why Mr. Aguilar wanted a union at Boar’s Head was nothing more than personal curiosity. (Guadalupe Rodriguez Tr. 902:7-11) He was fully familiar with Aguilar’s union sympathies. He knew that he had solicited authorization cards. Aguilar testified that “I just told my supervisor, Lupe, that I was supporting the union and that I was signing into the union.” (Walter Aguilar Tr. 156:13-15). He did not report the conversation to upper management and asked nothing regarding the union sympathies of other employees. As in the cases cited above, Mr. Aguilar’s reply was “truthful and freely expressed”. There was nothing in his reply that could indicate any inference of fear or intimidation. There is nothing to support the conclusion that Mr. Rodriguez’s question was posed “in a manner that would cause a reasonable employee to feel coerced, intimidated, or restrained in the ability to exercise Section 7 rights”. In fact, Mr. Aguilar continued to openly engage in activities in support of the UFCW after his conversation with Mr. Rodriguez. They continue to have friendly, casual workplace conversation to this day. Aguilar testified that he continues to be on good terms with Lupe Rodriguez after the conversation. (Walter Aguilar 174:22-175:4).

The Administrative Law Judge in *Hearthside*, citing *Rossmore House*, stated the following regarding supervisory questioning of an employee:

In particular, the Board holds that the type of content which constitutes hallmark evidence of coercion is whether the questioning was designed to elicit information “on which to base taking action against individual employees” *Rossmore House*, supra at 1177. Merritt’s question was not designed to uncover information about any individual employees’ activities or sympathies. He was merely seeking to understand of Gibson’s reasons for supporting the union. *Hearthside Food Solutions*, ALJ Decision (2012)

Acknowledging the realities of the industrial workplace, citing the brief conversation on the production floor and the employee’s truthful and fully expressed reply, the ALJ therefore concluded:

Because he did not pose his question in a manner that would cause a reasonable employee to feel coerced, intimidated or restrained in the ability to exercise Section 7 rights, Merritt’s conduct was not unlawful. *Hearthside Food Solutions*, ALJ Decision (2012).

These circumstances are identical to the discussion between Mr. Rodriguez to Mr. Aguilar. He credibly testified that he was not seeking information on the union activities of other employees and merely wanted to satisfy his own curiosity. (Guadalupe Rodriguez Tr. 902:7-11). In *Hearthside*, the ALJ cited the realities of the workplace where supervisors and employees work closely together and routinely discuss a wide range of topics, sometimes including unionization efforts in concluding that without more, there is no unlawful interrogation. The very same conclusion should be reached regarding Mr. Rodriguez’s brief questions and comments to Walter Aguilar. “It is well established that interrogation of employees is not illegal per se.” *Rossmore House*, (supra). Here, the totality of the circumstances do not support the claim that the “interrogation” reasonably tended to restrain, coerce, or interfere with Mr. Aguilar’s rights guaranteed under the Act. “In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is

directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Center*, 330 N.L.R.B. 935, 163 LRRM 1225 (2000). Nothing in the conversation at issue here would have reasonably tended to coerce Mr. Aguilar to not exercise his rights under the Act. The General Counsel failed to provide evidentiary support for the 8(a)(1) allegation of threats of loss of benefits and unlawful interrogation by Lupe Rodriguez.

- **About August 24, 2017, Respondent, by Plant Manager Brad Rurka, in conference room B at Respondents Holland facility:**
 - **By soliciting employee complaints and grievances, promised its employees increased benefits and terms and conditions of employment if they do not select the Charging Party as their bargaining representative.**
 - **Threatened its employees with loss of benefits by telling them that benefits would be on hold and that negotiations would start from scratch if the employees select the Charging Party as their bargaining representative.**

C. Mr. Rurka Did Not Solicit Any Grievances at the August 24 Meeting Nor Did He Discuss Negotiations or Make Any Unlawful Threats About Negotiations.

In several meetings held on August 24, 2017 Brad Rurka read a prepared speech to employees. At no time in any of the meetings did Mr. Rurka solicit employee grievances or promise increased benefits if employees refrain from selecting the union. Rodolfo Rodriguez and Senior Human Resources Coordinator Leah Cochran translated the speech for Mr. Rurka at the day and evening meetings, respectively. (Leah Cochran 1071:20-21). During the meetings that Rodolfo Rodriguez translated, Mr. Rurka read the first 2 paragraphs of G.C. Exh. 9 in English and then Rodolfo read the entire speech in Spanish. (Shannon VanNoy Tr 800:2-6; Rodolfo Rodríguez Tr.

1240:13-18). There were no deviations from the words of the text. During the speech the company was announcing changes in certain policies that were simultaneously being made at all the non-union plants. (Shannon VanNoy Tr 10-12). The purpose of the meetings was to make sure that employees understood those changes being made – as well as several policies that were already in place, but about which employees had raised questions. (Brad Rurka Tr. 108:10-16).

During the evening meetings where Leah Cochran translated, Mr. Rurka read the entire speech in English and then Leah read the entire speech in Spanish. (Leah Cochran Tr. 1073:8-17). No questions were taken during any of the meetings, no discussion occurred, and thus no complaints were solicited. (Leah Cochran Tr. 1073:13-17). At all meetings the text was read verbatim in English and Spanish and no questions or discussion were entertained.

While no direct solicitation of grievances or concerns occurred at Mr. Rurka's meetings on August 24, 2017. General Counsel will likely argue that by informing employees generally through the speech that it wanted to hear their concerns, it was soliciting complaints. Such comments were not unlawful solicitation of grievances. Boar's Head could lawfully solicit grievances and complaints consistent with its well-established past practice of doing so. That longstanding practice and the means of doing so are reviewed in detail in Section E. below. Suffice it to say an employer with a past practice of soliciting grievances may continue to do so during a union campaign.

Johnson Technology, Inc., 345 NLRB 762 (2005) (citing *Wal-Mart Stores*, 340 NLRB 637, 640 (2003)). "An employer may rebut the inference of an implied promise by . . . establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by [showing] . . . that the statements at issue were not promises." *VT Hackney, Inc.*, 367 NLRB No. 15 (2018) *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010)).

The Board has frequently held that the employer can also resolve the employee grievances.

See Longview Fibre Paper & Packaging, Inc., 356 NLRB No. 108 (2011)(no violation during an ongoing union organizing campaign where the employer implemented a change to workplace schedules as a result of a brainstorming meeting consistent with past practice); *TNT Logistics N. Am., Inc., 345 NLRB 290 (2005)* (no violation during ongoing union organizing campaign where employer had past practice of soliciting grievances through an “open door” policy); *Johnson Tech Inc., 345 NLRB 762 (2005)* (no violation where employer had a past practice of soliciting grievances and management representative asked a single coercive question).

By reading the speech to employees at the meetings Mr. Rurka did not engage in the unlawful solicitation of employee complaints, promises of benefits, or threats of loss of benefits. The allegation is not supported by the evidence and should therefore be dismissed.

- **In about September 2017, the Employer, by Plant Manager Brad Rurka, at about 6:30 AM in conference room B, threatened employees with loss of benefits by telling them that negotiations would start from zero or the minimum wage if they select union representation.**

D. Brad Rurka Did Not Hold a Meeting In September 2017. The Only Meeting Held was the August 24, 2017 Meeting Where Negotiations Were Not Discussed.

This allegation epitomizes the flawed investigation that permeates this case. There was no September 2017, 6:30am Brad Rurka meeting. There was an August 24, 2017 meeting where Mr. Rurka read the prepared speech and did nothing more. G.C. Exh. 9 The speech makes no mention of unions. There was no mention of unions or negotiations by anyone in any of the meetings. (Shannon VanNoy Tr 801:15-18; Rodolfo Rodriguez Tr. 1241:20-25). Nothing more is needed to show that there is no evidence whatsoever that any threats of loss of benefits were made during the meetings.

Neither the union nor negotiations were ever mentioned during the speech at any of the meetings by anyone.

Plant Manager Brad Rurka never threatened employees by telling them negotiations would start from “zero or the minimum wage”. Those words were never spoken. Rodolfo Rodriguez and Leah Cochran, both of whom translated and read the Spanish version of the speech at the meetings testified that the words “bargaining from scratch” or “bargaining from zero to minimum were never uttered or translated.” (Rodolfo Rodriguez Tr. 1241:23-1242:6; Gabriela Esquivel Tr. 1392:12-19). The allegation of threats of loss of benefits is therefore entirely unfounded. Testimony from company representatives that were present for the meetings, unbiased employee testimony and the very text of the speech confirm that such words were never spoken in Mr. Rurka’s meetings.

The only General Counsel witness to testify anything about Mr. Rurka’s meetings, Rodney Valenzuela, claimed that Mr. Rurka said that “vacations would be put on hold, and all that other stuff because of negotiations and that Holland was one of the highest paid plants”. (Valenzuela Tr. 361:2-6). His bizarre conduct and demeanor on the stand should be sufficient to question his veracity. However, Valenzuela, by his own admission confirms his total lack of credibility. He “thought the meeting was a bunch of malarkey, so I wasn’t really paying attention.” (Valenzuela Tr. 361:9-11).

As confirmed by various witnesses, the speech was read verbatim in all sessions in English and Spanish. There were no questions taken nor was anything said in addition to the script. No reference to negotiations appears in the written speech and none were made. The allegation is therefore unsupported by the facts and should be dismissed.

- **Larry Helfant on August 29, 2017, by soliciting employee complaints and grievances,**

promised its employees increased benefits and improved terms and conditions of employment if they do not select the Charging Party as their bargaining representative.

E. Larry Helfant Engaged In Boar's Head Well-Established Practice of Seeking Employee Concerns at the August 29, 2017 Meeting. The Board Has Consistently Found that Such Past Practices May be Lawfully Continued During Union Organizing. At No Time Did He Make Promises to Employees to Deter Them From Supporting the Union.

Boar's Head has for years routinely solicited employee concerns and complaints. It has utilized numerous methods to do so. The Holland plant has monthly town hall meetings; an open-door policy; stay interviews, exit interviews and suggestion boxes. (Shannon VanNoy Tr 787:11-14; 787:21-788-13; 789:20-22; 790:2-12). In addition, supervisors have one-on-one annual meetings with all employees on their crew to discuss any work issues, concerns and to gage employee satisfaction (see Maria Mendoza December 2017 meeting with Ascension Rios). In addition to management, HR employees are scheduled to be on the plant floor every week to hear from employees. (Shannon VanNoy Tr 791:4-15). Visiting corporate executives such as Senior Vice President Larry Helfant routinely walk the production areas and interact with the employee to solicit their concerns. (Shannon VanNoy Tr 786:17-787:1; Leah Cochran Tr. 1039:21-1042:3; Scott Habermehl Tr. 1517:6-1519:6).

The company has had an open door policy since sometime before 2014. (Shannon VanNoy Tr 787:11-14). At "town halls" each department sends a representative to bring up concerns about the work environment that affects all employees (no discussion on wages and individual discipline permitted). They have occurred since before Shannon VanNoy began working at Boar's Head in

2014. (Shannon VanNoy Tr 787:21-788-13). If an issue is raised at a town hall “it gets assigned to somebody to get it corrected or follow-up on it and then get back to the group. (Scott Habermehl Tr. 1521:20-1522-5). “Stay interviews” are interviews with both new and longer-term employees about what the company is doing that keeps them at Boar’s Head, concerns that they may have, and what they would like the company to do better. (Shannon VanNoy Tr 789:10-14). They were being conducted prior to August 2017. (Shannon VanNoy Tr 789:20-22). “Exit interviews” were conducted prior to 2014 as well, and involve asking questions regarding the employees, their work, and what changes might improve the workplace. (Shannon VanNoy Tr 790:2-12). Suggestion boxes have been in use at the facility since well before 2014. (Shannon VanNoy Tr 790:15-20). In August 2017 the company moved one of the suggestion boxes to a more prominent location. (Shannon VanNoy Tr. 712:21-24).

As noted above, HR staff are regularly scheduled to go to the floor at least once per week to interact with employees and to solicit employee concerns. This process was also occurring prior to August 2017. (Shannon VanNoy Tr 791:4-15). More on point regarding the allegation, corporate executives, including Senior Vice President of Sales and Operation Larry Helfant, Senior Vice President Jeff Szymanski, and Scott Habermehl also spent time on the floor talking with employees about their concerns prior to August 2017. (Shannon VanNoy Tr 792:2-21; Gabriela Esquivel Tr. 1395:9-18). In fact, Jorge Torres, an hourly employee, confirmed this when he testified that top management comes to the company every quarter or so. (Jorge Torres Tr. 1202:14-15). Not a single witness contradicted that these efforts to seek out employee feedback have existed for years. Mr. Helfant’s meeting with employees was therefore consistent with well-established past practice at Boar’s Head. As he testified regarding his purpose in meeting with employees on August 29, 2017, he was there to listen to their concerns. (Larry Helfant Tr. 1619 :1-5; Tr. 1637: 15-19). This was not

a change in response to union organizing. To maintain a productive workplace, keep morale high, and retain qualified employees, Boar's Head regularly seeks feedback and ways to improve from its employees. These efforts were undertaken long before any union organizing by UFCW began at the facility. Mr. Helfant's discussion with employees was consistent with what had been done before as he himself testified. (Larry Helfant Tr. 1616:15-24; 1617:3-25; 1633:19-21; 1634:6-8; 1635:20-25)

- **On about August 29, 2017, the Employer, by Senior Vice President of Sales and Operations Larry Helfant, in the employee cafeteria threatened employees with loss of benefits by telling them that negotiations would start from zero or the minimum wage if they select union representation.**

F. Larry Helfant Made Lawful Statements About What May Happen in Negotiations at the August 29, 2017 Meeting. At No Time Did He say that Negotiations would Start from Zero or the Minimum Wage.

At no point in any discussions with employees on August 29, 2017 or at any other time did Larry Helfant say that negotiations would start from scratch, zero or the minimum wage if the union was selected. (Abigail Forsten Tr. 1163:5-16; Jorge Torres Tr. 1191:4-16; Rodolfo Rodriguez Tr. 1250:1-16; Gabriela Esquivel Tr. 1396:5-14; Lawrence Helfant Tr. 1622:10-22) Despite the General Counsel's allegations that virtually every single Boar's Head management representative made the very same statements each time they spoke with assembled employees, it simply did not occur. Nor did it occur at Mr. Helfant's meetings on August 29, 2017. Mr. Helfant testified that all he said about negotiations in the meetings is that "you never know what the outcome is going to be" and "in negotiations anything can happen." (Larry Helfant Tr. 1622:23-25; 1623:1-5; 1623:12-16). Rodolfo Rodriguez who translated for him, said he never heard or translated the words "bargain from scratch, start from zero or the minimum wage" or anything similar. He also testified that he

would not have known how to translate “bargain from scratch”. (Rodolfo Rodríguez Tr. 1250:1-16). What he did say about the unknown results of negotiations was not a threat and perfectly lawful. There is no credible evidence to support this allegation and it too should be dismissed.

- **On about August 29, 2017, the Employer, by Senior Vice President of Sales and Operations Larry Helfant, in the employee cafeteria, promised its employees they would change policies to the benefit of employees in order to discourage union activity.**

G. At No Time Did Larry Helfant Make Any Promises at the August 29, 2017 Meeting. In Fact, He Stated that He Was Not There to Fulfill Promises and No Decision Had Been Made On the Vacation and Attendance Policies.

The allegation that Mr. Helfant promised to change the policies to the benefit of employees at his August 29, 2017 employee meetings was contradicted by numerous witnesses, including the General Counsel’s own witnesses. Testimony from General Counsel’s witness Ascension Rios confirmed that at his employee meeting on August 29th, Mr. Helfant said that he would “being looking into” in response to issues raised by employees. (Ascension Rios Tr. 270:21-23). The Board found in *Radio Broadcasting Co.* that an employer’s statement that they would “look into it,” referring to increased health coverage, when an employee asked about improved health benefits was not a promise as there was no other evidence that (the employer) promised or even discussed increased health care benefits. *Radio Broadcasting Co.*, 277 NLRB 1112 (1985).

In responding to questions about the vacation policy from employees, Mr. Helfant consistently responded that not only had no final decision been made, he did not want to do anything illegal by announcing any vacation policy change. (Larry Helfant Tr. 1640 : 17-25; Tr. 1641:1-8). Apolonia Rios, a union supporter and key General Counsel witness, testified that “[h]e hear about the benefits. He just also say that he was working on it, that he did not want to compromise to give the

Union any part of it.” (Rios Tr. 397:11-13). Rodolfo Rodriguez who was translating specifically recalled the comments as well. Mr. Rodriguez testified that Mr. Helfant said that he did not “want to compromise the issue” or put the company at risk of breaking the law, and he did not want to talk about it. (Rodolfo Rodriguez Tr. 1249:2-6). He did not want to say something that could get him in trouble. (Rodolfo Rodriguez Tr. 1249:7-9). Mr. Helfant said that he could not talk about the changes to the vacation policy because nothing was decided yet. (Lawrence Helfant Tr.1623:20-1624:3). He also recalled Larry saying that they have been working on the vacation policy for a long time, but the company does not have an answer for that right now. (Rodolfo Rodriguez Tr. 1245:21-1246:6). Mr. Helfant said that he could not talk about the changes to the vacation policy because nothing was decided yet. (Lawrence Helfant Tr.1623:20-1624:3). Ascension Rios, another union supporter, testified that Mr. Helfant very clearly said that he was not there to promise. In responding to a question regarding attendance points, he answered that it was being looked into but that he was not there to “fulfill all the promises”. (Ascension Rios Tr. 270:21-23). The testimony clearly contradicts any assertion that he promised to change Boar’s Head policies to discourage union activity. The allegation is not supported by the evidence and should be dismissed.

- **About August 2017, Respondent, by asking employees to use the suggestion box in a handout entitled “Explanation of Changes to Policies”, promised its employees increased benefits and terms and conditions of employment if they do not select the Charging Party as their bargaining representative.**

H. Boar’s Head has had Suggestion Boxes for More than Twelve Years. It Lawfully Continued Its Past Practice of Soliciting Grievances Through Methods that Preexisted the Union Campaign.

It is alleged that Boar's Head in August 2017 unlawfully solicited employee complaints and grievances and promised increased benefits by making a reference to a suggestion box in the plant. The allegation is contradicted by the facts as well as witness testimony. Historically, Boar's Head facilities have had suggestion boxes for the purpose of allowing employees to submit comments, questions, and requests. The Holland plant is no exception. Jorge Torres, an hourly employee, said that the suggestion box had been at the company for more than 12 years. (Jorge Torres Tr. 1188:25-11). Gabriela Esquivel, another hourly employee, also testified that the suggestion box has been at the company since she started working there in 2004; the company even has three or four of them. (Gabriela Esquivel Tr. 1394:13-21). Several management witnesses equally confirmed the long-standing practice of utilizing suggestion boxes at Boar's Head to solicit employee input. Referring to the suggestion box was nothing more than a reminder to employees that it was available as it always had been.

Employers across the country, including Boar's Head, have found that a suggestion box can help create real solutions to workplace problems. Employees identify more closely with the company when they're given opportunities to participate directly in decisions or make suggestions they know will be considered. There is absolutely no connection whatsoever between the union organizing that occurred at the Holland plant in 2017 and the completely lawful reminder that employees may continue to utilize the suggestion box that Boar's Head has for years had available to them in its facility. The company had an established practice of soliciting employee concerns in a variety of ways, including suggestion boxes, and reminding employees of the suggestion boxes was perfectly lawful. The allegation lacks legal support and should be dismissed.

- **In August 2017, the Employer, by distributing a handout entitled “Boar’s Head Brand”, threatened its employees with loss of benefits by telling employees that**

negotiations would start from scratch if they select the Charging Party as their representative.

I. The Handout Entitled “Boar’s Head Brand” Made Lawful Statements Regarding Negotiations. The Words “Bargain from Scratch,” as Alleged in the Complaint, do Not Even Appear in the Handout.

This allegation completely mischaracterizes the contents of a posting entitled “Boar’s Head Brand” that was on a plant bulletin board alleging as unlawful the presence of words that are not there. (G.C. Exh. 6) Nothing in the Boar’s Head Brand posting is unlawful, and any reading of it as being so would be a gross misinterpretation of the words used. The handout does not inform employees that negotiations will start from scratch if they select the union as their representative. The words “negotiations would start from scratch” do not appear anywhere on the posting, as a simple reading of the notice will confirm. Nor does it threaten employees with loss of benefits. The handout clearly states, as Board law permits employers to say, that no one knows the final outcome of negotiations, that negotiations will start where required by law and that “the outcome could be more but it could be less.” Those words neither explicitly nor implicitly threaten employees with loss of benefits. Board law supports this conclusion. Communications that make it clear that “any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations” do not violate the Act. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) (citing *TRW-United Greenfield Division*, 245 NLRB 147 (1979)); *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974). The Board has found that language such as the following to be lawful because the employers remarks did not imply that benefits would unilaterally be taken away and the emphasis was on the possible results of lawful bargaining; namely that some benefits may be reduced in bargaining while others would increase:

Now I'm sure you have been told your wages and benefits could only get better. But if you think I am going to start bargaining from where you are now you've got another think coming. I'm going to start from scratch, a minimum proposal. If the Union wants something like checkoff of union dues or preferred security for stewards they may have to exchange vacations, paid sick time or some other superior benefit you now have in order to get these things. Bargaining is just that, give and take. *Computer Peripherals, Inc.*, 215 NLRB 293, 293-294 (1974); *See also Herbert Halperin Distributing Corp.*, 228 NLRB 239 (1977).

The General Counsel may try to argue that G.C. 6 was the basis of Mr. Habermehl's presentation on August 21 and 22, 2017 because Ms. VanNoy in confusion over exhibit numbers erroneously so testified. (Shannon VanNoy Tr. 854:12-14) However the fact that she was temporarily confused regarding an exhibit does not overcome the substantial testimony of numerous witnesses, including Ms. VanNoy's, that the alleged words were never spoken by Mr. Habermehl in any of the employee meetings. The posting is consistent with Board law and the allegation should be dismissed.

- **About August 25, 2017, Respondent suspended its employee Walter Aguilar.**
- **About August 31, 2017, Respondent issued a disciplinary notice to its employee Walter Aguilar.**

J. Boar's Head Lawfully Suspended Walter Aguilar to Conduct an Investigation and Issued a Written Warning to Mr. Aguilar for Encouraging People to Engage in a Workplace Slowdown.

The allegation that Walter Aguilar was "suspended" on or about August 25, 2017 in violation of Sections 8(a)(1) and (3) implies that he was subjected to an unwarranted and unlawful disciplinary suspension. The reality, as testified to by both Shannon VanNoy and Leah Cochran, is that no disciplinary suspension occurred. It was an administrative suspension pending the

investigation of a report that he told fellow employees to slow down production. Removing Mr. Aguilar from the workplace during the investigation was consistent with the company's routine practice where there was potential that the accused employee's presence in the workplace might compromise the investigation. (Shannon VanNoy Tr. 811:19-24; 816:1-4) The primary witnesses to the alleged conduct were employees working on the same line in close proximity to Mr. Aguilar. The potential impact on the investigation was obvious.

Leah Cochran was made aware of the slowdown by RTE manger Judy Urasinski who called her late on Friday, August 25, 2017. (Leah Cochran Tr. 1044:1-7). At the end of the shift, Leticia, a lead in the department, told Ms. Urasinski that one of her employees had told other employees to slowdown, not work so hard, and was making a hand gesture, (slow down). (Leah Cochran Tr. 1044: 3-12). Ms. Cochran informed Ms. VanNoy, who had already left for the day, of the complaint. (Leah Cochran Tr. 1044:23-25). All the employees had gone home for the day, so Ms. VanNoy told Ms. Cochran that they would touch base about the issue on Monday. (Leah Cochran Tr. 1045:1-5).

The typical Boar's Head procedure for investigating a complaint is to meet with the person who made the complaint or the person that the complaint was about and then continue interviewing other witnesses. (Leah Cochran Tr. 1047:3-7). Ms. VanNoy interviewed Mr. Aguilar on Monday morning, Leah Cochran translated his comments from Spanish to English. Ms. Urasinski was also present. (Leah Cochran Tr. 1047:16-23). They then spoke with Leticia, Marisela and finally Daniel. (Leah Cochran Tr. 1047:16-23). Ms. Cochran prepared detailed notes of what the employees said. She explained that since many employees are uncomfortable or have a difficult problem writing out their own statement, she takes notes instead. (Leah Cochran Tr. 1049:15-22).

Ms. VanNoy began by telling Mr. Aguilar that “she received a complaint that he was telling the employees or encouraging them to work slowly. She asked him whether he had done it and Aguilar denied it. He also said that “he’s not going to do the work of two people,” and commented that he didn’t know why people had made reports about him asking others to slow down. (Shannon VanNoy Tr. 674:10-13; Res. Exh. 5). Aguilar also testified that Ms. VanNoy told him that he knew that the factory had a production goal that he knew that they had to meet every month, that he was “under investigation” and that he “was being suspended for 3 days, until they finish the investigation.” (Aguilar Tr.122: 10-18). Aguilar testified that in that meeting he told Ms. VanNoy that there were other people doing the same thing as he was doing, telling people to slowdown, but that he did not mention any names. (Aguilar Tr. 158:7-18). Both Ms. VanNoy and Ms. Cochran, denied that he made such a comment. (Shannon VanNoy Tr. 812:22-25; Leah Cochran 1050:25-1051:8). Both also testified that had he made such a claim, it would have been in the interview notes and would have definitely been part of the investigation. (Leah Cochran Tr. 813:3-4; Leah Cochran 1050:25-1051:8). Ms. Cochran did not find Mr. Aguilar’s denial to be credible. She testified that “Walter at no point in the interview looked anyone in the eye. He fidgeted in his seat. He just avoided eye contact at all cost.” (Leah Cochran Tr. 1058:13-15).

Ms. VanNoy did tell Aguilar that he was going to be suspended pending investigation, but no time frame was mentioned. (Shannon VanNoy Tr. 674;17-20; 811:13-24; Leah Cochran Tr. 1060:19-22). The concern was that Aguilar might influence his coworkers if he remained and the company would not get an accurate report about the events. (Shannon VanNoy Tr. 674:22-25; 865:12-866:6; Leah Cochran Tr. 1061:1-4; 1084:18-25). Suspension pending investigation is a common tool when there is serious misconduct or if it is believed that the person may interfere with the investigation in any way. (Leah Cochran Tr. 1060:23-1061:4).

When Ms. Cochran and Ms. Uransinski spoke with Marisela that same morning of Monday August 28, 2017, she said that she saw “Walter making fun of Daniel and telling him not to work so hard and that he should relax, (Leah Cochran Tr. 1056; Res. Exh. 5). “Meat was falling on the floor.” (Res. Exh. 5; Leah Cochran Tr. 1056:20). Marisela also said that Walter was always telling her not to work so hard. (Res. Exh. 5; Leah Cochran Tr. 1056:24-25). In his interview, Daniel also said that Walter told him not to work so hard. (Res. Exh. 5; Leah Cochran Tr. 23-24).

Before she began her investigation, Ms. VanNoy informed Scott Habermehl about the incident because she always informs him of serious employee relations issues. (Shannon VanNoy Tr. 670:9-11). She also knew that she would likely suspend Mr. Aguilar pending investigation and she also lets Scott know when she takes that action. (Shannon VanNoy Tr. 671:13-20). She freely admitted in her testimony that since Mr. Aguilar was one of the main union supporters, she wanted to confirm with Mr. Habermehl how she should proceed. Mr. Habermehl told VanNoy that she should treat the situation the same way that she would treat any other employee. (Shannon VanNoy Tr. 673:1-3; 816:12-16).

On Tuesday morning, August 29, 2017, Ms. Cochran provided Shannon her investigation notes and gave a verbal summary of the interviews that had taken place. (Leah Cochran Tr. 1080:20-25).

It took 3 days for management to consider and make a decision about Aguilar and the course of action that would be taken. (Shannon VanNoy Tr. 685:10-14). This was the first time that the company received a report that an employee had told other employees to slowdown. (Leah Cochran Tr. 1114:4-7). It is not unusual for an investigation to take several days since the first day or two would normally be spent interviewing employees, and then supervisors, managers, and corporate

HR would often need to become involved, as occurred here. (Leah Cochran Tr. 1081:5-18) It is likely that the General Counsel will likely argue that the three days to complete the process was excessive, and intended to keep Mr. Aguilar out of the plant and unable to organize fellow employees. There are no facts or evidence to support such an assertion and it is plainly wrong. The time the investigation would take was not decided beforehand by the investigators, but was caused by the need to investigate the matter and consult with Mr. Habermehl, and local management. In addition, Ms. VanNoy needed to contact Mr. Habermehl before they brought Mr. Aguilar back to work, which was part of the reason it took the three days. (Shannon VanNoy Tr. 685:13-21).

Mr. Aguilar was disciplined on August 31, 2017. Contrary to the allegation that the disciplinary notice was unlawful, there was ample proof of Mr. Aguilar's misconduct. The decision to issue a written warning was based upon Ms. VanNoy's recommendation and the plant manager's decision. The discipline notice stated that the company received reports that Aguilar encouraged individuals not to work so fast or so hard. (G.C. Exh. 10). He was cited for violating work rule 2.23, "restricting his own production or interfering with the production of other employees." (G.C. Exh. 10)

Mr. Aguilar was fully reimbursed for the time he was out and there is no record of a disciplinary suspension. Nor is there any evidence that Boar's Head sought to exclude him from the workplace to limit his union organizing activity as the General Counsel seemed to be asserting at trial. Since the investigation confirmed the fact that Mr. Aguilar had repeatedly told employees to slow down over a period of time, he received progressive discipline, a written warning for violation of work rule 2.2.3. (Shannon VanNoy Tr. 815:8-20) Mr. Aguilar's union support played no role in the investigation or determination of whether the alleged conduct violated company policy. (Leah

Cochran Tr. 1061:14-25). The company decided to apply progressive discipline because it had not addressed Mr. Aguilar's similar behavior in the past. (Leah Cochran Tr. 1062:6-8).

Subsequent to the incident involving Mr. Aguilar, there was another individual that was also investigated for possibly engaging in a slowdown. The employee was suspended pending investigation just as had occurred in other serious cases and with Mr. Aguilar. After an investigation, the conclusion was that there was no merit to the allegations. (Shannon VanNoy Tr. 731:6-12). The employee returned to work, paid the wages for the time she missed, and no discipline was issued. (Shannon VanNoy Tr. 731:13-16). This incident occurred 6 weeks or so after the incident involving Mr. Aguilar. (Shannon VanNoy Tr 737:7-9).

While no disciplinary suspension occurred in this case, and only a written warning was issued, an allegation of violation of Section 8(a)(1) and 8(a)(3) is a claim of unlawful discrimination. In such cases the employer's motive is determinative. Thus, establishing that Boar's Head was motivated by union animus in the action it took regarding Mr. Aguilar is a precondition to finding a violation. No such motivation can be shown in this instance as to either an alleged disciplinary suspension or the written warning that he ultimately received.

The analysis in cases of alleged discrimination is conducted under the Wright Line protocol. *In re Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F. 2d 899 (1st Cir. 1981) cert. denied (1982). The General Counsel must present a prima facie case, which is the existence of protected activity, knowledge of that activity by the employer, and union animus. *Id.* Proof of these elements permits an inference that protected conduct was a motivating factor in the employer's action and that a violation has occurred. The prima facie case can be rebutted by the employer by showing that the prohibited motivation did not occur. *Id.* While Mr. Aguilar admittedly was a union supporter and

that fact was known to Boar's Head, sufficient evidence of animus to support a prima facie case is lacking. Nonetheless, assuming a prima facie case has been presented, Boar's Head has shown that prohibited motivations had no role in the action taken regarding Mr. Aguilar.

It has been long held that an employer such as Boar's Head has the right to take disciplinary action for good cause related to maintenance of order and efficiency in its facility. *NLRB v. Jones & Laughlin Steel Company*, 301 U.S. 1 (1977); *Associated Press v. NLRB*, 301 U.S. 103 (1937). The Board has consistently found that disciplining employees who engage in a work slowdown does not violate section 8(a)(3) and is not an unfair labor practice. In fact, the NLRB's own website specifies that an employer does not violate Section 8(a)(3) by "discharging employees who engage in an unprotected or prohibited strike. Unprotected strikes include sit-down strikes, partial strikes (such as slowdowns), and intermittent strikes." (Discriminating against employees because of their union activities or sympathies (Section 8(a)(3) <https://www.nlr.gov/rights-we-protect/whats-law/employers/discriminating-against-employees-because-their-union>, accessed 9/3/2019). This was the very first occasion in which a slowdown had been reported at the Holland plant. Additionally, the Board and the courts have consistently confirmed an employer's right to take disciplinary action for such unprotected conduct. *NLRB v. Blades Mfg. Corp.*, 344 F. 2d 998, (8th Cir. 1965); *Daimler-Chrysler Corp.*, 344 NLRB 154 (2005); *Elk Lumber Co.*, 91 NLRB 333 (1950).

The General Counsel may try to argue that no records demonstrating reduced production were offered and that it somehow confirms that no slow down occurred. Here, the other employees that Mr. Aguilar was urging to slow down refused to do so. He was disciplined for urging them to slow down not because he was successful in his efforts. The General Counsel may try to argue that no records demonstrating reduced production were offered and that it somehow confirms that no slow down occurred. Here, the other employees that Mr. Aguilar was urging to slow down refused

to do so. He was disciplined for urging them to slow down not because he was successful in his efforts.

Even though no disciplinary suspension but only a written warning was issued in this case, there can be no question that an employee urging others to slow-down production as was done here on a repeated basis by Mr. Aguilar could significantly impact “order and efficiency” in the plant. It would certainly constitute good cause for disciplinary action. Boar’s Head’s unbiased investigation confirmed that Mr. Aguilar had repeatedly told fellow employees to slow down their production and had been doing so for some period of time. (Leah Cochran Tr. 815:8-20) As explained by Shannon VanNoy, it was because supervision had obviously not been vigilant and failed to become aware of the conduct when it had occurred in the past, that she felt more serious discipline beyond a written warning was not warranted. (Shannon VanNoy 866:24-867:24). It was also the first time Mr. Aguilar had been disciplined. Additionally, it was a Class II violation, less serious than a Class I violation which generally warrants discharge. (Shannon VanNoy Tr. 867:4-13) The General Counsel presented no evidence that Mr. Aguilar’s union support was ever a factor in the decision to issue discipline.

The General Counsel will also likely cite the fact that Mr. Aguilar reportedly commented in support of the union at an employee meeting on unionization as a factor in the company’s actions. His union support was well known and, no one, including Mr. Aguilar, testified about what exactly he said. Mr. Habermehl could not even recall a comment from Mr. Aguilar, and he was conducting the meetings. Moreover, other employees also asked questions or spoke up during the several meetings that were held. None were disciplined, because none told other employees to withhold production. Mr. Aguilar’s union support was well known and it caused Boar’s Head to be even more cautious in conducting its investigation of the alleged misconduct. (Shannon VanNoy Tr.

673:1-3; 816:12-16). The General Counsel will undoubtedly argue that the company failed to investigate Mr. Aguilar's allegation that others were also telling employees to slow down. Shannon VanNoy and Leah Cochran, both present when he was interviewed regarding the report, both credibly testified that he never made such a claim and nothing supporting his claim appears in the notes. (Res. Ex. 5) Nor were any such alleged claims confirmed by any of the employees interviewed in the investigation.

Moreover, Mr. Aguilar's conduct and testimony raise substantial questions about his credibility. As noted above, Leah Cochran, who conducted the investigation, found him not to be credible in his denial of the slowdown claim. Virtually everything that he testified to on this and other matters was contradicted by multiple witnesses. For example, Aguilar even testified that he did not tell employees to slow down production, but rather the purpose of his comments was for them not to work as fast so that they do not injure themselves. (Aguilar Tr. 249:13-18). He further testified that while he personally was never hurt by the speed of the line, other individuals had been. (Aguilar Tr. 253:22-254:11). He claimed that these individuals work in the same boxing and packing area where he works. (Aguilar Tr. 254:6-11). He said that they were injured from "opening the meat and peel off the meat" while working on the line, a clearly fabricated claim. (Aguilar Tr. 254:27-23). The boxing and packing department works with fully packaged cooked products. There is no "opening the meat or pulling off the meat" as Mr. Aguilar claims. It would destroy the packaged product. The job of employees packing is to put the ready-to-eat packaged product into boxes. It is not to open or work with raw or cooked unpackaged products. It is clear that Aguilar's testimony on this point was totally fabricated, or at the very least related to individuals in areas outside of packing despite his testimony.

In addition, Senior Human Resources Coordinator, Rodolfo Rodriguez, had in the past worked in the same packing and boxing area as a lead. He explicitly contradicted Mr. Aguilar's claim that the line speed was so fast that employees were regularly injured. (Rodolfo Rodriguez Tr. 1218:19-25). Mr. Rodriguez testified that the line speed is not fast and is consistent throughout the day. (Rodolfo Rodriguez Tr. 1220:7-9). He also said that there are also gaps of 15-20 minutes where production is down, no product is coming through and the line is stopped. These gaps regularly occur about three or four times a day. (Rodolfo Rodriguez Tr. 1220:15-1221:9). These gaps in production are in addition to the regular breaks given to employees. (Rodolfo Rodriguez Tr. 1221:10-12).

Nor did Mr. Rodriguez recall any injuries from the speed of the line, or complaints from employees that felt that the speed was too fast when he was a lead. (Rodolfo Rodriguez Tr. 1222:20- 1223:1). He also has not had any reports of injuries on the boxing line or complaints from employees that the line is too fast since he has been in HR. (Rodolfo Rodriguez Tr. 1223:2-16).

Mr. Aguilar further testified that he talked to management about employees being injured because of the speed of the line; specifically, he claimed he talked with supervisor Guadalupe Rodriguez. (Aguilar Tr. 255:7-20). Mr. Rodriguez denied it, and also contradicting Aguilar, testified that he has not experienced employees being injured because of the speed of the line. (Guadalupe Rodriguez Tr. 909:15-24).

Ms. VanNoy testified that when she heard Mr. Aguilar's testimony at trial about employee injuries because of the line speed, including a claim of fractured bones, it was surprising since she had never heard of any such injuries. She therefore decided to review the medical records. She

found no reports of fractured bones and nothing about injuries resulting from the speed of the line. (Shannon VanNoy Tr. 817:16-20).

Aguilar's testimony was thus repeatedly contradicted by numerous witnesses as well as company records. He was totally lacking in credibility and his testimony cannot be relied upon.

The investigation of his attempts to foster a slowdown focused solely on his conduct and was conducted by Leah Cochran in an unbiased manner consistent with all other investigations of serious misconduct. Unbiased witness testimony confirmed that Mr. Aguilar had for some time been urging employees to slow down their production. It had never been reported before.

The progressive discipline that was issued to Mr. Aguilar was clearly warranted. The allegation that Boar's Head violated Section 8(a)(1) and (3) with regard to the discipline of Mr. Aguilar is not borne out by the evidence.

- **Respondent, by Shannon VanNoy and security guards unknown to the General Counsel but particularly within the knowledge of Respondent, at Respondent's Holland facility:**
 - **About October 11, 2017, engaged in surveillance and created the impression of surveillance of employees;**
 - **About October 18, 2017, engaged in surveillance and created the impression surveillance of employees;**
 - **About October 25, 2017, engaged in surveillance and created the impression surveillance of employees;**
 - **About November 16, 2017, engaged in surveillance and created the impression surveillance of employees in access to parking lots, gates and other outside**

nonworking areas.

K. At No Time on October 11, 18, 25, or November 16, 2017 did Boar's Head Employees or Members of Management Engage in Surveillance on Employees Passing Out Union Literature in the Parking Lot. Board Law is Clear that Employers May Observe Open Union Activity of Employees that is Conducted on or Near Company Property.

At the conclusion of trial, the General Counsel withdrew in each of the subsections of the original Paragraph 12, the allegation that Boar's Head "denied its off-duty employees' access to parking lots, gates, and other outside working areas". In its place it substituted the words "engaged in surveillance and created the impression of surveillance" on each of the dates referenced. This amendment was an admission by the General Counsel that they had woefully failed to present evidence of a denial of employee access despite almost two weeks of trial and hundreds of pages of testimony, a substantial portion of which was on that very issue. The amended allegation is not a mere clarification of an ambiguous or incomplete pleading. It does not correct missing or misspelled words. It is an entirely separate and distinct type of alleged unlawful conduct that bears little relation to the original allegation. Respondent objected to the proposed amendment but was overruled.

At no point was Respondent put on notice that surveillance or the impression of surveillance would be placed in issue. General Counsel had access to all the relevant information for one full year before the hearing to investigate the charge. General Counsel neither provided nor offered to provide a valid excuse for failing to include the amended charge in the Complaint despite multiple amendments to the original charges. Despite that failure, General Counsel could have moved to amend at trial as soon as it became evident that evidence of a denial of access was seriously lacking

or non-existent rather than after Respondent had rested its case. With proper notice, Respondent could have cross-examined General Counsel's witnesses to expose any inconsistencies as to alleged surveillance and fully explored the issue with managers, security personnel and other of Respondent's witnesses. There can be no question that the late amendment was prejudicial and denied Respondent due process.

The Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales, Inc.*, 296 NLRB 333 (1989) The issues of unlawful surveillance or the impression of surveillance in the context of the parking lot activity that occurred on four separate occasions in October and November of 2017 were not closely connected to the subject matter of the Complaint and were neither alleged nor fully litigated in this proceeding. In *Owens-Corning Fiberglas Corp. v. NLRB*, the Court, in addressing the sufficiency of complaints, stated "all that is required in a valid complaint before the Board is that there be a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put on his defense. Such a complaint need state only the manner by which the unfair labor practice has been or is being committed, the absence of specifics being tolerated where there has been no special showing of detriment." *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F. 2d 1357, 1361 (4th Cir. 1969). Similarly, in *Pergament United Sales, Inc. v. NLRB*, the 2nd Circuit stated "in the context of the Act, due process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated". *Pergament United Sales, Inc. v. NLRB*, 920 F. 2d 130, 131 (2nd Cir. 1990). In the current case the only "plain statement of the things claimed" related solely to the denial of employee access. There was no "fair notice" of alleged unlawful surveillance or the

impression of surveillance of the employee activity in the company parking lot. As a consequence, the conduct alleged in the amended allegation was not “fully and fairly litigated” in this hearing, much to the detriment of Boar’s Head. The amendment changed the alleged conduct as well as the theory of one of the most significant allegations in the case, one which consumed a substantial amount, if not a majority, of the trial time.

Had an allegation that unlawful surveillance was at issue in the parking lot activity been even suggested in the original Consolidated Complaint, or at any time during trial, the Respondent would have presented much more relevant testimony and other evidence to support its position. What resulted was hours of testimony from multiple witnesses over several days that focused almost exclusively on whether employees had at any time been denied access to the company parking lot to distribute union literature. Proper notice of the allegation would have permitted much more specific testimony and other evidence that surveillance of protected activity was neither contemplated nor occurred. Boar’s Head would have been permitted to elicit testimony from relevant witnesses that neither the security personnel nor any manager were ever requested to try to identify employees distributing union literature and that no record, video or otherwise, was kept of employee union activity by anyone at Boar’s Head. Respondent would not have spent the many hours questioning numerous witnesses about every conceivable act or comment that could be construed as a denial of access. Respondent was therefore denied the opportunity to provide substantial evidence that would help to shape the “totality of the circumstances”, the applicable standard applied in considering the allegedly unlawful conduct in the amended allegations.

Notwithstanding the belated amendment, the General Counsel presented no evidence at trial to support either a surveillance or impression of surveillance claim. There is no evidence that pictures or video of the protected activity, notes of when and where it occurred, or a record of which

employees engaged in the distribution of union literature or any similar information was kept or requested by Boar's Head management. There is no credible record evidence that management ever inquired of anyone as to which employees were participating or told any company representatives to keep track of what employees participated. There is no evidence that management sought to track or identify which entering and exiting employees took the union literature being distributed. There is no record of discussions among management regarding the employees distributing literature. There is no credible record evidence of any reference to the distribution of union literature to any employee from any manager.

It is anticipated that the General Counsel will attempt to support the amended allegation by trying to establish that the presence of the security guards in the parking lot while union flyers were being distributed was "out of the ordinary" and therefore unlawful. This of course ignores the fact that there had never before occurred any similar activity in the company parking lot and no blocking of employee vehicles had ever been experienced. Additionally, they will likely argue that the surveillance was "excessive" and therefore coercive. A single security guard, or even two observing vehicles exiting to prevent dangerous blocking can hardly be deemed excessive. There were generally only two guards per shift. (Gerald Cox Tr. 1373:2-3). The only time when there were more than two guards on duty was in the brief overlap between 1 and 2 pm on October 11, 2017 before Jeff Dahl left to be replaced by Candy Miller, another security guard. (Ron Ortega Tr. 1425:19-22). Ms. Miller, who no longer works at Boar's Head, took turns with Gerald Cox going out into the parking lot. (Gerald Cox Tr. 1352:5-14). One guard would be in the parking lot or patrolling the plant grounds while the other remained in the guard shack to admit visitors and log in delivery trucks. (Gerald Cox Tr. 1353:1-8). After one of her trips to the parking lot, Candy commented that "it's a circus out there." (Gerald Cox Tr. 1353:6-12).

The record evidence confirms that the Boar's Head security guards and managers were in the parking lot only to address concerns about traffic and the blocking of vehicles. After informing his supervisor Mr. Ortega, about the presence of union organizers in the parking lot on October 11th. Gerald Cox, and Jeff Dahl, another security guard, went out to the parking lot to "maintain a safe environment and to keep the traffic flowing." (Gerald Cox Tr. 1346:15-17). Mr. Cox told the chief organizer, Francisco Castillo to "stay behind the line, and don't come into the parking lot, and keep the traffic flowing." (Gerald Cox Tr. 1347:21-1348:1). After Mr. Cox spoke with Mr. Castillo, he and Mr. Dahl "monitored operations for a while to make sure the traffic was flowing" before they went back to the guard house. (Gerald Cox Tr. 1349:23-25). As the time passed traffic got more and more backed up. (Gerald Cox Tr. 1350:7-13). Around 2:30, Mr. Cox went into the parking lot because the traffic was backed up and told the cars to keep moving to ensure that traffic was flowing. (Gerald Cox Tr. 1350:7-13). The traffic was backed up for vehicles entering and exiting the parking lot. (Gerald Cox Tr. 1350:22-23).

Security manager, Ron Ortega's instructions to the security guards "was we need to keep the vehicles moving." (Ron Ortega Tr. 1437:13-14). "That was the big thing is they were -- the traffic was backed up." (Ron Ortega Tr 1437:14-15). "And our efforts were to keep the vehicles moving." (Ron Ortega Tr 1437:15-16). Between 2:30 and 3:30 there were "like 15, 20 cars that were backed up, because it was all the way to the stop sign which is a couple of hundred feet." (Ron Ortega Tr. 1438:15-19).

The company received numerous complaints from employees that individuals were stepping in front of vehicles as they were entering and leaving the parking lot on October 11th. (Shannon VanNoy Tr 770:2-5). Shannon VanNoy received a dozen or so reports through phone calls or face-

to-face interactions with individuals that came into HR to complain about the cars getting backed up. (Shannon VanNoy Tr 770:8-18).

Also, on October 11th, between 3:00pm and 3:30pm because of employee complaints of vehicles being blocked, Shannon VanNoy, Rodolfo Rodriguez, Assistant Plant Manager Mark Emmons, Ron Ortega, and Gerald Cox went to the parking lot to discuss the situation with the union organizers.

Even Chief UFCW Organizer, Francisco Castillo, acknowledged that the guards were concerned about traffic. He testified that the security guards kept telling employees in the cars that they had to keep moving (Francisco Castillo Tr. 488:11-18).

Castillo's testimony regarding what occurred when Ms. VanNoy, Mr. Rodriguez, and Mr. Emmons came to speak with him was confusing, often evasive, and ultimately less than credible. It deals almost exclusively with the original allegation of denial of access but confirms the lack of credibility of most of his testimony at trial. Castillo claims that the guard was yelling and screaming at the employees in the vehicle not to stop and to keep moving. (Francisco Castillo Tr. 488:20-24). He testified that Shannon was yelling in English for the workers (distributing literature) to go home and Rodolfo was saying the same thing in Spanish. (Francisco Castillo Tr. 494:2-25). Castillo claims that Shannon specifically told him that he needs to leave. He testified that he told Shannon that she should call her attorney because she was breaking the law. (Francisco Castillo Tr. 497:3-5). He further claimed that Shannon was yelling and screaming at employees from when she walked from the inside of the building to when she reached him. (Francisco Castillo Tr. 503:10-13). His incredible claims were contradicted by Ms. VanNoy and every other witness involved in that incident.

Contrary to Castillo's testimony, Rodolfo Rodriguez credibly testified that he did not yell at employees in Spanish, nor did Shannon or Mark Emmons yell in English. (Rodolfo Rodriguez Tr. 1256:1-7; Ron Ortega Tr. 1436:7-17). Rodolfo only said "hi" to Nelson Langarita as he passed him in the parking lot. (Rodolfo Rodriguez Tr. 1259:17-22). Unlike Castillo's claims, Rodolfo did not say anything to any employees in Spanish while he was out in the parking lot on October 11. (Rodolfo Rodriguez Tr. 1270:2-5). As noted above, Castillo also claimed that Shannon loudly told the employees distributing materials that they had to leave the parking lot. However, he notably neglected to mention that very significant alleged conduct in the affidavit he provided to the Board in support of the UFCW charges. It would have been critical evidence for the original allegation of denial of access. His failure to mention it in his affidavit further confirms his lack of credibility. (Castillo Tr. 614:19-25).

Despite the lack of fair notice of the substantively revised allegations and legal theory, substantial testimony was presented regarding the efforts to address the safety concerns created by employee vehicles being blocked by both employees and union organizers. Shannon VanNoy, Security Manager Ron Ortega, and security guard Gerald Cox credibly testified that it was their concern over employee safety created by the blocking of exiting and entering vehicles that caused them to be present while the activity was occurring.

It is clear from the testimony above that the reason for the guards and, the one brief instance on the first day of parking lot activity, October 11th, other members of Boar's Head management to be in the parking lot was due to employee safety. It was not related to the surveilling of employees and none occurred. There is no evidence that the names or any other information about employees engaging in protected activity were recorded.

The Board has not found unlawful employer observation of employee activity such as handbilling that occurs on or near company property when the observation was consistent with the legitimate employer interests in good order and productivity. Moreover, “It is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful”. *In re Roadway Package Sys., Inc.*, 302 NLRB 961, 961 (citing *Southwire Co.*, 277 NLRB 377, 378 (1985)); *Porta Systems Co.*, 238 NLRB 192 (1978)); *See also Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007); *Fred’K Wallace & Son, Inc.*, 331 NLRB 914 (2000); *Roadway Package System*, 302 NLRB 961 (1991); *Hoschton Garment Co.*, 279 NLRB 565 (1986); *Southwire Co.*, 277 NLRB 377, 378 (1985); *NLRB, ALJ Decision, Transcare New York, Inc.*, No. RC-11762, 2010 BL 464113 (2010).

Boar’s Head did not engage in surveillance of any employees or create the impression of surveillance during any of the four instances of employee distribution of union materials in the parking lot. The testimony demonstrates that employee safety and the blocking of traffic in the parking lot was the only concern on all of the days at issue.

Ron Ortega stated that the backup of vehicles on October 18th, October 25th, and November 16th wasn’t as bad, [b]ut there were -- there pockets of backups during those times.” (Ron Ortega Tr. 1445:6-12).

Gerald Cox saw the organizers again on October 18 and informed his supervisor, Ron Ortega. (Gerald Cox Tr. 1359:21-25) Mr. Ortega and he then went out to the parking lot around 1:30 or 1:45. (Gerald Cox Tr. 1360:6-10). They went to the parking lot “[j]ust like before to keep the traffic moving” and “[t]o make sure safety was maintained in the parking lot (Gerald Cox Tr. 1379:14-16). The purpose was “[t]o make sure they didn’t cross the line and hold up traffic on the road.” (Gerald

Cox Tr. 1380:3-7) Castillo claims that he told Ron that he was surveilling workers and violating the act. (Francisco Castillo Tr. 517:8-13) While Castillo's claim is legally incorrect, this is the only reference to surveillance in this entire matter, and no employees were present at the time of Castillo accusation. (Francisco Castillo Tr. 524:18-20) Mr. Ortega responded that he was here because of Castillo and the other union employees. (Gerald Cox Tr. 1360:11-17; Ronald Ortega 1452: 2-3) He said that "[y]ou have been obstructing our employees from leaving the parking lot." (Ronald Ortega Tr. 1452:2-3) At that time there were no employees handing out flyers. (Gerald Cox Tr. 1361:5-10; Ronald Ortega Tr. 1452:11-22) After the conversation they continued to monitor the cars coming in and out. (Gerald Cox Tr. 1361:18-19) Mr. Castillo's testimony confirms that the guard was motioning to drivers to keep the traffic flowing. (Francisco Castillo Tr. 525:11-13; 526:18-24)

Castillo's testimony also confirmed that security was concerned with the cars getting backed up in the parking lot. Castillo was unsure of the day, but he testified that on October 18th or 25th, the security guards were walking around the parking lot while cars were backing up and there was a lot of commotion in the parking lot. (Francisco Castillo Tr. 617:24-618:6) Castillo said that "they tried to move the cars." (Francisco Castillo Tr. 618:7-9)

On October 11th, 18th, and 25th, Gerald Cox was in the parking lot monitoring the traffic, trying to keep the traffic flowing, and used the words "keep moving" to backed up vehicles. (Gerald Cox Tr. 1363:4-12)

Mr. Castillo admitted that on November 16th, while employees were driving out of the parking lot exits, a security guard also made a hand gesture to shoo. (Francisco Castillo Tr. 553:17-20; 554:14-17) Castillo testified that the guard made the same motion to the employees that were driving the exiting cars on October 11th, the first time that the union handbilled. (Francisco Castillo

Tr. 555:14-17) For all the reasons stated herein, including the lack of due process in preventing the company from presenting evidence denying surveillance and the impression of surveillance and the lack of evidence of surveillance or the impression of surveillance, Paragraph 12 and its belated amendments should be dismissed.

- **About October 25, 2017, Respondent, by Larry Helfant, in the employee parking lot at Respondent's Holland facility, by driving a vehicle while another management official recorded video and/or took pictures, engaged in surveillance of employees engaged in union activities and concerted activities.**

L. Larry Helfant did Not Engage in Surveillance at the Holland Facility on October 25, 2017 as He was Not in the Parking Lot when Mr. Castillo, the Union Organizer and Witness, Alleged that He Was There and He Arrived Alone to the Facility Contrary to Mr. Castillo's Testimony.

The Consolidated Complaint alleges that Senior Vice President of Sales and Operations Larry Helfant engaged in unlawful surveillance by being present in a vehicle while another unknown person in the vehicle recorded a video or took pictures of employees' protected activity. The record testimony, including that by the General Counsel's primary witness on the allegation, Francisco Castillo, totally contradicts the assertion of surveillance, unlawful or otherwise.

On October 25, 2017 Boar's Head held a company-wide, quarterly operations meeting at the Holland plant. (Scott Habermehl Tr.1573:18-22) It was attended by various managers, including Scott Habermehl and Larry Helfant. (Scott Habermehl Tr. 1573:23-1574:6) Originally scheduled to begin at 1:00pm, the meeting actually began at 2:30pm despite Mr. Helfant not having yet arrived. (Scott Habermehl Tr. 1573:18; 1574:4) Mr. Helfant arrived at 2:52pm, alone. (Scott Habermehl Tr. 1625:4-6; Lawrence Helfant 1574:5-6) To enter the plant, all visitors must be electronically buzzed

in by a security guard, show identification, be signed in, and have the serial number of any laptop recorded by security. (Ron Ortega Tr. 1459:8-23) This includes Boar's Head employees from other plants and the corporate office. The security gate logs show that Mr. Helfant was signed in at 14:53 (2:53pm) and was signed out at 18:10 (6:10pm). (Res. Exh. 10) He never left the meeting once he arrived. (Ron Ortega Tr. 1459:8-23) Any visitor must sign out and back in if they leave the plant. Mr. Helfant was signed in and out only once. (Res. Exh. 10) In addition, Mr. Helfant drove himself in a small or subcompact car, possibly a Toyota. This was confirmed by Security Manager Ron Ortega, who encountered Mr. Helfant in the parking lot when he arrived. (Ron Ortega Tr. 1461:21-24) Together, these facts highlight the General Counsel's lack of proof of this allegation.

Mr. Castillo confirmed in his testimony the implausibility of the timeline alleged by the General Counsel. On at least three separate occasions in his testimony, he stated the alleged cell phone video surveillance incident occurred "around between 3 and 4 o'clock" as the vehicle he alleged Mr. Helfant was riding in exited the plant. (Francisco Castillo Tr. 622:14-15, 17-18; Francisco Castillo 625: 4-10, 17-19) As noted, the security log confirms that after arriving at 2:53pm, Mr. Helfant never left the plant until 6:10pm. (Res. Exh. 10) Scott Habermehl confirmed that he was in the meeting the entire time and that from the time he joined the meeting shortly before 3:00pm, Mr. Helfant did not leave until the meeting ended at 6:00pm. (Scott Habermehl Tr. 1573:18; 1574:22; 1575:1-10) Therefore, he could not have been in a vehicle exiting the parking lot and driving by Mr. Castillo between 3:00pm and 4:00pm as he claims. (Scott Habermehl Tr. 1573:18; 1574:4; 1575:1-10) In addition, on several occasions, Mr. Castillo testified that the vehicle he alleged Mr. Helfant was a passenger in a Chevrolet Impala. (Francisco Castillo Tr. 540:12-542:6) Ron Ortega testified that Mr. Helfant drove a small subcompact car that day. (Ron Ortega 1461:21-24) Mr. Castillo could not reasonably confuse a sub-compact a full-size car such as an

Impala. In addition, Mr. Helfant, in denying the allegation, testified that he always drives himself to the plant, as he did that day. (Larry Helfant Tr. 1625:2-3; 1626:23-24; 1627:1-3)

Mr. Castillo's contradictory testimony about the alleged incident creates even more credibility questions. He testified that between 3:00pm and 4:00pm the Chevy Impala exited the plant parking lot, turned right and shortly thereafter returned and drove past the plant. (Francisco Castillo Tr. 541:1-16; 622:14-20; 625:4-12) He testified that he saw a man in the back seat holding a cell phone who appeared to be taking a video or picture. (Francisco Castillo Tr. 541:1-16; 622:14-20; 625:4-12) Mr. Castillo said that the person was holding the backside of the phone towards him. (Francisco Castillo Tr. 622:22-623:6) He admitted that he did not see the screen of the phone. (Francisco Castillo Tr. 623:6-9) He had no idea whether the phone was filming or what function of the phone was being utilized. (Francisco Castillo Tr. 623:6-9) He also testified the manner the cell phone was being held was similar to how someone holds up a cell phone to make a conference call. (Francisco Castillo Tr. 625:1-3) Mr. Castillo could not even say with certainty that Mr. Helfant was in the car, stating "I can't say that it was Larry directly because according to the worker and the profile, I can identify he's Larry. (Francisco Castillo Tr. 541:21-24) "But I not sure it's Larry was taken to be." (Francisco Castillo Tr. 541:21-24) No employee testified in support of Mr. Castillo's implausible and contradictory claims.

The record evidence does not support the allegation that Mr. Helfant or any other Boar's Head manager engaged in unlawful surveillance on October 25, 2017. Therefore, this allegation should be dismissed.

- **About October 2017, the Employer, by Vicente Nunez, on the workroom floor at Respondent's Holland facility, by soliciting employee complaints and grievances,**

promised its employees increased benefits and terms and conditions of employment if they refrained from union organizing activity.

M. Vicente Nunez Made No Promise of Benefits To Employee Norma Chacon For Her To Refrain From Supporting The Union.

The General Counsel failed to identify in the Consolidated Complaint a particular employee from whom Vicente Nunez solicited complaints or to whom he promised benefits. It is either an October 2017 conversation between Mr. Nunez and an employee named Samuel on the production floor, or a later conversation with an unknown female employee in her work area, later identified as Norma Chacon that presumably form the basis of this allegation. Mr. Nunez himself admitted to these conversations. However, neither were conversations that involved solicitation of employee complaints or grievances or promises of increased benefits and improved terms and conditions. Each employee initiated – unsolicited by Mr. Nunez – the respective conversations.

Samuel initiated his conversation with Mr. Nunez by inquiring into when union organizers would quit bothering him at home. (Vicente Nunez Tr. 1138:9-25) He also informed Mr. Nunez that he considered signing the organizers' card, simply so that the union organizers would go away. (Vicente Nunez Tr. 1138:9-25) Mr. Nunez replied only that Samuel should do whatever he thinks is right. (Vicente Nunez Tr. 1138:9-25) The female employee, who was identified at trial as Norma Chacon, asked when the union meetings would be done. (Vicente Nunez Tr. 1132:16-20) Mr. Nunez replied only that he did not know, and then had a brief conversation with her. (Vicente Nunez Tr. 1132:21-25)

Boar's Head Human Resources representatives like Vicente Nunez, are scheduled to visit the plant production areas on a regular basis. (Vicente Nunez Tr. 1130:20-21) The purpose of being

on the floor is to be visible to employees and available to address any concerns. (Vicente Nunez Tr. 1130:24-1131:2) Ms. Chacon initiated the conversation with Mr. Nunez. (Vicente Nunez Tr. 1132:16-20) The transcript of Mr. Nunez's testimony contains an error as it says that "I remember that she is mad to me." (Vicente Nunez Tr. 1132:17-20) This was noted in the Motion for Correction of the transcript and Judge Randazzo's order. Mr. Nunez recalls Ms. Chacon calling him over as he passed ("made a gesture to me") and asking him when the union meetings will be done, He responded that he did not know. (Vicente Nunez Tr. 1132:16-20) He also engaged in a casual conversation with her, asking the usual questions of how she is doing, does she like her job, does she need help on anything and routine human resources issues. (Vicente Nunez Tr. 1132:21-25) He told her that if she had an interest in trying jobs in other areas, he would try to help her with it. She responded that she was happy with her current job. (Norma Chacon Tr. 307:18-25) An offer to assist an employee transfer to another job if they so desire, which is a part of his human resources job duties, can in no way be considered an unlawful promise of benefit for refraining from union activity. There was certainly no testimony from Ms. Chacon that she viewed it in that manner.

Nunez did not raise the issue of the union in their conversation, but Ms. Chacon did so totally unsolicited. She told him that she felt they needed a union at Boar's Head because of all the poor treatment. (Vicente Nunez Tr. 1133:6-10) When he responded by asking how she had been poorly treated, she mentioned that she felt that she was not being treating well at the company because the nurse had not treated her well. She also made a vague reference to a problem in the past with another employee. (Vicente Nunez Tr. 1133:11-1134:1) Nunez told her about his positive experience at Boar's Head and that he respects what she thinks, but was surprised because he believes that the owners take care of their employees and try to treat them right. (Vicente Nunez Tr. 1134:2-7) Contrary to Ms. Chacon's claim, Nunez at no point said that he saw her passing out union

literature in the parking lot nor did he mention the union at all as Ms. Chacon testified. (Vicente Nunez Tr. 1134:8-13) Mr. Nunez had not seen Ms. Chacon passing out union materials in the parking lot and was not in the parking lot at any time when employees were passing out materials. He testified that on one day as he was leaving the plant around 4:30pm – 5:00pm, he noticed several people near the parking lot exit but he did not recognize anyone. (Vicente Nunez Tr. 1134:17-23) However, even if he had seen Ms. Chacon openly engaging in such activity, and merely mentioned it to her, it would have been entirely lawful conduct. *Sunshine Piping, Inc.*, 350 NLRB 1186, 1186-1187 (2007); *Michigan Roads Maintenance Co.*, 344 NLRB 617, 627 fn.4 (2005). *Fred’K Wallace & Sons*, 331 NLRB 914 (2000); *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986). Mr. Nunez was not instructed to speak with Ms. Chacon nor did he inform anyone in Boar’s Head management about the conversation. (Vicente Nunez Tr. 1135:21-1136:6)

While the allegation is framed as one of unlawful solicitation of complaints and promise of benefits, on neither of which there is supporting evidence, out of an abundance of caution we also address the claim as one of unlawful interrogation. “It is well established that interrogation of employees is not illegal per se.” *Rossmore House*, 269 NLRB 1176, 1177 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985) (quoting *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980)). It is proper to review the totality of the circumstances to determine whether an interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed under the Act. *Id.* “The underlying premise of the Board’s holding in *Rossmore House* is that on many occasions interrogations can be completely lawful acts.” *Quicken Loans, Inc.*, 367 NLRB 112, 20 (2019).

Addressing the conversation with Samuel, Mr. Nunez did not engage in any interrogation, much less coercive interrogation. As he testified, Samuel initiated the conversation by asking when the

union issue was going to end and he simply replied that he did not know. (Vicente Nunez Tr. 1138:9-25) He did not ask Samuel a single question. (Vicente Nunez Tr. 1138:9-25) When Samuel added that he considered signing a union card to stop them from bothering him at home, Nunez merely told him that he should do what he felt was right for him. Nothing unlawful occurred in the conversation. (Vicente Nunez Tr. 1138:9-25)

In the conversation with Ms. Chacon, contrary to her claim that he confronted her and said he had seen her passing out union material in the parking lot, he testified that she called him over as he passed her work area. (Vicente Nunez Tr. 1132:16-20) Much like Samuel's question, she asked when the union meetings were going to end. (Vicente Nunez Tr. 1132:16-20) He similarly told her that he did not know and then engaged in small talk about her and her job. (Vicente Nunez Tr. 1132:16-25) She, unsolicited, commented that she felt a union was needed at Boar's Head to address the poor treatment. (Norma Chacon Tr. 307:2-4; 308:8-18; Vicente Nunez Tr. 1139:3-7) Mr. Nunez said nothing about the union in response and certainly posed no union-related inquires to her. (Vicente Nunez Tr. 1134:8-11, 12-13; 1135:11-13) Rather, he simply asked how she had been treated poorly. (Norma Chacon Tr. 308:8-9; Vicente Nunez Tr. 1133:17-19) He also expressed his opinion about Boar's Head being a good and caring company. (Norma Chacon Tr. 307:6-9; Vicente Nunez Tr. 1134:2-7) There was no unlawful interrogation in the conversation. As a Human Resources Coordinator, Mr. Nunez is responsible for training and development often speaks with employees regarding their day-to-day work. (Vicente Nunez Tr. 1131:6-17) Employees addressing Mr. Nunez about workplace concerns, including questions regarding union organizing and company meetings, in no way constitutes unlawful solicitation or coercive interrogation. The allegation regarding Vincente Nunez should be dismissed as unsupported by the evidence.

- **In about October 2017, Respondent by Maria Mendoza in the Beef Trim department:**

- **Interrogated employees about their union membership, activities and sympathies;**
- **Threatened employees with loss of benefits by telling them they would lose their grace period for donning and doffing if the employees select the union as their bargaining representative;**
- **Stated that employees are disloyal if they support the Charging Party.**

N. Ms. Mendoza Did Not Interrogate Employees, threaten Employees or State that Employees Would be Disloyal in a Meeting in October 2017 on the Beef Trim Line. The Line is too Loud to Have a Conversation with All Employees and One of the Alleged Witnesses to the Meeting Named by the GC's Witness on the Issue Denied that Meeting Ever Occurred.

At no time did Ms. Mendoza interrogate employees, regarding their union sympathies. Nor did she threaten employees with loss of benefits or state that they are disloyal if they support the Charging party. The alleged meeting on the Beef trim line testified to by Elba Rivas that apparently forms the primary basis for the allegations never occurred, as confirmed to by both employee Jose Villalobos and Ms. Mendoza. Uncontradicted testimony confirmed that employee meetings are not held on the Beef Trim line because it is not safe to have a meeting on the line while product is running. Additionally, it is too noisy to hold a meeting with a group of employees in that area.

According to employee Elba Rivas, a union supporter who testified in support of the allegation. Ms. Mendoza, Rivas's supervisor, allegedly speaking to the entire group of employees on the Beef Trim line while they were working, asked if they would like to have the Union. (Elba Rivas Tr. 87:12-13) Ms. Rivas stated that there were 15-19 people there. (Elba Rivas Tr. 88:2-6) She claimed that Mendoza was speaking to "everybody in general." (Elba Rivas Tr. 88:12-14) Ms.

Rivas specifically named fellow employees Martina Ramirez and Jose Villalobos as being on the line when Mendoza spoke. (Elba Rivas Tr. 88:19-22) The General Counsel chose not to call Ms. Ramirez or any of the other 15-19 employees allegedly present to support Ms. Rivas's testimony. The General Counsel made no indication any of these employees were unavailable to testify or failed to comply with a subpoena. However, Mr. Villalobos did testify contradicting Ms. Rivas's claims. (Jose Villalobos Tr. 929:1-9)

According to Ms. Rivas, the employees on the line continued to work cutting meat while Ms. Mendoza was talking. (Elba Rivas Tr. 92:15-23) Ms. Rivas also testified that was the only time that Ms. Mendoza talked to her about the union. (Elba Rivas Tr. 93:10-12) However, Mr. Villalobos and Ms. Mendoza denied that the alleged conversation ever occurred. (Jose Villalobos Tr. 929:1-9; Maria Mendoza 964:18-23; 966:10-14) They both confirmed that such a conversation could not occur while the employees were on the line cutting meat. (Jose Villalobos Tr. 932:10-12; Maria Mendoza 964:18-23) Safety concerns preclude meetings on the line because the employees cannot be distracted while cutting with razor-sharp knives. (Jose Villalobos Tr 932:15-18; Maria Mendoza 966:10-16) Ms. Mendoza also testified that she does not have meetings on the line because the employees cannot hear her due to their earplugs and the noise. (Jose Villalobos Tr. 932: 22-23; Maria Mendoza 966:22-967:1)

Contrary to Ms. Rivas's testimony which identified him as being present, Jose Villalobos very clearly denied that such a conversation ever took place. He was adamant, saying "No, no, never. No, that's false." (Jose Villalobos Tr. 928:9) Mr. Villalobos testified that Ms. Mendoza never spoke to him about unions on the Beef Trim line while production was running or at any other time. (Jose Villalobos Tr. 928:22-25) He also testified that Ms. Mendoza never talked about union payments or dues nor did she tell employees that if they supported the union then they were being

disloyal. (Jose Villalobos Tr. 931:18-21)

Contrary to Ms. Rivas highly questionable claims, it is evident that conversations such as alleged cannot and do not occur on the line for safety reasons. On the Beef Trim line employees use a meat hook, a 10-inch boning knife, hard hat, hearing protection, belly guard, hard arm sleeve, and a Kevlar proof glove to protect them while they are making cuts on the beef. (Mark Emmons Tr. 886:20-25; Jose Villalobos 924:16-925; Maria Mendoza 960:24-961:6) Employees are not allowed to remove their hearing protection while they are working because it would cause contamination, requiring them to change gloves before resuming work on the meat. (Maria Mendoza Tr. 961:14-24) In addition to the obvious dangers of distracting employees working with sharp knives, there was ample testimony about the difficulty in being heard while the line is in operation.

The noise on the line makes having a conversation with any employees, much less 15-19 employees, as alleged by Ms. Rivas, impossible. The employees on the line are about 2 feet apart from each other. (Mark Emmons Tr. 887:12-14; Maria Mendoza 959:15-19) There are approximately 15 employees on the line. (Mark Emmons Tr. 885:11-13) In between the two lines of Beef Trim employees is a meat conveyer that is approximately 6 to 7 feet wide. (Mark Emmons Tr. 887:19-22; Maria Mendoza 959:20-22) As noted, employees are required to wear ear protection because it's "very loud in the area." (Mark Emmons Tr. 887:23-25) There is noise from the running conveyor belts, a non-curing meat injector in the background, two refrigerant units directly above the employees' heads that are constantly running, a meat dumper that sounds a loud signal horn when it is in use, and the beeping of the material handlers trucks. (Mark Emmons Tr. 887:23-888:9) The employees on the line are also elevated about 5 feet on a platform. (Mark Emmons Tr. 885:23-25) Mark Emmons, the Assistant Plant Manager over the area, testified that it would not be possible

to have a conversation while production is running on the Beef Trim line because the employees are spread out over an area almost 30 feet in length. (Mark Emmons Tr. 888:16-889:2) It is too loud. (Mark Emmons Tr. 887:23-888:21) And, since the employees are using knives it would be unsafe. (Mark Emmons Tr. 888:16-889:11)

Ms. Mendoza testified that she rarely attempts to speak with the employees on the Beef Trim line. It only occurs when there is an operational problem and the conveyor belt is stopped. (Jose Villalobos Tr. 941:9-25) Ms. Mendoza steps up on to the line to observe production about 2 times a day for no more than a total of 10 minutes. (Jose Villalobos Tr. 999:14-19) To communicate with someone on the line, Ms. Mendoza calls the person down off the line and speaks with them on the production floor. (Maria Mendoza Tr. 968:8-11) She testified that even then, due to the noise, she needs to be about a foot away to have a conversation. (Maria Mendoza Tr. 968:8-18)

There was testimony by Mr. Villalobos regarding an incident where he was present when Ms. Rivas was in the cafeteria talking to other employees about the union. (Jose Villalobos Tr. 944:5-13) Ms. Rivas herself was the one discussing the union and asking the employees whether they wanted the union. (Jose Villalobos Tr. 945:1-5) This is perhaps the real basis for the allegation, simply reversing the actual speaker. Mr. Villalobos testified that in response to her question he told Rivas that he had been there for 17 years, was fine and did not need anything. (Jose Villalobos Tr. 944:10-22) Ms. Mendoza was apparently present in the cafeteria at the time, passing out checks, but did not speak to employees about the union. (Jose Villalobos Tr. 946:2-13) She simply put the checks on the table after calling out people's names and gave them the checks. (Jose Villalobos Tr. 946:18-20)

Ms. Mendoza is also alleged to have said "that if the Union came, they also will take away the minutes to go up and down the cafeteria." (Elba Rivas Tr. 88:20-22) Again, the claim is that this

was also said in that alleged conversation on the still running Beef Trim line. Allegedly, Ms. Mendoza was talking about the 7 minutes employees are allowed at the beginning, and end of their break to take off and put on their gear (donning and doffing). Ms. Rivas alleged that Ms. Mendoza said that the Union would be taking these things away. (Elba Rivas Tr. 93:13-17) The fact that she claims Ms. Mendoza said the union, not the company, would be taking this benefit away is confusing and creates further credibility issues about this alleged, apparently wide-ranging and lengthy conversation which she claims occurred while the line continued to operate. (Elba Rivas Tr. 87:7-88:18) Ms. Rivas also claimed that Ms. Mendoza said that the union “was no fit” for the employees and Boar’s Head “will take away” their bonuses. (Elba Rivas Tr. 89:25-90:2)

At no time did Ms. Mendoza threaten employees that they would lose their donning and doffing time or bonuses by either union or company action. (Maria Mendoza Tr. 974:16-21) As noted above, for a variety of very substantial reasons, no conversation such as Ms. Rivas claims could have occurred on the Beef Trim line. Of the 15-19 or more employees allegedly present, not a single one testified in support of Ms. Rivas’s claims. However, Mr. Villalobos, one of two fellow employees specifically named by Ms. Rivas as having been present during that alleged conversation did testify and credibly denied that it ever occurred. The record evidence does not support the allegations regarding Ms. Mendoza and should be dismissed.

- **About October 2017, Respondent, by Carlos Giron, in the employee parking lot at Respondent's Holland facility, by telling employees that he had seen their picture on the Charging Party's Facebook page, created the impression among its employees that their union organizing activity was under surveillance.**

O. Carlos Giron Lawfully Mentioned to an Employee Having Seen a Public Facebook Post. Board Law is Clear that Such Action is Lawful and Does Not Create an

Impression of Surveillance.

The General Counsel alleges that Supervisor-in-training Carlos Giron violated Section 8(a)(1) by creating the impression of surveillance through a comment he made to employee and union supporter Ascension Rios. This allegedly occurred when Mr. Giron told Mr. Rios that he had been surprised to see him in a Facebook photo showing a group of employees identifying themselves as supporters of the UFCW.

According to Mr. Rios' confused and rambling testimony, the incident occurred one afternoon in either September or October 2017. (Ascension Rios Tr. 278:12-14) As Mr. Giron testified, as he walked across the parking lot toward the plant entrance on his way to work one October 2017 afternoon he encountered three employees with whom he worked, Ascension Rios, Pablo Mendoza, and Jose Armijo. (Carlos Giron Tr. 1331:4-11) These three employees were standing together and conversing "about the people from the Union that were on the street," handing out flyers. (Carlos Giron Tr. 1331:12-22) Mr. Giron stopped to greet them. According to Mr. Rios' testimony, the two employees he was conversing with and Mr. Giron were laughing. (Ascension Rios Tr. 297:7-9) Mr. Giron testified that Mr. Armijo had jokingly said to Mr. Rios that he was going to say "hi to his friends from the Union." (Carlos Giron Tr. 1331:20-25; 1332:1-12) Mr. Giron told Ms. Rios that he had been surprised to see him in a Facebook picture of union supporters. In his trial testimony he said he was surprised because for several years he and others had personally helped Mr. Rios with his job duties to keep him out of trouble and did not think Mr. Rios had any workplace complaints that would prompt him to seek union help. (Carlos Giron Tr. 1333:5-11) He mentioned to Mr. Rios that an employee had shown him the Facebook photo a few days before. (Carlos Giron Tr. 1330:4-12; 1332:23-25; 1333:22-25) In his testimony at trial he identified the employee as Elena Martinez.

Mr. Giron's comment to Mr. Rios was not made in anger or in a threatening manner. (Carlos Giron Tr. 1339:11-21) In fact, he testified that it was a jovial conversation with all four of them laughing when Mr. Armijo said that he was going to go say hello to Mr. Rios's "union buddies" who were passing out materials at the parking lot exit. (Carlos Giron Tr. 1340:1-6) Contrary to Mr. Rios claim that Mr. Giron showed him the Facebook picture of the union supporters on his cell phone when he made the comment, Mr. Giron credibly testified that he did not show Rios his cell phone and that he never had the Facebook posting in his cellphone. (Carlos Giron Tr. 1333:12-16) Mr. Giron testified that he specifically told Mr. Rios that it had been shown to him by another employee. (Carlos Giron Tr. 1332:23-25) His clear, detailed and concise testimony regarding the conversation can be contrasted with Mr. Rios rambling, and sketchy description of what occurred. (Ascension Rios Tr. 288:22-289:22)

The allegation that Mr. Giron's casual mentioning of a photo that was intentionally and publicly posted to Facebook could create in a reasonable employee the impression of surveillance is self-contradictory at best. The photo was not posted to Mr. Rios' personal Facebook account. (Ascension Rios Tr. 279:17-18) Mr. Francisco Castillo, the UFCW representative in charge of the Boar's Head union organizing campaign at the Holland plant, testified that he personally took the photo and caused it to be posted to the union's Facebook page to promote the union campaign. (Francisco Castillo Tr. 572:14-25; 573:6-16; 575:1-3) He testified that his goal in posting the picture was to publicize that the group of Boar's Head employees pictured supported the union in hopes of attracting other employees to support the union as well. (Francisco Castillo Tr. 573:17-22) The posting was not restricted in any manner and was readily available for all to see. The parties at trial entered into a stipulation that the Facebook posting was publically accessible. (Ascension Rios Tr. 283:1-10) Additionally, although Mr. Giron testified that while he has a Facebook account, he

did not search for or view the photo through his own account. (Carlos Giron Tr. 1333:12-21) He had been unaware of it until Ms. Martinez showed him the Facebook photo totally unsolicited. (Carlos Giron Tr. 1330:4-12)

The Board's Tr. for determining whether an employer has created an impression of surveillance is whether an employee would reasonably assume from the supervisor's comment that his or her union activities had been placed under surveillance. *National Hot Rod Association*, 368 NLRB 26, 27 (2019); *Durham School Services, L.P.*, 361 NLRB 470 (2015); *Decca LP*, 327 NLRB 980 (1999); *Schrement Bros, Inc.*, 179 NLRB 853 (1969). "In applying this test, a relevant consideration is whether the employer's statement reveals detailed knowledge of specific activities." *National Hot Rod Association*, at 27 (2019). The Board, in *Decca LP*, found that "[b]ecause [Employee's] wearing of union buttons was public and a matter of common knowledge, she could not reasonably assume from her supervisor's comment that her union activities were under surveillance." *Decca LP*, 327 NLRB 980, 980 (1999). Moreover, the General Counsel issued an advice memorandum in a similar case involving a Facebook posting. The General Counsel's advice memorandum stated that "no impression of surveillance is created where the employer explains that it obtained the information from other employees, particularly in the absence of evidence that the employer solicited the information." Advice Memorandum from the NLRB Office of the Gen. Counsel to Director J. Michael Lightner, Regional Director of Region 22, MONOC, No. 22-CA-29008, *et al.*, 2010 WL 4685855, at *2 (May 5, 2010). Here, Mr. Giron's comment about having seen the union's public posting of Mr. Rios' photo on Facebook, hardly rises to the level necessary to impart an impression of surveillance. Moreover, Mr. Rios's conduct of openly appearing in a public posting of his photo is quite similar to those cases where an employer observes open union activity, as well as the cases finding that mentioning such open activity to the

employee does not create the impression of surveillance. *Sunshine Piping, Inc.*, 350 NLRB 1186, 1186-1187 (2007); *Michigan Roads Maintenance Co.*, 344 NLRB 617, 627 fn.4 (2005).

The union organizers, apparently with Mr. Rios's consent, intentionally made the photo publicly available on Facebook without restriction. (Francisco Castillo Tr. 573:6-22) In fact, promotion of the union through views of the Facebook posting by the public (employees) was the primary purpose of posting the photo to Facebook. (Francisco Castillo Tr. 573:6-19) A reasonable employee in Mr. Rios' position would assume that others at Boar's Head would see it, since it was readily available to the public. (Francisco Castillo Tr. 572:16-21; 573:6-19) Ms. Martinez, an hourly employee, showed Mr. Giron the photo several days before. (Carlos Giron Tr. 1330:11-17) Mr. Rios never asked Mr. Giron how or where he had seen the Facebook posting. In fact, in their conversation Mr. Giron specifically told Mr. Rios that another employee had shown the photo to him. (Carlos Giron 1332:23-25; 1333:1-4) This is unlike the situation in *Avondale Industries* and *Promedics Health Systems, Inc.*, in that Mr. Giron did not refuse to tell Mr. Rios how he had come to view the Facebook page. *See Avondale Industries*, 329 NLRB 1064 (1999) and *Promedics Health Systems, Inc.*, 343 NLRB 131 (2004). Mr. Giron made no effort to hide how he became aware of the photo. (Carlos Giron 1332:23-25; 1333:1-4) There was no effort to give Mr. Rios the impression that he was secretly being spied upon and no reasonable employee could so conclude.

Mr. Giron never reported the encounter with Mr. Rios or his knowledge of the Facebook page to anyone in management. (Carlos Giron Tr. 1334:18-20) Nor did he have any further discussions with Mr. Rios about the Facebook posting or his support for the union. (Carlos Giron Tr. 1334:9-17) These circumstances demonstrate that the General Counsel has failed to establish any facts to support the allegation of the creation of the impression of surveillance by Mr. Giron. The allegation regarding Mr. Giron should therefore be dismissed.

- **About December 6, 2017, Respondent, by Maria Mendoza, in the Beef Trim work area at Respondent's Holland facility".**
 - **Interrogated employees about their union membership, activities, and sympathies;**
 - **Threatened employees that they would enforce work rules more strictly and terminate employees if they select the Charging Party as their bargaining representative;**
 - **By telling employees that the Charging Party would not be able to get them reinstated if Respondent terminates them informed employees that it would be futile for them to select the Charging Party as their bargaining representative.**

P. Maria Mendoza Never Interrogated Mr. Rios in a Meeting on or About December 6, 2017 regarding His Union Activity, Threatened Him with Enforcing Work Rules More Strictly, or Stated that Selecting the Union Would be Futile.

The General Counsel alleges that Ms. Mendoza engaged in additional unlawful conduct in comments allegedly made in the Beef Trim department on or about December 6, 2017. Mr. Rios testified that as he was working in his department, Maria Mendoza approached him and asked if he supported the union. (Asencion Rios Tr. 272:13-15)

Ms. Mendoza denied that she ever posed such a question. (Maria Mendoza Tr. 980:9-18) She testified that she had received the TIPS (Threats, Interrogation, Promises, Surveillance) training when the union organizing began and knows not to engage in such conduct. (Maria Mendoza Tr. 990-991:11-25) He also claimed that in the same discussion she told him that he would be noticed if he supported the union and that he may be taken to court. (Asencion Rios Tr. 272:15-24) In

questioning by the Charging Party, he claimed that she told him if the union were there, he would be “noticed.” (Ascencion Rios Tr. 272:11-24) On cross-examination he contradicted earlier testimony and said that he had been present at the alleged group conversation on the Beef Trim line. (Ascension Rios Tr. 272:13-15) Mr. Rios’s recollection of the details of this and all other alleged conversations is unclear at best. Testimony that is unclear as to the alleged meetings, where they allegedly occurred and what alleged statements were made cannot be relied upon.

Ms. Mendoza also denied telling Mr. Rios or any employees that she would enforce work rules more strictly or terminate them if they select the union. (Maria Mendoza Tr. 976:1-9) She also denied telling employees that they would not be able to be reinstated if Boar’s Head terminated them. (Maria Mendoza Tr. 975:22-25) Mr. Rios’s disjointed and thoroughly confusing recollection about the alleged incidents raise serious doubts about reliance on his testimony to support any alleged unlawful conduct. Even the General Counsel had to cut short his direct examination due to its disconcerting and confusing nature. Nonetheless, the comments to Mr. Rios attributed to Ms. Mendoza were denied by her in clear and concise testimony. The allegation is unsupported by a preponderance of the evidence.

- **About December 24, 2017, Respondent, by Maria Mendoza, in the human resources office at Respondent's Holland facility, by soliciting employee complaints and grievances, promised its employees increased benefits and improved terms and conditions of employment if they do not select the Charging Party as their bargaining representative.**

Q. Ms. Mendoza Solicited Employee Grievances in a Meeting on or About December 24, 2017 in Accordance with Boar’s Head Past Practice of Soliciting Grievances Prior to the Union Organizing Campaign. These Forms of Solicitation are Lawful.

This allegation is totally lacking in merit and the result of more of Mr. Ascension Rios befuddled recollection. Ms. Mendoza admitted that she held one-on-one meetings with employees in 2017 to see how the company can improve, including one with Mr. Rios. (Maria Mendoza Tr. 977:7-12) The meetings were part of Boar's Head's on-going initiatives to obtain employee feedback. All Boar's Head supervisors hold similar meetings with their employees annually. Ms. Mendoza testified that she began having these meetings around April 2017, long before any union activity had ever been reported. (Maria Mendoza Tr. 978:9-10) She interviewed about 3-4 people per week depending on how busy she was, starting with the most to the least senior. (Maria Mendoza Tr. 1003:16-25) Ms. Mendoza had a meeting with Mr. Rios in late December 2017 as part of this routine process. (Maria Mendoza Tr. 978:9-10) During this meeting, Ms. Mendoza followed an established format and asked how he felt about working at Boar's Head, how he viewed management, and what the company was doing wrong. (Maria Mendoza Tr. 979:12-19) Mr. Rios said that he did not understand the rules because they were unclear, there was not enough space to work in his area, and he sometimes felt stressed about the lack of space in the department. (Maria Mendoza Tr. 979:12-19)

The admitted purpose of the meeting with Mr. Rios and other employees was to obtain feedback directly from individual employees in Ms. Mendoza's department. (Maria Mendoza Tr. 976:23-977:12) It was an effort to gauge employee satisfaction and had no relation whatsoever to union organizing. (Maria Mendoza Tr. 976:23-977:12) Mr. Rios testified that he could not remember whether the union was even discussed in the meeting. (Ascencion Rios Tr. 289:8-22) Yet the allegation is that he was "interrogated" about his union sympathies. As Ms. Mendoza testified, she had written notes regarding topics covered and followed those notes in the interview. (Maria

Mendoza Tr. 977:13-17) It was simply one additional aspect of the Holland facilities continuing efforts to gather information to improve the workplace. Such solicitation, totally unrelated to any union activity and consistent with past practice, does not constitute unlawful conduct and the allegation should therefore be dismissed.

- **Since about May 15, 2017 Respondent has maintained the following rule: The following examples of misconduct are very serious and will result in progressive discipline... wearing unauthorized badges, pins, or other items on hardhat or exterior garments.**

R. Boar's Head Maintains a Lawful Rule Regarding Wearing Badges and Other Items on Exterior Garments in Food Production Areas to Prevent Contamination of the Food it Produces. Employees are Free to Wear Such Items in Non-Production Areas and this Rule is a Lawful Rule under Board Law.

The handbook rule that is alleged to be unlawful and a violation of Section 8(a)(1) is an integral part of Boar's Head food safety policies. (Scott Habermehl Tr. 81:5-7; 1570:19-25) As Mr. Habermehl testified, "This Class 2 Offense has its basis in the Boar's Head Good Manufacturing Process policy." (Scott Habermehl 81:5-7; G.C. Exh. 2 p. 33 Rule 2.9; p. 35) The sole reason that the dress code policy is in place is because Boar's Head strictly complies with all USDA requirements and manufactures food products that must remain free from any foreign objects or materials that may be brought in on people's clothing. (G.C. Exh. 2 p. 35) An employee might wear pins, jewelry or other items that "could detach and fall into a product." (Scott Habermehl Tr. 1572:9-11; *See also* GC Exh. 2 p. 35) It is a legitimate rule needed to maintain the integrity of the product and avoid contamination. (Shannon VanNoy Tr. 819:23-820:7) The rule applies only to the food production and exposed food storage areas of the plant. It is a mandatory USDA policy

throughout the food manufacturing industry. (Shannon VanNoy Tr. 821:11-21) It does not apply to any nonproduction areas. (Shannon VanNoy Tr. 821:24-25) Employees are permitted to wear metal pins and jewelry in the lunchroom, locker room, parking lot, common areas, and other non-production areas of the plant. (Shannon VanNoy Tr. 826:16-22; Scott Habermehl 1572:4-6) This would include union pins and any similar items employees choose to wear. There was testimony from Shannon VanNoy that employees frequently wear their jewelry while in the lunchroom. (Shannon VanNoy Tr. 827:1-3) In fact, many go to their locker to retrieve their jewelry before they go to the lunchroom. They then remove it before returning to any production area. (Shannon VanNoy Tr. 826:23-827:3)

The Board has consistently held that “special circumstances” justifying the proscription of union insignia and apparel “when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees.” *Smithfield Packing Co., Inc.*, 344 NLRB 1, 190 fn.20 (quoting *Nordstrom, Inc.*, [264 NLRB 698, 700](#) (1982)).

Here, Boar’s Head’s rule does not specifically ban only union insignia and apparel, and there are clearly special circumstances that justify the rule. It would qualify as a Category 1 rule under the three-category Tr. established in *The Boeing Company*. *The Boeing Company*, 366 NLRB 128 (2018). Category 1 under *Boeing* includes a rule where “any potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *The Boeing Company*, 366 NLRB 128, 20 (2018). Badges, pins, and other items worn on food processing employees’ exterior garments or helmets could contaminate products intended for human consumption. If a badge, pin or other object were to fall into the products being processed, the resulting contamination could cause the

entire operation to be stopped by USDA inspectors and possibly cause a recall. That is why the rule is limited to exterior garments and other protective equipment typically worn while on the production floor. (Sec Res. Exh. 8(a) & (b)) For food safety purposes, food industry production employees always wear smocks over their street clothes in production and product storage areas. Under the Boar's Head rule they are free to wear any type of badge, pin or other item if they so choose on their personal apparel. (Shannon VanNoy Tr. 826:12-15) Shannon VanNoy testified without contradiction that Boar's Head has never denied any employee that right. (Shannon VanNoy Tr. 826:16-827:3) The justifiable business necessity outweighs any potential adverse impact on protected rights. The rule is lawful under current Board law. The allegation should therefore be dismissed.

- **About August 28, 2017, Respondent increased the benefits of its employee Nelson Langarita by promoting him and raising his wages.**

S. Boar's Head Raised Nelson Langarita's Wages Because He Was Performing Job Duties that Deserved a Promotion. His Union Activities had No Effect on the Decision. In Fact, Not Promoting Him Because of His Union Activities Would have Violated the Act.

Paragraph 22, of the Consolidated Complaint alleges that a wage increase and promotion granted to employee Nelson Langarita in August 2017 violated Section 8(a)(1) and (3).

Mr. Langarita chose not to testify in support of any of the allegations in the Consolidated Complaint, including that regarding the pay increase and promotion he received. In August 2017 he was employed as a general laborer in the Browning Department. (Yaritza Berrios Tr. 1013:13-15) His duties in that position involved doing any job within the line; general laborers can rotate to other positions within the line as needed. (Yaritza Berrios Tr. 1012:19-24)

Langarita was assigned additional duties that involved data entry including entering yield numbers and batch numbers into the computer. (Shannon VanNoy Tr. 707:14-17) After performing these duties for a period of time, he decided that he should be compensated for the extra duties. He spoke with Yaritza Berrios, in Human Resources, in early August about it. (Yaritza Berrios Tr. 1012:19-24) Shannon VanNoy, the head of Human Resources, was out on medical leave at the time. (Shannon VanNoy Tr. 655:25-656:1)

When Ms. VanNoy returned to work, on August 21st she learned from Ms. Berrios about Langarita's issue with his pay rate. (Shannon VanNoy Tr. 706:17-22) Yaritza told Shannon that Langarita felt that he was not being compensated for the additional duties that the company had asked him to do. (Shannon VanNoy Tr. 707:6-9) Ms. Berrios had told Mr. Langarita when she met with him that she would conduct an investigation of the issue. She called his supervisor Michael Granillo to determine his exact duties. (Yaritza Berrios Tr. 1013:4-6)

Upon being informed of the issue, Ms. VanNoy contacted Judy Urasinski, the RTE department manager, and asked her if Langarita had been given extra responsibilities and if those responsibilities were comparable to a packaging specialist position that had recently been created in another area. (Shannon VanNoy Tr. 708:2-9) Ms. Urasinski told her she would look into it and found that the duties were in fact similar to those of the packaging specialist. (Shannon VanNoy Tr. 708:11-14) At that time there were no packaging specialists in the Browning department. (Yaritza Berrios Tr. 1014:11-23) Based on the information, the company adjusted Langarita's pay and changed his job title to "packaging specialist" on August 28, 2017. (Shannon VanNoy Tr. 708:15-21)

There have been similar instances in the plant where pay adjustments have been made because an individual's job duties differed from their job title. For example, the company created the position of "jockey driver," which applies to the individuals that positions semi-trucks around the parking lot. (Yaritza Berrios Tr. 1016:6-1016:14) This change occurred in 2018. (Yaritza Berrios Tr. 1025:5-9) The addition of the packaging specialist position in the Packing department, the position with which Ms. Langarita's duties were compared, occurred at the end of 2016. It resulted from a process similar to that involved in the Nelson Langarita's 2017 pay increase and title change. The department approved the creation of the position since the duties of these workers merited a higher pay rate than general laborers. (Yaritza Berrios Tr. 1025:16-21; 1015:6-7)

Mr. Berrios testified without contradiction that Mr. Langarita approached her and demanded a pay increase to compensate him for his new duties. (Yaritza Berrios Tr. 1012:19-24) He threatened that he would leave the job for another general laborer position if he did not receive the wage increase. (Yaritza Berrios Tr. 1019:15-19) No member of management approached Mr. Langarita offering a wage increase or promotion. The issue of his union sympathies was never discussed by anyone in management in relation to the pay increase. While Ms. VanNoy had seen Langarita speak up in favor of the union at a meeting with Scott Habermehl, his support of the union played no role in the decision to increase his pay or change his job title. (Shannon VanNoy Tr. 708:22-25; Yaritza Berrios 1014:24-1025:2)

Whether he was in favor of the union or opposed it, Ms. VanNoy would still have recommended the pay increase. Since he was performing the duties of a Packaging Specialist, it was only fair that he be so classified and paid accordingly. The General Counsel failed to present any evidence whatsoever that Mr. Langarita's support of the UFCW was in any manner a factor in the decision.

- **About October 2, 2017, Respondent increased the benefits of its employee Apollonia Rios by raising her wages and paying retroactive pay.**

T. Ms. Apollonia Rios's Pay Adjustment on or About October 2, 2017 Was Done in Accordance with Boar's Head Past Practices and Was Lawful. Her Union Affiliation Played No Role in the Decision and Refusing to Adjust Her Pay in Accordance with Past Practices Because of Her Union Affiliation Would Have Violated the Act.

Paragraph 25 of the Consolidated Complaint alleges that by granting Ms. Rios a pay increase to correct a pay error after she had approached Senior Vice President of Sales and Production Larry Helfant to request his assistance with a performance-related pay reduction, Boar's Head violated Section 8(a)(1) and (3).

Just as was the case with Ms. Langarita's pay increase, no evidence was presented that the action to make Ms. Rios whole for where she should have been regarding her pay after her earlier demotion was in any manner related to her union support.

Ms. Rios worked as a lead. (Shannon VanNoy Tr. 696:21-697:1) Due to performance issues, she was placed on a Performance Improvement Plan (PIP) in February 2017 (Shannon VanNoy Tr. 695:17-21) As the result of continued performance problems while on the PIP, she was demoted to a general production employee on March 7, 2017. (Shannon VanNoy Tr. 696:21-697:1; G.C. Exh. 12) Her pay was reduced from \$16.45 per hour to \$13.70 as a result of the demotion. (Shannon VanNoy Tr. 697:10-698:5)

On August 29, 2017 Senior Vice President Larry Helfant was on a visit to the Holland plant. While he was on the production floor speaking with employees, Ms. Rios approached Mr. Helfant to request his help regarding her pay reduction. (Apolonia Rios Tr. 400:21-24) A fellow

employee nearby served as translator for Ms. Rios since Mr. Helfant does not speak Spanish. (Apolonia Rios Tr. 401:11-20; Lawrence Helfant 1627:19-22) She pleaded her case to the point of tears that the demotion and large pay cut were creating serious problems for her. She asked Mr. Helfant for help. (Apolonia Rios Tr. 402:12-20) He told her that he would bring her concern to HR. He subsequently asked Shannon VanNoy to review the circumstances of her demotion and pay reduction to see that all had been properly done. (Shannon VanNoy Tr. 699:20-700:3)

Ms. VanNoy reviewed the documentation and concluded that Ms. Rios had in fact violated the PIP and had been properly demoted. However, she also concluded that her pay had been incorrectly reduced below what had historically been done in similar cases. (Shannon VanNoy Tr. 700:18-22; Tr. 701:1-7) Rather than being reduced to the pay of a general production employee, Ms. Rios should have been reduced to the highest hourly production rate paid in the room, other than lead pay. The company therefore increased Ms. Rios's pay to, \$15.90 per hour, which is one dollar less per hour than the wages of a lead person. (Shannon VanNoy Tr. 700:18-701:7; 875:8-25, 876:1-15) The company also gave her a lump sum payment for the difference in her pay rate from the time of her demotion to make her whole.

Consistent with past practice, Boar's Head also decided to keep her wages at this higher level for 12 months to give Ms. Rios the opportunity to find a job that compensated her more closely to the job that she left. (Shannon VanNoy Tr. 807:11-14) Ms. VanNoy testified that this was the procedure followed for transferred employees when the Holland plant closed its distribution center. (Shannon VanNoy Tr. 807:15-18) It was also done for a clerical employee that was demoted and placed in a production job. (Shannon VanNoy Tr 807:15-18, 21-23) Her adjustment occurred about a year before Ms. Rios's adjustment. (Shannon VanNoy Tr. 861:1-5) She was kept at the same wage when she was moved and also given 12-months to bid on a higher

paying job. (Shannon VanNoy Tr. 861:10-14)

There is no question that it was Ms. Rios that approached Boar's Head management to complain about her pay. The change was made for a valid business reason, to correct an error, and did not relate in any way to Ms. Rios's support of the union. (Shannon VanNoyTr. 808:2-5) Her support or opposition to the UFCW was never mentioned by anyone, and as Mr. Helfant testified, it didn't matter. (Lawrence Helfant Tr. 1628:14-16)

The pay increases given to both Apollonia Rios and Nelson Langarita were given for legitimate business reasons unrelated to their union support, and were therefore lawful. An allegation that an employer has violated Section 8(a)(1) by granting benefits in response to union organizational activity is analyzed under *NLRB vs. Exchange Parts*. See *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). It applies to the conferral of benefits during an organizational campaign but before a representation petition has been filed. While 8(a)(1) allegations are normally analyzed under an objective standard with motive irrelevant, the analysis under *Exchange Parts* is motive based. To be unlawful, the motive must be to interfere or influence the organizational campaign, and while the General Counsel may infer an improper motive and interference with employee rights under the Act, the employer may rebut the inference with a legitimate business reason for granting the benefit. *Vista Del Sol Healthcare*, 363 NLRB 135 (2016); *Manor Care Health Services – Easton*, 356 NLRB 202 (2010); *enfd.* 661 F. 3d 1139 (D.C. Cir. 2011); *Southgate Village Inc.*, 319 NLRB 916 (1995). Additionally, in order to establish a claim that benefits were granted to coerce employees in their choice of bargaining representative, the General Counsel must prove by a preponderance of the evidence “that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation”. *Southgate Village Inc.*, 319 NLRB 916, 916 (1995). The record evidence in this case confirms that

the General Counsel has not met that burden regarding the grant of a pay increase to either Ms. Rios or Mr. Langarita. In neither case was the granting of the pay increase an unsolicited, unilateral action by Boar's Head. They each requested the pay increase that was ultimately granted. In fact, Mr. Langarita demanded a pay increase under the threat that he would change jobs if it was not granted. In each case there was a legitimate business reason for granting the wage increase.

An important consideration in these types of cases is whether the employee saw the increase as an effort to dissuade them from supporting the union. *Southgate Village Inc.*, 319 NLRB 916, 916 (1995). There is no evidence whatsoever in the record of how either Ms. Rios or Mr. Langarita viewed the raise they received. Mr. Langarita chose not to testify and Ms. Rios was not asked by the General Counsel how she viewed the raise she received. Nor is there evidence that either employee shared the fact of the raise with coworkers. None of the General Counsel's employee witnesses were asked about or testified regarding the wage increase to either employee. This is true even though Ascension Rios, Ms. Rios's husband, testified in the case. There is however ample evidence that both Ms. Rios and Mr. Langarita made extensive efforts to convince Boar's Head to increase their pay. In neither case was the action precipitated by Boar's Head management. The actions were taken solely in response to specific requests by each employee. In both cases the facts supported the legitimate business reason for making the pay change. The issue of union support or any effort to induce either employee or others to refrain from such support was never a consideration. In fact, had the company refused to make the pay changes that were clearly justified, it might have resulted in charges of unlawful denial of merited wage increases. Here, Boar's Head chose to do what was fair and proper. In the case of Mr. Langarita, it was confirmed that he was performing the job duties of a Packaging Specialist, a higher rated position than the general laborer position he held at that

time. With regard to Ms. Rios, in her case a pay error had been made when she was demoted, and upon her bringing it to the attention of management, it was corrected. The pay correction properly included retroactive pay to make her whole. It is clear that in granting the wage increases to the two employee. Boar's Head did not have as its purpose the "impinging upon ... freedom of choice for or against unionization and was reasonably calculated to have that effect." *Exchange Parts*, 375 U.S. 405 at 409. No evidentiary support exists for the General Counsel's allegations regarding the pay increases to Apollonia Rios and Nelson Langarita and thus dismissal is warranted.

- **In about August 2017, Respondent Increased the Benefits of its Employees by Improving the Attendance and Vacation Policies:**

U. The Changes to the Attendance and Vacation Policies Were Proposed and In the Process of Being Approved Before the Union Organizing Began in 2017. There is No Basis or Evidence to Support the Allegation that Union Activity Played Any Role in the Decision to Improve these Benefits.

The changes made to the vacation and absence policies on October 1, 2017 were the culmination of over two years of analysis and efforts by Boar's Head to address two very critical and related company-wide concerns. Those two concerns were escalating employee turnover and the increasingly difficult ability to hire employees at all company facilities. The policies at issue were inextricably intertwined and were changed on the same date at all non-union Boar's Head facilities, including the Holland plant.

Boar's Head did not change the vacation and attendance policy to discourage union activity at the Holland plant. It was part of a corporate change to deal with significant turnover and hiring problems at all plants. (Scott Habermehl Tr. 1530:9-12) Turnover at the Boar's Head Columbus

plant in 2016 was 77%, and in 2017 it grew to 111%. (Scott Habermehl Tr. 1560:5-7) In Holland turnover was 31%. (Scott Habermehl Tr. 1560:11-19) For all nonunion facilities there was a 100% increase in turnover between 2013 and 2017. (Scott Habermehl Tr. 1560:13-16) It increased from 23% to 46%. (Scott Habermehl Tr. 1560:13-16) Boar's Head calculates the cost of losing an employee at approximately \$6,500, which is approximately 20% of their annual wage. (Scott Habermehl Tr. 1560:23-25) The total cost of turnover in 2015 was \$4.4 million, in 2016 it was \$6.2 million, and by 2017 it had reached to \$7.6 million; an increase of over \$3 million in 3 years. (Scott Habermehl Tr. 1561:1-3) In 2013, 2014, and 2015 the company gave a \$.20 per hour wage increase. (Scott Habermehl Tr. 1559:8-11) In an effort to stem the turnover and help the hiring effort, in 2016 the company gave a \$.30 per hour increase. (Scott Habermehl Tr. 1559:7-12) In 2017 the wage increase was raised to \$.45 per hour. (Scott Habermehl Tr. 1559:7-12) Unfortunately, granting greater pay increases did not help with the turnover as senior management had hoped. (Scott Habermehl Tr. 1559:20-22)

In 2015, Boar's Head made a change in the attendance policy that applies at all of its non-union locations. The change involved the point system for attendance violations. It was the only aspect of the policy not in effect at the Columbus plant since it would have exacerbated its already excessive turnover rate. The change, increasing the number of perfect attendance days from 30 to 60 before a point drops off, was unpopular, and prompted employee comments at all of the plants. (Shannon VanNoy Tr. 803:3-805:10; Scott Habermehl 1582:14-19) The attendance policy was the number one reason for turnover. (Shannon VanNoy Tr. 805:17-22) The 30 to 60 days change resulted in an increasing number of first year employees "pointing out," that is, they accumulated too many absence points and were therefore terminated. (Shannon VanNoy Tr. 805:17-19) The "pointing out" was directly related to the fact that first year employees were not eligible for

vacation time at any of the Boar's Head plants. (Shannon VanNoy Tr. 805:5-10) Employees in their first year of employment would accumulate excessive absence points for taking time off since no vacation was available and many were ultimately terminated. (Shannon VanNoy Tr. 805:5-10; 17-22) After the change to the absence policy the turnover rate at all the plants began to climb. (Scott Habermehl Tr. 1560:13-16) While all the plants had a turnover problem, it was particularly acute at the Columbus, Ohio facility. (Shannon VanNoy Tr. 803:18-23; Scott Habermehl 1540:13-15) The turnover problem was compounded by the increasingly tight labor market, especially in the Columbus area where there is a concentration of large employers. Hiring sufficient replacement employees had become increasingly difficult despite significant wage increases in 2016 and 2017.

The lack of vacation for first year employees, as well as its effect on turnover became a major issue for the Human Resource staff in 2015. (Scott Habermehl Tr. 1531:6-14) Because of its significant hiring and retention problem, the Columbus plant became the focus. The lack of first year vacation was especially challenging in trying to hire the highly sought after maintenance mechanics. (Scott Habermehl Tr. 1531:16-24) As noted above, giving larger wage increases did not stem the loss of employees or improve hiring. (Scott Habermehl Tr. 1539:6-10) Vacation time and attendance went hand in hand, since first year employees were willing to be assessed attendance points in order to take time off. The two issues were in reality, a single issue. (Leah Cochran Tr. 1064:1-4) Compounding the problem was the fact that many other employers in the same markets were offering vacation during the first year of employment. (Leah Cochran Tr. 1064:1-4)

The e-mails that together comprise Respondent Exhs. 12 a through n, document the focus on and evolution of this issue. (Res. Exhs. 12(a)-(n)) Beginning in 2015 Mr. Habermehl and the Human Resource team began an intensive effort to try to have the company address the lack of first year vacation time. (Res. Exh. 12) The effort was led by Sherry Zarbrough, the Human Resource

Business Partner at the Columbus plant and was initially focused solely on increased vacation for 1st year employees at the Columbus facility. (Shannon VanNoy Tr. 803:18-20) Despite significant effort, the Human Resources staff was unable to convince senior management to approve a change in 2015. (Scott Habermehl Tr. 1530:16-33) The effort to convince senior management to increase the vacation time for first year employees became even more intense in 2016. (Scott Habermehl Tr.1541:9-21; Res. Exhs. 12(e)(1)-(3)) In fact, as evidenced by the numerous e-mails discussed at trial by Mr. Habermehl, the issue had become so serious it had drawn the attention of Boar's Head Senior Vice President of Sales and Operations, Larry Helfant. (Scott Habermehl Tr. 1545:4-7) It had expanded from a focus on the Columbus plant, to all company facilities. (Res. Exh. 12(b)) In late April he requested and received from Scott Habermehl a side-by-side comparison of the vacation and holidays for all company plants. (Res. Exh. 12(b)) Costing out additional vacation proved time consuming and difficult. (Scott Habermehl Tr. 1545:4-7; Res. Exhs. 12(b);(c)(1)(2)(3);(e)(1)(2)(3); (f)(1)(2)(3); (g)) A compounding cost factor in increasing vacation is that the company has to also pay overtime to cover for employees on vacation. (Scott Habermehl Tr. 1543:10-12) This led to a protracted effort to prepare an accurate cost analysis. (Scott Habermehl Tr. 1561:16-1563:11) On June 28, 2016, Larry Helfant requested costs for adding first year vacation at all plants with hopes of taking the issue to ownership for approval soon thereafter. (Res. Exh. 12(b)) Despite substantial efforts, ultimately it was determined in 2016 by senior management that providing increased wages was a preferable way to address the turnover and hiring problems. (Lawrence Helfant Tr. 1631:16-2; Res. Exhs. 12(b)-(i))

The push by the Human Resources staff for more vacation began again in earnest in early 2017. (Scott Habermehl Tr. 1563:7-11) On February 10, 2017 Scott Habermehl exchanged e-mails with Shannon VanNoy regarding the first-year vacation issue and how the lack of vacation affected

the Holland plant. (Res. Exh. (j)(1)) He also indicated to her that he was meeting with one of the owners on the issue. (Res. Exh. (g)(1)(2)) On May 3, 2017 Scott sent an email to all HR Business Partners to try to obtain as much data as possible on their local markets regarding availability of first year vacation. (Scott Habermehl Tr. 1547:3-8; Res. Exhs. 12(m)(1-2);(a)(1-5)) He intended to use the information to help convince senior management of the need for Boar's Head to provide first year vacation time to be competitive. (Scott Habermehl Tr. 1547:11-24) In the meantime, Mr. Habermehl was continuing to work with the various cost accountants to try to obtain accurate cost estimates. (Scott Habermehl Tr. 1547:11-24) Colin vanAntwerp, Senior Manager, Total Rewards for Boar's Head, found that the total cost of adding vacation for first year employees would be \$288,252. (Res. Exhs. 12(p)(1-2)) On July 17, Scott Habermehl emailed Vice President Jeff Szymanski about a proposal regarding a first year vacation program he and Larry Helfant had submitted to "Mike and Bob" earlier. (Res. Exh. 12(o)) He was referring to Mike Martella, Boar's Head President and one of the owners. (Scott Habermehl Tr. 1548:14-20)

Not having received any response from Mr. Martella, Scott sent another email on August 8th to Larry Helfant and Jeff Szymanski regarding the vacation proposal previously submitted, a copy of which was attached. (Res. Exhs. 12(o), (q)(1-4)) They scheduled a meeting on August 10 to discuss it. (Scott Habermehl Tr. 1549:2-9; 1565:12-16; Res. Exhs. 12(q)(1-4)) The July submission of a vacation proposal and the August 8th e-mails regarding the proposal are significant in the context of the General Counsel's allegation. (Res. Exhs. 12(o), (q)(1-4)) Both confirm that the change to the vacation policy was in process before any information regarding union activity at the Holland plant had been reported. (Res. Exhs. 12(o), (q)(1-4)) Scott credibly testified that he first heard about the union organizing in 2017 in a telephone call with Leah Cochran on August 9th. (Scott Habermehl Tr. 1565:19-21) It is confirmed by e-mails of the same date. (G.C. Exh. 3) The

vacation proposal was obviously in the final stages of approval long before Boar's Head had any knowledge of union organizing at the Holland plant. (Scott Habermehl Tr. 1565:22-24)

Mr. Habermehl, in response to questions from Mr. Martella in an e-mail exchange of August 17, 2017 about limiting the change to the most difficult to hire employees, maintenance personnel, again emphasized to him the critical need to make the proposed changes for all first-year employees at all non-union plants as soon as possible. (Res. Exhs. 12(r)(1-2)) Mr. Habermehl's email to Mr. Martella on August 17th included the proposed vacation changes and the total cost of implementing the change at all plants. (Res. Exhs. 12(r)(1-5))

The question of exactly what to provide as additional vacation for employees with more than one year of service caused the final parameters of the vacation changes to be delayed. It was felt that to be fair at least some of the other employees had to receive additional vacation days as well. In the first week of September 2017 senior management signed off on changes for both first year employees and several groups of more senior employees. The changes were personally announced by corporate executives simultaneously at all plants on September 15, 2017. (Scott Habermehl Tr. 1577:15-22; 1579:9-19; Lawrence Helfant 1630:11-15) The vacation changes, along with the attendance policy change from 60-days back to 30-days for a point to drop off, were to become effective on October 1, 2017. (Shannon VanNoy Tr. 806:9-12; 850:17-19) The changes to the vacation and attendance policies would have occurred irrespective of the union organizing at the Holland plant in August 2017. (Scott Habermehl Tr. 1568:21-24) It was being worked on long before the specific changes were finally worked out. The high turnover cost and the competitive disadvantage in hiring were the sole reasons for the changes.

The Board has consistently found that when a company makes improvements in terms of conditions of employment on a company-wide basis in the midst of a union organizing campaign, as here, there is no violation of Section 8(a)(1). *Dynacor Plastics and Textiles*, 218 NLRB 1404 (1975); *Nalco Chemical Co.*, 163 NLRB 68 (1967) Where it was not established that the employer's motive was related to any protected activities, there was no violation of the Act. For example, in *Wal-Mart Stores, Inc.* the Board found that the employer did not violate the NLRA by giving employee wage increases where the increase was given one month before the union filed a representation petition, and it was not established that the employer's motive in granting the wage increase was related to any protected activities. *Wal-Mart Stores*, 348 NLRB 274 (2006). In addition, among the other factors that the Board has considered in cases of benefit improvements during an organizing campaign are (1) whether the benefit changes apply to other employer facilities or to employees not involved in the organizing campaign; [*Town & Country Supermarkets*, 244 NLRB 303 (1979), *enfd.*, 666 F. 2d 1294 (10th Cir. 1981); *Hayes-Albion Corp., Tiffin Div.*, 237 NLRB 20 (1978); *Centralia Fireside Health*, 233 NLRB 139 (1977); *Villa Sancta Anna Home for the Aged*, 228 NLRB 571 (1977); *Medline Industries, Inc.*, 218 NLRB 1404 (1975); *Essex Int'l, Inc.*, 216 NLRB 575 (1975).] and (2) whether the benefit improvements were essential to remain competitive with other employers in the same industry regarding the attrition and retention of a stable workforce. *NLRB v. Circo Resorts*, 646 F. 2d 403, (9th Cir. 1981), *enforcing as modified* 244 NLRB 880 (1979); *Delchamps, Inc.*, 588 F. 2d 476; *NLRB v. Gotham Indus.*, 406 F. 2d 1306 (1st Cir. 1969); *Springfield Jewish Nursing Home for the Aged*, 292 NLRB 1266 (1989); *In re Willow Corp.*, 244 NLRB 303 (1979); *Schulte's IGA Foodliner*, 241 NLRB 855 (1979); *Poultry Packers, Inc.*, 237 NLRB 250 (1978). Boar's Head vacation and absence policy changes here, clearly satisfy these factors. It is clear Boar's Head's goal was to improve the ability to hire and retain employees

in one of the most competitive markets in years. It was focused on attracting applicants and retaining first year employees, those employees most likely to leave.

In this case, the process to effect a change as costly and significant as the change in vacation policy had been underway long before any organizing by the UFCW was known to the company. (Larry Helfant Tr. 1643:12-19) Throughout the many e-mails and discussions of the proposed changes and related costs, there was not a single reference to the UFCW's organizing efforts at the Holland facility. There is no record evidence whatsoever that the issue of the union organizing was ever a consideration in making the changes. The decision was made company-wide and announced at all facilities on the same day. The decision was made for legitimate business reasons unrelated to union organizing.

The assertion that the UFCW organizing at the Holland plant, which was first reported to Boar's Head management on August 9, 2017, well after the specific vacation changes were being finalized, was the cause for the policy change ignores the indisputable facts.

Similarly, any assertion that the attendance policy was changed to discourage union activity is also without merit. The lack of first year vacation time was inextricably intertwined with the number of days for the removal of attendance points. The lack of one triggered the abuse of the other, resulting in employees "pointing out." Changing one without the other would render either single change ineffective in addressing the problems. Just as the lack of first year vacation time had affected all locations, so too had the 2015 change in the attendance policy. They were viewed as a single issue. Changing the attendance policy had essentially been decided in late August 2017. All that remained were the final adjustments to the vacation change for employees with more than one

year of employment. The changes on October 1, 2017 was an integral part of the effort to address a multi-million-dollar turnover cost to Boar's Head as a whole. (Scott Habermehl Tr. 1561:1-3)

As was discussed with regard to the wage increases to Ms. Rios and Mr. Langarita, under Exchange Parts, the inference of an improper motive in the conferral of benefits during an organizational campaign but before a representation petition has been filed can be rebutted with a legitimate business reason. Here there was a substantial legitimate business reason for the changes to the 1st year vacation and attendance policies. There was no certification petition on file and at no time had the UFCW requested recognition or claimed majority representation. Most importantly the changes were applicable to all non-union company facilities which were in process well before the company became aware of any unionization efforts at the Holland plant by the UFCW. In such circumstances the Board has found policy changes as occurred here lawful.

It should also be noted, as Region 7 was repeatedly informed, that identical charges filed in early 2018 against the Boar's Head Forrest City, Arkansas facility in Case no. 15-CA-212765 were dismissed. In its defense, Boar's Head presented the very same e-mail history of the policy changes as well as Mr. Habermehl's affidavit testimony identical to that provided by both affidavit and trial testimony in the present case. In dismissing the charge on August 31, 2018, the Regional Director stated:

While you contend the Employer violated the Act by promising employees, and later granting employees additional benefits, the evidence was insufficient to substantiate this allegation. During the course of the investigation, it was established that the changes to the vacation policy and point system had been planned prior to the most recent organizing campaign. In addition, these changes were made not only at the Employer's Forrest City, Arkansas facility, but rather the changes in benefits were a company-wide initiative. See *Nalco Chemical Co.* 163

NLRB 68, 70-71 (1967) finding improvements to vacation and holiday benefits did not violate Sec. 8(a)(1) in part because improvements applied corporate wide). Inasmuch as the evidence indicated these changes were already planned prior to the current organizing campaign, it cannot be shown that they were a result of the campaign and dismissal is appropriate. (August 31, 2018 decision to partially dismiss ULP charges from Region 15 Regional Director M. Kathleen McKenney, page 3.)

The same result should obtain here for the very same reason.

- **In about October 2017, the Employer increased the benefits to its employees by providing tools to maintenance employees:**

V. Boar's Head Made a Lawful Business Decision to Provide Tools to Employees to Make Its Policies Consistent

In Paragraph 26, the General Counsel alleges that in October 2017, Boar's Head, by providing hand tools to its maintenance employees, violated Sections 8 (a)(1) and (3) of the Act. The General Counsel asserts that the action was taken to discourage membership in the union. The reality is that the policy of providing tools to the mechanics at the Holland plant took effect on November 1, 2017 to correct a previously unknown error that had denied the Holland mechanics a benefit enjoyed by maintenance mechanics at all other Boar's Head plants. (Scott Habermehl Tr. 1528:13-14) It became an issue on August 9, 2017 when Scott Habermehl was informed in a telephone call with Leah Cochran that the Holland maintenance employees were upset after becoming aware that maintenance employees at the Indiana plant were furnished tools by the company, something not done at the Holland plant. (Scott Habermehl Tr. 1525:18-1526:6) Mr. Habermehl had been unaware of the difference in treatment before that telephone call.

The call set in motion a detailed review of exactly what items were being supplied to employees at all company facilities. (Res. Exhs. 11(a)-(e)) Mr. Habermehl began investigating why there was an apparent difference at the Holland plant, and promptly involved Mr. Guy Yondo, the facilities manager who was over all Boar's Head maintenance employees and Larry Helfant, Senior Vice President of Sales and Operations. (Scott Habermehl Tr. 1526:11-21)

On August 10, 2017, Mr. Helfant directed that all Boar's Head plants be consistent in providing company-paid equipment, including purchasing and providing all mechanics tools. (Res. Exh. 11(b)(l)) As for the Holland plant, he directed that the maintenance employees be given the option of the company reimbursing them for their own tools or be provided a new set. (Res. Exh. 11(b)(l)) On August 23, Scott Habermehl emailed Tim Bothum and Adam Lingle, plant managers at other Boar's Head plants, asking what tools and equipment they supply at each of their facilities. (Res. Exh 11(d)) Mr. Bothum responded on August 24 with the items that they supply, and Mr. Lingle responded on August 25 with the items that they provide. (Res. Exh 11(e)) The company surveyed every location to determine what safety equipment and tools the company provides or subsidizes for employees. (Scott Habermehl Tr. 1527:4-10) It was discovered in the course of the investigation that it had been the policy at Holland since the plant's inception that the maintenance mechanics purchase their own tools. (Scott Habermehl Tr. 1525:18-1527:24) They had agreed among themselves from the beginning that they preferred to buy their own, better tools rather than have the company supply what they felt were inferior tools. (Scott Habermehl Tr. 1528:1-9) The review process took several weeks. Tr. (Scott Habermehl 1527:10-17) Once the inconsistency was confirmed, Scott informed the HR team that they should correct the policy in Holland to ensure consistency across all plants. (Scott Habermehl Tr. 65:17-66:2) General Counsel witness and former

maintenance mechanic Rodney Valenzuela admitted that providing the tools was done to make Holland the same as the other facilities. (Rodney Valenzuela Tr. 383:11-15)

The policy was changed on November 1, 2017. (Scott Habermehl Tr. 1528:10-15) Union organizing played no role in the policy change. (Scott Habermehl Tr. 1529:22-25) The same policy regarding equipment and supplies is in affect at all Boar's Head plants. (Scott Habermehl Tr. 1530:1-4)

The General Counsel presented no evidence to support the contention that the change in the tool policy was made to discourage union support or membership. They rely upon a presumption of improper motive. Boar's Head's legitimate business reason of equalizing the policy across all facilities rebuts any claim of improper motive. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1174 (2004) (quoting *In re Gordonsville Industries, Inc.*, 252 NLRB 563, 575 (1980)). At no point in any of the discussions regarding the policy or in the numerous e-mails addressing the issue in Res Ex. 11, is there a single reference to union organizing as a motivating factor for the change. (Res. Exh. 11(a)-(e)). There was no credible testimony that the maintenance employees or any others viewed the policy change as an effort to dissuade them from supporting the union. The General Counsel presented no witnesses who testified as to having that view of the policy change. To the contrary, Mr. Valenzuela admitted that the tool policy was changed to make the Holland plant consistent with all other Boar's Head plants. (Rodney Valenzuela Tr. 384:4-10) The sole reason for the change was to assure that all plants, union and non-union, were consistent in providing tools and equipment to the employees free of charge.

It is anticipated that the General Counsel will argue that correcting the lack of company-paid tools was closely linked to the maintenance employees' talk regarding the union, and therefore the

change must have had an unlawful motive. It is undisputed that the first knowledge by the company of an inconsistency in the maintenance tool policy at the Holland plant with that at all other company plants was in the August 9, 2017 telephone call from Leah Cochran, that also alerted Mr. Habermehl to the union activity at Holland. (G.C. Exh. 4) However, Mr. Habermehl credibly testified that the change in policy would have been made even if no union organizing had occurred. (Scott Habermehl Tr. 1529:22-25) The fact that action was taken to correct a previously unknown error, immediately upon its discovery, without other evidence of unlawful motive, cannot support a violation of Sections 8(a)(1)(3). No evidence of unlawful motive has been shown by the General Counsel and this allegation should therefore be dismissed.

W. If Merit is Found, Reading of a Notice is Not an Appropriate Remedy in this Case.

In the event that merit is found as to any of the allegations, the General Counsel seeks as one of the remedies in this case the public reading of any notice to employees. There is no legitimate basis for such an extraordinary remedy under the facts of this case. While the General Counsel originally alleged twenty-six separate unfair labor practices, some with multiple subparts, most were the direct result of a superficial and inadequate investigation that assumed virtually all the union's claims to be true. The investigation blindly ignored every rational response from the company as well as the legitimate business justification for the actions taken. Evidence of unlawful motivation was completely lacking.

When the evidence at trial didn't support the General Counsel's allegations, several were withdrawn. At the conclusion of trial, the single allegation that took up the bulk of the trial time and testimony, the alleged denial of employee access to the company parking lot, was withdrawn and totally revised to a completely different theory and alleged violation. Proof of the revised

allegation failed as well. Moreover, none of the alleged violations even if proven true were flagrant, or inherently destructive of employee rights. Finally, there is no evidence that Boar's Head's alleged conduct would prevent a free and fair election from being conducted if the UFCW were to file a certification petition. In such circumstances the extraordinary remedy of reading of a notice is not warranted.

Date: September 4, 2019

Respectfully Submitted by:

ALANIZ LAW & ASSOCIATES, PLLC
Attorneys for Respondent, Boar's Head
Provisions Co., Inc.

/s/ Richard D. Alaniz

Richard D. Alaniz, esq.

Tex. Bar No. 00968300

ralaniz@alaniz-law.com

Brett Holubeck, esq.

Tex. Bar No. 24090891

bholubeck@alaniz-law.com

Scott Stottlemire, esq.

Tex. Bar No. 24098481

sstottlemire@alaniz-law.com

20333 State Hwy. 249, Ste. 272

Houston, TX 77070

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION**

Charging Party,

v.

BOAR'S HEAD PROVISIONS CO., INC.,

Respondent.

Consolidated Case Numbers:
07-CA-209874; 07-CA-212031

CERTIFICATE OF SERVICE

The undersigned, on behalf of Respondent, Boar's Head Provisions Co., Inc. (Boar's Head), sent a true and correct copy, via email, of Boar's Head's Post-Hearing Brief to the Administrative Law Judge filed this day in the NLRB Division of Judges with Administrative Law Judge Randazzo, to the parties at the addresses set forth below:

Steve Carlson

Steven.Carlson@nrlb.gov

Ms. Colleen Carol

Colleen.carol@nrlb.gov

Ms. Sarai King

sking@ufcw.org

/s/Richard D. Alaniz

Richard D. Alaniz