

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON D.C.**

**BOAR'S HEAD PROVISIONS CO., INC.**

**and**

**07-CA-209874  
07-CA-212031**

**UNITED FOOD & COMMERCIAL WORKERS  
INTERNATIONAL UNION (UFCW), AFL-CIO**

**THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully submitted,  
Steven E. Carlson  
Counsel for the General Counsel  
National Labor Relations Board  
Region 7, Resident Office  
Grand Rapids, Michigan  
[steven.carlson@nlrb.gov](mailto:steven.carlson@nlrb.gov)

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## STATEMENT OF THE CASE<sup>1</sup>

This case arises out of a series of unfair labor practice charges filed by the United Food & Commercial Workers International Union (UFCW), AFL-CIO (“the Union”), against Boar’s Head Provisions Co., Inc., (“Respondent”) from November 9, 2017 to March 30, 2018. On November 9, 2017, the Union filed charge 07-CA-209874 alleging numerous violations of Sections 8(a)(1) and (3) of the Act. That charge was amended four times on January 18, 2018, February 13, 2018, February 28, 2018 and March 30, 2018 [GC1(a),(e),(g),(k) and (m)]. Charge 07-CA-212031 was filed by the Union on December 21, 2017, and amended two times on February 13, 2018 and March 30, 2018 [GC1(c),(h) and (o)].

After an investigation, the Regional Director of Region 7 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing [GC 1(q)], alleging that Respondent violated the Act by: 1) threatening employees with the loss of benefits; 2) interrogating its employees about their Union membership and activities; 3) soliciting employee grievances and promising to remedy those grievances if employees abandoned their support for the Union; 4) engaging in surveillance of employees engaging in Union activity and/or creating the impression that their activities were under surveillance; and 5) maintaining an overly broad dress code. The Complaint further alleges that Respondent violated Section 8(a)(3) of the Act by: 1) increasing the wages of union supporter Apolonia Rios; 2) improving attendance and vacation policies for all employees; and 3) providing maintenance employees with hand tools in order to discourage their Union membership and activities. A hearing was held before Administrative Law Judge

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<sup>1</sup> References to the Administrative Law Judge’s decision are denoted as [ALJD followed by page number(s)]; the transcript as [Tr. followed by the page number(s)]; the General Counsel’s exhibits as [GC followed by the exhibit number]; the Union’s Exhibits as [U followed by exhibit number]; and Respondent’s exhibits as [R followed by exhibit number].

Thomas Randazzo (“ALJ”) December 10 through 14, 2018 and April 29 through May 3, 2019. Judge Randazzo issued his Decision on May 14, 2020 [ALJD at 1].

## **STATEMENT OF FACTS**

### **1. Background**

Respondent, headquartered in Sarasota, Florida, operates eight facilities throughout the United States, including a production facility in Holland, Michigan [Tr. 34-35; ALJD at 3].<sup>2</sup> The Holland plant employs approximately 600 employees assigned to either the “Raw” side, where uncooked meat is brought in to be cooked; or the “Ready to Eat/RTE” side, where cooked meat is packaged and distributed [Tr. 35, 219, 823; ALJD at 3].

Human Resources in Holland is headed by Shannon Van Noy (Human Resources Business Partner). Van Noy oversees approximately seven human resources representatives who are responsible for effectuating the personnel and labor policies within the plant [Tr. 766; ALJD at 3]. Several of the human resources staff, including Human Resource Specialists Rodolfo Rodriguez and Vicente Nunez, are fluent in Spanish and serve as interpreters for the staff and employees [Tr. 1120, 1216; ALJD at 4]. Van Noy and her staff report directly to Director of Human Resources Scott Habermehl, who works out of Respondent’s corporate offices in Florida [Tr. 34-35; ALJD at 4].

Plant Manager Bradley Rurka supervises numerous managers and supervisors on both sides of the facility including sanitation supervisor Guadalupe Rodriguez, Beef Trim Supervisor Maria Mendoza and Assistant to the Supervisor Carlos Giron [Tr. 103-104, 895, 1328; ALJD at 3].

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<sup>2</sup> There are two distribution facilities in Columbus, Ohio and Brooklyn, New York/Edison, New Jersey. The New York/New Jersey facilities are also represented by the UFCW. There are five production facilities in Forrest City, Arkansas, New Castle, Indiana, Jarratt, Virginia and Petersburg, Virginia [Tr. 34-35; ALJD at 3]. Both Virginia facilities are represented by the UFCW.

In 2017, and at all material times, Respondent maintained an employee handbook applicable to all production and maintenance employees [GC 2; Tr. 37; ALJD at 4]. The handbook includes specific examples of behavior considered by Respondent to be “Class II Offenses”, i.e., misconduct that is “serious and will result in progressive discipline,” including the following provision:

*2.9: ... Wearing unauthorized badges, pins or other items on helmet or exterior garments.*<sup>3</sup>

In the summer of 2017,<sup>4</sup> Respondent also maintained vacation and attendance policies for employees. These policies had been in effect since about 2015 [Tr. 805; ALJD at 4]. Due to the nature of Respondent’s policies, the attendance and vacation issue were inexorably intertwined [Tr. 1563]. Specifically, Respondent’s policies did not provide *any* sick leave or any vacation time to low-senior employees [Tr.1642-1645].<sup>5</sup> As a result, many employees incurred attendance points<sup>6</sup> for *any* absence, even if the absence was related to documented medical or family issues. While employees with higher seniority could use their vacation time for such issues or appointments, they were not allowed to take vacation time in any increment under eight hours – meaning they would need to use an entire day for even the shortest of medical appointments [Tr. 720]. The alternative for those employees, of course, was to incur attendance points for shorter absences and run the risk of being terminated after accumulating ten attendance [Tr. 1563].

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<sup>3</sup> There is no evidence that the policy had been modified, negated or explained by Respondent to any employees or that any exceptions were tolerated.

<sup>4</sup> All dates are in 2017, unless otherwise noted.

<sup>5</sup> Before the Union campaign, first year employees received *no* vacation time, employees with 1-3 years seniority earned only 5 days of vacation, employees with 3-10 years of vacation earned 10 days and employees with more than 10 years earned 15 days of vacation [Tr. 1062, 1164, R 11, R 12].

<sup>6</sup> A half point was issued for a tardy or an absence under four hours, while a full point was issued for absences of more than four hours.

Accumulated attendance points remained on an employee's record and would only drop off after two months [60 days] of perfect attendance [GC 7; Tr. 398, 400, 666, 710, 805, 849, 1043, 1563, 1642].<sup>7</sup> The 2015-2017 attendance and vacation policies were widely unpopular among the employees and had been for quite some time [Tr. 805, 1039; ALJD at 4]. While Respondent occasionally acknowledged the shortcomings of the policies, Van Noy expressed that she felt that the policy was "lenient" in the months prior to the Union organizing drive [R-12(j)(2)].

Respondent had been aware of its employees' animosity toward the policies since 2015, and changes to the policy were discussed by management from 2015 to 2017. However, no changes were approved, made or announced by Respondent prior to commencement of the Union organizing campaign in July 2017 (R 12; Tr. 804; ALJD at 4-5). In fact, attempts by local personnel to enhance or adjust the policies to address significant employee turnover had been steadfastly rejected by Respondent's corporate leadership for two solid years before the Union campaign [R 11, R 12; Tr. 853, 1538-1539, 1583; ALJD at 5].

Respondent also maintained a policy in 2017 that was applicable only to the employees in the maintenance department. Respondent had traditionally required its maintenance employees to buy and provide their own maintenance tools but would loan those employees five hundred dollars to purchase them. The employee would then be required to pay the five hundred dollars back over time from payroll deductions [Tr. 366, 1576; ALJD at 5].

## **2. The Employees' Organizing Campaign Begins**

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<sup>7</sup> The policy in effect from 2015-2017 was different from the prior policy, which dropped attendance points after the passage of 30 days without the accrual of a point [Tr. 398, 805].

The Union began organizing the employees in the summer of 2017; word of this activity spread very quickly to management officials [Tr. 47, 247; GC 3, GC 4; ALJD at 5]. The evidence shows that as of August 9, Van Noy was aware that the maintenance employees were considering organizing and that one of their issues was Respondent's requirement that they purchase their own maintenance tools to perform their jobs [GC 4; Tr. 247; ALJD at 5]. Van Noy and other Human Resources employees immediately brought the organizing efforts to the attention of Habermehl and Senior Vice President of Operations Larry Helfant. Respondent did not want its Holland facility to be unionized [Tr. 649; ALJD at 5]. Habermehl and Helfant agreed to coordinate a "strategy for communicating (their anti-union) message" [GC 4; ALJD at 5].

After learning of the organizing campaign, both local and corporate managers began to research ways to provide the disgruntled employees with a solution for the things that drove them to unionization [GC 8; ALJD at 5]. Specifically, Respondent contacted other Boar's Head facilities to determine exactly what equipment was provided to their employees and discussed whether similar policies could be enacted locally [R 11; R 12; ALJD at 5].<sup>8</sup> Respondent also decided to revisit the possibility of changing its attendance and vacation policies [R 12; Tr. 1575; ALJD at 5].

Within two weeks of being told about the organizing activity, on August 21 and 22, Habermehl traveled from Florida to Michigan to personally deliver Respondent's anti-union message to all the production and maintenance employees on all three shifts [Tr. 62-63; ALJD at 5]. During the approximately one-hour meetings, Habermehl presented a power point

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<sup>8</sup>Respondent acknowledged that the issue was related to unionization. In Respondent's Exhibit 12(r)(1), Habermehl posits that the Company couldn't limit any proposed additional vacation benefits to "maintenance only without giving union organizations a lot of ammunition for the production group."

presentation – without using a script – regarding the unionization process and a general message of why unionization was not in the best interest of the employees [Tr. 52; GC 27; ALJD at 6]. The first meeting was translated into Spanish by human resources employee Vicente Nunez. The remainder of the meetings were translated by another human resources employee, Rodolfo Rodriguez [Tr. 53; ALJD at 6].<sup>9</sup> At some of the meetings, employees asked questions and make comments, while at others, there was no employee participation.

The testimonial evidence regarding these meetings was highly variant and the employee witnesses had varied levels of recollection. However, the evidence demonstrated that at every meeting held August 21-22, Habermehl explained the unionization process and did an in-depth comparison of the wages of the employees in the Jarret, Virginia facility (which was unionized) and the wages of the Holland employees [Tr. 117, 148, 242, 263, 383, 662, 1172, 1504; ALJD at 6]. Habermehl also discussed any prospective negotiations with the Union and what impact it would have on employees. The evidence shows that in *at least* one of the meetings with employees, Habermehl stated that any prospective negotiations with the Union would begin at “zero” or “the minimum” [Tr. 115-117, 262, 395; ALJD at 6-7].<sup>10</sup>

The specific message that negotiations would start at zero was not limited to Habermehl’s meetings with the employees. It was repeated to the employees in written correspondence that

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<sup>9</sup> The workforce is predominately Spanish speaking.

<sup>10</sup> Walter Aguilar recalled Habermehl stating in the 6:30 a.m. meeting that negotiations would start from “zero to the minimum and that a lot of benefits could be lost” [Tr. 117]. Apolonia Rios recalls Habermehl stating that negotiations would “start at zero” in her meeting [Tr. 395]. Some employees who testified did not recall such a statement being made at the meeting they attended, but the evidence shows that most of those employees did not attend the same meeting as Aguilar. For example, Jorge Torres attended the afternoon meeting [Tr. 1184]. Abigail Forsten was an office employee who did not specify which meeting she attended [Tr. 1158]. Employee Gabriela Esquivel did not indicate whether she attended the same meeting as Aguilar and Langarita and did not recall much about what happened in her meeting [Tr. 1387]. However, a few of Respondent’s witnesses alluded to hearing either Habermehl himself or other employees mention a statement similar to “bargain from zero.” For example, translator Rodolfo Rodriguez indicated that at some point Habermehl mentioned a “blank piece of paper” [Tr. 1250] and Torres recalls other employees telling him that Habermehl said negotiations would start at zero at the meeting they attended [Tr. 1198]. Van Noy denied such statements were made, but admitted she does not speak Spanish [Tr. 795].

Respondent attached to their paychecks on September 1 [GC 6; ALJD at 9]. The document, which was confirmed by Van Noy to be an accurate summation of the statements made in those meetings [Tr. 665; ALJD at 9], reaffirmed that Respondent's negotiations with a union would specifically NOT start with what employees had, but would "start at zero or the minimum allowed by law" [GC 6; ALJD at 9].

The message was repeated by other managers as well. On about August 24, employee-organizer Walter Aguilar was working in his department when he was approached by his supervisor Guadalupe Rodriguez. Rodriguez admitted on the record that based on comments from other employees, he was aware of Aguilar's strong Union support [Tr. 101; ALJD at 9]. Supervisor Rodriguez asked Aguilar directly why he was supporting the Union [Tr. 99-100; ALJD at 9-10]. When Aguilar indicated that he felt that the facility did not have enough people to perform the work and that there was abuse of the employees [Tr. 100, 119],<sup>11</sup> Rodriguez threatened the loss of employee bonuses and company-sponsored picnics [Tr. 100; ALJD at 9-10]. Parroting Habermehl, Rodriguez also indicated that the Union would negotiate from zero if the employees selected the Union [Tr. 120; ALJD at 9-10].<sup>12</sup>

Respondent's union-avoidance tactics were not confined to threats. It also held numerous meetings with employees during which it solicited grievances and either overtly or implicitly promised that those grievances would be remedied. These meetings began within days of Habermehl's August meetings and continued throughout the month of September.

Specifically, on about August 24, the same day that Aguilar was interrogated by Supervisor Rodriguez about the Union, Plant Manager Bradley Rurka held at least three

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<sup>11</sup> This concern was held by many employees, as reflected in GC 28.

<sup>12</sup> Rodriguez admitted to the majority of the statements on the record [Tr. 95-102].

meetings with the production and maintenance employees where he read prepared remarks to them, with interpretation provided by Human Resources specialist Rodolfo Rodriguez [Tr. 106-107; GC 9; ALJD at 10]. In that oddly titled “24-hour speech,” Rurka told the employees that the purpose of the meeting was to “follow up” on the meetings held with employees earlier in the week. Rurka explicitly told employees that Respondent had heard their concerns and would respond in a way that reinforced to employees that they were a “family” [ALJD at 11]. Noting employee complaints about the unfairness of Respondent’s attendance and vacation policies, Rurka announced that Respondent was going to “try something new” and change those policies to better fit the needs of the employees [GC 9 at 5; ALJD at 11]. Specifically, Rurka stated that “[a]fter listening to you, we are adding to the list of court appearances, any meetings or events related to immigration issues and we are expanding the list of medical visits to include all medical visits, not just preventative [GC 9 at 4; ALJD at 11].” He told the employees that “what [Respondent is] changing is a good first step toward bring our family back together” [GC 9 at 7; ALJD at 11].<sup>13</sup> Rurka also mentioned pending changes to both the lock out policy and the PPE equipment that was provided, which were two issues that were specifically mentioned by the maintenance employees as the reason for considering the Union [GC 9, GC 4; ALJD at 11]. After giving the employees the good news that their complaints would most likely be remedied, Rurka then appealed to the employees to keep “communicating” with management so that their concerns could be addressed and, if possible, remedied. In furtherance of that goal, Rurka told employees that Respondent was “bringing back” the employee suggestion box and promised employees that every single comment would be considered and that management would report back to employees on what could and could not be fixed [GC 9; ALJD at 12].

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<sup>13</sup> He also indicated that “we acknowledge that [vacation] is an important issue to you and we are still working on it ... But we don’t want to come to you empty handed” [GC 9, page 5-6].

This message – that Respondent was eager to listen and remedy employee complaints– was reiterated a few days later on August 29. Senior Vice President of Operations Larry Helfant traveled from Florida and met with the production and maintenance employees in Holland for the purpose of getting “general feedback” from the employees [Tr. 447, 1619, 1637; ALJD at 12]. Despite not having a much of a recollection of anything that was said or communicated specifically, Helfant did recall that he scheduled and held the meetings “to listen” to the employees [Tr. 1637] and that two main concerns were vacation and attendance policies [Tr. 1620, 1639; ALJD at 12]. Helfant also indicated that he recalled that the maintenance employees wanted Respondent to provide and pay for their tools [Tr. 1640-1641; ALJD at 12].

Several employees had a better recollection of the meetings with Helfant and confirmed that the two main issues were the vacation and attendance policies [Tr. 269, 1162, 1246; ALJD at 12]. Employee Ascension Rios recalled Helfant indicating that he was aware of problems at the plant and that he would like to “solve” those problems for the employees [Tr. 270; ALJD at 12].<sup>14</sup> Apolonia Rios recalls that Helfant stated that he was there to address employee complaints because he “hear [sic] about the rumors; and he would address the complaints that the workers had at the time” [Tr. 397; ALJD at 12]. Maintenance employee Rodney Valenzuela recalled Helfant specifically asking the employees how Respondent could “help [the employees] out in maintenance” and what their opinions were about the Company’s policies [Tr. 366-367; ALJD at 12].<sup>15</sup>

### **3. Events of September 2017**

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<sup>14</sup> Respondent witness Abigail Forsten recalled Helfant stating that Respondent would “look into” employee complaints [Tr. 1162] and that Helfant stated that Respondent was “looking into what they could do better for the newer employees going on out” [Tr. 1174].

<sup>15</sup> Human Resource Representative Rodolfo Rodriguez recalls Helfant mentioned in this meeting that Respondent didn’t want to “compromise” or cause any issues while employees were talking about the Union [Tr. 1305].

After the August 29 meeting, employee Apolonia Rios decided to take advantage of Helfant's solicitous posture and approach him directly about her own grievances [Tr. 401, 447]. Rios and her husband Ascension Rios were both Union supporters whose photo had been featured on the front page of the Union's Facebook page [GC 11]. Through the translation services of a nearby maintenance employee, Rios explained to Helfant that she had been demoted in March 2017<sup>16</sup> and that the almost three dollar per hour wage decrease had negatively impacted her [Tr. 401, 1647; ALJD at 13]. She explained that she felt like her demotion had been unfair. Helfant told her that he would look into it for her [Tr. 401-402, 1648-1649; ALJD at 13].<sup>17</sup>

After the conversation with Rios, Helfant instructed the Human Resources department to reconsider the situation and investigate her demotion and complaints [Tr. 1628; ALJD at 14]. As a result, Rios was called into Human Resources to speak with representative Leah Cochran who informed Rios that Helfant had directed Cochran to reinvestigate the circumstances of Rios' demotion [Tr. 402-404; ALJD at 14]. About two weeks later,<sup>18</sup> Respondent increased Rios' wages and issued her a lump sum backpay check for the difference between her rate what she was demoted to in March to the wage rate she was given in September [Tr. 404-405; ALJD at 14].<sup>19</sup>

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<sup>16</sup> Apolonia Rios' March 2017 demotion was for performance issues after she had failed to successfully complete a performance improvement plan [GC 16; Tr. 400-404].

<sup>17</sup> It should be noted that Helfant recalled almost nothing about the encounter, including the approximate date [Tr. 1648-1649].

<sup>18</sup> There is no date certain, but it appears that this occurred around September 11 [Tr. 448].

<sup>19</sup> Pursuant to her demotion in March 2017, Rios had her pay reduced from \$16.45 to \$14.15 per hour [GC 12, GC 16-18]. After meeting with Helfant, Respondent increased her wage rate to \$15.90 and her lump sum check was issued at that same rate [Tr. 405].

Later in September, Helfant met again with the Holland employees. This meeting – a mere two weeks after employees were asked about and expressed their desire to see changes to the attendance, vacation and tool policies – was for the sole purpose of announcing that the vacation and attendance policies were in fact being updated and improved [Tr. 125, 1177, 1305, 1397, 1404; ALJD at 17]. In his meeting with the maintenance employees, Helfant also announced that Respondent would be purchasing tools – at no cost to the employees – for the whole maintenance department [Tr. 366; ALJD at 17].

The changes announced by Helfant during that meeting were summarized in a flyer entitled: “Explanation of Changes to Policies” that was issued to all employees in their paychecks [GC 7; ALJD at 17]. The flyer explained the specific changes that were pending, including: (1) allowing attendance points to drop off after 30 days instead of 60; (2) allowing employees to take pre-scheduled vacation time for medical appointments; (3) allowing absences for additional life events to be excused without the accrual of an attendance point; (4) granting employees the right to use vacation time for a call off (up to five times per year); (5) using vacation time in four-hour increments; and (6) other changes to holiday pay, the wellness program, the lock out procedure and the employees’ PPE [GC 7; Tr. 1177; ALJD at 17]. Significantly, the memo announced the creation of *another* suggestion box for employees and encouraged them to “Use it” [GC 7].

The official October 1 change to the policy included all the items in the bullet points set forth in the “Explanation of Benefits” [GC 7; ALJD at 18] and added a few more [GC 22; Tr. 1026]. The vacation policy – which had been the source of so many complaints by so many employees for several years as expressed in the August and September meetings – was expanded. Senior employees received two more days of leave, newer employees were rewarded

five days of vacation and employees were allowed to use the time in smaller increments, and in some circumstances, without prior approval [Tr. 400, 710, 720; ALJD at 18]. Later in October, Maintenance Manager Guy Yondo came to the facility to take tool orders from the maintenance employees so that they could choose the brands they preferred [Tr. 370].

While Respondent argued that it had been planning to change those policies (particularly the vacation policy) for a long time, the evidence demonstrated that changes to those policies had been floating on the periphery *since 2015* [Tr. R 11, R12]. Other than exploratory e-mails between managers from time to time, there was no evidence that any change had been agreed upon for discussion or implemented at any time before union organizing began. To the contrary, Respondent's witnesses appeared to confirm that the owners of the company had no appetite for an increased vacation benefit [Tr. 1530].<sup>20</sup> Then, despite a two-year period of no change, the matter was resolved within weeks Respondent learning of the Union organizing.

While the majority of the employees were receiving unexpected benefits, many individual Union supporters were continuing to hear about the negative effects of unionization. About two weeks after the meetings with Helfant, most likely in late September or early October, employee Ascension Rios was directly approached by his supervisor Maria Mendoza in the beef pump area [Tr. 271; ALJD at 19-21]. Mendoza asked Rios directly if he supported the Union.<sup>21</sup> She told him that if he did support the Union, Respondent would "notice" that and he could end up "in court" [Tr. 272; ALJD at 19-21]. Rios stated that he supported the Union even with the

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<sup>20</sup> The phrase used several times by Habermehl was that the ownership did not believe in "pay for time not worked" [Tr. 1530].

<sup>21</sup> Mendoza's denials of the conversation were based on leading questions [Tr. 980]. She later stated she was "not good at remembering" [Tr. 1005; ALJD at 20, fn. 40].

risks involved. She then told him that the situation in the [unionized] New York facility was “not good” [Tr. 273; ALJD at 19-21].<sup>22</sup>

Around the same time, employee Elva Rivas and a group of employees who worked near her on the beef trim line were approached by supervisor Maria Mendoza in mid-morning. Mendoza asked the employees if they agreed with the Union and whether they would like to be represented by a union [Tr. 87-88; ALJD at 21]. When one employee expressed support, Mendoza indicated that the Union was not for everyone and that if the Union came in, the employees would lose the seven minutes they were allotted at that time for donning and doffing their safety gear during break times [Tr. 89; ALJD at 21].<sup>23</sup>

#### **4. Events of October 2017**

In response to Respondent’s robust and retaliatory reaction to the employees’ organizing efforts, the Union decided to make its own showing of support. On four dates in October and November, Union organizers and several employee organizers distributed Union literature to other employees both in the employee parking lot and in the street adjacent to the facility [ALJD at 21].

The employee parking lot is next to the facility and has one exit and two entrances, all of which are one-way [GC 13; ALJD at 21]. In addition to being used as a parking area, employees often congregate during the off hours to work on cars or sell food and produce and have for

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<sup>22</sup> Rios explained that Mendoza indicated that if he received discipline from Respondent while represented by a union, he could have to go to court with the union [Tr. 273]. This appears to be some kind of reference to the NLRB charges, but that was not explicit on the record.

<sup>23</sup> The other witness to the conversation, Jose Villalobos, was inherently incredible and provided overly certain and conclusory testimony. For example, after denying that *anyone* had *ever* spoken to him about the Union (“Never. Never”) [Tr. 943], he then almost immediately admitted that employees were talking about the Union and “giving some papers” [Tr. 944]. He then admitted that employees were talking about the Union on the line and he actually participated in the conversation by saying that he had been with Respondent for 17 years and he didn’t need anything [Tr. 944-945].

many years [Tr. 768, 884, 1345].<sup>24</sup> Adjacent to the lot is a security gate house/guard shack that serves as the entrance to the facility and is normally manned by two security officers [ALJD at 21]. Those officers monitor the parking lot by CCTV and by periodic foot patrols [Tr. 250]. Those guards are supervised by Ron Ortega, who has an office inside the facility and does not normally perform day to day security patrols or duties [Tr. 1467-1468; ALJD at 21].

On October 11, Union organizer Francisco Castillo and two fellow organizers set up on the public right of way outside Respondent's parking lot at about 1:00 p.m. Respondent security officer Gerald Cox saw the organizers and immediately notified Ortega, who came down to the guard shack with Cox [Tr. 1423; ALJD at 22]. While security supervisor Ortega denied that he had any advance knowledge of the handbilling activities, internal email shows that he was told by Habermehl to expect such activities on that date [GC 29; ALJD at 22, fn. 46].

Cox and another officer, Security Officer Doll, approached the Union organizers at about 1:00 and informed them that they could not be on Respondent's property [Tr. 488, 1424, 1346; ALJD at 22]. Organizer Francisco Castillo indicated that he knew that he was not allowed on private property and he had no intention of entering the parking lot [Tr. 488; ALJD at 22]. At that time, there were only a few employees coming and going from the lot, and while some of the guards returned to the guard shack, others, including Ortega, stayed in the lot and encouraged the cars to keep moving past the Union organizers [Tr. 488; ALJD at 22].

At the time of the shift change, between 2:30 and 4:00, several employees, including Walter Aguilar, Nelson Langarita, Apolonia Rios, Norma Chacon, Tomasa Garcia and Sanjuana Garza began to hand out flyers to employees *inside* the parking lot [Tr. 127, 301, 408, 493; GC

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<sup>24</sup> Employees have traditionally done so without any security presence or interference [Tr. 1367, 1447].

13, GC 14; ALJD at 22]. Some cars stopped to take the literature as they were coming or going from work and others continued to drive by without stopping [Tr. 492, 1350; ALJD at 22].

During that time, at least two, and at one time four security guards [Tr. 1352; ALJD at 22] were in the parking lot near the employees who were handing out literature. Those guards regularly patrolled the lot to observe the Union supporters and at times were in very close proximity to them [GC 14; Tr. 303, 422, 489]. The employees who testified all indicated that the guards followed them and made loud statements in the direction of the employees and Union organizers. While the employees acknowledged that the guards were speaking in English and most of them did not understand all of what was said, the employees all testified that they felt the guards were instructing them to leave [Tr. 128, 303, 313, 494].<sup>25</sup>

During this chaotic situation on October 11, Human Resources Business Partner Shannon Van Noy, who had been contacted directly by security and informed of the Union's presence, came to the parking lot with Assistant Plant Manager Mark Emmons, Human Resources Specialist Rodolfo Rodriguez, Security Supervisor Ortega and Security Officer Cox [Tr. 771; ALJD at 22]. Those individuals, as a group, approached the employees and the Union organizers who were congregated near the exit of the parking lot [Tr. 496, 772; GC 14; ALJD at 22]. Van Noy and the other supervisory and security personnel spoke briefly to Castillo in English, telling him that he was not allowed on the property [Tr. 497, 772; ALJD at 23]. Castillo indicated that he understood and said that the employees had the right to handbill inside the parking lot and pointed to the solicitation policy posted outside the lot [Tr. 496, 1348; ALJD at 23]. The

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<sup>25</sup> Aguilar testified that the guards told them that the [employees] should get "out of there" [Tr. 128]; Chacon testified that the guards expression was "mad" and that he kept walking behind cars and "watching" her [303]; Apolonia Rios testified that the guards were "watching" them hand out flyers and that they moved toward the employees passing out flyers [Tr. 422; ALJD at 22, fn. 47]. This is corroborated by GC 14.

employees who were in the parking lot had congregated to listen to (if not understand) the conversation between Van Noy and Castillo.

While Van Noy, Emmons and Rodriguez returned to the facility, Ortega testified that he remained in the parking lot for two and a half hours that day observing the employees and the Union organizers [Tr. 1428; ALJD at 23]. It is undisputed that Ortega and the other guards did, in fact, remain in the parking lot the entire time the employees were attempting to distribute literature, and that they were both watching the employees and encouraging the other employees to move past the Union supporters. Specifically, Security Supervisor Ortega testified that he and Respondents' security guards made motions with their hands that individuals and cars should "keep moving" [Tr. 128, 459, 488-490, 1350, 1377, 1439, 1445]. Those movements included a pushing away gesture and a waving gesture toward the outside of the parking lot [Tr. 1377, 1445]. Both Security Officer Cox and Security Supervisor Ortega admit that they repeatedly said "keep moving" over and over (in English) while making the hand gestures, and that they did so in proximity of the employees who were passing out flyers [GC 14(2)-(5)]. Ortega further admitted that even when he was not herding employees out of the lot past the Union organizers, he stayed in the lot "observing" the situation [Tr. 1439, 1475; ALJD at 23]. This testimony was corroborated by the photos taken on October 11 and October 18 [GC 14(1); Tr. 518] which show the guards in close proximity to the employees who were distributing literature and, in some cases, between employees who were attempting to hand out literature and those who may have otherwise taken it [GC 14 (2)-(5)].

The Union returned to distribute flyers in the street on October 18, October 25 and November 16 [ALJD at 23]. On each of those dates, employees in the parking lot were joined by

various security guards who continued to patrol the lot, observe the employees, and direct the cars to move past the organizers [Tr. 511-514; ALJD at 23-24].

On one of the dates that the flyers were being distributed in October, employee Ascension Rios was approached by supervisor Carlos Giron in the parking lot [Tr. 278; ALJD at 24]. Giron, who was with two other employees, mentioned that he saw Rios in a photograph on the Union's Facebook page [Tr. 278-279; GC 11] and commented about Rios' "friends" who were handing out flyers in the parking lot.<sup>26</sup> Giron and the other two employees were laughing in what Rios characterized as a "mocking" fashion [Tr. 279; ALJD at 24].

## **THE GENERAL COUNSEL'S ANSWERS TO RESPONDENT'S EXCEPTIONS**

### **A. Introduction – The Nature of Respondent's Anti-Union Campaign**

Upon learning that its employees were engaged in union organizing, Respondent embarked on a four-month coordinated and aggressive course of conduct to undermine employee support for the Union. Respondent's Union-avoidance strategy utilized the proverbial "carrot and stick," coaxing the employees into abandoning the Union with promises and grants of benefits while simultaneously threatening them with reprisals if they did not abandon the Union.

Respondent's efforts to induce the employees to abandon the Union (i.e. the "carrot") specifically included numerous captive audience meetings between employees and high-level corporate and local managers where employees were not only allowed to express their "concerns," but were specifically encouraged to tell Respondent exactly what they wanted to see change at the facility. After employees expressed a series of grievances, including their unhappiness with the vacation and attendance policies, they were assured that the concerns would be heard, considered and changed where possible. In October 2017, Respondent changed

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<sup>26</sup> "Boar's Head Workers United"

those unpopular policies for the entire production and maintenance staff, and gave a significant wage increase to a known Union supporter.

In conjunction with those promises and benefits, Respondent brandished a “stick” by making it clear to employees that its apparent benevolence was conditioned on the absence of the Union. Specifically, during numerous captive audience meetings and in individual conversations, Respondent threatened employees that negotiations would start with nothing and that employees would lose their current benefits. In the following weeks, Respondent repeatedly interrogated and surveilled employees who either participated or were suspected of participating in Section 7 activity.

The substantial weight of the record evidence establishes that Respondent engaged in numerous and repeated violations of Sections 8(a)(1) and (3) of the Act, in an effort to completely undercut the Union campaign and to interfere with its employees’ rights to engage in union and protected concerted activities.

**B. Respondent’s Exceptions to Credibility Determinations [Exceptions 6, 11-14, 27]**

Respondent has excepted to several of the ALJ’s credibility findings. The Board’s well established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that a judge’s credibility findings are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). In the instant case, there is no basis for reversing the ALJ’s findings.

The General Counsel called several employee witnesses during its case-in-chief, all of whom testified in a straightforward, consistent, and detailed manner. The Board has long viewed a witness’ status as a current employee as a significant factor in resolving credibility issues. *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995) citing *Farris Fashions*, 312 NLRB 547, 554, fn. 3 (1993),

enfd. 32 F.3d 373 (8th Cir. 1994); *Circuit Wise, Inc.*, 309 NLRB 905, 909 (1992). In this regard, the Board has held that the testimony of current employees is entitled to enhanced credibility. *Advocate South Suburban Hospital*, 346 NLRB 209, fn. 1 (2006); *American Wire Products*, 313 NLRB 989, 993 (1994) (current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Moreover, testimony from current employees tends to be particularly reliable because it goes against their pecuniary interests. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). *Shop Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977) (Testimony of current employees adverse to their employer is “given at considerable risk of economic reprisal, including loss of employment ... and for this reason is not likely to be false”).<sup>27</sup>

In the instant case, the ALJ’s credibility determinations are specific, thorough and well-reasoned [See, e.g., ALJD at 7-8; 20-21]. Respondent has not shown by a clear preponderance of all relevant evidence that any credibility determinations should be overturned, and its Exceptions 6, 11-14, 27 should be denied.

**C. The ALJ Did Not Err in Granting the General Counsel’s Motion to Amend the Complaint [Exception 1]**

At the close of the hearing, the ALJ granted the General Counsel’s motion to amend Complaint paragraphs 12(a)-(d) from alleging that Respondent denied off duty employees’ access to the parking lots to alleging that Respondent engaged in surveillance and created the impression that employee’s union activities were under surveillance [ALJD at 2, 35, fn. 58]. Respondent takes exception to the Judge’s decision in this regard, arguing that allowing the

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<sup>27</sup> Current employees who testified included Walter Aguilar, Ascension Rios, Elva Rivas and Norma Chacon. It must also be noted that none of the employees who testified, whether current or former, stood to gain any backpay from the litigation of this case.

amendment denied Respondent due process. Respondent's argument is supported by neither the law nor the facts.

Administrative law judges have "wide discretion" to grant or deny a motion to amend. Section 102.17 of the Board's Rules authorizes the judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See also *Folsom Ready Mix, Inc.*, 338 NLRB 1172 n. 1 (2003). The factors to be considered include whether there was surprise or lack of notice and whether the matter was fully litigated. *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 549, fn. 8 (2015), *enfd.* 651 Fed. Appx. 34 (2d Cir. 2016).

Furthermore, as the ALJ determined, if a matter has been fully litigated, and the amendment conforms the complaint to the evidence, a motion to amend generally should be granted. [ALJD at 35, fn. 58, citing *Pincus Elevator & Electric Co.*, 308 NLRB 684, 685 (1992), *enfd.* 998 F.2d 1004 (3d Cir. 1993). In *Pincus*, the Board overruled an administrative law judge's denial of a motion to amend the complaint finding that the violations at issue were of the same class because the legal theory that the respondent engaged in unlawful conduct as part of an effort to prevent the organization of its employees was the same. See also *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973) (amendments allowed that deal with acts that are all "part of an overall plan to resist organization"); *Recycle America*, 308 NLRB 50 fn. 2 (1992)(amendment permitted "whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer"); *Outboard Marine Corp.*, 307 NLRB 1333, 1334 (1992) (threats of plant closure closely related where all allegations center on a plan to defeat the union organizing campaign).

Similarly, in the instant case, the amended allegation of surveillance involves unlawful acts that were part of Respondent's overall plan to thwart its employees efforts to organize a union. Moreover, as the ALJ found, the original and amended allegations involved the same individuals (Respondent's human resource personnel and security guards), the same location (the Respondent's parking lot), the same dates (October 11, 18, 25, and November 16, 2017), and the same activities that occurred in that parking lot. Respondent elicited testimony from most, if not all, of the witnesses that were involved in the surveillance activity<sup>28</sup> [ALJD at 35, fn. 58].

In sum, the facts and circumstances underlying the allegations regarding surveillance were fully litigated and the amendments merely conformed the complaint to the evidence. The ALJ concluded correctly that Respondent was not prejudiced by the amendment. Respondent's Exception "1" should be denied.

**D. The ALJ Correctly Found that Respondent's Prohibition on Badges and Pins Violates Section 8(a)(1) [Exceptions 2-5]**

In 2017 and at all material times, Respondent maintained an employee handbook [GC 2; Tr. 37] applicable to all production and maintenance employees. The handbook includes specific examples of behavior considered by Respondent to be "Class II Offenses", i.e., misconduct that is "serious and will result in progressive discipline," including the following provision:

*2.9: ... Wearing unauthorized badges, pins or other items on helmet or exterior garments.*

An employer may not prohibit employees from wearing buttons and pins containing union or other protected concerted messages unless the employer can show special circumstances

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<sup>28</sup> It is important to note that the test for determining whether an employer engages in unlawful surveillance, or unlawfully creates the impression of surveillance, is an objective one and involves the determination of whether the employer's manifest conduct, under the circumstances, was such as would tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *The Broadway*, 267 NLRB 385, 400 (1983). As such, Respondent's proffer in its exceptions brief of evidence that its management was not taking note of who was involved in union activities; or preparing lists of who did or did not take flyers; or instructing its managers to do so; or creating and/or retaining photographs, videos or incident reports to identify employees, even if true, is unavailing

justifying the restriction. *Cintas Corp.*, 252 NLRB 752 (2009). *Arden Post-Acute Rehab*, 365 NLRB No. 109, slip op. at 17-18 (2017); *In-N-Out Burger, Inc.*, 365 NLRB No. 39 (2017), enfd. 894 F.3d 707 (5th Cir. 2018); and *Boch Honda*, 362 NLRB 706, 707-708 (2015), enfd. 826 F.3d 558 (1st Cir. 2016). The Board has only found special circumstances justifying the proscription of union insignia when the display jeopardizes employee safety, equipment or product safety or unreasonably interfere with a public image which the employer has established as part of its business plan. *United Parcel Service*, 312 NLRB 596, 597 (1993) citing *Nordstrom Inc.*, 264 NLRB 698, 700 (1982).<sup>29</sup>

Respondent's proffered special circumstance for proscribing "unauthorized badges, pins or other items on helmet or exterior garments" – food safety – is most certainly reasonable. The problem with the rule as written is that it makes no distinction between production areas and non-production areas [ALJD at 38]. A rule that curtails employees' Section 7 right to wear union insignia in the workplace must be narrowly tailored to the special circumstances justifying maintenance of the rule, and the employer bears the burden of proving such special circumstances." *Boch Honda*, supra at 707; *W San Diego*, 348 NLRB 372, 373-374 (2006) (special circumstances that justified employer's ban on buttons worn in public areas did not justify a ban on buttons worn in nonpublic areas). In the instant case, Respondent's witnesses admitted that Respondent has absolutely no need to prohibit badges and pins in non-production areas [Tr at 826, 1572; ALJD at 38, fn. 60]. As Respondent has not demonstrated special

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<sup>29</sup> In *The Boeing Company*, 365 NLRB No. 154, slip op. (2017), the Board adopted a new standard for evaluating an employer's workplace rule, policy, or handbook provision. The *Boeing* test considers both the legitimate justifications associated with the disputed rule and any adverse impact the rule may have on protected activity. The Board in *Boeing* did not, however, alter well-established standards regarding certain kinds of rules where the Board has already struck a balance between employee rights and employer business interests. As it pertains to the instant case, the *Boeing* decision did not deal with the "special circumstances" test of apparel rules. See, e.g., *Long Beach Memorial Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children's and Women's Hospital Long Beach*, 366 NLRB No. 66, slip op. at 1-2 (Apr. 20, 2018) (finding hospital's restrictions on wearing union pins overbroad and unlawful without reference to *Boeing* test).

circumstances justifying its absolute prohibition on badges and pins in non-production areas, the ALJ was correct to find that its maintenance of this overly broad prohibition of unauthorized pins and badges violates Section 8(a)(1).

**E. The ALJ Correctly Found that Respondent Unlawfully Solicited Employee Grievances [Exceptions 7, 17-19]**

During Plant Manager Rurka's August 24 "follow up" meetings with the employees [Tr. 106-107; GC 9; ALJD at 10-11] he noted employee complaints about the unfairness of Respondent's attendance and vacation policies, and announced that Respondent was going to "try something new" and change those policies to better fit the needs of the employees [GC 9 at 5; ALJD at 11, 44]. Specifically, Rurka stated that "[a]fter listening to you, we are adding to the list of court appearances, any meetings or events related to immigration issues and we are expanding the list of medical visits to include all medical visits, not just preventative [GC 9 at 4; ALJD at 11, 44]." He told the employees that "what [Respondent is] changing is a good first step toward bring our family back together" [GC 9 at 7; ALJD at 11, 31, 44]. Rurka also mentioned pending changes to both the lock out policy and the PPE equipment that was provided, which were two issues that were specifically mentioned by the maintenance employees as the reason for considering the Union [GC 9, GC 4; ALJD at 11, 43-44]. Rurka told the employees to keep "communicating" with management about their concerns so that they could be addressed and, if possible, remedied Rurka told employees that Respondent was "bringing back" the employee suggestion box and promised employees that every single comment would be considered and that management would report back to employees on what could and could not be fixed [GC 9; ALJD at 12, 17, 31].

A few days later, on August 29, Senior Vice President of Operations Larry Helfant traveled from Florida and met with the production and maintenance employees in Holland for the purpose of getting “general feedback” from the employees about “anything” [Tr. 447, 1619, 1637; ALJD at 12]. Helfant indicating that he was aware of problems at the plant and that he would like to “solve” those problems for the employees [Tr. 270, 397]. Maintenance employee Rodney Valenzuela recalled Helfant specifically asking the employees how Respondent could “help [the employees] out in maintenance” and what their opinions were about the Company’s policies [Tr. 366-367; ALJD at 12].

Respondent then summarized the improvements made in response to the grievances it solicited in an “Explanation of Changes to Policies” that was issued to all employees with their paychecks [Tr. 665, GC 7]. The memo concluded by announcing another suggestion box for employees and encouraged them to use it [GC 7; ALJD at 12, 31, 44].

Suggestion Box

- The box in the hall by Accounts Payable is now a Suggestion Box. Use it.

Respondent’s message to the employees could not have been clearer – a union wasn’t necessary because Respondent was ready and willing to address their concerns. As the Supreme Court stated in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964): “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” Id at 409.

The solicitation of employee grievances during an organizing campaign raises an inference that the employer is promising to remedy the grievances; an inference that is “particularly compelling when, during a union organizational campaign, an employer that has not

previously had a practice of soliciting employee grievances.” *Garda CL Great Lakes, Inc.*, 359 NLRB 1334 (2013) citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004); *Desert Aggregates*, 340 NLRB 289, 297-298 (2003) (Employer statements that union campaign had “rung bells all the way to the top” of company coupled with an appeal that employees should “give the company a year” and see what changes would be made was an unlawful solicitation and promise to remedy employee grievances); *Jefferson Smurfit Corp.*, 325 NLRB 280, 283 (1998) (Employers entreaty to employees “if you have further problems or there’s things here in the plant that you don’t like, why don’t you give us a chance to address them” found to be unlawful solicitation and implied promise to remedy grievances in violation of Section 8(a)(1)). See also *Multi-Natl. Food Serv.*, 238 NLRB 1031, 1036 (1979) citing *Merle Lindsey Chevrolet, Inc.*, 231 NLRB 478 (1977), citing *Uarco, Incorporated*, 216 NLRB 1 (1974).

In the present case, repeated and unequivocal solicitation of employee grievances was a key component of Respondent’s union avoidance strategy. The ALJ was correct to find that Respondent’s brazen solicitation of, and promises to remedy, the employees’ grievances for the purpose of discouraging union activity violated Section 8(a)(1).

**F. The ALJ Correctly Found that Respondent’s Decision to Give Apolonia Rios a Pay Raise Violated Sections 8(a)(1) and (3) [Exception 7]**

After the August 29 meeting, employee Apolonia Rios decided to take advantage of Larry Helfant’s solicitous posture and approach him directly about her own grievances [Tr. 401, 447; ALJD at 13-14]. Rios and her husband Ascension Rios were both Union supporters whose photo had been featured on the front page of the Union’s Facebook page [GC 11]. Through the translation services of a nearby maintenance employee, Rios explained to Helfant that she had been demoted in March 2017, and that the almost three dollar per hour wage decrease had negatively impacted her [Tr. 401, 1647; ALJD at 13-14]. She explained that she felt like her

demotion had been unfair and Helfant told her that he would look into it for her [Tr. 401-402, 1648-1649; ALJD at 13-14].

After the conversation with Rios, Helfant instructed the Human Resources department to reconsider the situation and investigate her demotion and complaints [Tr. 1628; ALJD at 14]. About two weeks later, Respondent increased Rios' wages and issued her a lump sum backpay check for the difference between her rate what she was demoted to in March to the wage rate she was given in September [Tr. 404-405; ALJD at 14].

The timing of Respondent's decision to grant a wage increase to Rios compels the inference of unlawful motive. Respondent did not rebut this inference by showing that the timing of its actions was unrelated to the employees' organizing efforts. Respondent attempted to present evidence that others had been granted ad hoc wage increase upon request in the past, but those instances involved either employee downsizing or transferring to another department [Tr. 807]. Respondent's decision to raise Rios' pay interfered with the employees' exercise of their Section 7 rights and violated Sections 8(a)(1) and (3). *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 632 (1993).

**G. The ALJ Correctly Found that Respondent Unlawfully Changed Vacation and Attendance Policies and Provided Tools to Maintenance Employees to Dissuade Employees from Supporting the Union [Exceptions 20-22, 24]**

In September, a mere two weeks after employees were asked about and expressed their desire to see changes to the attendance, vacation and tool policies, Larry Helfant met with the Holland employees for the sole purpose of announcing that the vacation and attendance policies were in fact being updated and improved [Tr. 125, 1177, 1305, 1397, 1404; ALJD at 44]. In his meeting with the maintenance employees, Helfant also announced that Respondent would be purchasing tools – at no cost to the employees – for the whole maintenance department [Tr. 366].

While Respondent argued that it had been planning to change those policies (particularly the vacation policy) for a long time, the evidence demonstrated that changes to those policies had been floating on the periphery *since 2015* [Tr. R 11, R12; ALJD at 46]. Other than exploratory e-mails between managers from time to time, there was no evidence that any change had been agreed upon for discussion or implemented at any time before union organizing began. To the contrary, Respondent's witnesses confirmed that the owners of the company had no appetite for an increased vacation benefit [Tr. 1530; ALJD at 44]. Then, despite a two-year period of no change, the matter was resolved within *a month and a half* of Union organizing. Respondent also points to the fact that it changed policies at all non-union facilities. But as noted above, the changes at Holland and the other facilities took place only *after* the threat of Union organizing began and only *after* employees expressed their desire to see it change, in response to Respondent's solicitations [Tr. 857; ALJD at 46].

The Supreme Court has held that an employer violates the Act when it grants a wage increase or other benefits for the purpose of inducing employees to vote against the union. *NLRB v. Exchange Parts Co.*, supra at 409. The Court explained that Section 8(a)(1) "prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect." Id. The *Exchange Parts* standard applies to allegations both that an employer unlawfully announced a benefit in violation of Section 8(a)(1), see, e.g., *Village Thrift Store*, 272 NLRB 572 (1983), and that it unlawfully implemented a benefit in violation of Section 8(a)(3), see *In Home Health, Inc.*, 334 NLRB 281, 284 (2001) and *Perdue Farms*, 323 NLRB 345, 352-353 (1997), enf. denied in relevant part on other grounds 144 F.3d 830 (D.C. Cir. 1998).

Respondent did not meet its burden of showing that the timing of these improved working conditions was based on reasons other than the organizing efforts. Announcement of the changes unlawfully interfered with the employees' exercise of their Section 7 rights in violation of Section 8(a)(1). *Guard Publishing Company*, 344 NLRB 1142 (2005). Furthermore, the implementation of the changes violated Section 8(a)(3). *Thorgren Tool & Molding, Inc.*, 312 NLRB 628, 632 (1993).

**H. The ALJ Correctly Found that Supervisors Maria Mendoza and Guadalupe Rodriguez Unlawfully Interrogated and Threatened Employees [Exceptions 8-10, 23]**<sup>30</sup>

About August 24, Union organizer Walter Aguilar was working in his department when he was approached by his supervisor Guadalupe Rodriguez [ALJD at 10]. Rodriguez asked directly why Aguilar was supporting the Union [Tr. 99-100]. When Aguilar indicated that he felt that the facility did not have enough people to perform the work and that there was abuse of the employees [Tr. 100, 119], Rodriguez told Aguilar that employees could lose their bonuses and their company-sponsored picnics [Tr. 100]. Rodriguez also indicated that the Union would negotiate from zero if the employees selected the Union [Tr. 120].<sup>31</sup>

Around October, employee Elva Rivas and a group of employees who worked near her on the beef trim line were approached by supervisor Maria Mendoza in mid-morning. Mendoza asked the employees if they agreed with the Union and whether they would like to be represented by a union [Tr. 87-88; ALJD at 19, 28]. When one employee expressed support, Mendoza indicated that the Union was not for everyone and that if the Union was selected by the employees, the employees

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<sup>30</sup> While not framed as such, Respondent's exceptions relating to Supervisor Mendoza are premised largely on credibility determinations [ALJD at 20-21]. The General Counsel, therefore, incorporates its arguments regarding witness credibility to these exceptions.

<sup>31</sup> As noted above, Rodriguez admitted to making most of these statements [Tr. 95-102].

would lose the seven minutes they were allotted at that time for donning and doffing their safety gear during break times [Tr. 89; ALJD at 27].

The Board has determined that the legality of interrogations of employees must be viewed in context of all the circumstances and whether the questioning would reasonably tend to coerce the employee at whom it is directed so that she would feel restrained from exercising the rights protected by Section 7 of the Act. *Westwood Health Center*, 330 NLRB 935, 940 (2000); *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029 (2014). While the Board will consider whether an employee is an open union supporter as a factor in determining whether an interrogation is coercive, the factor is merely one of many and not determinative. *Norton Audobon Hospital*, 338 NLRB 320 (2002); *Bourne v. NLRB* 332 F.2d 47, 48 (2d Cir. 1964). The fact that any such conversation is cordial or polite is not dispositive of whether it would be coercive to a reasonable employee. *Woodcrest Health Care Center*, 360 NLRB 415, 423 (2014).

Often, as in the present case, interrogations are accompanied by threats. Supervisor Rodriguez's August threats to Walter Aguilar that the employees' bonuses and Company-sponsored picnics were at risk, were made in the context of Rodriguez asking Aguilar why he was supporting the Union [Tr. 99-100, 120]. Similarly, when Supervisor Mendoza asked employees about their Union support, she told them if they selected the Union, they would lose the seven minutes they were allotted at that time for donning and doffing their safety gear during break times [Tr. 89]. Mendoza asked employee Ascension Rios about his support for the Union and told him that if he supported the Union, Respondent would "notice" [ALJD at 21, 27, 29].

It is well established that an employer must explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining rather than suggesting that employees, by entertaining the prospect of union representation, were

courting the wrath of the employer. *Franklinton Preparatory Academy*, 366 NLRB No. 67, slip op. at 2 (April 20, 2018). Respondent did not meet its burden of proving that Rodriguez’s and Mendoza’s predictions were based on objective fact. Furthermore, in the context of these threats and Respondent’s other contemporaneous unfair labor practices, the questioning of these employees regarding their support of the Union would reasonably tend to coerce the employees such that they would feel restrained from exercising their Section 7 rights. As such, the ALJ was correct in finding that these interrogations and the accompanying threats were coercive and violated Section 8(a)(1).

**I. The ALJ Correctly Found that Respondent Engaged in Unlawful Surveillance in the Employee Parking Lot [Exceptions 15 and 16]**

While an employer may observe open, public union activity on or near its property lawfully, an employer unlawfully “surveils employees engaged in Section 7 activity when it observes them “in a way that is ‘out of the ordinary’ and thereby coercive.” *Alladin Gaming, LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the duration of the observation, the employer’s distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Id.*

In the instant case, the following facts are undisputed:

- On October 11, Security Supervisor Ron Ortega stood in the parking lot for two and a half hours watching employees and the Union organizers distribute literature to Respondent’s employees [Tr. 1428; ALJD at 22-23].
- Ortega and other security guards stayed in the parking lot the entire time the employees were attempting to distribute literature, both watching the employees hand out the flyers and encouraging other employees to move past the Union supporters [Tr. 1439, 1475; ALJD at 22-23].
- Ortega stayed in the lot for the purpose of “observing” the situation [Tr. 1439, 1475]; see also GC 14(1), Tr. 518, showing that the guards were very close to the employees distributing literature and, in some cases, between employees who were attempting to hand out literature and those who may have otherwise taken it [GC 14(2)-(5); ALJD at 22-23].

- The Union returned to distribute flyers in the street on October 18, October 25 and November 16. On each of those dates, several employees passed out flyers in the parking lot and on each of those dates, those employees in the parking lot were surveilled by security guards who encourage the cars to move past the organizers [Tr. 511-514; ALJD at 22-23].

There is no evidence that Security Supervisor Ortega had a regular practice of standing in the parking lot for long periods of time to observe employees [ALJD at 35]. There is no evidence that Respondent's security guards had a regular practice of standing in close proximity to, or between, employees while they were in the parking lot [ALJD at 35]. There is no evidence that Respondent's security guards had a regular practice of discouraging employees from communicating with each other in the parking lot [ALJD at 35]. To the contrary, it is not at all unusual for employees to congregate in Respondent's parking lot at the end of their shifts for various purposes [Tr at 1447-1448]. Respondent's observation of employees as they distributed literature was indisputably "out of the ordinary." As such, Respondent's surveillance was coercive and violated Section 8(a)(1).

On one of the dates in October that the employees distributed flyers, Production Supervisor Carlos Giron approached employee Ascension Rios in the parking lot and said that he saw Rios in a photograph on the Union's Facebook page and commented about Rios' "friends" handing out flyers in the parking lot [Tr. 278-279, GC 11; ALJD at 36]. As noted supra, it is well established that whether an employer creates an unlawful impression of surveillance is determined on an objective basis. Such actions are unlawful if a reasonable employee would assume that his union activities are being monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295 (2009). In this case, when Supervisor Giron indicated to employee Rios that he had been looking at the Union's Facebook page it was entirely reasonable for Rios to assume that Giron

was monitoring employees' Union activities. The ALJ was correct to find that Giron's statement created an impression of surveillance in violation of Section 8(a)(1).

**J. The ALJ Correctly Found that Respondent Unlawfully Threatened Loss of Wages and Benefits at Employee Meetings and in Writing [Exception 25, 26 and 28]**

In assessing whether a statement is a threat, the Board gauges whether the employer engaged in conduct which tends to interfere with the free exercise of employees' rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The determination does not turn on the employer's motive or on whether the coercion succeeded or failed. *Olympic Supply Inc. d/b/a Onsite News*, 359 NLRB 797 (2013). While the Board has found that an employer is free to make statements predicting the effects of unionization to employees, such statements must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." *NLRB v. Gissel Packing Co.*, supra at 618; *Olympic Supply*, supra. Questionable threats need not be explicit "if the language used...can reasonably be construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing an implicit or ambiguous threat. *KSM Industries*, 336 NLRB 133 (2001).<sup>32</sup>

Threats that unionization would result in loss of wages have long been found to be coercive and as such, violate Section 8(a)(1). *Oklahoma City Collection District of Browning Ferris, Inc.* 263 NLRB 799, 800 (1980, enfd. mem. 679 F.2d 900 (9th Cir. 1982). Predictions of plant shut down, loss of contracts, loss or transfer of work, lost jobs, or changes in working

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<sup>32</sup> Any argument that Respondent's unlawful statements were "lost in translation" and that this precludes finding a violation is without merit. It is well established that an employer bears the risk that its statements will be translated in such a way that an employee who speaks a different language will reasonably understand the statements as coercive. See, e.g., *API Industries*, 314 NLRB 706, 706 fn. 1 (1994); *Cream of the Crop*, 300 NLRB 914, 917 (1990). "It is a reality that antiunion employers often choose their words carefully in an attempt to convey an unlawful message to employees – who will miss the legal niceties but will grasp the employer's gist – while avoiding statements that are literal violations of the Act. The need for translation complicates this strategy." *Langdale Forest Products Co.*, 335 NLRB 602, 603 (2001) (dissent).

conditions or benefits must be based on objective facts. *NLRB v. Gissel Packing Co.*, 395 U.S at 618. As stated above, an employer must explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining rather than suggesting that employees, by entertaining the prospect of union representation, were courting the wrath of the employer. *Franklinton Preparatory Academy*, 366 NLRB No. 67, slip op. at 2 (April 20, 2018). The burden of proof is on the employer to show that a prediction was based on objective fact. *Schaumburg Hyundai*, 318 NLRB 449 (1995).

The weight of the evidence shows that during his August meetings with the employees, Director of Human Resources Habermehl said that any prospective negotiations with the Union would begin at “zero” or “the minimum” [Tr. 115-117, 262, 395; ALJD at 6-8]. A couple of days later, Supervisor Rodriguez repeated Habermehl’s threat when he told Union supporter Walter Aguilar that employees could lose their bonuses and their company-sponsored picnics and that Respondent would negotiate from zero if the employees selected the Union [Tr. 120]. Respondent repeated these threats in a written correspondence to employees that it attached to their paychecks [GC 6]. The letter was confirmed by Van Noy to be an accurate summation of the statements made in Habermehl’s meetings with employees [Tr. 665; ALJD at 9, 26]. It reaffirmed that Respondent’s negotiations with the Union would not start with what employees had, but would “start at zero or the minimum allowed by law” [GC 6]. It read:

**If a union gets voted in, will negotiations start with what we already have? No. If a union is voted in, negotiations will not start at current wages and benefits. Nobody knows what the final outcome of the contract will be because each item is negotiated starting with zero or the minimum allowed by law. It could be more but it could be less.**

It is well established that ‘bargaining from scratch’ statements by employers violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may

ultimately receive depends upon what the union can induce the employer to restore; for the duty to bargain ordinarily forecloses unilateral changes, and bargaining begins with existing wages and conditions. On the other hand, such statements do not constitute a violation when the employer's other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980) citing *TRW United Greenfield Division*, 245 NLRB 1135 (1979); *Stumpf Motor Co., Inc.*, 208 NLRB 431 (1974); *BP Amoco Chemical*, 351 NLRB 614, 617–618 (2007) (statements regarding loss of existing benefits are evaluated in terms of whether they are more reasonably construed as a result of union selection versus a “possible outcome of good-faith bargaining”).

In reviewing such statements, the Board has stated that “‘bargaining from scratch’ is such a dangerous phrase which carries within it the seed of a threat that the employer will become punitively intransigent in the event the union wins the election.” The Board emphasized that when such a statement can be reasonably read in the context of a threat to either end existing benefits prior to bargaining or to “adopt a regressive bargaining posture designed to force a reduction of existing benefits for the purpose of penalizing the employees” for selecting the union, it will find a violation. *Coach & Equipment Sales Corp.*, 228 NLRB 440, 440–441 (1977). In so finding, the Board stressed that “presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks.” *Id.*

Here, Respondent's references to bargaining from zero and similar statements went beyond descriptions of the normal give and take of collective bargaining and are more reasonably construed as a result of union selection versus a possible outcome of good faith

bargaining. Respondent's statements reasonably could be understood – and indeed, *were* understood – by the employees as threats to their existing wages and benefits, leaving them with the impression that what they might ultimately receive through collective bargaining would depend upon what the Union was able to induce Respondent to restore. The ALJ was right to find that these threats violated Section 8(a)(1).

### **CONCLUSION**

For the reasons set forth herein, Counsel for the General Counsel respectfully asks the Board to conclude that Respondent engaged in the unfair labor practices found by ALJ Randazzo and to issue the Judge's recommend remedial Order.

Respectfully submitted this 6<sup>th</sup> day of July 2020.

*/s/ Steven E. Carlson*  
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Counsel for the General Counsel  
National Labor Relations Board  
Region 7 – Resident Office  
Grand Rapids, Michigan  
[steven.carlson@nlrb.gov](mailto:steven.carlson@nlrb.gov)