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2 Sisters Food Group, Inc. *and* United Food and Commercial Workers International Union, Local 1167. Cases, 21–CA–38915, 21–CA–38932, and 21–RC–21137

December 29, 2011

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION CASES

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On June 10, 2010, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed separate exceptions and supporting briefs, and answering briefs to the Respondent's exceptions. The Respondent submitted a reply brief to the General Counsel's answering brief, and an answering brief to the Charging Party's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision, Order, and Direction of Second Election, and to adopt the recommended Order as modified and set forth in full below.[1]

Overview

The Union commenced an organizational campaign at the Respondent's food processing and packaging plant in 2008. On July 17, 2009,[2] an election was held pursuant to a Stipulated Election Agreement. The tally of ballots showed 66 votes for and 87 votes against the Union, with 24 challenged ballots.[3]

For the reasons the judge stated, we adopt her findings that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting distribution of printed matter, and violated Section 8(a)(3) and (1) by terminating employee Xonia Trespalacios.[4] For the reasons stated below, we further adopt her findings that the Respondent violated Section 8(a)(1) by maintaining work rules prohibiting the unauthorized solicitation of contributions and the "inability or unwillingness to work harmoniously with other employees" as well as its policy requiring arbitration of employment-related disputes.[5] Contrary to the judge, however, we find that the Respondent's rules prohibiting leaving the plant or taking breaks without permission were lawful.[6]

We adopt the judge's recommendation, for the reasons she stated, to sustain the Union's objections relating to Trespalacios' termination.[7] Contrary to the judge, however, we also find that the Respondent's distribution of antiunion paraphernalia to employees on the day of the election interfered with employee free choice, and we rely on this objectionable conduct as a further basis for setting aside the election.[8] Finally, we remand the Union's request that the rerun election be held off premises controlled by the Respondent with instructions guiding the Regional Director's exercise of his sound discretion over the selection of the election site.

Analysis

1. The Respondent's work rules include a prohibition on the "[u]nauthorized soliciting of contributions on Company premises." We agree with the judge that the Respondent violated Section 8(a)(1) by maintaining this rule. To determine whether the maintenance of a challenged rule is unlawful, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (emphasis in original). If so, the rule is unlawful. If not, "the violation is dependent upon a showing of one

[1] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay shall be paid with interest compounded on a daily basis.

We shall modify the judge's recommended Order to conform to our findings, and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. Should the notice need to be mailed, the Respondent shall mail it to all employees on its payroll as of February 1, 2009, consistent with the parties' stipulation during the hearing that since at least that date the Respondent's employees received new-hire packets containing the work rules found unlawful herein.

[2] All dates are in 2009, unless otherwise noted.

[3] The parties stipulated during the hearing to sustain 3 of the 24 challenged ballots, so the remaining challenged ballots are nondeterminative.

[4] In finding the latter violation, Member Hayes notes that the security camera video footage of Trespalacios' allegedly hostile encounter with a coworker, on which the Respondent relied to terminate her, was inconclusive and susceptible to differing interpretations. Under those circumstances, he agrees that the Respondent's failure to thoroughly investigate the incident supports an inference that the discharge was unlawful.

[5] As stated in his dissenting opinion, Member Hayes would not find these violations.

[6] We deny the Union's request for special remedies that are not warranted in the circumstances of this case and are beyond the scope of the Board's usual remedies.

[7] In doing so, we additionally rely on the dissemination of information concerning the discharge to about 80 unit employees by Tracey Reilly, the Respondent's vice president of operations, on July 13, 4 days before the election.

[8] Member Hayes finds it unnecessary to reach this issue.

of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

As the Board observed in *Lutheran Heritage,* "a rule prohibiting employee solicitation, which is not by its terms limited to working time, would violate Sec. 8(a)(1) under this standard, because the rule explicitly prohibits employee activity that the Board has repeatedly found to be protected by Sec. 7." Id. at 646 fn. 5. The Respondent's prohibition of solicitation is not limited to working time, and thus it explicitly restricts activities protected by Section 7. Moreover, contrary to the Respondent and our dissenting colleague, the rule is unlawful even though it is limited to the solicitation of contributions since solicitation of contributions to support an incipient organizing drive, to help a fired fellow employee, and for many similar purposes is protected by Section 7.

2. We also affirm the judge's finding that the Respondent's policy requiring its employees to submit "all [employment] disputes and claims" to binding arbitration is unlawful. In *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), the Board found that a similar policy requiring arbitration of "all disputes relating to or arising out of an employee's employment . . . [including] any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" violated Section 8(a)(1). There, as here, employees would reasonably read the broad language of the policy to prohibit the filing of unfair labor practice charges with the Board, even though the policy did not explicitly restrict access to the Board. Id. at 377.

The Respondent and our dissenting colleague argue that the policy is lawful because it is explicitly limited to claims "that may be *lawfully* [] resolve[d] by arbitration." (emphasis added). They argue that, in these circumstances, employees would reasonably understand that the policy did not prohibit the filing of charges with the Board. The Board, however, rejected a similar contention in *U-Haul,* above at 377–378, where it found that language arguably limiting the mandatory arbitration policy to claims "a court of law would be authorized to entertain" did "nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges." Id. at 377–378. There, as here, the limiting language in the Respondent's arbitration policy does not by its terms specifically exclude NLRB proceedings, and "most nonlawyer employees" would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration for the language to be effective. Id. at 378.

3. We also affirm the judge's finding that the Respondent violated Section 8(a)(1) by maintaining a rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees." In *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999), the Board found unlawful a rule that prohibited, among other things, "[u]sing loud, abusive or foul language." The Board reasoned that "[b]ecause the [rule did] not define abusive or insulting language or conduct, . . . [it] could reasonably be interpreted as barring lawful union organizing propaganda." Id. Like the rule in *Flamingo Hilton-Laughlin*, the Respondent's rule does not define what it means to "work harmoniously" (or to fail to do so). Its patent ambiguity distinguishes it from those conduct rules found to be lawful in *Palms Hotel & Casino,* 344 NLRB 1363, 1367–1368 (2005), and *Lutheran Heritage,* supra at 647–649, cited by our dissenting colleague, that were more clearly directed at unprotected conduct. In these circumstances, we agree with the judge that the Respondent's rule was sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and that employees would reasonably construe the rule to prohibit such activity. See *Lutheran Heritage*, supra at 646.

4. The judge found that the Respondent's rules prohibiting "[l]eaving a department or the plant during a working shift without a supervisor's permission" and "[s]topping work before shift ends or taking unauthorized breaks" violated Section 8(a)(1) because they were "impermissibly overbroad." We disagree.

Applying *Lutheran Heritage*, we find first that these rules do not explicitly restrict Section 7 activities. On their face, they only prevent an employee from taking unauthorized leaves or breaks and do not expressly restrict concerted action by employees.[9] Further, an employee reading these rules would not reasonably construe them to prohibit conduct protected by Section 7. In *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000), the Board held that a rule prohibiting "walk[ing] off" the job was unlawfully overbroad. Employees would reasonably understand such a rule to prohibit Section 7 activity, such as a strike, given the common use of the term "walk out" as a synonym for a strike. The rules here, in contrast, prohibit only leaving a department or plant during a shift without permission, stopping work before a shift ends,

[9] The General Counsel does not contend that the Respondent promulgated these rules in response to the union organizing campaign at the Respondent's facility. And the Respondent did not apply them to restrict the exercise of Sec. 7 rights.

and taking unauthorized breaks. For these reasons, we find that they are lawful.[10]

5. As noted above, we have adopted the judge's recommendation to sustain the Union's Objections 4 and 37, relating to Trespalacios' termination, and to set aside the election. The Union additionally alleged in Objections 12, 45, and 50 that the Respondent's distribution of T-shirts and beanies to employees on the day of the election constituted objectionable conduct. The judge overruled those objections, finding that there was no evidence that the Respondent disseminated any coercive communications or information regarding the Union or the election along with the T-shirts and beanies. In its exceptions, the Union points out that representatives of the Respondent were involved in the distribution of the T-shirts and beanies. We find merit in this exception.[11]

Helen Marquez, the Respondent's Production Manager, dropped off T-shirts and beanies imprinted with the Respondent's name and logo for Laura Perez, a laundry room employee, to distribute on the day of the election. In the context of a campaign during which the Respondent vigorously sought to persuade employees to vote against representation and because these items were distributed on the day of the election, we find that they were and would have been understood by the employees to be campaign paraphernalia.

On the morning of the election, pursuant to the Respondent's direction, Perez handed out these T-shirts and beanies to any interested employee while otherwise performing her normal duties at the laundry room distribution center. She also went to the employee cafeteria and offered the same items to employees there. Perez subsequently summoned Marquez to the area where the items were being distributed because employees were grabbing the items in a disorderly fashion. According to Marquez, Perez wanted her to clarify to the employees that they could take one T-shirt or one beanie, but not both. Marquez testified that she did as Perez had asked, and that she then answered a question from an employee regarding whether temporary associates could take any items.

Employers may make campaign paraphernalia available to employees at a central location, provided that supervisors are absent from the distribution process and there is no other coercive conduct in connection with the distribution. *Circuit City Stores*, 324 NLRB 147 (1997). However, "employers may not distribute campaign paraphernalia in a manner pressuring employees to make an observable choice that demonstrates their support for or rejection of the union." Id. Here, the Respondent did not simply provide a supply of T-shirts and beanies at a central location; it used employee Perez during her working hours, and while performing her otherwise normal duty of distributing laundry to employees, to distribute the paraphernalia. Cf. *Black Dot, Inc*., 239 NLRB 929, 929 (1978) ("mere availability" of antiunion buttons in a flowerpot hung on a wall could not reasonably tend to interfere with employees' free choice). Because Perez could not have engaged in this activity without the Respondent's permission, it would have been evident to all employees that she was acting as the Respondent's agent in distributing the paraphernalia even if she was not an agent for any other purpose. Moreover, Marquez, a manager and an agent of the Respondent,[12] was not only present during the distribution but took control of it when Perez was unable to maintain order, and thereafter regulated the dissemination of the campaign paraphernalia. Additionally, the employees were aware that the Respondent was monitoring their actions because, just a few days earlier, the Respondent showed employees security camera footage from the cafeteria of the incident that led to Trespalacios' termination. By these actions, the Respondent created a situation where employees were pressured to make an "observable choice" on the day of the election that demonstrated their support for or

[10] In deciding this issue, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), a case issued by two Board Members, and cited by the judge. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010); *Hospital Pavia Perea,* 355 NLRB No. 215, slip op. at 1 fn. 2 (2010) (recognizing that two Board members "lacked authority to issue an order").

[11] As noted, Member Hayes finds it unnecessary to resolve these latter objections.

In the absence of exceptions, we adopt pro forma the judge's overruling of Objections 14, 22, 39, and 46. The Union also excepts to the judge's overruling of Objections 2 and 51, but failed to present any supporting arguments. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we disregard those exceptions. *Naples Community Hospital*, 355 NLRB No. 171, slip op. at 1 fn. 4 (2010). We find it unnecessary to pass on the judge's findings regarding the remaining objections.

[12] We find that Marquez is an agent of the Respondent. According to Reilly, Marquez was involved in Trespalacios' termination: Marquez translated for Reilly and Trespalacios during the termination meeting and, after the meeting, Marquez escorted Trespalacios to retrieve her lunchbox before Trespalacios left the plant. Marquez also facilitated the resolution of an incident between employee Ricardo Lopez and Manager Mark Slade to which she was a witness: Lopez asked her whether he could speak with human resources about the incident; Marquez then directed him to human resources, emailed the human resources manager with her account of the incident, and participated in the meetings between Lopez and human resources. In these circumstances, where the Respondent placed Marquez in a position identifying her with management, employees would reasonably understand that she was acting on behalf of management. See *Ella Industries*, 295 NLRB 976, 976 fn. 2 (1989) (employee who served as translator and conduit for employer's communications to employees regarding union election was agent for that purpose).

rejection of the union. Thus, the Respondent's distribution of the T-shirts and beanies was coercive, and tended to interfere with employee free choice in the election.

6. The Petitioner asks that we order that the rerun election be conducted off the Respondent's premises. Under the circumstances of this case, we direct the Regional Director to consider and resolve this request on remand consistent with our decision in *Austal USA, LLC*, 357 NLRB No. 40 (2011).

a. As the Board recently observed in *Austal*, id., slip op. at 2, "[t]he Act is silent on the location of elections." Thus, the Board must exercise its discretion to select an appropriate election site. In *Halliburton Services*, 265 NLRB 1154, 1154 (1982), the Board observed that "it is clear under the broad remedial powers contained in Section 10(c) of the Act and our administrative powers to conduct elections under Section 9(c)(1)(A) of the Act, that the Board may designate the site of an election." (Footnote omitted.)

Consistent with the Board's broad delegation of authority to its regional directors to conduct elections, pursuant to Section 3(b) of the Act, the Board has left the selection of the election site within the sound discretion of its regional directors. We explained in *Austal* that this practice is based on the fact that "the regional director, through his agents, can investigate potential sites and evaluate their suitability." Id., slip op. at 3. Over half a century ago, the Board similarly explained, "[t]hose factors which determine where an election may best be held are peculiarly within the Regional Director's knowledge. His close view of the election scene, including the many imponderables which are seldom reflected in a record, is essential to a fair determination of this issue. We are convinced that it would be administratively unfeasible for the Board to make such determinations in every case." *Manchester Knitted Fashions*, 108 NLRB 1366, 1366 (1954). The Petitioner in this case does not ask that we intrude into the Regional Director's discretion to select the precise site for conducting the election based on his review of the physical site and inquiry into its availability by actually selecting the site ourselves. Rather, the Petitioner asks only that we preclude the Regional Director, based on the facts of this case, from conducting the rerun election on the Respondent's premises. We decline at this time to limit the Regional Director's discretion in even this limited respect, concluding that it is more appropriate to direct that the Regional Director resolve this matter on remand.

The regions' current practice is ordinarily to conduct rerun elections on the employer's premises, so long as the employer consents. The source of the current practice is the Board's nonbinding Casehandling Manual (Part Two) Representation Proceedings Section 11302.2, which provides that in "the absence of good cause to the contrary," any election should be held "somewhere on the employer's premises."[13] As far as we can determine, the Board has never provided an express rationale for this practice, although in most instances the ease of voting and cost are obvious factors weighing in favor of voting at the workplace. In addition, the Board has until recently provided limited guidance as to when the ordinary practice should be departed from in a rerun election,[14] except, consistent with the Casehandling Manual, in extreme cases of "egregious and pervasive" unfair labor practices.[15] In other words, the Board has appropriately vested the regional directors with discretion to choose the election site based on their direct appraisal of the physical layout and other factors that they may deem appropriate to consider on a case-by-case basis.

In *Austal*, the Board directed the Regional Director to consider the following factors when deciding whether to hold a rerun election off the employer's premises:

> First, the Petitioner's objection to holding the third election on the Employer's premises, the Employer's request that it be held there, and the grounds therefor.

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[13] The Board has not *required* that elections be conducted on the employer's premises, as the Board has invested regional directors with discretion to conduct mail ballot elections under appropriate circumstances. See *GPS Terminal Services, Inc.*, 326 NLRB 839, 839 (1998) (upholding Regional Director's decision to conduct mail-ballot election when employees were "scattered because of their job duties"); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (Regional Director has discretion to conduct elections using "a combination of mail and manual ballots"); *M & N Highway Service*, 326 NLRB 451 (1998).

[14] Sec. 11302.2 of the Casehandling Manual provides, in part:

> It may also be necessary to conduct an election off the employer's premises where there are egregious or pervasive employer unfair labor practices. Thus, where a request to proceed has been filed, the Regional Director may direct that the election be conducted away from the employer's premises in situations where an election held on the employer's premises would compromise the prospect that employees will be able to exercise free choice. Examples of such conduct might include discharges or other discrimination directed at a significant portion of the voting unit, threats of plant closure, or other serious consequences if the union were to prevail and threats of violence to union adherents. In exercising discretion, the Regional Director should consider factors such as size of the unit, whether the conduct is ongoing, the extent to which the unfair labor practices are known to the voters, and the potential impact upon voter participation of having the election off premises.

[15] See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 474 (1995), enfd. in relevant part 97 F.3d 65, 74 (4th Cir. 1996) (ordering rerun election be conducted off the employer's premises in light of "egregious and pervasive" unfair labor practices including threats of discipline and discharge, coercive interrogation, threats of plant closing, threats of deportation, and discriminatory reassignments, suspensions and discharges).

> Second, the extent and nature of the Employer's prior unlawful and objectionable conduct and the fact that the Petitioner has made a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed. See Casehandling Manual Section 11302.2.
>
> Third, the advantages available to the Employer over other parties to this proceeding if the election is conducted on premises it owns or otherwise controls.
>
> Finally, the Regional Director must evaluate the alternative site proposed by the Petitioner, as well as other readily available sites. In evaluating these sites, the Regional Director shall consider their accessibility to employee-voters, the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this proceeding have equal access to and control over the site, and the cost of conducting the election on the site.

Id., slip op. at 3.

These same factors must be considered in the present case. In accord with our longstanding precedent, and particularly in the absence of any record on the issue, it is a task for the Regional Director in the first instance to adduce and weigh evidence relevant to these factors in determining where to conduct the rerun election. Any party aggrieved by that determination may seek review by the Board.

b. In *Austal*, we were unable to provide further guidance because the matter came to the Board on a request for special permission to appeal only a short time before the election was set to begin.[16] We thus take this opportunity to elaborate further on the considerations that should guide the Regional Director's exercise of discretion in this regard.

First, the Regional Director should consider the Petitioner's objection to holding the rerun election on the Employer's premises, the Employer's request that it be held there, and the grounds therefor. Here, as in *Austal*, the Petitioner objects to the Regional Director conducting the rerun election on the Respondent's premises. This alone is a relevant consideration.[17] All parties to a Board-supervised election, whatever its outcome, should believe, insofar as possible, that it was conducted under conditions that were fair to all. The Petitioner objects on the generally applicable grounds that the rerun election should not "be conducted on the premises of one side in the election process who is decided[ly] not neutral." But the Petitioner also objects on the more specific grounds that the Respondent used its control over the worksite on the election day "through the use of security guards, delaying voters, posting antiunion literature in the voting area and having security cameras on." Both grounds for objection are entitled to be weighed by the Regional Director. Further, the Respondent did not respond to the Petitioner's request that the Board order that the rerun election be held off the Respondent's premises. On remand, the Regional Director shall afford the Respondent an opportunity to address (but not litigate) this issue.

Second, the Regional Director should consider the extent and nature of the Respondent's prior unlawful and objectionable conduct and whether the Petitioner makes a request to proceed despite the fact that the compliance period relating to the prior unlawful conduct has not yet closed. See Casehandling Manual Section 11302.2. Here, the Respondent discharged a key union supporter, a member of the organizing committee who had distributed union literature at the facility, 4 days before the election. Later that same day, the Respondent called a meeting of all employees and played a security video of the incident that led to the discharge, which the Respondent mischaracterized as showing the employee "threatening, intimidating, and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union." In addition, the Respondent maintained several unlawful rules, including an overbroad prohibition on distributions of literature. During the preelection period, these rules may have restricted the ability of prounion employees to spread their message (while, as described below, the Respondent faced no such restrictions on spreading its message). Finally, the Respondent engaged in a form of unlawful polling on the day of the election by distributing the T-shirts and beanies. On remand, the Regional Director shall consider the extent and nature of this unlawful and objectionable conduct. Given the pendency of the Respondent's exceptions to the judge's findings, the question of whether the Petitioner would proceed with a rerun election despite these unfair labor practices and the nonexhaustion of the compliance period was not ripe until now. On remand, the Regional Director shall afford the Petitioner an opportunity to make that choice.

[16] For reasons set forth in his dissenting opinion, Member Hayes does not join sec. 6,b of the majority opinion.

[17] The dissent suggests that we hold that the petitioner's preference is the decisive factor, but *Austal* holds, as we reiterate above, that the Regional Director should consider the preferences of *all* the parties to the representation proceeding.

Third, the Regional Director must evaluate "the advantages available to the Employer over other parties to this proceeding if the election is conducted on premises it owns or otherwise controls." *Austal*, supra, slip op. at 3.[18] Employers are, of course, parties to representation proceedings of which elections are critical elements under the Board's regulations. 29 CFR § 102.8 (2011). See also Casehandling Manual Section 11008.1. Aside from this formal designation, employers have an interest in the results of elections conducted under Section 9 of the Act because those results are a predicate for an employer's legal duty to recognize a representative of its employees. It is an unfair labor practice for an employer to refuse to recognize and bargain with a labor organization selected by its employees in an election conducted under Section 9 of the Act. For this reason, our experience teaches that some employers choose to conduct an active campaign prior to a Board-supervised election in an effort to convince their employees to remain unrepresented. The Respondent did so in this case. The fact that employers are parties to representation proceedings, not uninterested and, in many cases, not neutral parties, weighs against holding elections on their property if doing so gives them an advantage over other parties.[19]

Our experience further reveals that many employers control access to their premises, often for operational reasons, and often choose to deny access to union representatives. Employers' right to bar nonemployee union organizers from its property is the general rule. See *Lechmere v. NLRB*, 502 U.S. 527 (1992); accord *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).[20] Our experience also reveals that many employers bar nonemployee union organizers from their property on the day of the election even when the election is taking place on the employer's premises. Indeed, the Board has held that the failure of union representatives to vacate the premises at the employer's request may constitute objectionable conduct by the union warranting setting aside the election on the grounds that it suggests to employees that the employer is powerless to defend its property rights. See *Ansted Center*, 326 NLRB 1208, 1213–1214 (1998); *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991); see also *Chrill Care, Inc.*, 340 NLRB 1016 (2003). Employers likewise retain their right on election day to regulate and restrict employee posting of campaign material on company property and to restrict employee campaign conduct during worktime and in work areas so long as the restrictions are consistent with *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), not promulgated in response to the protected activity, and not otherwise discriminatory. An employer's use of its premises to campaign, through managerial and supervisory employees or retained third-party consultants, while excluding union representatives and limiting employee campaigning to the full extent permitted under *Republic Aviation* and its progeny has not been held to violate the Act, *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958); *Hale Nani Rehabilitation*, 326 NLRB 335 (1998), even on election day.

In sum, when an election is held on an employer's premises during work hours, the employer retains access to its employees during the voting period, and its highest-ranking officials or any third parties the employer designates may speak to the employees in one-on-one conversations at their work stations or in most other locations[21] in the workplace and urge them to vote against the union.[22] At the same time, the employer may prevent union representatives from gaining access to employees during that same crucial period. Given employers' right to control their premises in these respects, holding an election on the employer's premises raises questions about the parties' relative opportunities to campaign, particularly in light of the Board's well-established concern about the influence of campaign conduct in the 24-hour period immediately preceding the election. See *Peerless Plywood Co.*, 107 NLRB 427 (1953) (prohibition against election speeches to massed assemblies of employees within 24 hours of election); *Milchem, Inc.*, 170 NLRB 362 (1968) (strict rule against prolonged conversations between representatives of any party to the election and voters waiting to cast ballots); *Kalin Construction Co.*, 321 NLRB 649 (1996) (changes in paycheck process prohibited 24 hours before election). The significant advantage obtained by the party who obtains the "last,

[18] Our dissenting colleague assumes that this factor will always weigh against holding the election at the workplace, but that is not the case. Some workplaces may be open to the public, including representatives of all parties to the representation proceeding, for example, a college campus. Even when that is not the case, the employer may permit access by representatives of the other parties. And even when that is not the case, the regional director may be able to select the precise location of the polls and the hours of voting so that conducting the election at the worksite does not advantage any party, for example, conducting the election just before employees begin work at a location on the work site accessed directly from a public sidewalk.

[19] Notably, the Casehandling Manual provides that when an election is held off the employer's premises, it *cannot* be held in a hall "used as a headquarters by a union." Sec. 11302.2.

[20] Limited exception is made for remote or isolated employment locations where the employees are beyond the reach of reasonable union efforts to communicate with them, and when the employer's access rules discriminate against unions. *Lechmere*, supra at 535.

[21] The only exception is conversations in the "locus of final authority." See, e.g., *General Shoe Corp*., 77 NLRB 124, 127 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied 343 U.S. 904 (1952).

[22] *Electro-Wire Products*, 242 NLRB 960 (1979); *Associated Milk Producers*, 237 NLRB 879 (1978).

most telling word" has been recognized by the Board,[23] as well as in political campaign scholarship.[24] That it is also recognized by employers is evidenced by the fact that, despite the Board's lack of authority to require that elections take place on employers' property, employers consent to holding elections on their premises in almost all instances.[25] While the existing empirical work on this subject is not definitive, it is persuasive and creates concern that holding representation elections on premises controlled by one party without the consent of all other parties is inconsistent with the Board's obligation to "insure[] that no party gains a last minute advantage over the other." *Milchem*, supra at 362.[26]

In this case, during the first election, the Respondent utilized all the advantages afforded to it by the election being held on its premises. On the day of the election, employees arriving at the facility to vote were greeted by six security guards (the Respondent typically utilized one) and law enforcement officers from the Sheriff's Department. The Respondent stopped and held at its entrance gate several employees who arrived to vote in the election. Even after granting these employees admission to the premises, the Respondent required that its agents escort several of them to the voting area.[27] In some instances, the Respondent's conduct led to it taking up to an hour for employees to vote. In addition, the Respondent permitted several of its campaign consultants free access to the premises on election day, which they utilized to speak to numerous employee-voters one-on-one before they voted. One employee testified that a consultant was telling employees about a company in another state that had purportedly gone "bankrupt" because of a union. At the same time, the Respondent restricted access to the facility by nonemployee union representatives to attendance at the preelection conference and inspection of the polling place, the minimum required under the Board's Casehandling Manual.[28] Finally, the Respondent's campaign literature was ubiquitous throughout the premises, and employees had to pass some of the posters on their way to vote. Employees also had to pass by four or five operational security cameras going to the polls. All of this must be considered by the Regional Director on remand.

Fourth, on remand, the Regional Director must evaluate any alternative sites proposed by the Petitioner as well as others known or discovered by the Regional Director. In evaluating these sites, the Regional Director shall consider their accessibility to employee-voters,[29] the ability of the Board to conduct and properly supervise the election on the site, whether the parties to this

[23] See *Peerless Plywood Co.*, supra at 429 ("Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.").

[24] See, e.g., Seth J. Hill, et al., *The Duration of Advertising Effects in Political Campaigns*, prepared for the American Political Science Association Annual Meeting, August 29-September 3, 2007, Chicago, IL, available at http://web.mac.com/vavreck/Lynn_Vavreck/Working_Papers_files/HLVZapsa8.doc (findings suggest the existence of "an electorate in which swing voters . . . are not persuaded by the totality of campaign information, but simply decide on the basis of whatever message they have encountered most recently") (cited with permission of authors); *The Duration of Advertising Effects in the 2000 Presidential Campaign*, prepared for the 2008 Midwest Political Science Association Annual Meeting. Available at http://bellarmine2.lmu.edu/economics/papers/HLVZ-APSA.pdf ("advertising in the home stretch— perhaps just the last week – appears to have a disproportionate impact") (cited with permission of the authors); Fernanda Leite Lopez de Leon, *The Tuesday Advantage of Politicians Endorsed by American Newspapers*, prepared for the American Economic Association Annual Meeting, Ja. 6–9, 2011, available at http://www.aeaweb.org/aea/2011conference/program/retrieve.php?pdfid=64 (documenting electoral advantage of candidates endorsed by newspapers on election day compared to those receiving earlier endorsements) (cited with permission of author).

[25] We note that our dissenting colleague is simply wrong when he suggests that a factor weighing in favor of holding an election on the work site "is the symbolic import to employees of requiring that their employer accede to the presence of Board agents and the conducting of a Board election on its premises," because the Board has no authority to require the employer to so accede.

[26] Contrary to the dissent's assertion, an employer's exercise of its constitutional right to freely speak to employees concerning an upcoming or even ongoing election is entirely irrelevant to the choice of election sites under *Austal* as elaborated by our holding today. Nor are any advantages or disadvantages generally possessed by any party prior to or even after the opening of the polls relevant in any way. The *only* relevant consideration is "the advantages *available* to the Employer over other parties to this proceeding *if the election is conducted on premises it owns or otherwise controls*." *Austal*, supra, slip op. at 3 (emphasis added). Whether the employer has or is likely to avail itself of those advantages is not the question. In other words, the *only* relevant consideration is whether the choice of election sites advantages one party over another.

The union, after all, also has a right to speak freely, but we seriously doubt that our colleague would consider it to be irrelevant to the regional director's exercise of his or her discretion in choosing the site of the election whether the site chosen for the election is accessible to union but not employer representatives. Indeed, our colleague expresses serious concern about employers not having equal access to election sites other than their own premises. But under *Austal* this is also a relevant consideration, as *Austal* clearly states that in considering any alternative locations the regional director must consider "whether the parties to this proceeding have equal access to and control over the site." Id.

[27] Cf. *North American Plastics Corp.*, 326 NLRB 835(1998) (employer refused to allow all potentially eligible voters onto its premises to vote).

[28] NLRB Casehandling Manual (Part Two) Representation Proceedings Sec. 11318.3.

[29] Consideration of this factor is responsive to the dissent's concern about voter turnout. Depending on its precise location, an off-site polling place may be just as accessible and convenient for employee voters as an on-site location.

proceeding have equal access to and control over the site, and the cost of conducting the election on the site.[30] It is in this area, the evaluation of the suitability of alternative sites, that the Board must defer to the sound discretion of its regional directors. See *Mental Health Association, Inc.*, 356 NLRB No. 151, slip op. at 1–2 fn. 5 (2011) (declining "to deviate from the Board's current practice of leaving the determination of the appropriate method and location for initial and rerun elections to the discretion of the Regional Director"); *Federated Logistics & Operations*, 340 NLRB 255, 258 fn. 12 (2003) (refusing to rule directly on union's request for a rerun election off the employer's site, instead deferring to Regional Director's "judgment on the issue of election site"); *Halliburton Services*, 265 NLRB at 1154 (same). But, as we held in *Austal*, the Regional Director must exercise his discretion after considering the factors described above. 357 NLRB slip op. at 3 ("We are unable to determine whether the Regional Director abused her discretion or, indeed, whether she exercised any discretion at all.")

7. Fresh & Easy Neighborhood Market, Inc. moved to intervene and supplement the record with a Declaration by its chief human resources officer indicating that it purchased the Respondent's assets on June 28, 2010, shortly after the judge issued her decision, and that a majority of the Respondent's employees accepted employment with Fresh & Easy under terms that differed significantly from those offered by the Respondent. According to the motion, Fresh & Easy seeks to intervene for the purpose of objecting to any direction of a second election in this matter on the basis that such an election would be predicated upon a stipulated election agreement to which Fresh & Easy was not a party.[31] The facts asserted in the Declaration are not relevant to our determination that the election must be set aside or our disposition of the complaint allegations in this case. Accordingly, we deny the motion to supplement the record, and we deny Fresh & Easy Neighborhood Market, Inc.'s motion to intervene without prejudice to its right to renew the motion before the Regional Director in connection with subsequent proceedings in this case. See Section 102.48(d)(1) of the Board's Rules and Regulations.

[30] In this respect, the applicable provision of the Casehandling Manual is sound:

> If an election is held away from the employer's premises, it should be held as close by as is appropriate and necessary in a public building, social hall (other than one used as headquarters by a union), or a hotel, motel, school, church, or garage. A place normally used as a municipal voting place is particularly desirable. A van or truck may also be used if other accommodations are not found.

Sec. 11302.2.

[31] The Union filed a statement of position with respect to the motion, and the General Counsel filed an opposition to the motion.

AMENDED REMEDY

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

Having found that the Respondent maintained unlawful rules prohibiting unauthorized soliciting of contributions, unauthorized distribution of printed matter, and the "inability or unwillingness to work harmoniously with other employees," and an unlawful policy requiring employees to submit all employment disputes and claims to binding arbitration, we shall order the Respondent to rescind the rules and policy.[32]

Having found that the Respondent has unlawfully terminated employee Xonia Trespalacios, we shall order the Respondent to offer Trespalacios immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. We shall order the Respondent to make Trespalacios whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

In addition, the Respondent shall be required to remove from its files any references to Trespalacios' unlawful discharge, and to notify her in writing that this has been done and that the discharge will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, 2 Sisters Food Group, Inc., Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[32] Regarding the rule and policy violations, we will modify the judge's recommended Order to conform with *Guardsmark, LLC*, 344 NLRB 809, 811–812 (2005). Pursuant to that decision, the Respondent may comply with the Order by rescinding the unlawful provisions and republishing its Rules of Conduct and employee handbook without them. We recognize, however, that republishing the Rules of Conduct and handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with Rules of Conduct and handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the Rules of Conduct and handbook without the unlawful provisions. Thereafter, any copies of the Rules of Conduct and handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees. Id. at 812 fn. 8.

(a) Maintaining a work rule prohibiting unauthorized soliciting of contributions on company premises.

(b) Maintaining a work rule prohibiting distribution of printed matter on company premises without permission.

(c) Maintaining a work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees."

(d) Maintaining a policy requiring its employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

(e) Discharging or otherwise discriminating against employees for supporting United Food and Commercial Workers International Union, Local 1167 or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule prohibiting unauthorized soliciting of contributions on company premises.

(b) Rescind the work rule prohibiting distribution of printed matter on company premises without permission.

(c) Rescind the work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees."

(d) Rescind the policy requiring its employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

(e) Furnish all current employees with inserts for the current Rules of Conduct and employee handbook that (1) advise that the unlawful rules and policy have been rescinded, or (2) provide the language of lawful rules or policy; or publish and distribute revised Rules of Conduct and an employee handbook that (1) do not contain the unlawful rules and policy, or (2) provide the language of lawful rules or policy.

(f) Within 14 days from the date of this Order, offer Xonia Trespalacios full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(g) Make Xonia Trespalacios whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Riverside, California facility copies of the attached notice, in English and Spanish, marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2009.

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

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers International Union, Local 1167.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. December 29, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BECKER, dissenting in part.

The Petitioner objects to the Employer's conduct of the mandatory employee meeting where Vice President Reilly showed the video of the incident involving Trespalacios and explained, falsely, as we found above, that Trespalacios had been terminated for "threatening, intimidating, and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union." Petitioner acknowledges that the meeting, which took place 4 days before the election, is not objectionable under *Peerless Plywood Co.*, 107 NLRB 427 (1953), because it did not take place within the 24 hours before the election. But Petitioner asks the Board to extend the rule of *Peerless Plywood* to all mandatory campaign meetings conducted by an employer during the critical period between the filing of the petition and the election. Although we need not reach this issue in order to overturn the results of the election and order a rerun, as the majority does, I would nevertheless reach the issue because of its centrality to the fair conduct of Board-supervised elections.[1]

Board-supervised elections have been called the "crown jewel of the Board's accomplishments" under the Act. *London's Farm Dairy, Inc*., 323 NLRB 1057, 1060 (1997) (Member Higgins, dissenting). By continuing to permit employers to require that employees attend campaign meetings as a condition of continued employment, the Board does not simply tarnish that jewel, it fractures it. I would not continue down this long but fundamentally misguided path.

The central right established in the Act we enforce is embodied in its Section 7. Section 7 vests in employees a right to form, join, or assist labor organizations and to refrain from any and all such activity. Attending a campaign meeting, whether to hear about the benefits of union representation or its detriments, is clearly conduct protected by Section 7. See, e.g., *Electric Hose & Rubber Co.*, 265 NLRB 696, 699 (1982) (employer violated rights guaranteed by Section 7 by warning employee to "be careful" if he went to a union campaign meeting).

Section 8 of the Act bars both employers and labor organizations from coercing employees in the exercise of their Section 7 rights. It is beyond doubt that if a labor organization threatened employees in any manner in order to coerce their attendance at a union meeting where they would be urged to vote in favor of representation or

[1] A 1990 study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percentof the elections. John J. Lawler, Unionization and Deunionization: Strategy, Tactics, and Outcomes 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend captive audience meetings during work time and that the majority of employees attended at least five such meeting during the course of the campaign. Kate Bronfenbrenner & Dorian Warren, The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence, ISERP Working Paper Series 2011.01 at 6 (June 2011), available at iserp.columbia.edu/research/working-papers.

to prevent their attendance of an employer meeting where they would be urged to vote against representation, the labor organization's conduct would be an unfair labor practice under Section 8(b)(1)(A). Similarly, in my view, when an employer conducts a mandatory meeting to urge employees to vote against representation by a labor organization, the employer interferes with, restrains, and coerces employees in the exercise of their Section 7 rights under Section 8(a)(1). A mandatory meeting, by definition, is a meeting employees are required to attend as a condition of employment. By instructing employees to attend a meeting and informing them it is mandatory, an employer threatens to discharge or discipline the employees if they choose not to attend. This violates Section 8(a)(1).

Moreover, the coercion inherent in a mandatory campaign meeting is directly tied to employees' casting their ballots in the election. When employees enter the voting booth, whether it is 25 hours after the meeting or 1 hour after the meeting,[2] they will surely remember not only that the employer urged them to vote against representation but that the employer threatened them with termination or other discipline if they refused to listen to the employer's views on the question. Permitting such a threat to be tied directly to the employer's position on the question of representation is not consistent with the employee free choice protected by Sections 7 and 9 of the Act. In other words, requiring employees to attend campaign meetings as a condition of employment is also objectionable.

Nothing in the words of Section 8(c) suggests that the Board should tolerate such clearly coercive conduct. Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). This section has no application here for two, independent reasons.

First, regardless of what is said at a mandatory meeting, a meeting cannot be mandatory without a threat of discipline or discharge for not attending. That threat clearly falls outside the protection of Section 8(c).

Moreover, Section 8(c), on its face, insulates speech only from "constitut[ing] or be[ing] evidence of an unfair labor practice." The section thus applies only in unfair labor practice proceedings brought under Section 8 of the Act and not in representation proceedings under Section 9. In fact, the Board clearly so held in *General Shoe Corp*., just 1 year after Congress adopted Section 8(c). 77 NLRB 124, 126 (1948), enfd. 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952). Since that time, the Board has expressly and repeatedly reaffirmed its original construction. See, e.g*., Dal-Tex Optical Co*., 137 NLRB 1782, 1787 fn. 11 (1962) ("Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and its has no application to representation cases."); *Kalin Construction Co*., 321 NLRB 649, 652–653 (1996). Indeed, the Board found pure speech to be objectionable and grounds for overturning an election in *Peerless Plywood* itself. And the courts of appeals have recognized that "because of the need for an atmosphere amenable to rational decisionmaking, the parties to a representation election do not retain their full panoply of [First Amendment] rights during the critical period" between the filing of a petition and the election. *Freund Baking v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999).

As the District of Columbia Circuit has reminded us, the Supreme Court has repeatedly instructed that:

> The most fundamental principle in any case involving the interpretation of a statute is that "the 'starting point' must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980); accord *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Indeed, that language must be given conclusive weight unless the legislature expresses an intention to the contrary.

Electrical Workers Local 474 v. NLRB, 4814 F.2d 697, 710 (D.C. Cir. 1987)(parallel citations omitted). Indeed, when the language of our statute is clear and unambiguous, we are not permitted to look behind it at the legislative history. See *Beverly Health & Rehabilitation Services v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003) (when the language of the Act "manifests an 'unambiguously expressed intent' [it] precludes the Board's [contrary] interpretation"). The language of Section 8(c) clearly and unambiguously does not

[2] Under current law, such compelled attendance at a meeting or compelled participation in a conversation through which employees are urged to vote against representation is not objectionable at any time until employees enter the polling area or are waiting in line to vote unless it involves a "massed assembl[y]" within the meaning of *Peerless*. 107 NLRB at 429. Thus, for example, the Board has held that it is not objectionable for an employer's highest ranking officials systematically to proceed through the workplace less than 24 hours before a vote urging all individual employees at their work stations where they cannot escape the message to cast their ballot against representation. See *Electro-Wire Products,* 242 NLRB 960 (1979); *Associated Milk Producers, Inc.*, 237 NLRB 879 (1978). As explained below, the rule I would adopt would cover all such compulsion.

protect threats and does not apply in representation cases. We need not and are not permitted to proceed further.

Even if there were some ambiguity in Section 8(c) as to this issue, the Supreme Court has further instructed us that ambiguous language should not be construed in a manner inconsistent with the fundamental principles embodied in a statute. "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." *U. S. v. Fisher*, 6 U.S. 358, 390 (1805). Permitting employers in the period prior to a representation election to force employees on threat of discipline or discharge to listen to speech aimed at influencing their vote is inconsistent with the "fundamental principles" embodied in the Act. Congress has certainly not expressed an intention to permit such coercion with "irresistible clearness" in Section 8(c).

Moreover, even if we could proceed to examine the legislative history of Section 8(c), it does not suggest that Congress intended to permit employers to force employees to attend campaign meeting on threat of discipline. The clear purpose of Section 8(c) was "to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). But holding that employers engage in objectionable conduct by compelling employees to listen to those views under threat of discipline would in no way interfere with employer free speech as we now understand the concept or as it was generally understood in 1947.

The Supreme Court has found that Section 8(c) codified the First Amendment. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 386 (1998). As the Court explained in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969), "[Section] 8(c) (29 U. S. C. § 158 (c)) merely implements the First Amendment." This is instructive because the First Amendment permits regulation of speech designed to protect captive audiences. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 734 (2000) ("The regulations in this case, however, only apply if the pedestrian does not consent to the approach. Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider.") (footnote omitted); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) ("The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."); *Lehman v. Shaker Heights*, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) ("While [a person] clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it."); *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737 (1970) ("[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit"). Federal courts have recognized that "[f]ew audiences are more captive than the average worker." *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1535 (M.D. Fla. 1991) (citation omitted). And this is certainly true when those workers are required by their employer to attend a campaign meeting on pain of discipline or discharge.[3] It thus follows from the First Amendment captive audience jurisprudence that Section 8(c) does not insulate the express or implied threat inherent in requiring employees to attend meetings in order to listen to campaign communications.

The source of the Board's contrary position on this issue is *Babcock & Wilcox Co*., 77 NLRB 577 (1948). In that case, the Board held that Section 8(c) prevented it from concluding that an employer committed an unfair labor practice by conducting a mandatory meeting. In full, the Board reasoned:

> With respect to the "compulsory audience" aspect of the speeches, the Trial Examiner concluded from all the evidence that the notices of the meetings as well as the oral instructions given to the employees concerning these meetings removed the element of choice from the employees and, in effect, compelled them to attend in violation of the Act. In reaching this conclusion, the Trial Examiner relied upon the "compulsory audience" doctrine enunciated in *Matter of Clark Bros. Co., Inc.* However, the language of Section 8 (c) of the amended Act, and its legislative history, make it clear that the doctrine of the *Clark Bros.* case no longer exists as a basis for finding unfair labor practices in circumstances such as this record discloses. Even assuming, therefore, without deciding, that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act.

Id. at 578 (footnote omitted). Notably, the Board did not in any way analyze "the language of Section 8(c)" or explain how the employer could "require its employees to attend or

[3] Our sister agency, the Equal Employment Opportunity Commission, has construed the prohibition of discrimination on grounds of religion in Title VII of the 1964 Civil Right Act to mean that "[e]mployees cannot be forced to participate—or not participate—in a religious activity as a condition of employment." See http://www.eeoc.gov/types/religion.html. Surely this means that employers cannot require employees to attend a meeting where they are urged to practice one religion rather than another or no religion at all.

listen to the speeches" without an explicit or implicit threat of adverse consequences if they did not comply with the requirement.

Nor did the *Babcock & Wilcox* Board point to any specific portion of the legislative history to support its conclusion. The Senate Report on what became the Taft-Hartley amendments to the Act, which contained what became Section 8(c), does express disapproval of the Board's pre-Taft-Hartley decision in *Clark Bros. Co*., 70 NLRB 802 (1946), enfd. 163 F.2d 373 (2d Cir. 1947), but the Report in no way suggests that the Committee intended the amendments to permit employers to require employees to attend campaign meetings on threat of discipline. The Report states:

> The Supreme Court in *Thomas v. Collins* (323 U.S. 516) held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F.(2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive . . . if the speech was made in the plant on working time (*Clark Brothers*, 70 N.L.R.B. 60). The committee believes these decisions to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an express or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statements.

S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947). Thus, the Report makes clear that while Section 8(c) guarantees "freedom of speech," it also does not insulate express or implied threats. Moreover, the specific element of *Clark Bros*. disapproved of in the Report as "too restrictive" is the holding that employers' speech is unlawful "if the speech was made in the plant on working time." Id. Requiring attendance on threat of discipline is, of course, a critical step beyond holding a meeting in the plant on working time. As if to underscore that distinction, immediately after criticizing what it characterized as the *Clark Bros*. holding that speech was unlawful simply because it took place "in the plant on working time," the Senate Report makes clear that Section 8(c) insulates speech only if "under all the circumstances, there is neither an express or implied threat of reprisal." There is thus nothing in the legislative history supporting the Board's holding in *Babcock & Wilcox*.

Subsequent Board holdings on this issue provide no further rationale, but typically simply rely on *Babcock & Wilcox*. In *Fontaine Converting Works*, 77 NLRB 1386, 1387 (1948), for example, the Board merely stated, "Nor, on this record and for the reason stated in *Matter of The Babcock & Wilcox Co.*, do we find that this Respondent violated the amended Act by compelling its employees to attend and listen to speeches on company time and property." (Footnote omitted.) Similarly, in *Litton Systems, Inc*., 173 NLRB 1024, 1031 (1968), the Board summarily affirmed an administrative law judge's dismissal of a charge based on the discharge of an employee who left a mandatory campaign meeting. The judge concluded:

> I do not agree with the General Counsel's premise that Provost's above-described conduct at the June 6 meeting constituted a concerted activity protected by the Act. An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election. For if he had such a statutory right, then management's compulsory requirement to attend such a meeting would interfere with and restrain him in the exercise of that right in violation of Section 8 (a)(1) of the Act. Yet, the Board has held as long ago as 1948, that such a finding is barred by "the language of Section 8(c) of the amended Act and its legislative history." Thus, the Board concluded that "even assuming therefore, without deciding, that the respondent required its employees to attend and listen to the speeches, we conclude that it did not thereby violate the Act." *Babcock & Wilcox Co.,* 77 NLRB 577, 578.

Id. at 1030–1031 (footnote omitted). See also *F.W. Woolworth Co.*, 251 NLRB 1111, 1113 (1980), enfd. 655 F.2d 151 (8th Cir. 1981), cert. denied 455 U.S. 989 (1982) (summarily affirming judge's conclusion: "Under the precedent, Respondent's attempt to further its antiunion campaign by conducting a captive-audience meeting and by declaring that no questions would be answered in the course thereof, did not amount to an unfair labor practice.")

In *S & S Corrugated Paper Mach. Co*., 89 NLRB 1363 (1950), the Board extended the holding in *Babcock* to representation cases but without any attention to the actual language in Section 8(c) or its own holding in *General Shoe*, 77 NLRB at 126. Again, in total, the Board reasoned:

> On the facts revealed by the Regional Director's report in this case, the "captive audience" aspect of the Employer's speeches, otherwise protected by Section 8(c) of the amended Act, cannot form the basis for a finding that the Employer, by denying the Petitioner an equal opportunity to use its facilities and time, has interfered with the employees' free choice of a bargaining repre-

> sentative. The Petitioner's objections to the conduct of the election on this ground are therefore overruled.

Id. at 1363. In other words, one searches Board precedent in vain for a colorable rationale for the current rule despite the rule's critical importance in representation elections.

In sum, employers have a right to speak freely on the question of whether their employees should be represented for purposes of collective bargaining, but "[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed." *Thomas v. Collins*, 323 U.S. 516, 537–538 (1945). An express or implied threat of discipline for not listening to the employer's speech indisputably adds to the speech the element of coercion that takes it outside the protection of both the First Amendment and Section 8(c) and permits it to serve as grounds for overturning the results of an election. I would restore at least some of the luster to the Board's "crown" the Board-supervised representation election – by holding objectionable such obvious and overtly coercive yet widespread conduct.[4]

Dated, Washington, D.C. December 29, 2011

Craig Becker, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

I disagree with my colleagues' affirmation of the judge's findings that certain of the Respondent's rules or policies violate Section 8(a)(1). On a matter of far greater import, I also disagree with their unwarranted, unprecedented, and restrictive definition of guidelines governing a regional director's discretion to decide where to hold a Board election.

1. The Respondent maintained work rules separately addressing the "[u]nauthorized soliciting of contributions on Company premises" and "inability or unwillingness to work harmoniously with other employees." Employees would not reasonably view either of these rules to prohibit Section 7 activity. The former rule is specifically limited to prohibiting solicitation of "contributions." As limited, it does not explicitly restrict Section 7 solicitation activity, and there is no invalidity in its implicity prohibition of unprotected solicitation of contributions during nonworking time. Further, there is no ambiguity in the rule's wording which employees would not reasonably construe as prohibiting protected activity on its fact. In sum, by interpreting this rule to prohibit Section 7 solicitation activity, my colleagues impermissibly "pars[e] workplace rules too closely in a search for ambiguity that could limit protected activity." *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 1991) (noting that the Board itself has cautioned against such parsing in finding that the employer's no-solicitation rule was lawful).

As for the latter rule, the Board has previously held that such restrictions are lawful. See *Palms Hotel & Casino,* 344 NLRB 1363, 1367–1368 (2005) (lawful rule prohibited conduct that "is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with" employees or customers); *Lutheran Heritage,* 343 NLRB 646, at 647–649 (lawful rule prohibited "harassment," "verbal, mental, and physical abuse," and "abusive and profane language"). Such rules reflect the lawful expectation that employees "comport themselves with general notions of civility and decorum in the workplace," *Palms Hotel,* at 1368, inasmuch as both employers and employees have a substantial interest in promoting a workplace that is "civil and decent." *Lutheran Heritage,* at 649. The rule requiring employees to work "harmoniously" goes no further than this, and the majority's finding that it is unlawful cannot be reconciled with the holdings in these cases.

The Respondent also had a policy requiring arbitration of employment-related disputes. In my view, employees would not reasonably construe this policy to prohibit filing charges with the Board because it is explicitly limited to claims "that may be lawfully [] resolve[d] by arbitration." Thus, the Respondent's arbitration policy is distinguishable from that found unlawful in *U-Haul Co. of California*, supra; *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990); and *Great Lakes Chemical Corp.*, 298 NLRB 615, 621–622 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). None of those unlawful policies were explicitly limited to claims that could be lawfully resolved by arbitration. Further, I note that arbitration agreements are common and necessary in today's employment landscape, and that Federal policy favors the enforcement of arbitration agreements, especially in the employment context. See *Circuit City Stores. v. Adams*, 532 U.S. 105, 122–123 (2001). In these circumstances, I does not subscribe to extant Board law insofar as that precedent can be read to invalidate standard arbitration agreements solely because they do not contain a specific

[4] I would so hold whether it is a single employee or a group of employees who are compelled to listen because I do not believe that the "mass psychology" referenced by the Board in *Peerless*, 107 NLRB at 429, and used to distinguish communications to individuals and smaller groups, see, e.g., *Electro-Wire*, 242 NLRB at 960, has any foundation in reliable social science data or other evidence.

express exclusion for the filing of charges with the Board.

2. Let me simplify my colleagues' discussion of a regional director's "discretion" when ruling on the Petitioner's request to conduct the rerun election offsite. First, whenever a petitioning union makes such a request, "[t]his alone is a relevant consideration." Second, whenever there is the potential that an employer will exercise its legal right to campaign against unionization on or before election day, particularly to exclude nonemployee union agents from its premises, this lawful conduct weighs against conducting an election on its premises. The rest of my colleagues' guidance, primarily discussing the Respondent's unlawful conduct, is window dressing. The longstanding Board preference for holding onsite *any* representation election—not just rerun elections—has now been eliminated by the vote of two Board Members responding to a single paragraph argument by the Petitioner's counsel, without any apparent concern that such a sweeping change should be undertaken by a "minority" majority and absent prior notice or invitation for broader discussion of its ramifications.[1] If the foregoing factors are present, a regional director's actual discretion is limited to identifying a suitable offsite location for the election. That is all.

It is certainly true that the Board has not gone to great lengths to explain why onsite elections have traditionally been preferred. My colleagues refer to the "obvious" factors of "ease of voting and cost." These factors are not insignificant, particularly the former, which relates to the core purpose of insuring maximum employee participation in the democratic process.[2] Tellingly, my colleagues do not refer to empirical data on employee participation rates in offsite elections.[3] In their opinion, a regional director's consideration of the ease of voting and cost is limited to the assessment of whether a particular off-premises site is suitable. For that matter, it is unclear what diminished level of participation or increased level of expense would outweigh the factors of a Petitioner's request and an Employer's activity in lawful opposition to collective-bargaining representation, and thereby permit the regional director to reject a particular offsite location and to direct that an election be held on the Employer's premises.

My colleagues' countervailing concern is that an employer has what they perceive to be such an unfair advantage in access to employees during the election campaign that it should at least be denied the opportunity on election day to deliver what might be the "last, most telling word" to employees before they enter the voting area.[4] If that last word is to be uttered offsite in opposition to collective-bargaining representation, it will now have to come from an employee or some non-agent of the employer. The presence of any officials of the employer who appear at the offsite location for purposes other than attending the preelection conference will almost certainly be challenged as unlawful surveillance. This is not true, of course, for union agents who, unlike the employer, have had general access to employees at their homes and elsewhere offsite throughout the organizational campaign. These agents may populate the immediate vicinity outside of the offsite voting area before and during polling hours in order to assure that the last word communicated to employees favors their postion.

To some, myself included, it may seem surpassingly strange to premise a change in the requirements for resolving disputes about where to hold a Board election on the prospect that an employer might exercise its legal right to communicate with employees on a question concerning representation. By now, however, we should be accustomed to my colleagues' concern that this should happen. Time and time again, they have demonstrated a willingness, if not open zeal, for limiting employer communications and, in the process, for diminishing the impact of the Supreme Court's *Lechmere* decision.[5] In *Independence Residences*, 355 NLRB No. 153 (2010), the majority perceived no problem with conducting Board elections under the cloud of an obviously preempted New York State law limiting the ability of certain employers to engage in legal activity in opposition to an organizational campaign. In rulemaking, my colleagues have effectively limited both the time for pre-

[1] My colleagues do not dispute that they have articulated guidelines applicable to any election where the voting location is at issue.

[2] There are other factors that seemingly support a preference for holding onsite elections. One entails consideration of the possible disprution to an employer's business operations in order to accomodate employees going to vote. Another factor is the symbolic import to employees when their employer accedes to the presence of Board agents and the conducting of a Board election on its premises even if that employer adamantly opposes unionization.

[3] There is, for comparison, an empirical study of mail ballot election statistics indicating that making voting more inconvenient depresses voter turnout. See Sara Slinn and William A. Hebert, "Some Think of the Future: Internet, Electronic and Telephonic Labor Representation Election" at pp. 11 and 13, available at: http://works.bepress.com/william_herbert/21, showing Board data to the effect that mail ballot elections have around a 15—20 percent lower participation rate than manual elections. It seems at least plausible that requring employees to vote at places other than where they work could have a comparable effect.

[4] My colleagues contend that they are concerned only with the advantages available to an employer during election hours if voting takes place on its premises. I do not view their rationale as so limited.

[5] *Lechmere v. NLRB*, 502 U.S. 527 (1992) (reaffirming precedent holding that, except in limited circumstances, employers may bar nonemployee union organizers from their property).

election employer campaigns as well as the preelection opportunity to litigate and resolve eligibility issues affecting a substantial number of potential voters.[6] In *New York, New York Hotel & Casino,* 356 NLRB No. 119 (2011), and subsequent related cases,[7] my colleagues substantially curtail an employer's claimed onsite communication advantage by requiring a property-owning employer to give to an onsite contractor's employees essentially the same onsite access to engage in organizational activity as is enjoyed by the property owner's own employees.

Unlike my colleagues, I would leave to Congress to determine what permissible limitations, if any, may be constitutionally imposed to redress the claimed advantage held by employers in Board election campaigns because they can communicate with employees at their workplace.[8] Absent good reason to depart from Board practice about where to hold representation elections, I would adhere to the status quo preferring onsite elections and leaving to regional directors the broad discretion to depart from that preference in rerun elections under the general factors cited in *Austal USA*.[9]

Dated, Washington, D.C. December 29, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a work rule prohibiting unauthorized soliciting of contributions on company premises.

WE WILL NOT maintain a work rule prohibiting distribution of printed matter on company premises without permission.

WE WILL NOT maintain a work rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees."

WE WILL NOT maintain a policy requiring employees to agree to submit all employment disputes and claims to binding arbitration as a condition of employment.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the United Food and Commercial Workers International Union, Local 1167 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the work rules and policy set forth above.

WE WILL furnish all of you with inserts for the current edition of the Rules of Conduct and employee handbook that (1) advise that the unlawful provisions, above, have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised Rules of Conduct and employee handbook that (1) do not contain the unlawful provisions, or (2) provides the language of lawful provisions.

WE WILL, within 14 days from the date of the Board's Order, offer Xonia Trespalacios full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Xonia Trespalacios whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Xonia Trespalacios, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

2 SISTERS FOOD GROUP, INC.

Irma Hernandez and *Jean Libby, Attys.,* for the General Counsel.

David Rosenfeld and *Ana M. Gallegos, Attys. (Weinberg Roger*

[6] [Include Federal Register cite]

[7] *Simon De Bartolo Group*, 357 NLRB No. ___ (2011), and *Reliant Energy*, 357 NLRB No. ___ (2011).

[8] Member Becker would go further still and prohibit employers from making captive audience election campaign speeches during the entire critical pre-election period, rather than just in the 24 hours preceding the election. I would not do so. Absent three affirmative votes to overrule this precedent, there is no need to discuss the details of Member Becker's dissenting view.

[9] *Austal USA, LLC*, 357 NLRB No. 40 (2011).

& Rosenfeld, PC), Alameda, and Los Angeles, California, for the Charging Party.

Alan Berkowitz and Cathy Lee, Attys. (Bingham McCutchen LLP), of San Francisco, and Los Angeles, California, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice charges and timely objections to a representation election of July 17, 2009,[1] filed by United Food and Commercial Workers International Union, Local 1167 (the Union), the Regional Director of Region 21 of the National Labor Relations Board (Region 21 and the Board, respectively) issued a Report on Challenged Ballots and Objections in Case 21–RC–21137 and order consolidating Cases 21–CA–38915 and 21–CA–38932 and notice of hearing (the report and the complaint, respectively) on December 14, 2009.[2] The complaint alleges that 2 Sisters Food Group, Inc. (the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).[3] This consolidated case was tried in Riverside, California on March 1–3, 17–19, and in Los Angeles, California, on March 29, 2010.

II. ISSUES

1. Did the Respondent violate Section 8(a)(1) of the Act by promulgating and maintaining overbroad rules, including solicitation and distribution rules and a rule waiving employees' right to file charges with the Board, all of which has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights?

2. Did the Respondent violate Section 8(a)(3) and (1) of the Act by terminating employee Xonia Trespalacios on July 13, 2009?

3. Did the Respondent engage in conduct that affected the results of the representation election held July 17, so as to require the setting aside of the election?

III. JURISDICTION

At all material times, the Respondent, a Delaware corporation, with a facility located in Riverside, California (the facility), has been engaged in the nonretail business of processing and supplying food. During the 12-month period ending September 30, a representative period, the Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at the facility goods valued in excess of $50,000 directly from points outside the State of California. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. PROCEDURAL BACKGROUND

The Union commenced an organizational campaign among the Respondent's employees in 2008. Thereafter, the following sequence of events occurred:

- August 26, 2008 and October 24, 2008, respectively: the Union filed unfair labor practices against the Respondent in Cases 21–CA–38480 and 21–CA–38563 (the 2008 ULP charges).
- February 26: the Region authorized the issuance of a consolidated complaint in the 2008 ULP charges, alleging violations of Sections 8(a)(1) and (3) of the Act, hearing for which was ultimately scheduled for June 10.
- May 28: the Petitioner filed a representation petition with the Region in Case 21–RC–21137, which was blocked pending disposition of the 2008 ULP charges.
- June 4: the Petitioner executed a request to proceed with the representation election, notwithstanding the blocking charges and the pending unfair labor practice hearing in the 2008 ULP charges.
- June 10: hearing on the 2008 ULP charges commenced before an administrative law judge, continuing on four intermittent days until July 11.
- June 17: the Regional Director approved a Stipulated Election Agreement, setting the election in Case 21–RC–21137 for July 17 in an appropriate unit of the Respondent's employees as follows:

> All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its [Riverside] facility . . . excluding all other employees, temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

- July 15: the Union filed an unfair labor practice charge against the Respondent in Case 21-CA-38915.
- July 17: the Region conducted the representation election in Case 21–RC–21137. The tally of ballots showed that of approximately 186 eligible voters, 66 cast ballots for, and 87 against, the Petitioner.
- July 29: the Union filed an unfair labor practice charge against the Respondent in Case 21–CA–38932.
- September 28: an administrative law judge approved the parties' settlement agreement

[1] All dates herein are 2009, unless otherwise specified.

[2] At the hearing the General Counsel amended the Complaint to include an allegation that Fernando Rivera and Luz Ceballos were, at all material times, labor relations consultants to the Respondent and agents within the meaning of Sec. 2(13) of the Act, which was not disputed. At the hearing, the Union withdrew its challenges to the ballots of Sotelo Avila, Angelica Baca, and Roxanne Harris, whereafter challenges were no longer sufficient to affect the results of the election.

[3] In representation cases, an employer is traditionally referred to as "Employer" and the union as "Petitioner." For convenience, 2 Sisters Food Group, Inc. will be referred to throughout as "the Respondent," and United Food and Commercial Workers International Union, Local 1167 as "the Union."

of the 2008 ULP charges, on which compliance thereafter closed.[4]

- October 28: Consolidated complaint in Cases 21–CA–38915 and 21–CA–38932 issued.
- December 14: the Report and the Complaint issued.

V. UNFAIR LABOR PRACTICE CASE

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings.

A. Relevant Company Work Rules and Policies

The Respondent operates the following production departments at its facility: shipping and receiving, cooked and breaded processing, red meat, poultry, and home meal replacement (HMR). At all relevant times the following individuals in the following positions were supervisors at the facility within the meaning of Section 2(11) of the Act:

Tracey Reilly (Ms. Reilly)	Vice President of Operations
Veronica Vega (Ms. Vega)	Poultry Department Supervisor

Fernando Rivera (Rivera) and Luz Ceballos (Ceballos) were labor relations consultants to the Respondent and agents within the meaning of Section 2(13) of the Act. Florinda Avila was a lead employee in the poultry production department.

The Respondent's written rules of conduct contained the following relevant rules, violation of which subjected employees to discipline ranging, variously, from written warning through discharge:

> Rule 11: Leaving department or the plant during a working shift without a supervisor's permission.
>
> Rule 12: Stopping work before shift ends or taking unauthorized breaks.
>
> Rule 28: Unauthorized soliciting of contributions on [Respondent's] premises.
>
> Rule 33: Distributing printed matter on [Respondent's] premises without permission.
>
> Rule 34: Fighting or attempting to provoke a fight on company property.
>
> Rule 35: Inability or unwillingness to work harmoniously with other employees.[5]

The Arbitration of Disputes provision in the Respondent's written offer of employment, reads:

> Any dispute arising between you and 2 Sisters Food Group Inc, will be resolved by arbitration in accordance with 2 Sisters Food Group Inc, Arbitration Policy, which is included in the Employee Handbook that you will receive. By accepting this offer of employment, you agree to waive your right to a court or jury trial, and you acknowledge that all claims that may be lawfully [resolved] by arbitration will be decided by a neutral arbitrator whose decision will be final and may not be appealed.

The Respondent required prospective employees to sign the following arbitration agreement:

> I agree to submit to binding arbitration all disputes and claims arising out of this application and, in the event that I am hired, all disputes and claims arising out of my employment. This agreement includes every type of dispute that may be lawfully submitted to arbitration, including claims of wrongful discharge, discrimination, harassment, or any injury to my physical, mental or economic interests. This means that a neutral arbitrator, rather than a court or jury, will decide the dispute. As such, I am waiving my right to a court or jury trial. I agree that any arbitration will be conducted in accordance with 2 Sisters Food Group employee handbooks, or the rules of the American Arbitration Association.

With regard to discipline of employee misconduct, the Respondent, in both policy and practice, was committed to interviewing employees accused of misconduct and obtaining an employee's explanation prior to imposition of discipline. In pertinent part, the Respondent's Progressive Discipline Policy stated:

> Prior to imposing any disciplinary action, the Supervisor must determine if there are sufficient reasons to initiate the disciplinary process, and if so, at what level of discipline.
>
> 1. *Adequacy of notice.* The Supervisor must first determine whether the employee was given fair notice of the consequences of the misconduct. . . . Supervisors should not assume that employees learn rules by word of mouth. Supervisors should consider whether communication of the rules was reinforced in policy manuals or employee handbooks.
>
> 2. *Investigate facts.* Supervisors are responsible for investigating each incident as soon as possible. They should obtain all facts, interview available witnesses, and review the information fairly and impartially before initiating disciplinary action. Employees should always be given an opportunity to explain their actions.
>
> 3. *Classify disciplinary violation.* Supervisors must determine if a particular act is a major or minor problem, an isolated incident, or a recurring problem.

[4] Counsel for the Union requested that the hearing transcripts/exhibits and settlement agreement from this hearing be received as evidence of animus and to support certain objections to the election, which request was denied. A CD of the materials is held in the file as a rejected exhibit.

[5] First violation of rules 34 and 35 carries the potential discipline of "Written Warning up to Discharge," which presumably includes discharge as a discretional penalty. As noted by Human Resource Manager Angie Sandoval (Ms. Sandoval), the Respondent could impose a written warning, a suspension, or discharge for a first violation of rule 34.

B. Discharge of Xonia Trespalacios

Xonia Trespalacios (Trespalacios) had two periods of employment with the Respondent: October 10 to December 7, 2007, and April 8 until July 13, 2008, when she was discharged. At the time of her discharge, Ms. Trespalacios worked in the day-shift poultry department. Ms. Trespalacios was known to many coworkers to have an outgoing, demonstrative personality, given to touching people when talking to them.

In May, Ms. Trespalacios became involved in the union campaign at the facility, joining the union organizing committee, participating in committee meetings, and distributing prounion flyers at the Riverside facility. From May through July 13, Ms. Trespalacios distributed as many as two prounion flyers per week to day-shift coworkers. Ms. Reilly saw Ms. Trespalacios passing out union leaflets. On one occasion, Ms. Trespalacios, holding a flyer in one hand, placed her other hand on Ms. Reilly's shoulder and walked a short distance with her. Ms. Trespalacios was one of a group of the Respondent's employees pictured on two of the Union's election campaign flyers that were widely distributed in the plant. On July 4, Ms. Trespalacios was present when a coworker asked Mr. Rivera about compensation for the holiday. When Ms. Trespalacios disputed Mr. Rivera's computations, Mr. Rivera said something to the effect that Ms. Trespalacios was always with the Union.

On Thursday, July 9, during a day-shift lunchbreak in the dining area of the Riverside facility, Ms. Trespalacios interacted with employee Yolanda Flores (Ms. Flores) in the presence of employees Sonia Vicente (Ms. Vicente) and Martha Castillo (Ms. Castillo) (the Trespalacios/Flores interaction). A security camera in the dining area filmed the interaction, the footage of which the Respondent later copied to a CD (the Trespalacios/Flores CD), which was received into evidence at the hearing. The Trespalacios/Flores CD lacks high-quality clarity and definition and has no audio component. Nonetheless, the CD shows the following:

> Ms. Trespalacios stops by a table at the far end of the dining area where Ms. Vicente, Ms. Castillo, and Ms. Flores are seated. While standing next to the seated Ms. Flores, Ms. Trespalacios touches her on the shoulder multiple times with patting motions and then delivers four firmer touches or nudges to Ms. Flores' shoulder that appear to jostle Ms. Flores. Ms. Trespalacios turns away from the table momentarily but soon reappears and momentarily addresses Ms. Flores while gesturing animatedly before folding her arms across her chest and inclining her body toward Ms. Flores with her head bent toward Ms. Flores' head. Although it is not entirely clear, Ms. Trespalacios' folded arms appear to touch or bump Ms. Flores' shoulder and to jog her slightly. The reactions of Ms. Vicente, Ms. Castillo, and Ms. Flores, if any, cannot be ascertained.

After she finished her lunch break, Ms. Flores told lead employee, Ms. Avila, that she had had a problem with Ms. Trespalacios. Ms. Avila reported the matter to Ms. Vega who took Ms. Flores to her office. Ms. Flores told Ms. Vega about the Trespalacios/Flores interaction, stating that Ms. Vicente and Ms. Castillo had also been present.

On the same day, July 9, Ms. Vega told Ms. Reilly that Ms. Trespalacios had pushed and abused Ms. Flores. . . .Ms. Reilly told Ms. Vega to obtain written statements from witnesses to the incident. On Friday, July 10, Ms. Vega provided Ms. Reilly with written statements from herself, Ms. Avila, Ms. Flores, and Ms. Vicente, translating for her those written in Spanish. Ms. Flores' statement, in pertinent part read:

> Yesterday, on Thursday . . . during my lunch hour, I asked Xonia why she was upset with me, if it was because of the Union. And she told me that she didn't care, then she told me that she was gonna kick my ass out and throw me away, and she pushed me. And I am very upset for what she told me. I also told Xonia that it was my decision to vote in favor or against the Union. All I want is to work comfortably and to be left alone.

Ms. Vicente provided two statements[6] of the incident that read in pertinent part:

> Xonia approached Yolanda and Xonia touched her shoulder. And Yolanda said, she told her, "You're angry because I'm not in your Union." And Xonia said, "Aside from that, I am the same person here."
>
> Xonia approached Yolanda touching her on her shoulder. And Yolanda told her, "Are you angry because I don't support your Union?" And Xonia told her, "I am another person here. The Union is something else very apart from this."

Ms. Avila's statement, in pertinent part read:

> Yolanda Flores coming from the lunch room and told me that a lady from poultry had told her a bad word and had pushed her. I told her that it needed to be reported to the supervisor because we cannot say bad words to people. And I told her that [I] was going to communicate it to the supervisor, and I told Veronica [Vega].

Ms. Vega's statement, in pertinent part read:

> Yesterday 7/9/09 @ 2:09 p.m. Flo Sotelo [Florinda Avila] and Yolanda Flores came to me in Sealing, telling me that at lunch time, Xonia Trespalacios pushed her and told her that when the Union comes in, she will be fired with a kick up her __s…Yolanda tells me she feels really uncomfortable with the things Xonia Trespalacios told her.

After reviewing the statements, Ms. Reilly did not direct anyone to interview and/or obtain a statement from either Ms. Trespalacios or Ms. Castillo, the other worker present during the Trespalacios/Flores interaction, and she did not, herself, interview any of the four witnesses to the interaction. Ms. Reilly acknowledged that she had not followed the company discipline policy in three particulars: (1) she did not obtain statements from all available witnesses to Ms. Trespalacios' alleged misconduct; (2) she did not obtain all facts relevant to Ms. Trespalacios' discipline; and (3) she did not give Ms. Trespalacios an opportunity to explain her actions. Ms. Reilly fur-

[6] It is not clear how it happened that Ms. Vicente came to give two statements.

ther acknowledged that of the two eyewitnesses who gave statements, only Ms. Flores claimed that Ms. Trespalacios had threatened her. Ms. Reilly agreed that Ms. Vicente's statement did not corroborate that a threat or an assault had occurred.[7]

After reviewing the Vega/Flores/Vicente statements, Ms. Reilly viewed the camera footage of the incident, i.e., the footage contained in the Trespalacios/Flores CD, five to seven times. On the afternoon of July 10, based on her review of the statements and the camera footage, Ms. Reilly concluded that Ms. Trespalacios had committed an extremely serious, even violent, "assault" of Ms. Flores, and she decided to terminate Ms. Trespalacios. To Ms. Reilly's knowledge, it was the only assault of one worker on another since the Union had filed its petition for election.

On Saturday July 11, Ms. Reilly talked to labor consultant, Carlos Restrepo, about a presentation she planned to make to employees regarding the Trespalacios/Flores interaction, asking him to prepare a script for it in English and Spanish. Her intention was to play for employees the Trespalacios/Flores CD and to make it clear to them that employees could not carry on as they had been because employees were "just becoming a bit hot and heated, and [Ms. Reilly] wanted people to understand that [she] wanted people to work together, not against each other [because they] would be a better company if [they all] worked together."

On Monday, July 13, Ms. Trespalacios was called into the training center to meet with Ms. Reilly and Helen Marquez, the factory manager. With Ms. Marquez translating, Ms. Reilly told Ms. Trespalacios that she was going to be dismissed because it had been reported to Ms. Reilly that Ms. Trespalacios had broken a company rule by assaulting someone. Ms. Trespalacios asked Ms. Reilly who the person was, but Ms. Reilly refused to give her any information, saying, "The interview is over. Can you please leave?" Ms. Trespalacios asked Ms. Reilly if she were being fired because she was supporting the Union, which Ms. Reilly denied.

On the same day, shortly after firing Ms. Trespalacios, Ms. Reilly assembled about 80 employees into the dining area. Ms. Reilly read to employees from the following script, as consultant Ms. Ceballos, utilizing the same script, translated:

> I called this meeting because I'm very concerned with something I've seen happening here lately as the union election gets closer.
>
> But before we talk about that let me say that this type of behavior has been going on since last year. In fact last year we had to terminate another employee for threats of physical harm against another employee who did not support the union.[8]
>
> Although the union claims that these types of actions do not occur, the truth is that they do and things are actually getting worse, allow me to show you. Here is a video of what happened here last Thursday. After you see it, I'll tell you more.

Ms. Reilly played the Trespalacios/Avila CD for the employees, projecting the footage on the dining area wall, and thereafter read aloud the following:

> The video clip is of an employee threatening, intimidating and physically assaulting another employee who used to be her friend because she changed her mind and decided to vote against the union.
>
> This is one example of the mistreatment some employees have shown their coworkers who disagree with them on the union question.
>
> I'm here to tell you that I won't tolerate that kind of behavior here in our plant.[9]

Ms. Reilly had never before shown any video of employee misconduct to assembled employees and had never before told assembled employees of another employee's termination.

C. Discussion of Alleged Unfair Labor Practices

1. Legal principles

Section 7 of the Act provides that employees have the right to engage in union activities. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

An employer may lawfully impose some restrictions on employees' statutory rights to engage in union solicitation and distribution. Such restrictions, however, must be clearly

[7] Ms. Trespalacios testified about her interaction with Ms. Flores as follows: while Ms. Trespalacios was passing through the dining area, Ms. Vicente called her over to a breakroom table where Ms. Vicente sat with Ms. Flores and Ms. Castillo. Ms. Trespalacios spoke briefly to Ms. Vincente about nonunion matters. As they talked, Ms. Flores said to Ms. Trespalacios something to the effect that since Ms. Trespalacios was with the Union, Ms. Trespalacios was no longer talking to her. Ms. Trespalacios softly touched Ms. Flores' arm, assuring her, "With the Union or without, I continue to be the same." Saying no more, Ms. Trespalacios left. Ms. Trespalacios insisted that she touched Ms. Flores only once and never bumped her. She denied telling Ms. Flores the Union would have her kicked out or that she would lose her job when the Union came in. Ms. Vicente, who also testified, denied that Ms. Trespalacios had used any foul language or made any threats during the interaction. Ms. Flores' testimony, although more detailed than her written account, was essentially consistent with her statement.

I recognize that Ms. Trespalacios' version is not fully consistent with the camera footage. However, since Ms. Trespalacios' version of the Trespalacios/Flores interaction was neither obtained nor considered before Ms. Reilly decided to terminate her, the credibility of her version is irrelevant.

[8] The employee referred to was alleged as a discriminatee in the consolidated complaint issued pursuant to the 2008 ULP charges, which allegations were outstanding on July 13 and were later settled on September 28.

[9] Based on employee Maria Garcia's testimony that Ms. Reilly had a paper from which she read every time she spoke, as did Luz Ceballos in translating, I accept that Ms. Reilly did not deviate from the script in her remarks to employees.

limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in nonwork areas. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945); *Our Way, Inc.,* 268 NLRB 394 (1983). The Board considers that an employer's maintenance of a work rule violates Section 8(a)(1) if employees would reasonably construe the language of the rule to restrict the exercise of Section 7 rights, applying a standard articulated in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646–647 (2004), and restated in *NLS Group,* 352 NLRB 744–745 (2008):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. The elements required to support such a showing are union activity by the employee, employer knowledge of that activity, and employer animus toward the activity. Direct evidence of union animus is not required; a discriminatory motive for adverse action may be inferred from circumstantial evidence and the record as a whole. *Verizon and its Subsidiary Telesector Resources Group*, 350 NLRB 542, 548 (2007); *Tubular Corp. of America,* 337 NLRB 99 (2001). If the General Counsel meets the initial burden, the burden of proof then shifts to the Respondent to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC,* 353 NLRB No. 33 (2008).

1. Independent alleged violations of Section 8(a)(1) of the Act

a. Maintenance of work rules

The General Counsel contends that the Respondent violated Section 8(a)(l) of the Act by maintaining the following work rules:

Rules 11 and 12. Rules 11 and 12 respectively prohibit employees from leaving their department or the plant during a working shift without a supervisor's permission, and stopping work before shift ends or taking unauthorized breaks. Citing *Crowne Plaza Hotel*,[10] the General Counsel argues that employees could reasonably read Rules 11 and 12 to require consultation with supervision before engaging in a protected work stoppage on penalty of discipline.

The Respondent points out that Rules 11 and 12 address legitimate business concerns and do not expressly or implicitly prohibit protected activity and argues that no evidence exists that the rules have been applied so as to restrain or chill employees in exercising their Section 7 rights or that any employee interpreted them to prohibit protected activities. The Respondent cites *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998) (mere maintenance of certain rules does not chill employees' Sec. 7 rights). The rules considered in *Lafayette Park Hotel* do not parallel those at issue herein. The Board in *Crowne Plaza Hotel*, on the other hand, held that rules prohibiting employees from "leaving [their] work area without authorization before the completion of [their] shift [and/or] walking off the job" were unlawfully overbroad because "an employee would reasonably read those rules as, respectively, requiring management's permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity . . . or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities."[11] See also *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000) (invalidating, as overbroad, a rule that "[e]mployees who walk off the job will be discharged"). Accordingly, I find Rules 11 and 12 violate Section 8(a)(1) of the Act as impermissibly overbroad.

Rule 28. Rule 28 prohibits the unauthorized soliciting of contributions on [the Respondent's] premises. Citing *Our Way, Inc.,* 268 NLRB 394 (1983) and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the General Counsel argues that rules barring solicitation on employees' own time are presumptively invalid. Without citing any authority for its position, the Respondent contends the prohibition of "contribution" solicitation cannot have a chilling effect on Section 7 rights. Although not clearly explicated, the Respondent's position appears to be that the language of rule 28, restricted as it is to solicitation of "donations," cannot be construed to encompass any protected activity. While barring solicitation of donations may not explicitly restrict activity protected by Section 7, I cannot find the word "donations" to be so intrinsically limited as to prevent employees from reasonably construing the language to prohibit protected solicitations and thus to chill protected activity.[12] See *Lutheran Heritage Village-Livonia*, at 646. Since any ambiguity in the Respondent's rules must be construed against it as the promulgator of the rules,[13] I find Rule 28 to be overbroad and violative of Section 8(a)(1) of the Act

Rule 33. Rule 33 prohibits distributing printed matter on [Respondent's] premises without permission. This rule unqualifiedly bars literature distribution at any time on the Respondent's premises, which must necessarily include distribution of protected material on nonworking time and in nonworking areas. It is thus presumptively invalid. See *Hale Nani Re-*

[10] 352 NLRB 382, 386–387 (2009) (rules that prohibit "walking off the job" and "leaving your work area without authorization before the completion of your shift" are unlawful)

[11] *Crowne Plaza Hotel* at 386–387.

[12] Among other potentially overbroad applications of the rule, it would prohibit solicitation of a financial donation to defray printing costs of protected literature.

[13] *Lafayette Park Hotel*, at 828.

habilitation & Nursing, 326 NLRB 335 (1998); *Stoddard-Quirk Mfg. Co.*, 38 NLRB 615, 621 (1962).

Rule 35. Rule 35 prohibits inability or unwillingness to work harmoniously with other employees. The adjuration to "work harmoniously" is so imprecise as to encompass any disagreement or conflict among employees, including those related to protected discourse and/or interaction. Since employees could reasonably construe the language of the rule to prohibit Section 7 activity, it is overbroad and violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia*, at 646.

b. Maintenance of mandatory arbitration agreement

As a condition of employment, the Respondent requires its employees to agree to submit all employment disputes and claims to binding arbitration, "including claims of wrongful discharge, discrimination, harassment, or any injury to . . . physical, mental or economic interests."

The General Counsel contends that the Respondent's involuntary arbitration provision precludes employees from seeking redress with the Board, which reasonably tends to inhibit employees from invoking their right to raise employment-related complaints under the provisions of the Act and violates Section 8(a)(1) of the Act.

The Respondent disagrees, arguing that as the provision does not explicitly restrict employees from resorting to the Board's remedial procedures, employees would not reasonably believe they are precluded from filing unfair labor charges with the Board. The Respondent further argues that absence of evidence of intent to interfere with employee access to the Board and/or of implementation prevents a finding of violation.

Applying an objective standard, the Board has found that even if a mandatory arbitration policy does not explicitly restrict employees from resorting to the Board's remedial procedures, the inquiry must be whether its language "would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board." *U-Haul Co. of California*, 347 NLRB 375, 377 (2006). Here, employees would reasonably understand the arbitration policy to require employees to utilize the Respondent's arbitration procedures instead of filing charges with the Board. Accordingly, the policy violates Section 8(a)(1) of the Act.

3. Discharge of Xonia Trespalacios

No party disputes that the General Counsel has met the first two elements of the *Wright Line* burden as to the discharge of Ms. Trespalacios. Uncontroverted evidence shows that Ms. Trespalacios engaged in union activities of which the Respondent was aware. As to the third element—the existence of employer animus toward Ms. Trespalacios' union activities or to employee union support generally—there is no direct evidence. Any finding that the Respondent had a discriminatory motive in discharging Ms. Trespalacios must be inferred from circumstantial evidence and the record as a whole.

Consideration of the circumstantial evidence starts with the Trespalacios/Flores CD and necessitates a determination as to what inferences may be drawn from the recorded footage. After carefully reviewing the Trespalacios/Flores CD, I find that the most tenable inference to be drawn is that Ms. Trespalacios innocuously patted and nudged Ms. Flores' shoulder as the two women spoke and later bent toward Ms. Flores with folded arms to whisper in her ear, jogging her shoulder inadvertently in the process. Viewed in a light most favorable to the Respondent, the Trespalacios/Flores footage is, at best, susceptible to two interpretations, an innocent as well as a culpable one. Therefore, the camera footage alone cannot justify a conclusion that Ms. Trespalacios hostilely pushed Ms. Flores' shoulder as they spoke and later vindictively bumped her with folded arms. Since the Respondent could not have unequivocally determined the tenor of the Trespalacios/Flores interchange solely by viewing the Trespalacios/Flores CD, it follows that the Respondent would have had to examine fully the circumstances surrounding the interchange in order to ascertain fairly and impartially whether Ms. Trespalacios had engaged in misconduct.

The course of action the Respondent took was the antithesis of a full examination of the circumstances surrounding the Trespalacios/Flores interchange. Ms. Reilly failed to follow established, written company policies in investigating the alleged misconduct of Ms. Trespalacios; she did not attempt to obtain accounts from all witnesses to the incident; she made no attempt to obtain Ms. Trespalacios' version of events, although company policy dictated that "[e]mployees should always be given an opportunity to explain their actions," and she took no steps to ascertain whether Ms. Trespalacios had been given notice of the consequences of her alleged behavior. Finally, Ms. Reilly did not consider all available evidence to evaluate, as policy prescribed, whether the alleged conduct was "a major or minor problem, an isolated incident, or a recurring problem."

Even apart from Ms. Reilly's unexplained failure to follow company disciplinary policy, her investigation of Ms. Flores' complaint against Ms. Trespalacios was plainly inadequate by any standard: she failed to gather information from all witnesses to the incident; she failed to look into Ms. Trespalacios employment record; she rejected, without plausible explanation, Ms. Vicente's eyewitness account, which contradicted in material part Ms. Flores' accusations, and, without any articulated or apparent need for haste, she precipitately resolved to terminate Ms. Trespalacios. The investigation deficits and disciplinary haste strongly suggest animus.[14]

Ms. Reilly's post-termination conduct may also be consid-

[14] See *Toll Mfg. Co.,* 341 NLRB 832, 833 (2004) (employer failure to follow progressive discipline system evidence of unlawful motivation); *Embassy Vacation Resorts*, 340 NLRB 846, 848–849 (2003) (animus shown by employer's failure to give employees a chance to defend themselves and its deviation from its past practice of discipline); Guardian Automotive Trim, Inc., 340 NLRB 475, 475 fn. 1 (2003) (employer failed to follow its progressive discipline policy); *Alstyle Apparel,* 351 NLRB 1287, 1287–1288 (2007) (limited investigation into alleged misconduct without giving employees an opportunity to explain allegations against them supports a conclusion that the discharges were discriminatorily motivated); *Midnight Rose Hotel*, 343 NLRB 1003,1005 (2004) (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct); *Toll Mfg. Co.,* supra (precipitous discharge persuasive evidence of unlawful intent).

ered in determining animus. On the same day that she discharged Ms. Trespalacios, Ms. Reilly assembled employees and played for them the Trespalacios/Flores footage, asserting that the CD showed an employee threatening, intimidating and physically assaulting another employee because she had decided to vote against the Union. Although Ms. Reilly admitted she knew of no employee violence toward union nonsupporters since the election petition had been filed, she nevertheless told the assembled workforce that threats of physical harm against nonsupporters was worsening. Her stated aim of making employees understand they should work together, not against each other, reveals an antipathy for employee discord that goes beyond reasonable workplace concerns and encompasses the robust, vigorous, and protected employee interactions that are common during union campaigns. Ms. Reilly did not assure employees that the Respondent would respect the rights of employees to campaign enthusiastically for the Union but only emphasized that she would not "tolerate" the "mistreatment some employees had shown their coworkers who disagreed with them on the union question."[15] Her stated aim and her warning reveal animus toward vigorously expressed union support. Finally, since the Trespalacios/Flores footage recorded, at most, ambiguous behavior, its presentation as an example of conduct that could provoke termination also reveals animus toward forceful but protected union activity.[16]

The Respondent's above-described omissions and commissions require an inference that the Respondent had a discriminatory motive in discharging Ms. Trespalacios. Ms. Reilly's poorly investigated and otherwise-inexplicable assessment of Ms. Trespalacios' alleged misconduct and her utilization of Ms. Trespalacios' discharge in unwarrantedly cautioning employees against "mistreatment" of those who differed on the union issue evidence animus toward Ms. Trespalacios' union activity and toward employee union support generally.[17] The General Counsel having met the initial *Wright Line* burden, the burden shifts to the Respondent to establish persuasively by a preponderance[18] of the evidence that it would have discharged Ms. Trespalacios even in the absence of her union activities or the union activities of employees generally.

In order to meet its shifted *Wright Line* burden, the Respondent "must show that it had a reasonable belief that [Ms. Trespalacios] committed the offense, and that it acted on that belief when it discharged [her]." *McKesson Drug Co.,* 337 NLRB 935, 936–937 fn. 7 (2002). After careful consideration of the evidence, for the reasons detailed above, I find Ms. Reilly did not have a reasonable belief that Ms. Trespalacios had committed an offense that merited termination. The Respondent has neither justified Ms. Reilly's digression from prior practice and policy nor vindicated Ms. Reilly's extraordinary postdischarge employee presentation to employees. The only rational explanation is that the Respondent was motivated in both instances by a desire to quell employee union support and generally to impede the union organizational drive. The Respondent has not met its shifted burden under *Wright Line;* accordingly, I find the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Ms. Trespalacios on July 13.

VI. REPRESENTATION CASE: FINDINGS OF FACT, AND DISCUSSION

A. Objections to the Election

The Board does not lightly set aside representation elections. *Quest International,* 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.,* 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328, and the burden of proving a Board-supervised election should be set aside is a "heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.,* 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Petitioner has the burden of proving interference with the election. See *Jensen Pre-Cast,* 290 NLRB 547 (1988). The test, applied objectively, is whether the employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division,* 336 NLRB 157, 158 (2001); *Baja's Place,* 268 NLRB 868 (1984).

On July 24, the Petitioner filed 53 timely objections to employer conduct affecting the results of the election. Either prior to or in the course of the hearing, the Petitioner withdrew all objections except for Objections 2, 4, 12, 13,14,15,16, 17, 22, 25, 29, 31, 33, 34, 35, 37, 39, 40, 43, 45, 46, 47, 49, 50, 51, and 53, which are before me for consideration. Where objections relate to the same sequence of events, I have considered them together.

Objection 2

> Employer, by its agents, intimidated eligible voters with loss of employment opportunities if they supported the Union.

The Petitioner does not address this objection in its posthearing brief. However, the evidence adduced in support of the objection is as follows: (1) After the Petitioner distributed consumer boycott flyers at facilities of Fresh & Easy food stores

[15] See *Champion Home Builders Co.,* 350 NLRB 788, 789 (2007) (employer's speech to employees lawful where it "explicitly affirmed that [the employer] would respect the right of employees to solicit (and even argue) for the Union.")

[16] The absence of an 8(a)(1) allegation regarding Ms. Reilly's presentation does not prevent me from considering it as evidence of animus.

[17] Even assuming Ms. Trespalacios was the unfortunate casualty of the Respondent's animus toward union activities generally rather than animus toward her activities specifically, the General Counsel has established the necessary animus element.

[18] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676–677 (1st ed. 1954).

(F&E), the Employer's sole customer, the Employer distributed campaign flyers stating, "An Attack on Fresh & Easy is an Attack on 2 Sisters" and "Don't Let the UFCW Make Us Fail." (2) Consultant Mr. Rivera showed employees a document describing how a company in Arizona had gone bankrupt because of a union, telling them they had the right to vote yes or no and they should think over whether they wanted the union.

Under Section 8(c) of the Act employers may express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefits. *NLRB V. Gissel Packing Co.*, 395 U.S. 575 (1969); *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006). Even "intemperate" personal opinions are protected by the free speech provisions of Section 8(c). *International Baking Co.*, 348 NLRB 1133 (2006); *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). An employer may explain its perception of the advantages and disadvantages of collective bargaining to its employees as long as there are no threats or promises of benefits. *Amersino Marketing Group LLC*, 351 NLRB 1055(2007); *Langdale Forest Products Co.*, 335 NLRB 602 (2001). The Board also permits the employer to distribute antiunion materials, as long as there is no coercion. *In Re Allegheny Ludlem Corp.*, 333 NLRB 734 (2001). Since there is no showing that the Respondent overstepped its speech rights under Section 8(c), I recommend that Objection 2 be overruled.

Objections 4 and 37

> Objection 4: Employer, by its agents, interfered with the rights of employees by singling out known Union adherents and publically insulting them.
>
> Objection 37: The Employer fired a known Union supporter on or about July 13 and made an example out of her by escorting her out of the plant with a guard. The Employer then showed a video to captive audience meetings using her as an example. This coerced employees.

The evidence relating to Objections 4 and 37 has been set forth above in the statement of facts as to the discharge of Ms. Trespalacios and the presentation of the Trespalacios/Flores CD to assembled employees. I have found the Respondent unlawfully discharged Ms. Trespalacios. Such unlawful conduct is "a fortiori, conduct which interferes with the results of an election." See *Airstream, Inc.,* 304 NLRB 151, 152 (1991). Further, Ms. Reilly's statements in her July 13 meeting with employees would reasonably have the effect of discouraging employees' protected activities and her threat to discipline workers for "mistreatment" of those with differing union views was so vague as to chill protected, albeit vigorous, activity. See *Tawas Industries,* 336 NLRB 318, 322 (2001)(employer statements that employees who harass or pressure other employees in the course of union solicitations should be reported to management, who will discipline the offending individuals, discourage employees from engaging in protected activity). Accordingly, I recommend that Objection 4 and 37 be sustained.

Objections 12, 45, and 50

> Objection 12: Employer, by its agents, questioned and polled employees regarding their support for the Union during the pre-election period.
>
> Objection 45: The Employer passed out free T-shirts and hats to employees in a manner as to engage in interrogation of the employees as to their sentiments for or against the Union.
>
> Objection 50: The Employer asked voters how they voted and if they voted.

The Employer made available to employees tee shirts and beanies imprinted only with the Respondent's name and logo. Laura, a laundry room employee who gives out clean smocks and gear to workers, handed out the tee shirts and beanies to any interested employee at the laundry room distribution counter. Later, Laura went to the employee cafeteria and proffered free tee shirts and beanies to employees there. Although an employee rush to obtain the free items caused some congestion and confusion at the laundry counter, there is no evidence that, along with the handouts, the Respondent disseminated any coercive communications or any information at all about the Union or the election. Accordingly, I recommend that Objections 12, 45, and 50 be overruled

Objections 13 and 35

> Objection 13: Employer, by its agents, imposed a discriminatory non-solicitation and/or discriminatory no-distribution rule on employees in a manner designed to interfere with the conduct of a fair election.
>
> Objection 35: The Employer maintained and enforced illegal rules restricting section 7 activities of employees.
>
> Objections 13 and 35 are substantially coextensive with allegations of the complaint, and evidence relating to both the objections and the complaint allegations has been set forth above in the statement of facts regarding relevant company work rules and policies.

Although I have found that the Employer maintained overbroad and unlawful workplace rules, it is not axiomatic that such conduct warrants setting aside an election; rather, the Board looks to all facts and circumstances to determine whether the employment atmosphere was so tainted as to warrant setting aside the election. *Delta Brands, Inc.,* 344 NLRB 252, 253 (2005). There is no evidence the Employer implemented or enforced the overbroad rules at any time during the critical period or that employees' union activities were in any way affected by them. The evidence shows that employees engaged in open prounion activity at the facility during the entire election campaign and filed unfair labor practice charges. Since there is no showing that the mere existence of the rules could have affected the results of the election, I recommend that Objections 13 and 35 be overruled.

Objection 14

> Objection 14: Employer, by its agents, denied employees access to their Union representatives during the period preceding the conduct of the NLRB election.

The Union presented no evidence in support of Objection 14. Accordingly, I recommend that Objection14 be overruled.

Objection 22

> Objection 22: The Employer, by its agents, interfered with the free choice of employees (by) threatening to have a Union representative arrested in the presence of employees, interfering with the laboratory conditions necessary for the conduct of a fair election.

The evidence relating to Objection 22 consists of testimony that when union agent Joe Duffle arrived at the facility in the evening for the postelection vote count, an officer of the Moreno Valley Police Department told him he needed to leave the property or face incarceration. The Union did not address this objection in its posthearing brief, and I find no basis on which to find that a police officer's post-election threat to a union agent interfered with the free election choice of any voter. Accordingly, I recommend that Objection 22 be overruled.

Objection 33 and 47

> Objection 33: The Employer interfered with the voting rights of six employees who were forced to wait outside the plant for up to an hour, escorted through the plant by management and security thugs and then escorted out all serving to intimidate them and other employees.
>
> Objection 47: The Employer, by its attorney, tried to prevent employees from voting by closing the gate to employees arriving before the polls closed. This intimidated the workers who observed this although the one worker who showed up was eventually allowed to enter the premises and vote. This is also direct persuader activity and Seyfarth Shaw should be required to file its LM-20.

On election day, off-duty employees seeking to vote entered the facility through the Respondent's entrance gate. The name of one woman who appeared to vote had inadvertently been omitted from the Excelsior List, and her admission was delayed for 30 minutes. Because she was on medical leave from the Respondent's Corona facility and was unfamiliar with the facility, Ms. Reilly accompanied her to the entrance to the voting area. Former employees, Perla Sosa, Soccoro Serrano, and Laura Salcedo, alleged discriminatees in the 2008 ULP charges, were delayed for about 30 minutes at the entrance gate until escorted by an office employee to the voting area and permitted to vote challenged ballots. Two individuals arrived at the facility entrance apparently shortly before the polls closed. One used an electronic employee gate pass to enter the facility. The other, Javier Castro, who was not named on the Excelsior list, was delayed at the gate. Both were ultimately allowed to vote. No evidence was presented from which I can infer that any of the delays interfered with any employee's free choice in the election. Accordingly, I recommend that Objection 22 be overruled.

Objections 39

> Objection 39: The Employer refused to allow representatives of the Petitioner on the premises to attend a preelection conference, interfered with the right of one Union observer to participate as an observer and refused to allow Union representatives on the property to attend the vote count.

The Union did not address this objection in its post-hearing brief, but evidence relating to Objection 39 consists of the following: (1) although union representatives attended a pre-election conference conducted by the Region, the Respondent limited their number; (2) employee Pablo Andreas, prospective union observer, arrived at the facility gate, telling a guard that he was to be an election observer but that he was 30 minutes late. When asked to wait, he waited for 15 minutes and then went to the parking lot; (3) the same facts as set forth under Objection 22.

None of the evidence adduced in support of Objection 39 permits an inference that any of the alleged conduct interfered with the free election choice of any employee or precluded a fair election. Accordingly, I recommend that Objection 39 be overruled.

Objections 15, 16, 34, and 43

> Objection 15: Employer, by its agents, including third party agents, created an atmosphere of fear and coercion, interfering with the laboratory conditions necessary for the conduct of a fair election.
>
> Objection 16: Employer, by its agents, and by third parties, created an atmosphere of fear, intimidation and coercion which made impossible the holding of a fair election.
>
> Objection 34: The Employer hired extra security guards during the campaign and on the election day in order to intimidate employees.
>
> Objection 43: The Employer created an atmosphere of coercion by having three Moreno Valley police stationed at the plant on election day. This along with the increased security thugs caused an atmosphere of intimidation.

During a union demonstration conducted by the Union in May, 40–50 demonstrators, over the objections of Respondent's managers and security officers, entered the Respondent's premises.[19] Although management repeatedly advised the demonstrators they were trespassing and asked them to leave, the demonstrators raucously refused to leave the building, demanding that the Respondent recognize the Union and shouting for Ms. Reilly to appear. The demonstrators remained in the Respondent's facility until ousted by law enforcement.

On the day of the election, the Respondent increased security officers from one to six, positioning guards at the gates and parking area of the property, a not unwarranted precaution in light of the May demonstration. In response to a rumor that a large group of demonstrators was approaching the facility, the Respondent requested law enforcement presence, and Sheriff's Department officers appeared briefly at the facility with one unit staying 20 to 25 minutes. There is no evidence the officers interacted with voters or interjected themselves into election issues.

The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. *Quest International,* 338 NLRB 856*,* 857 (2003). Since neither the security guards nor law enforcement personnel engaged in any coercive or even questionable conduct towards employees, I cannot find that the Respondent's implementation of security measures on the day of the

[19] The Respondent provided video evidence of the demonstration.

election had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. Accordingly, I recommend objections 15, 16, 34, and 43 be overruled.

Objections 17 and 40

> Objection 17: The Employer, by its agents, made captive audience speeches to employees within 24 hours before the scheduled time of the Board conducted election.
>
> Objection 40: The Employer engaged in a captive audience meeting within 24 hours of the election by having numerous on-on-one meetings where the same script was read to employees effectively constituting a captive audience meeting.

As to Objection 17, the Union has proffered no evidence of any formal captive audience meeting held by the Respondent within 24-hours of the election. The objection appears relate to the July 13 meeting, detailed above, in which Ms. Reilly played the Trespalacios/Avila CD for employees. Pointing out the coercive character of the July 13 meeting, the Union argues that "the Board should use this opportunity to prohibit captive audience meetings by the employer during the critical period." The Union correctly "recognize[s] this Judge will not overrule… current Board precedent" and proposes to reserve meaningful discussion for the appellate process. As the Union acknowledges, the objections hearing is not the appropriate forum in which to seek reversal of Board precedent; accordingly I recommend objection 17 be overruled.

As to Objection 40, the Union argues that interaction among the Respondent's consultants and various employees on the day of the election was tantamount to captive audience meetings. On the day of the election, consultant Mr. Rivera spoke to various employees in the locker room, in the employee cafeteria during employees' break or lunch times, and in the designated smoking area. The Board has said that the 24-hour rule enunciated in *Peerless Plywood,* 107 NLRB 427, 429 (1953) "was not intended to, nor, in our opinion, does it prohibit every minor conversation between a few employees and a union agent or supervisor for a 24-hour period before an election." *Business Aviation, Inc.*, 202 NLRB 1025 (1973). The Board has also held that the rule does not prohibit employers and unions from making campaign speeches during the 24-hour period "if employee attendance is voluntary and on the employees' own time." *Peerless Plywood Co*., supra at 430; see also *Foxwoods Resort Casino,* 352 NLRB 771, 771 and 780–781 (2008).

Although employees may have been personally disinclined to leave the locker room, cafeteria, or smoking area when the Respondent's consultant spoke to them, they cannot by any stretch of logic have been considered "captive." As the Union has presented no evidence to show that the Respondent made speeches to a captive assembly of employees within 24 hours of the election, I recommend that Objection 40 be overruled.

Objection 25

> The Employer, by its agents, engaging in campaigning at the polling places and in the line to the polling place by the NLRB conducted election.

The Union contends that because campaign posters urging employees to vote against the Union were affixed to facility walls in proximity to the immediate voting area and along the anticipated route to the voting area, election laboratory conditions were violated.[20] There is no evidence the posters were affixed on the day of the election, rather it appears the posters had been displayed for some time. The following employees, Pablo Andreas, Maria Garcia, Antonio Quintero, and Zeferino Arzate testified, variously, that on the day of the election the Vote-No posters could be seen in the changing room and the production office, at the plant entrance, in the cafeteria, next to the Human Resources office, at the back door, by the production office, and near the production rooms. Employees had to pass some of the posters enroute to the voting area. There is no evidence the posters were visible to voters waiting in line to vote.

In considering objections of impermissible electioneering, the Board determines whether the conduct, under the circumstances, warrants an inference that it interfered with the free choice of the voters by assessing the following factors: whether the conduct occurred within or near the polling place, whether the conduct occurred within a designated "no electioneering" area, the extent and nature of the alleged electioneering, whether it was conducted by a party to the election or by employees, and whether it is contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982).

Under the circumstances of this case, the evidence is insufficient to warrant an inference that the existence of Vote-No posters interfered with the exercise of the employees' free choice. There is no evidence the posters could be seen by employees waiting in line to vote; they were not displayed in any no-electioneering area, and their placement did not violate any instructions by the Board agent. The posters were apparently *in situ* during much of the pre-election period; no particular attention was drawn to them on the day of the election, and there is no reason to infer that their continued presence, without more, rose to the level of impermissible electioneering. Accordingly, I recommend that Objection 25 be overruled.

Objections 29, 31, and 49

> Objection 29: The Employer, by its agents, discriminated against employees in violation of Sections 8(a)(1) and (3) by terminating them because of their union and/or protected concerted activities.

Insofar as Objection 29 relates to the discharge of Sonia Trespalacios, that issue has been dealt with under Objections 4 and 37 and need not be reconsidered under Objection 29. No evidence as to any other discriminatory discharge was received.

> Objection 31: The Employer fired four Union supporters during the pre-petition period. Those unlawful discharges have not been remedied.
>
> Objection 49: The Employer committed numerous violations of the Act which are the subject of the Complaint in Case 21–CA–38480 and 38563. Those unfair labor practices are unremedied and the failure to remedy them interferes with laboratory conditions.

Objections 31 and 49 relate to the unfair labor practice alle-

[20] The Union raises no objection to the content of the posters but only to their placement.

gations stemming from the 2008 ULP charges. As noted earlier, following several days of hearing on the cases, an administrative law judge approved the parties' settlement agreement of the complaint allegations on September 28. Compliance on the settlement agreement thereafter closed. I have declined to receive the hearing transcripts/exhibits and settlement agreement in these cases as evidence of wrongdoing. Accordingly, I recommend that Objections 31 and 49 be overruled.

Objection 46

> The Employer asked employees not to wear items supporting the Union.

The Union provided no evidence in support of this objection. Accordingly, I recommend objection 46 be overruled.

Objection 51

The Union was not allowed at the pre-election conference to tour enough of the facility in order to insure that the voting areas would be secure from campaigning and that there would be free access to voting without intimidation and coercion from the Employer.

The Union did not address this objection in its post-hearing brief, but the evidence relating to Objection 51 is essentially that during the pre-election conference, the Respondent refused to accommodate a union representative's request to tour employees' pathways from work areas to the voting room. There being no basis for inferring that the Respondent's denial of this request would interfere with employees' free choice in the election, I recommend objection 51 be overruled.

Objection 53

> The Employer, through its agents, unlawfully recorded employees, thus intimidating and coercing them.

At the time of the election, the Respondent operated 30 security cameras in the plant, all of which recorded in "real time" mode and which surveyed the Respondent's entire operations. On the day of the election the two cameras in the immediate vicinity of the voting area were conspicuously covered with cardboard boxes. The remaining 28 cameras were operative throughout the election day as usual. Camera footage from the remaining cameras was viewable in the security-guard and Ms. Reilly's offices. Although each employee would normally have to pass by four or five operating cameras on his/her way to the voting area, no camera was positioned to track employees' final passage into the voting area.

The Union contends that by viewing election-day camera footage, the Respondent could determine with reasonable accuracy who was and who was not voting by tracking employees' treks from work areas to the voting area. Such information could allow the Respondent to "encourage employees to vote whom the employer believes to be employer sympathizers" and to allow the Respondent to "coerce employees because they know that they are being watched whether they decide to vote or not vote." There is no evidence the Respondent encouraged any employee to vote or had any knowledge of whether individual employees had or had not voted.

The Board "recognize[s] that an employer has the right to maintain security measures necessary to the furtherance of legitimate business interests during the course of union activity." *National Steel & Shipbuilding Co.*, 324 NLRB 499, 501 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998). The Board also finds it "neither unlawful nor objectionable when a . . . security camera, operating in its customary manner, happens to record protected concerted activity on videotape." *Robert Orr-Sysco Food Services*, 334 NLRB 977 (2001). There being no evidence that the Respondent's security cameras in use on election day operated in other than their customary manner, I recommend objection 53 be overruled.

Alleged Conduct Not Included in the Union's Objections

In its post-hearing brief, the Union has alleged that Board agent misconduct interfered with the election, arguing that a Board agent's pre-election-day tour of the facility constituted secretive and serious misconduct warranting a new election. The Union has raised an issue "not reasonably encompassed within the scope of the objections that the Regional Director set for hearing." See *Precision Products*, 319 NLRB 640, 641 (1995). A party affected by objections to an election is denied procedural due process if the fundamental requirements of "meaningful notice . . . and . . . full and fair opportunity to litigate" are not provided. *Factor Sales, Inc,* 347 NLRB 747 (2006). To be "meaningful, the notice must provide a party with a "clear statement" of the accusation against it, as a party "cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp.*, 339 NLRB 672, 673 (2003). Inasmuch as the Union's allegations in this regard constitute an untimely objection, they are not considered.

VII. CONCLUSIONS AS TO THE UNION'S OBJECTIONS

Inasmuch as I have recommended that Objections 4 and 37 be sustained, I recommend that the election held on July 17, 2009, in Case 21–RC–21137 be set aside and that the representation proceeding be remanded to the Regional Director of Region 21 for the purpose of conducting a second election.

Further, in accordance with *Lufkin Rule Co.*, 147 NLRB 241 (1964), and *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 109 fn. 3 (1998), I recommend that the following notice be issued in the Notice of Second Election in Case 21–RC–21137:

NOTICE TO ALL VOTERS

The election conducted on July 17, 2009, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

> All full-time and regular part-time production employees, maintenance employees, technical/quality assurance employees, sanitation employees, shipping and receiving employees and plant clerical employees employed by the Employer at its Riverside facility, excluding all other employees, temporary employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National labor Relations Act, as amended,

gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining overbroad work rules and by promulgating and maintaining a mandatory arbitration rule that required employees to waive their right to file charges with the Board.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Xonia Trespalacios because she engaged in union or other concerted protected activities and to discourage employees from engaging in these activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

6. By the conduct described in Objections 4 and 37, which conduct occurred during the critical election period, the Respondent has interfered with the holding of a fair election; the conduct warrants setting aside the election in Case 21–RC–21137 that was conducted on July 17, 2009.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully terminated employee Xonia Trespalacios, it must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of her discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will be ordered to make appropriate emendations to Xonia Trespalacios' personnel files. The Respondent will be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, 2 Sisters Food Group, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overbroad work rules and a mandatory arbitration rule that requires employees to waive their rights to file charges with the Board

(b) Terminating any employee for engaging in union activities and/or to discourage employees from engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Xonia Trespalacios full reinstatement to her former jobs or, if that job no longer exists, to substantially equivalent positions, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make employee Xonia Trespalacios whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Xonia Trespalacios and, within 3 days thereafter notify, her in writing that this has been done and that the termination will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Riverside, California, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 13, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: June 10, 2010

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT have any work rules that interfere with your right to engage in union or other protected, concerted activities or to file charges with the National Labor Relations Board.

WE WILL NOT discharge any employee for supporting the United Food and Commercial Workers International Union, Local 1167 (the Union) or any other union and/or to discourage employees from engaging in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

WE WILL rescind all work rules that interfere with your right to engage in union or other protected, concerted activities or to file charges with the National Labor Relations Board.

WE WILL offer Xonia Trespalacios full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or to any other rights or privileges previously enjoyed.

WE WILL make Xonia Trespalacios whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge.

WE WILL remove from our files any reference to the unlawful discharge of Xonia Trespalacios and notify her in writing that this has been done and that the discharge will not be used against her in any way.

2 SISTERS FOOD GROUP, INC.