Copper River of Boiling Springs, LLC *and* Autumn Ballew and Katie Massey. Cases 10–CA–085934, 10–CA–088882, and 10–CA–087199

February 28, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND JOHNSON

On September 25, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The Charging Parties filed exceptions and a supporting brief, and the Respondent filed a cross-exception and brief in opposition to the Charging Parties' exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The 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,[2] and conclusions,[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Copper River of Boiling Springs, LLC, Boiling Springs, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified by substituting the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in Boiling Springs, South Carolina, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 May 1, 2012."

Dated, Washington, D.C. February 28, 2014

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[1] In its opposition brief, the Respondent urges the Board to disregard the Charging Parties' exceptions, asserting a failure to comply with Sec. 102.46(b)(1) of the Board's Rules and Regulations. We decline to do so. Although the Charging Parties' exceptions do not fully comply with the Board's Rules, they are not so deficient as to warrant striking, particularly in light of the Charging Parties' pro se status. See *Budget Heating & Air Conditioning*, 333 NLRB 199, 199 fn. 2 (2001).

[2] The Charging Parties have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(1) when its manager asked an employee to keep him informed about organizing efforts, and to his recommended dismissal of the following amended consolidated complaint allegations: pars. 8(a)-(d); 9(a)-(c); 10(b), (c); 11(a), (b); 13(a)-(c).

Contrary to his colleagues, Chairman Pearce would reverse the judge's dismissal of the allegation that rule 4 of the Respondent's employee handbook was unlawful. That rule prohibited "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests," and stated that "[t]his includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." Chairman Pearce adheres to the view he expressed in his dissent in *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011), that an employee would reasonably interpret a "negative attitude" as one that is critical of the employer, and that the rule would thereby reasonably inhibit employees from discussing controversial topics, including terms and conditions of employment. Further, he finds the rule here to be even more overbroad than the similar one found lawful by the *Hyundai America* majority, which threatened disciplinary action for "exhibiting a negative attitude toward or losing interest in your work assignment." The majority there relied on the linkage of "negative attitude" to one's work assignment as proof of the rule's lawful context. Rule 4, by contrast, contains no similar limitation.

Because the Respondent discharged employee Autumn Ballew, in part, under rule 4, Chairman Pearce would analyze her discharge under *The Continental Group, Inc.*, 357 NLRB No. 39 (2011), instead of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which the judge applied in dismissing the discharge allegation. Applying *Continental Group*, however, the Chairman would also dismiss this allegation. Even assuming Ballew's outburst was protected conduct or conduct that otherwise implicated concerns underlying Sec. 7 of the Act, the Respondent established that it validly discharged her for interfering with its operations.

[3] Unlike our dissenting colleague, we do not find the Respondent's rule 4 materially distinguishable from the rule found lawful in *Hyundai America Shipping Agency*, supra. Rule 4 specifically prohibits "displaying a negative attitude *that is disruptive to other staff or has a negative impact on guests*" (emphasis added). This language, like the *Hyundai America* rule, limits the rule to unprotected conduct that would interfere with the Respondent's legitimate business concerns.

[4] In accordance with the Respondent's cross-exception, we shall modify an inadvertent error in the judge's recommended Order to require that the Respondent post the attached notice at the facility at issue, in Boiling Springs, South Carolina, in conformance with the judge's findings and the Board's standard remedial practice.

Mark Gaston Pearce,	Chairman
Philips A. Miscimarra,	Member
Harry I. Johnson, III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jasper C. Brown, Jr., Esq., for the General Counsel.
Stephen F. Fisher, Esq. and *Lee Daniels, Esq. (Wimberly, Lawson, Daniels & Fisher, LLC),* of Greenville, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Because credited evidence does not establish that Respondent discharged two employees for union or protected concerted activities, I conclude that Respondent did not engage in unlawful discrimination. However, Respondent violated Section 8(a)(1) of the Act when its supervisor asked an employee to keep him informed about the union organizing campaign.

Procedural History

This case began July 24, 2012, when Autumn Ballew, an individual, filed an unfair labor practice charge against her former employer, Copper River of Boiling Springs, LLC (the Respondent), in Case 10–CA–085934. She amended that charge on August 7 and 22 and November 13, 2012, and January 17, 2013.

On September 7, 2012, Ballew filed another charge against Respondent, in Case 10–CA–088882.

On August 14, 2012, another former employee, Katie Massey, filed an unfair labor practice charge against Respondent in Case 10–CA–087199. She amended that charge on January 28, 2013.

On January 30, 2013, after investigation of the charges, the Regional Director for Region 10 of the Board, acting on behalf of the Board's Acting General Counsel (the General Counsel or the government), issued an order consolidating cases, consolidated complaint, and notice of hearing. The Respondent filed a timely answer.

On March 22, 2013, the Regional Director issued an amended consolidated complaint and notice of hearing which, for brevity, I will refer to as the "complaint." The Respondent filed a timely answer.

On April 22, 2013, a hearing opened before me in Greenville, South Carolina. During the hearing, the General Counsel amended the complaint by added certain allegations and withdrawing others, which will be discussed below.

The parties presented evidence on April 22, 23, and 24, 2013, when the hearing closed. Thereafter, the parties filed briefs, which I have considered.

Admitted Allegations

In its answers, the Respondent admitted some of the allegations. Based on those admissions, I make the following findings.

The charges and amended charges were filed and served as alleged in complaint paragraph 1.

The General Counsel has proven the allegations raised in complaint paragraphs 2, 3, 4, and 5. More specifically, I find that at all material times, the Respondent has been a limited liability company with an office and place of business in Boiling Springs, South Carolina, and has been operating a public restaurant selling food and beverages. It meets both the statutory and discretionary standards for the exercise of the Board's jurisdiction and has been, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based on Respondent's admission of the allegations in complaint paragraph 7, as amended at hearing, I find that at all material times, the following individuals were Respondent's supervisors within the meaning of Section 2(11) and its agents within the meaning of Section 2(13) of the Act: Owner/Operator Joshua Walker; Manager Will Lawrence; Manager Keith Means; and Vice President and Chief Operating Officer Stephen Jackson.

During the hearing, the General Counsel moved to amend complaint paragraph 7 to add the allegations that Chief Executive Officer Angell and the Respondent's human resources director, J. Anthony Worthington, were supervisors and agents of Respondent within the meaning of Sections 2(11) and 2(13) of the Act, respectively. Respondent did not oppose the amendment. As to the supervisory and agency status of these two persons, Respondent denied "any and all of the conduct by them or at their direction."

Respondent presented uncontradicted testimony that Angell possessed sole authority to discharge and that he made the decision to discharge Autumn Ballew and Katie Massey after a careful and nonroutine examination of the facts. Such testimony, which I credit, also proves that Angel was a supervisor of Respondent, because Section 2(11) of the Act defines "supervisor" to mean "any individual having authority, in the interest of the employer, to . . . discharge . . . other employees . . . if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." See 29 U.S.C. § 152(11).

Although I find that Angell has been a supervisor of Respondent at all material times, it is not necessary to resolve whether Worthington also possessed sufficient 2(11) indicia to warrant that conclusion. Uncontradicted evidence clearly establishes that the human resources director was Respondent's agent within the meaning of Section 2(13) of the Act, and I so find.

Respondent has admitted that, as alleged in complaint paragraph 10(a), it has maintained in its employee handbook a rule which prohibits "Insubordination to a manager or lack of respect and cooperation with fellow employees or guests. This

includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." I so find.

Respondent also has admitted that, as alleged in complaint paragraph 10(c), it has maintained a rule prohibiting employees from engaging in "Any other action or activity which the Company believes represents an actual or potential threat to the smooth operation, goodwill, or profitability of its business." I so find.

Complaint paragraph 13 alleges that Respondent discharged employee Katie Massey on April 19, 2012, and discharged employee Autumn Ballew on July 17, 2012. Based on the Respondent's admissions, I find that it discharged Massey on April 19, 2012, as alleged, and discharged Ballew, but on July 16, 2012, rather than July 17, 2012.

Union Status Allegations

Complaint paragraph 6(a) alleges that the National Workers Association is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, and terms and conditions of employment. Complaint paragraph 6(b) alleges that at all material times, the National Workers Association has been a labor organization within the meaning of Section 2(5) of the Act. The Respondent has denied these allegations for lack of sufficient knowledge.

The record reveals very little about the "National Workers Association." No evidence clearly delineates its organizational structure, its officers, or when it came into existence. Indeed, credible evidence does not does not even establish that it exists except for the name. However, a footnote in the General Counsel's posthearing brief states that on March 7, 2013, the Regional Director for Region 10 issued a decision and direction of election in Case 10–RC–098046, "finding, inter alia, that the National Workers Association is a labor organization within the meaning of Section 2(5) of the Act." The Board has published this Decision and Direction of Election on its website: http://www.nlrb.gov/case/10RC098046.

Taking administrative notice of this decision, and based on its findings, I conclude that the General Counsel has proven the allegations raised in complaint paragraphs 6(a) and 6(b). Therefore, I further conclude that the National Workers Association is a labor organization within the meaning of Section 2(5) of the Act.

The March 7, 2013 Decision and Direction of Election stated that Kevin Ballew was the "chief representative" of the National Workers Association (for brevity, the Union) and had been for about 7 months. Therefore, it would appear that Ballew assumed that position with the Union after the events which the complaint alleges to be unfair labor practices.

According to a footnote in the General Counsel's brief, Kevin Ballew is not related to Autumn Ballew, one of the two charging parties in this case, and her testimony described Kevin Ballew as a "friend." The record does not indicate they are kin. Kevin Ballew did not take the witness stand in this proceeding, but Autumn Ballew gave the following testimony regarding how the Union started:

> Q. At some point during 2012, did the employees try to organize a union?
>
> A. Yes, sir.
>
> Q. And who were the leading employees who tried to organize the Union?
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> A. Kevin Ballew, Katie Massey, and myself.
>
> Q. Okay. And when did you all start on this union campaign?
>
> A. December or January 2012.
>
> Q. December of 2011 and January 2012?
>
> A. Correct.
>
> Q. Okay. And what did you do regarding the Union? Explain just what kind of activities did you engage in?
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> A. Well, we did a lot of research and we made flyers.
>
> Q. A lot what?
>
> A. A lot of research. We just did a lot of research and we made flyers. We put flyers on the employees' cars. We talked to the employees about organizing and what the Union could do for them. Told them what you know, exactly what we were doing and if they agreed with it, we would get them to sign a petition, a showing of interest.
>
> Q. Umhmm. Did you distribute any flyers and the Union—and flyers about the Union?
>
> A. We distributed informational flyers and flyers that we would hold meetings for the employees to come to.

The General Counsel introduced some of the flyers into the record. One of them urged employees to unionize but did not specifically mention the name "National Workers Association." Another stated that "We will be having a meeting on May 21 at 6 p.m. at Kevin's home to discuss our plans to support" legislation pending in Congress which would raise the minimum wage for tipped employees. This flyer does not mention "National Workers Association" or use the word "union."

The General Counsel also introduced into evidence a petition titled "DECLARATION OF WORKERS UNITY" (the "s" on "workers" having been scratched out) which began by stating that "WE THE EMPLOYEES OF COPPER RIVER GRILL" wished to exercise their "right to bargain collectively." It bore the signatures of eight individuals, with dates ranging from "1–3–12" to "7/1/12."

The name "National Workers Association" does not appear on this petition. From all the circumstances, it seems likely that the Kevin Ballew, Autumn Ballew, and Katie Massey formed the Union first and named it later. Needless to say, that sequence of events would not diminish in any way the protection afforded by Section 7 of the Act.

Withdrawn Allegations

Complaint paragraph 12(a) had alleged that at some time in May 20, 2012, "Respondent's employee Ballew," presumably referring to Autumn Ballew, had "engaged in concerted activities with other employees for the purposes of mutual aid and protection, by advocating to management on behalf of another employee regarding the mistreatment that employee was receiving." Complaint paragraphs 12(b) and 12(c) had alleged that because of this protected activity, Respondent had suspended Ballew for the remainder of her shift. However, at hearing, the General Counsel withdrew these allegations from the complaint.

Because the allegations have been withdrawn, I will not address them further or make any findings related to them.

Disputed Allegations

Complaint Paragraph 8(a)

Complaint paragraph 8(a) alleges that "about March 2012," Respondent, by Will Lawrence, threatened employees with discharge because of their union activities. Respondent denied this allegation.

For clarity, and to avoid confusion with other allegations, it may be helpful to quote the General Counsel's brief to identify the specific conduct which complaint paragraph 8(a) describes. The brief states, in part, as follows:

> Massey testified that, in March, after she completed her evening work shift, she went out into the parking lot where she met with K. Ballew and A. Ballew. [Tr. 99, 100.] At that time, A. Ballew and K. Ballew were placing union flyers on employee vehicles in the parking lot. [Tr. 100.] Supervisor Lawrence came out to the parking lot and called Massey over to his vehicle. A. Ballew followed Massey and was also present during this discussion. [Tr. 101, 143,144.] When Massey arrived at Lawrence's vehicle, he asked what K. Ballew was doing. [Tr. 100.] Massey told Lawrence that they were distributing flyers and waiting on the other servers to come out after they got off work. [Tr. 100.] Lawrence then asked Massey, what they we doing? [Tr. 100.] She stated again that they were passing out flyers and waiting on other servers. [Tr. 100.] Lawrence then asked her, "Do you know what Kevin is doing is illegal?" [Tr. 100.] Lawrence then told Massey that being involved in this kind of activity could affect her job. [Tr. 100.]

This quoted portion of the General Counsel's brief does not describe some predicate facts which place the events in quite a different context. Although at one time Kevin Ballew had been one of Respondent's employees, he was not an employee in March 2012. Rather, uncontroverted evidence establishes, and I find, that Respondent had discharged him 2-1/2 years earlier, on September 8, 2009, for theft.

Respondent had pressed criminal charges against Ballew, but he agreed to pay, and did pay, $800 in restitution, resulting in the charges being dropped. An agreement to pay this restitution, and bearing what appears to be Kevin Ballew's signature, is in evidence.

Even though Kevin Ballew had been discharged for theft, he returned to the restaurant as a customer and created a disturbance. This incident occurred sometime around February 26, 2012, on an evening when Manager Will Lawrence was on duty. Based on my observations of the witnesses, I conclude that Lawrence's testimony is trustworthy and I rely on it here. As noted above, Kevin Ballew did not testify in this proceeding.

On this occasion, a server reported to Lawrence that "a guy was bothering them" while they were working in the silverware rolling area. Lawrence discovered that the server was referring to Kevin Ballew. Lawrence's testimony, which I credit, describes what happened next:

> I, you know, I told him he can't really bother the servers while they're working. And that was all I said; he flipped out on me, started yelling at the top of his lungs and using profanity, and I still had about 15 tables in the restaurant. And so at that point when he started doing that, I asked him to leave, and he continued to yell as he walked out of the restaurant. And when he got into the parking lot, screeched tires out of the parking lot. Basically, I mean, I think there were, you know, a couple of families out there that were trying to get to their cars, so that kind of was, you know, pretty scary that he was, you know, rodding out like that. But he left after that, then that was the end of him being there that night.

Lawrence reported the incident to higher management. Respondent's director of human resources, Anthony Worthington, served Ballew with a "no trespass" letter dated February 27, 2012. This letter stated as follows:

> This Letter is to notify you that you are hereby placed on TRESPASS NOTICE on any and all property owned by Copper River of Boiling Springs, LLC located at 2104 Boiling Springs Rd., Boiling Springs, SC 29316.
>
> If you fail to honor this notice and return to Copper River of Boiling Springs, you will be charged with TRESPASSING AFTER NOTICE (SC Code 1611600)[.]

Notwithstanding that he had been served with the "no trespass" letter, Kevin Ballew came on Respondent's property again in March 2012. At this point, he had not been an employee of Respondent for more than 2 years. Autumn Ballew gave the following testimony concerning this incident:

> Q. Okay. Explain for the Judge what happened. This is March of 2012.
>
> A. Okay. Kevin Ballew and myself were outside in the parking lot, putting flyers on the employees' cars. Katie had just got off a shift and had joined us, and Will came out of Copper River from his shift, from his a.m. shift, and saw
>
> Q. This is Will Lawrence?
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> A. Will Lawrence, yes.
>
> Q. Yeah.
>
> A. saw Kevin in the parking lot and asked him to leave. And we, Katie and I, walked over to my car, and then Will Lawrence pulled his car closer to us and called Katie Massey over to the car, and I followed shortly behind her. And when I came up in the conversation, Will was asking what Kevin Ballew was doing. She told him that we were passing out flyers to get better working conditions. And he told us that we couldn't be associated with that and it was going to cost us our jobs.

Massey gave similar testimony:

> And Will Lawrence got off work 10 to 15 minutes after I did. He came out, got in his car, called me over to his car. I came over there. He asked me what Kevin Ballew was doing. I told him that flyers were being put on the other employees' cars and we were, you know, waiting on other servers to come out after they had gotten off work to answer their questions and explain more to the ones who didn't really have the full

> understanding of it, what it was about and our intentions.
>
> And Will asked me when he asked me what we were doing, I said, "Passing out flyers, waiting on the other servers."
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> And he said, like, "Do you know that what Kevin is doing is illegal?"
> And I said, "It's not illegal. He is you know, he has the right to do this."
>
> And Will stated that being involved in this kind of activity could affect my job. As he pulled up some more, closer to where the cars were parked, Autumn approached the car, and Autumn was told the same thing, that doing this could hurt us as employees there.

Lawrence did not recall any incident involving Kevin Ballew, Autumn Ballew, and Katie Massey placing flyers on cars. My observations of his demeanor while testifying lead me to conclude that Lawrence was a conscientious and reliable witness. Moreover, had the incident described by Autumn Ballew and Massey actually have taken place, it seems quite likely that Lawrence would have remembered it, since it would have been an occasion when Kevin Ballew violated the "no trespass" letter.

Lawrence did describe an instance, which occurred sometime after Kevin Ballew received the "no trespass" letter, when Lawrence was leaving work and spotted Kevin Ballew on the Respondent's property, but Ballew was on the restaurant patio rather than in the parking lot. Lawrence gave the following testimony concerning this occasion:

> Q. Do you recall or can you describe the first incident on which you remember him returning?
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> A. The first incident that he returned I was leaving from . . . we'd had inventory on Sunday night, and I was leaving work to go to my car, and Kevin was out on the patio with Autumn Ballew and Katie Massey and another gentleman that I did not know. I didn't say anything to them. I walked back into the restaurant, told my owner/operator, Josh Walker, that, you know, Kevin was on the patio and that he needed to call the, you know, you need to call the cops. Josh picked up his phone, dialed 911, and, you know, about right after he called, he squealed out of the parking lot.
>
> Q. Who's he?
>
> A. Kevin, yes, sir.

Later in his testimony, Lawrence explicitly denied discussing this incident with either Katie Massey or Autumn Ballew. Further, he explicitly denied ever asking either of them "what Kevin Ballew was up to" and also denied telling either Massey or Autumn Ballew that union activities could affect their job.

My observations of the witnesses lead me to conclude that Lawrence was telling the truth and that his testimony is more reliable than that of Massey or Ballew. Therefore, crediting Lawrence, I conclude that he did not make the statements which Massey and Ballew attributed to him. Accordingly, I further conclude that the government has not proven the allegations raised in complaint paragraph 8(a).

However, even if I had credited Massey and Ballew, I would conclude that the words they attributed to Lawrence did not violate Section 8(a)(1) of the Act. As always, in evaluating whether a statement by a supervisor or manager reasonably would interfere with, restrain, or coerce employees in their exercise of Section 7 rights, the words must be considered in context, because the context necessarily affects how employees reasonably would understand the words.

Lawrence credibly testified that at this time, he was unaware of any effort to organize a union. That testimony is consistent with the fact that the Regional Director did not issue a Decision and Direction of Election until March 7, 2013, almost a year later. There is no reason to believe that Lawrence would view the presence of Kevin Ballew on the Respondent's property as having anything to do with a union organizing drive.

Lawrence would not have regarded Ballew as a union organizer because he was unaware that Ballew had ever been involved in such activity. (In this regard, Autumn Ballew's testimony, quoted above, indicates that she and Kevin Ballew and Katie Massey decided to start a union sometime in December 2011, more than 2 years after Kevin Ballew's employment with Respondent had ended.) Based on his experience, Lawrence would have known that Ballew was a former employee who had been discharged for stealing from the company, who had avoided prosecution by paying back the money he had stolen, and who had, more recently, created such a noisy commotion at the restaurant that higher management had served him with a "no trespass" letter warning that if he returned he would be prosecuted.

A typical person with Lawrence's knowledge of events would not have looked at Kevin Ballew and thought "union organizer" but instead would have been astonished and puzzled by a temerity which, for want of a better word, might be called sociopathic. Most people who had been caught stealing, and fired for it, would be too ashamed to return to the scene of the crime. Not Ballew. Most people who had been served with a notice that they would be prosecuted if they trespassed would take care to stay away. Not Ballew.

The essence of trespass is an entering or presence on property *without permission*. If Respondent's employees participated with Kevin Ballew in any activity on Respondent's property—any activity at all, whether playing cards, dancing the two-step, or just laughing at a joke—their participation could create the impression that Ballew had at least tacit permission to be there. Potentially, it could undermine the Respondent's ability to enforce the "no trespass" letter.

Respondent had a legitimate interest in making sure that its employees did not act in a manner which would not undermine its legal ability to exclude trespassers. Moreover, no antiunion motivation entered into Respondent's decision to send Kevin Ballew a letter forbidding his presence on its property. That decision resulted from Ballew's previous noisy disturbance in the dining room, which had nothing at all to do with organizing a union or with employees' protected, concerted activities.

This context would have affected how employees reasonably would have understood the words attributed to Lawrence. Even in the testimony offered by Massey and Autumn Ballew, and relied upon by the General Counsel, Lawrence did not refer to union activity but merely stated that *what Kevin Ballew is*

doing was illegal, which was a statement of fact. Kevin Ballew's presence on the property, after having been served with the "no trespass" letter, was a crime in progress.

According to Massey and Autumn Ballew, Lawrence added—after remarking that Kevin Ballew was acting illegally—either that "we couldn't be associated with that and it was going to cost us our jobs" (Autumn Ballew's testimony) or "being involved in this kind of activity could affect my job" (Massey's testimony). The message communicated by such statements depends on the meaning imputed to the vague phrases "with that" and "this kind of activity." Considering that Lawrence had just stated that Kevin Ballew was breaking the law, the words "with that" and "this kind of activity" reasonably would be understood to refer to the unlawful trespass, not to protected activity.

A restaurant owner which has issued a "no trespass" letter to exclude a rowdy customer properly expects its staff not to engage in conduct which appears to condone a breach of that letter. It may require its staff to tell that customer to leave the premises. Likewise it may forbid its employees from engaging in activities on company property which might act as a waiver of the prohibition or create the appearance that the trespasser was now welcome. Therefore, even if Lawrence had made the statements attributed to him, such statements reasonably would have been understood as referring to the unlawful trespass and not to protected activities.

However, as stated earlier, based on my observations of the witnesses' demeanor while testifying, I credit Lawrence rather than Massey and Ballew, and therefore find that he did not make the statements they attributed to him. I recommend that the Board dismiss the unfair labor practice allegations related to Section 8(a) of the complaint.

Complaint Paragraphs 8(b) and 9(a) and (d)

Complaint paragraph 8(b), like paragraph 8(a), alleges that Respondent, by Will Lawrence, threatened employees with discharge for their union activities in about March 2012. Because the language in the complaint does not provide details which would distinguish the two allegations, clarity will be served by quoting again from the government's brief.

Massey testified about a second conversation with Lawrence, which took place in March or April in the kitchen of the restaurant. (Tr. 101, 102.)

> A. Ballew was also present during this discussion about the Union. [Tr. 101, 102.] Massey testified that as they stood near the pizza bar in the kitchen looking toward the restaurant dining area, Lawrence asked her about K. Ballew' s intentions and what he was trying to do. [Tr. 102.] Massey told Lawrence that K. Ballew was trying to get better working conditions and to inform the workers of their rights. [Tr. 102.] Lawrence then asked her if she had signed the petition that was being circulated. [Tr. 102.] She said yes; he then rolled his eyes in derision. [Tr. 102.] Massey told Lawrence that K. Ballew's intentions with the Union were good. [Tr. 102.] Massey stated that Lawrence again threatened her by stating that "this" could affect her job, especially if it got back to corporate or Owner/Operator Walker. [Tr. 102.]
>
> A. Ballew also testified about this discussion in the kitchen with Massey and Lawrence. [Tr. 144, 145.] A. Ballew recalled that the discussion took place in March inside the kitchen. [Tr. 144, 145.] She testified that Lawrence again asked what K. Ballew was doing. [Tr. 145.] She told Lawrence that there was a petition going around to organize a union. [Tr. 145.] A. Ballew testified that, during this discussion, Lawrence asked the two employees if they had signed the petition and they both said yes. [Tr. 145.] According to A. Ballew, Lawrence stated that it was illegal to solicit for a petition around the restaurant, and that it could look bad on them down the road to be associated with that. [Tr. 145.] Lawrence also said that it could cost them their jobs. [Tr. 146.]

The conduct described in the portion of the General Counsel's brief quoted above includes not only the threat alleged in complaint paragraph 8(a) but also an instance of interrogation alleged in complaint paragraph 9(a), which states that Respondent, by Will Lawrence, on "several occasions in about March 2012, at the Employer's facility, interrogated its employees about their union activities and the union activities of other employees."

Therefore, I will consider both allegations here.

Massey testified that sometime during March or April 2012, while standing near the pizza bar at Respondent's restaurant, she had a conversation with Manager Lawrence. According to Massey, Lawrence asked her "what were Kevin's intentions and what was he trying to do," to which she replied that "Kevin's intentions were good, that we were trying to get better working conditions and inform other servers of their rights, other employees of their rights." From the context, I infer that "Kevin" referred to Kevin Ballew. Massey further testified as follows:

> And Will asked me, Will Lawrence asked me if I had signed the petition. I responded that, yes, I did. He kind of—he like rolled his eyes at me. And I told him that what Kevin was doing was not anything bad, that it was good. It was going to make things better, the working conditions better there, and that it had nothing to do with any kind of like revenge towards like anybody. It wasn't about trying to harm anybody or anything. It was his intentions were you know, the intentions with the Union were good intentions.
>
> Q. BY MR. BROWN: So what, if anything did he say anything else in response?
>
> A. He said again that this could affect my job, especially if it got back to corporate or Walker.

Autumn Ballew gave similar testimony concerning a conversation in March 2012 which involved Massey, Manager Lawrence, and herself. She testified that Lawrence asked them what Kevin Ballew was doing and that they told him that the petition was to organize. "And he told us that it was going to look bad on us down the road and that it could cost us our job and that it was illegal to solicit a petition in the restaurant." Ballew further testified that Lawrence asked both of them whether they had signed the petition.

According to Massey, Lawrence's questioning of her was not

limited to this one instance described above. Massey testified that "every few days" and at least once a week during the period of March and April 2012, Lawrence would ask her "what exactly was going on, what we intended to do with this, why we were trying to do this, and he would I would tell him, you know, every time that I would explain to him that we were just trying to get better working conditions."

In his testimony, Lawrence specifically and unequivocally denied making the statements which Massey and Ballew attributed to him. Based on my observations of the witnesses when they testified, I conclude that Lawrence's testimony is more reliable than that of Massey or Ballew, which I do not credit.

Accordingly, I find that the government has not proven the allegations raised in complaint paragraphs 8(b). Therefore, I recommend that the Board dismiss the unfair labor practice allegations predicated on paragraph 8(b).

Because I do not credit Massey's testimony, it also does not prove the allegations raised in complaint paragraph 9(a). However, the language of paragraph 9(a) refers to more than one event. (It begins, "On several occasions in about March 2012.") To establish these allegations, the General Counsel also elicited testimony from another employee, Victoria Ballard, concerning a different conversation.

Before discussing that evidence, one other matter should be noted to prevent confusion. After the General Counsel examined Ballard, he decided that her testimony described not just the interrogation alleged in complaint paragraph 9(a) but also a separate 8(a)(1) violation not alleged in the complaint. Therefore, he amended the complaint to add a new paragraph 9(d), which states as follows: "On or about the latter part of April or early part of May 2012, supervisor Will Lawrence instructed an employee to report on the union activities of other employees."

The Respondent denied this allegation. It has also raised the defense that the allegation is time barred under Section 10(b) of the Act. As already noted, the General Counsel relied on the testimony of employee Victoria Ballard both to prove the allegations in both complaint paragraphs 9(a) and 9(d). At the time she took the witness stand, Ballard was working at Respondent's restaurant as a server. She testified that in late April or early May 2012, she had a conversation with Manager Lawrence in the office adjoining the kitchen at Respondent's restaurant. No one else was present.

Ballard's testimony does not establish why Ballard was speaking with Lawrence or how the meeting had begun. Thus, it not entirely clear whether Lawrence called Ballard into the office or whether she had approached him. (However, her testimony that only the two of them were present because Lawrence "just asked to keep it private" certainly would be consistent with a conclusion that Lawrence initiated the meeting.) Ballard further testified as follows:

> Q. By MR. BROWN: All right. What did Mr. Lawrence say to you?
>
> A. Well, at first he was kind of hesitant, but he started to say, "Is everything okay?" And he goes on to ask me, did I sign the paper?
>
> And I acknowledged what he was talking about, and I was like, "Yes, I did sign that paper." And I was like, "I don't understand why you're so worried about it," you know.
>
> And then he goes, "Well, just keep that between us and if anything else happens or you have any more information," just come and tell him.
>
> And that's what I did. Besides, I talked to John about it, but that's the only person.
>
> Q. Okay. And that was the end of the conversation?
>
> A. Yes, sir.

Lawrence denied that he asked Ballard whether she had signed anything. As discussed earlier in this decision, my observations of the witnesses lead me to place confidence in the reliability of his testimony.

Additionally, although I certainly believe that Ballard was scrupulous in trying to provide accurate testimony, I have some concerns about her recollection of the events she described. For example, she testified that she thought her meeting with Lawrence took place "around the end of April, beginning of May" 2012," but she also testified that she believed (but was not certain) that the meeting occurred before Katie Massey's termination. Respondent discharged Massey on April 19, 2012, so if Ballard's meeting with Lawrence indeed had been before that event, it could not have taken place "around the end of April, beginning of May."

Ballard's testimony came about a year after the event she described, so it is not surprising that there might be some uncertainty as to the date. In these circumstances, an error as to date would not necessarily signify that the rest of her testimony was doubtful. However, I am more concerned about the rather vague nature of her testimony, which does not give a clear sense of what actually was said.

For example, Ballard's testimony does not reveal how the meeting started or how the subject of the union campaign arose. There may have been some other purpose for the meeting, in which case the topic might have arisen incidentally. On the other hand, Lawrence might have called Ballard into office solely for the purpose of questioning her about the union organizing drive. These circumstances, considered together with others, affect whether the alleged interrogation was sufficiently coercive to violate Section 8(a)(1) of the Act. See, e.g., *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). However, Ballard's testimony sheds no light.

If Lawrence had indeed asked Ballard about the union organizing drive or the circulation of the petition, he would have had to ask a question specific enough to communicate to Ballard the subject of the conversation. However, the words which Ballard attributed to Lawrence—" Is everything okay?"—would not have sufficed.

Ballard testified that, at first, Lawrence "was kind of hesitant" before asking "Is everything okay?" However, it would be too great a leap simply to infer that Lawrence was about to raise the subject of the union organizing campaign but was reluctant to do so. For example, Lawrence might have observed Ballard's work as a server and have had concerns about her pregnancy's effect on that work or vice versa.

(Ballard's testimony placed this meeting with Lawrence in roughly the same time period as her baby shower.) Lawrence might have been just as reticent about raising a pregnancy-related issue as about asking a question concerning a union campaign.

(It should be stressed that I am not here suggesting that Lawrence asked "is everything okay" to inquire about Ballard's ability to work. Such conjecture would be quite speculative, to say the least. My point simply is that neither the hesitancy nor the words which Ballard attributed to Lawrence would have informed her that the subject he wanted to discuss was the union organizing drive. If he raised this subject, he necessarily would have used more direct and unambiguous language, yet Ballard's testimony gives no clue as to what this language might have been. This vagueness causes some concern about the reliability of Ballard's recollection, particularly considering that a year had elapsed between the conversation and the testimony.)

Rather than quoting the words Lawrence spoke, Ballard's testimony had more the flavor of being about the conversation in general. For example, the following sentence did not allay my concern that, after a year, the testimony did not reflect a recollection of the actual words so much as the witness' reconstruction of what she thought must have been said: "And I acknowledged what he was talking about, and I was like, 'Yes, I did sign that paper.'"

The actual language used is important because not every reference to union or protected activity violates the Act. Only those statements of an employer which interfere with, restrain, or coerce employees in the exercise of Section 7 rights violate Section 8(a)(1). Here, complaint paragraph 9(a) alleges an unlawful interrogation. Under *Rossmore House*, above. the Board determines whether a supervisor's question is unlawful by considering whether, *under all the circumstances*, the question reasonably tended to restrain, coerce, or interfere with those rights. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004); *Mediplex of Danbury*, 314 NLRB 470, 472 (1994).

Based on my observations of the witnesses and my concerns about the generality of Ballard's testimony, I conclude that Lawrence's testimony is more reliable. Crediting his denial, I find that he did not ask Ballard whether she had signed the petition.

However, Lawrence did not deny that he and Ballard had discussed the union organizing drive, and he did not deny telling Ballard "if anything else happens or you have any more information" to tell him. In this instance, Ballard's testimony did quote specific words, which Lawrence did not specifically deny. Crediting that testimony, I find that Lawrence did ask her to tell him if anything else happened or if she had any more information concerning the unionization effort.

Although asking an employee about union activity which already has taken place clearly constitutes interrogation, the lawfulness of which is evaluated under the *Rossmore House* line of precedents. Asking an employee to report back in the future about union activity which has not yet happened interferes with the exercise of Section 7 rights in a different way. Paragraph 9(d) does not allege an unlawful interrogation but rather an instruction to report on the union activities of other employees. Therefore, I do not evaluate this allegation under the *Rossmore House* framework.

The coercive effect of asking an employee to report on the union activities of other employees almost always is sufficient to violate Section 8(a)(1) of the Act. The Board does recognize an exception when an employer makes clear that it is *only* asking to be informed of abusive acts, such as intimidation, which lie outside the Act's protection. Compare *First Student, Inc.*, 341 NLRB 136 (2004); and *West Michigan Plumbing & Heating, Inc.*, 333 NLRB 418 (2001). However, this exception is not applicable here. Lawrence did not simply ask to be told of any instance of intimidation and his words would not reasonable be understood as a request only to be informed about such nonprotected conduct.

Accordingly, I conclude that Respondent interfered with employees' Section 7 rights when its manager and agent, Will Lawrence, asked an employee to keep him informed about developments in the union organizing drive. Therefore, I must consider Respondent's defense that the allegation is untimely.

Section 10(b) of the Act provides that "no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Notwithstanding the literal language of Section 10(b), the Board does not absolutely bar complaint allegations that are based on charges filed outside the 6-month 10(b) period. The Board has stated that "the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." *WGE Federal Credit Union,* 346 NLRB 982 (2006).

In determining whether an amended charge relates back to an earlier charge for 10(b) purposes, the Board applies the three-prong "closely related" test set forth in *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). The Board considers

> (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge;
>
> (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and
>
> (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations.

Here, the new allegation involves a statement closely related to one which already had been alleged to violate the same section of the Act. Thus, complaint paragraph 9(a) alleges that Respondent, by Will Lawrence, interrogated employees concerning their union activities and the union activities of other employees. The newly-added complaint paragraph 9(d) alleges that this same supervisor instructed an employee to report on the union activities of other employees. The complaint further alleges both actions to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act.

It may be argued that the legal theory is slightly different for each of the two allegations, but certainly not by much. The first *Redd-I* factor clearly favors a finding that the two allegations are closely related.

So does the second *Redd-I* factor. Both complaint paragraphs 9(a) and 9(d) allege that the same supervisor, Lawrence, made statements to the same employee during the same meeting.

Moreover, the Respondent would raise the same or similar defenses to both statements. Therefore, I conclude that the new allegation, set forth in complaint paragraph 9(d), is closely related to the allegation described in complaint paragraph 9(a) and is not barred by Section 10(b) of the Act.

Accordingly, I recommend that the Board find the Respondent violated Section 8(a)(1) of the Act when its supervisor and agent, Will Lawrence, asked an employee to keep him informed about the union organizing campaign.

Complaint Paragraph 8(c)

Complaint paragraph 8(c) alleges that Respondent, by Manager Keith Means, in about May 2012, threatened employees with discharge because of their union activities. Respondent has denied this allegation.

To support this allegation, the General Counsel elicited testimony from Autumn Ballew that while in the kitchen sometime in May 2012, she had a brief conversation with Kitchen Manager Keith Means. According to Ballew, the conversation was "really quiet" because Means was whispering. She further testified:

> Q. And what was said in this conversation and who spoke?
>
> A. Keith [M]eans told me that I needed to watch my back because they were looking to fire me, and I asked him why, and he said that he overheard a conversation in the kitchen between Will Lawrence and the manager.
>
> Q. Was there anything else to this discussion? Was that it?
>
> A. That was it
>
> Q. Okay.
>
> A. [T]hat I can recall now.

When Means took the witness stand, he explicitly denied having such a conversation with Ballew and making the statement which Ballew attributed to him. Based on my observations of the witnesses, I conclude that Means' testimony is more reliable and credit his denials.

Although I find that Means did not tell Ballew that she should watch her back because they were looking to fire her, even if Means had made such a statement, it would not be sufficient to prove the allegations in complaint paragraph 8(c) and would not violate the Act. Complaint paragraph 8(c) alleges that Respondent, through Means, threatened employees with discharge for their *union activities*. Ballew's testimony does not indicate that Means said anything at all about union or other protected activities.

Moreover, Ballew's testimony does not suggest that the statement she attributed to Means arose in the context of a conversation about union or protected activities. Other evidence, discussed below, indicates that Ballew did not attend to customers and had performance problems which led to her discharge. A person who heard the words which Ballew attributed to Means would not reasonably understand them to refer to union or protected activities, a subject not mentioned.

In sum, the pleadings and the proof differ significantly. The complaint alleges a threat of discharge related to union activities but Ballew's testimony does not indicate this subject ever arose during the conversation. In any event, I do not credit that testimony. Therefore, I recommend that the Board dismiss the unfair labor practice allegations predicated on the conduct alleged in complaint paragraph 8(c).

Complaint Paragraph 8(d)

During the hearing, the General Counsel amended the complaint to add a paragraph 8(d), alleging that sometime in July 2012 Respondent, by Means, threatened employees with discharge for their union activities. Respondent denied the allegation and also raised a 10(b) defense.

Autumn Ballew testified that sometime in July 2012 she had a conversation with Kitchen Manager Means. She said it took place near the computer terminal in Respondent's kitchen, with no one else present. Ballew further testified as follows:

> Q. By the way, did you approach him? Did he approach you? How did it take place?
>
> A. I'm not sure, but he had to stay in the kitchen, so I had to come into the kitchen, but I don't know exactly what the situation was to start the conversation.
>
> Q. Okay.
>
> A. But he did say, he said, "Don't look at me. Just listen." And he goes, talking to me, and he said that—he said, "If you go outside to smoke with that server, Will told me that he was going to fire you."
>
> Q. Give me that again. Speak up.
>
> A. He told me, he said, "Don't look at me. Just listen." And he told me that if I went outside to smoke with the server, that I won't—that Will Lawrence is going to fire me.
>
> Q. Do you know what he was referring to?
>
> A. Yes, I do.
>
> Q. What was that?
>
> A. Just shortly after this conversation, a server came up to the bar while I was waiting on customers, and she looked at me really funny and she said, "Will told me to ask you to go outside and smoke so he could fire you."
>
> Q. Do you know this server's name?
>
> A. I do not.
>
> Q. What did she look like?
>
> A. Short, real blonde hair. She didn't work there very long. She had just started.
>
> Q. Now, in relation to the conversation with Keith Means, when was that? Was that the same day or
>
> A. The same day shortly after the conversation. Thirty minutes or so.

Means specifically denied such a conversation. Based on my observations of the witnesses, I credit Means' denial and find that he did not make the statement which Ballew attributed to

him.

Ballew's story requires the listener to accept some melodramatic elements of the sort familiar on television but not in real life, namely, that a supervisor said "don't look at me, just listen" and that a server she did not know then gave her a strange look followed by a strange message hinting at a conspiracy to have Ballew fired for violating a smoking rule.

Sometimes, an implausible story indeed proves to be true, but that happens when other parts of the record reveal a reasonable explanation for the events and when there is some other corroborating testimony or evidence not present here. The record does not corroborate Ballew's testimony or provide predicate facts which would put the described events in a believable context. The notion that management would have another employee deliberately encourage Ballew to break a rule to set her up for discharge simply doesn't fit the evidence.

Manager Lawrence explicitly denied any scheme to have Ballew discharged and credibly testified that he never indicated to anyone that he was trying to have Ballew terminated because of smoking. However, he did have a conversation with Manager Means about Ballew smoking, and it would appear that this conversation may have been the melody which gave rise to Ballew's fanciful riff.

It is important to stress that Respondent has a very strong no-smoking policy. Lawrence described how an unfortunate event led to the promulgation of the rule:

> Q. Can you tell us why it was prohibited?
>
> A. Smoking is prohibited because a hourly employee put a cigarette out in one of the trash cans behind the building, which caused a fire and the flames were, you know, 12, 15 feet in the air, and if the trash can would have been another foot closer to the restaurant, it would have caught the restaurant on fire. So the fire department had to come out, put out the flames, and it was pretty bad. So we definitely take that seriously.

One evening, as Lawrence was about to leave for the night, a bartender approached him and reported that Ballew had left multiple times during shifts to go smoke, which was strictly prohibited. Lawrence, realizing that Kitchen Manager Means would be the only remaining manager on duty, decided to speak to him. "I just told him," Lawrence testified, "I said, you know, keep an eye on Autumn. She's been, you know, leaving to go smoke. If you see anybody smoking, you know, tell them to stop and then just, you know, write me a note in the manager's log or, you know, document it somehow and let us know who it was and what they were doing."

Ballew may well have learned somehow, perhaps even from Means himself, that Lawrence wanted Means to make a note of anyone who was smoking. However, crediting Means, I find that he did not say the words which Ballew attributed to him. Indeed, he would have felt no need to try to conceal the conversation by saying "don't look at me, just listen," because Lawrence had left and Means was the highest ranking supervisor on duty. From whom would he be trying to hide the fact that he spoke with the bartender?

Another part of Ballew's testimony, discussed below, also leads me to suspect that she processed information in a quirky way vulnerable to misperception. Her testimony about the reasons Manager Walker gave for her discharge omitted a serious matter—a customer's complaint that Ballew neglected customers and left her post to text on her cell phone—but did mention receiving an oral warning for being 3 minutes late.

However, even if Ballew fancied herself the central figure around whom intrigue swirled, rather than an employee who was warned not to go outside and smoke, the story she told did not implicate Section 7 rights. The words she attributed to Means did not mention the Union or protected activities, and neither did the words she attributed to the server. Moreover, her testimony did not indicate that there was any mention of union activities or that she had recently engaged in any union activities. Nothing about the context would associate the words with the Union or protected activities.

It concerns me the General Counsel alleges that Means threatened to discharge employees for union activities when the words attributed to Means made no reference to either a union or union activities and there was no context which would lead a listener reasonably to believe he was talking about union activities. Significantly, this could not be an instance in which a witness's pretrial affidavit claimed that a supervisor did mention union activities, resulting in a complaint allegation, but then the witness changed her testimony at trial. Instead, the General Counsel amended the complaint during the hearing to add the allegation.

My concern is about fairness, not about whether the allegation meets the notice pleading requirements. It is about a commonsense notion of truth-in-labeling. A can marked "beans" should have at least one bean in it somewhere. Likewise, when the complaint labels a supervisor's remark a "threat to discharge employees for union activities," the remark should either have the word "union" in it somewhere or at least include a reasonably recognizable reference to union activities.

No evidence, either credited or uncredited, establishes that Means threatened employees with discharge because of their union activities. Therefore, I recommend that the Board dismiss the unfair labor practice allegations predicated on complaint paragraph 8(d).

Complaint Paragraph 9(b)

Complaint paragraph 9(b) alleges that about May 7, 2012, at the Employer's facility, threatened employees with unspecified reprisals because they engaged in forming and assisting a union. The Respondent denies this allegation.

In late April 2012, notwithstanding that he had been served with the "no trespass" letter, Kevin Ballew again entered the restaurant, where he left an envelope. The record doesn't disclose the contents of the envelope or even that it ever was opened.

Respondent's management reported the matter to police, who later arrested Ballew. The record indicates that a South Carolina state court later found him guilty of violating a criminal trespass statute.

According to Autumn Ballew, on the day after Kevin Ballew's arrest, she had a conversation with Manager Lawrence. She said this conversation took place in the restaurant's office, and no one else was present.

Ballew testified that Lawrence told her that Kevin Ballew's arrest "serves him right" and that he had told Kevin Ballew that the petition was going to cause a lot of trouble, adding that it was going to cause her a lot of trouble down the road. Ballew said that she protested that it was her right to sign the petition and that it should not be held against her, and that Lawrence replied "Well, you signed it. It will be held against you."

Lawrence denied these allegations. As explained above, my observations of the witnesses lead me to place greater trust in the accuracy of Lawrence's testimony. Crediting his denial, I find that he did not make the statements which Ballew attributed to him.

Therefore, I recommend that the Board dismiss the unfair labor practice allegations predicated on complaint paragraph 9(b).

Complaint Paragraph 9(c)

Complaint paragraph 9(c) alleges that about June 18, 2012, at the Employer's facility, Respondent, by Will Lawrence, impliedly threatened employees with discharge because they engaged in forming and assisting a union. The General Counsel's brief describes this allegation as follows:

> In or around June, Lawrence also impliedly threatened A. Ballew with discharge. In this connection, she testified that after she returned from vacation in June, she approached Lawrence about getting her work shifts back. [Tr. 156.] She asked Lawrence why she was scheduled for only one shift. [Tr. 156.] He told her it was because she had been on vacation. [Tr. 156.] In the past, she had never lost shifts after vacation, so A. Ballew asked Lawrence why he was doing this to her. [Tr. 156.] Lawrence simply responded, "Well, why don't you just quit?" [Tr. 156.]

The General Counsel's brief accurately summarized Autumn Ballew's testimony. However, it does not explain how the statement attributed to Lawrence—that Ballew had been assigned fewer shifts because she had been on vacation—could be even an implied threat of retaliation for union or protected activity. Although Ballew claimed that Lawrence asked her why she didn't just quit, that question also makes no reference to union or protected activities. An employee hearing the words attributed to Lawrence would not reasonably understand them to relate to union or protected activities.

Under some circumstances, when a supervisor and employee are engaged in a conversation which makes some reference to union activity or has some obvious connection with union activity, a "why don't you just quit" remark might violate Section 8(a)(1). The Board has consistently found violative employer statements that a union supporter who is unhappy should seek work elsewhere. Such statements suggest that union support or dissatisfaction is incompatible with continued employment. See, e.g., *El Paso Electric Co.*, 350 NLRB 151 (2007); *Paper Mart*, 319 NLRB 9 (1995). However, the "just quit" comment attributed to Lawrence does not communicate any such message. According to Ballew, Lawrence made the remark during a conversation about her work schedule. As stated above, nothing about the conversation Ballew described constituted a reference to union or protected activities.

Lawrence denied making these remarks and, crediting his testimony, I find that he did not. I recommend that the Board dismiss the unfair labor practice allegations predicated on complaint paragraph 9(c).

Finally, the significant difference between the allegation pleaded in the complaint and the evidence the government offered to satisfy its burden of proof again troubles my sense of fairness. When the testimony and other evidence makes no reference, either explicit or implied, to a union or union activity, is there any justification for alleging that a respondent threatened employees with discharge for forming and assisting a union?

Complaint Paragraphs 10(a), (b), and (c)

Paragraph 10 of the complaint and its three subparagraphs concern work rules published in Respondent's employee manual. Respondent's answer admits that complaint paragraphs 10(a) and 10(c) accurately set forth the respective rules. It denies the accuracy of complaint paragraph 10(b). A comparison of this allegation with the evidence leads me to conclude that the complaint allegation is verbatim except for the inclusion of the word "other" between the words "to any" and "unauthorized person or party." Based on the admissions in Respondent's answer and on the Respondent's employee handbook, which is in evidence, I find that at all material times, Respondent maintained in effect work rules which included the following prohibitions:

> [Rule 4]
> Insubordination to a manager or lack of respect and cooperation with fellow employees or guests. This includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests.
>
> [Rule 18]
> Unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party. This includes but is not limited to policies, procedures, financial information, manuals, or any other information contained in Company records.
>
> [Rule 24]
> Any other action or activity which the Company believes represents an actual or potential threat to the smooth operation, goodwill, or profitability of its business.

The Board has established a framework for evaluating whether a work rule reasonably would tend to chill employees in the exercise of Section 7 rights and thereby violate Section 8(a)(1) of the Act. A work rule which explicitly restricts the exercise of such rights is unlawful on its face. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If the rule does not include such an explicit limitation, then, to prove its illegality, the government must establish one of following: (1) Employees reasonably would understand the rule to prohibit Section 7 activity; (2) the employer promulgated the rule in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Here, the government does not argue that the work rules meet either the second or third criteria, but instead contends

only that employees reasonably would understand the rules to limit their right to engage in activities the Act protects. The General Counsel's brief states, in part, as follows:

> In the instant case, it is not alleged that the work rules in issue were promulgated in response to union activity, nor is it alleged that the work rules explicitly reference Section 7 activity. However, with respect to work rules 4 and 24, Respondent's broad prohibitions against displaying a negative attitude that is disruptive to other staff or has a negative impact on guests and actions which threaten smooth operation, clearly encompass employees' concerted communications or conduct protesting terms and conditions of employment. In finding language similar to work rules 4 and 24 to be overly broad, the Board, in adopting the administrative law judge's analysis in *University Medical Center*, 335 NLRB 1318, 1321 (2001), stated that concerted employee protest of supervisory activity and employee solicitation of union support from other employees are protected activities under the Act. The Board also found that the employer's prohibition against all disrespectful conduct toward others could reasonably be construed to prohibit concerted employee protests or other protected activities. Id. at 1322. Similarly, in *Ridgeview Industries*, 353 NLRB 1096 (2009), the Board found the promulgation, maintenance, and enforcement of rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony to be overly broad and, thus, violative of Section 8(a)(1) of the Act. However, the Board distinguishes work rules addressing conduct that is reasonably associated with actions that fall outside the Act's protection such as conduct that is malicious, abusive, or unlawful. [See *Lutheran Heritage Village-Livonia*, supra.]

With respect to rule 18, the General Counsel cites *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 1 (2012), and *University Medical Center*, above, for the proposition that employees could reasonably understand the language, forbidding "unauthorized dispersal of sensitive Company operating materials or information," to prevent them from disclosing or discussing their wages or other terms and conditions of employment.

Disagreeing, the Respondent cites other authority to support its argument that employees would not reasonably believe the rules applied to activities protected by the Act. See *Lutheran Heritage Village-Livonia*, above; *Tradesman International*, 338 NLRB 460 (2004); *Lafayette Park Hotel*, 326 NLRB 824 (1998).

Before discussing the case law, clarity may be served by making some observations about the cases cited in the government's brief. I do not rely on *Ridgeview Industries*, 353 NLRB 1096 (2009), because it is one of the decisions affected by the Supreme Court's holding in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

Additionally, although the General Counsel's brief cited *University Medical Center*, 335 NLRB 1318, 1321 (2001), to support a finding that Respondent's work rules violated the Act, the brief did not mention that the Court of Appeals for the District of Columbia Circuit had denied enforcement of this portion of the Board's decision. See *University Medical Center v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003). The court of appeals decision is especially significant because of its apparent influence on subsequent Board decisions, notably *Lutheran Heritage Village-Livonia*, above, which the General Counsel's brief did cite, and which will be discussed below.

The *University Medical Center* case remains instructive even though the court of appeals disagreed with its work rule analysis and even though the Board's later precedents responded to the Court's concerns. The *University Medical Center* decision demonstrates that two work rules which superficially appear quite similar can differ in their effects and their legality. The decision also shows how the Board has distinguished two rules which appear to be fraternal twins, if not identical, a lesson which will prove useful in the discussion below.

In *University Medical Center*, the Board distinguished the rule it was examining - and ultimately found violative—from a rather similar (but not identical) rule which had passed muster in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Here is the language the Board found unlawful:

> [Rule] 1. Insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual;
>
> . . . .
>
> [Rule] 8. Release or disclosure of confidential information concerning patients or employees.

The Board majority stated that it was applying the principle it articulated in *Lafayette Park Hotel*, that the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. However, the Board concluded that this rule did chill the exercise of such rights in a way the corresponding rule in *Lafayette Park Hotel* had not.

The rule in *Lafayette Park Hotel* had prohibited "Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that *does not support the Lafayette Park Hotel's goals and objectives*." (Emphasis added.) However, the rule in *University Medical Center* did not make reference to the employer's "goals and objectives." The Board majority considered this difference distinctive:

> In *Lafayette Park*, the majority, focusing on the "goals and objectives" language, concluded that the language in question addressed legitimate business concerns and contained no ambiguity. The rule in this case, however, included no such limiting language which removes its ambiguity and limits its broad scope.

335 NLRB at 1321.

Certainly, the District of Columbia Circuit rejected the Board's conclusion that the language in question violated the Act, and the Board cited the Court's opinion and followed it in

Lutheran Heritage Village-Livonia, above. However, the idea that limiting language in a rule can affect employees' reasonable understanding of it flows logically from the well-established principle that the Board "must refrain from reading particular phrases in isolation." *Lutheran Heritage Village-Livonia*, above, 343 NLRB at 646. Thus, language in a rule which relates a prohibition to a specific legitimate business purpose may well affect how employees reasonably understand the scope of the rule.

Indeed, where work rules appear together in a publication, such as Respondent's employee handbook, employees reasonably would read the individual rules as part of the whole. If one of the rules articulated goals and objectives, a reader reasonably would conclude—absent some indication to the contrary—that such a statement of purpose informed the rules as a whole and suggested the contours of their application. Such a statement of goals and objectives could, as the Board explained in *University Medical Center*, amount to "limiting language" which prevented employees from concluding that an unclear rule restricted the exercise of their Section 7 rights.

The work rule described in complaint paragraph 10(c) and identified in the manual as rule 24 refers to actual or potential threats "to the smooth operation, goodwill, or profitability of its business." These words are tantamount to an explanation of goals and objectives and therefore constitute limiting language. Thus, even under *University Medical Center*, I would conclude that limiting language made the rule lawful. Clearly, it would be lawful under later precedent.

The Board's decision in *Lutheran Heritage Village-Livonia* does not affect the principle that limiting language can narrow the scope of a rule so that it does not infringe on the exercise of Section 7 rights. However, this decision does underscore the need for caution in drawing conclusions based on the *absence* of limiting language. The Board "must not presume improper interference with employee rights." Id., citing *Lafayette Park Hotel*, 326 NLRB at 825, 827.

In *Lutheran Heritage Village-Livonia*, the Board affirmed the judge's findings that some work rules (which did not resemble those at issue here) violated the Act but concluded that others (which were similar to those at issue here) did not. Citing the Court's opinion in *University Medical Center v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003), the Board held that a reasonable employee would not read a rule prohibiting "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a [supervisor] or other individual as proscribing solicitation of union support or concerted employee protest of supervisory activity because, read as a whole, the rule applied only to insubordinate activity." The Board continued as follows:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

343 NLRB at 647 (footnote omitted).

The General Counsel's brief also cites *Claremont Resort & Spa*, 344 NLRB 832 (2005), a case in which the Board further explained and applied the principles it had discussed in *Lutheran Heritage Village-Livonia*. The respondent in *Claremont Resort & Spa* had issued a work rule stating, "Negative conversations about associates [employees] and/or managers are in violation of our Standards of Conduct that may result in disciplinary action."

The Board found that this prohibition "would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities."

The General Counsel's brief equates the rule's unlawful prohibition of "negative conversations" with the Respondent's prohibition against "displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." However, the two rules can be and should be distinguished.

Prohibiting "conversation" cuts to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees' discussions about their wages, hours, and other terms and conditions of employment. There could be no union organizing effort at all without such employee conversations. Typically, a negative emotion—dissatisfaction with wages or working conditions, stimulates such discussions. A typical employee reasonably would understand the prohibition of "negative conversations" to ban discussion of work-related complaints and, therefore, to restrict the exercise of Section 7 rights.

By comparison, Respondent's rule, forbidding "displaying a negative attitude" does not limit employees' rights to have conversations about any subject. Moreover, the rest of the rule includes the kind of "limiting language" which the Board discussed in its *University Medical Center* decision. Specifically, the Respondent's rule does not ban all displays of negative attitude but only a display "that is disruptive to staff or has a negative impact on guests."

The limiting language thus links the scope of the prohibition to Respondent's legitimate business concerns. Thus, just as the Board, in *University Medical Center*, drew a distinction between the work rule in that case and the rule in *Lafayette Park Hotel*, the violative work rule in *Claremont Resort & Spa* should be distinguished from the Respondent's rules in the present case.

A more recent case cited by the General Counsel, *Costco Wholesale Corp.*, above, did involve work rules which described particular activities which enjoy the Act's protection. Indeed, the rules even forbade the sharing of employees' names, addresses, and telephone numbers. However, the rules under examination in the present case neither refer to specific Section 7 activities nor prohibit any.

In sum, based on *Lutheran Heritage Village-Livonia*, I conclude that employees would not reasonably understand the rule to prohibit Section 7 activity. Further, the record does not indicate and the government does not contend that Respondent promulgated the rules in response to protected activity. I find that Respondent did not.

There is a third question which must be answered: Has Respondent applied any of the rules to restrict the exercise of Section 7 rights. The government so asserts. The General Counsel's brief states, in part:

> As will be discussed later in this Brief, rule 4 was not only maintained, but, also enforced to restrict the exercise of employees' Section 7 rights when Respondent discharged employee Autumn Ballew citing, among other things, her violation of this work rule.

Among other things, Rule 4, quoted above, prohibits a "lack of respect" which "includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." Indeed, as will be discussed further below, Respondent did discharge Autumn Ballew for reasons which included "displaying a negative attitude" which was disruptive and had a "negative impact on guests." In Respondent's restaurant, which does business as the "Copper River Grill," within the hearing range of guests, Ballew loudly announced "Fuck Copper River!"

This fit of pique wasn't part of the service that guests reasonably would expect. It also was not activity protected by the Act. Credible evidence does not establish that Respondent ever applied the work rules to restrict Section 7 activity and I conclude that it did not. In sum, I conclude that the government has not established that the work rule described in complaint paragraph 10(a) chills the exercise of employees' Section 7 rights, and therefore further conclude that it does not violate Section 8(a)(1) of the Act.

The work rule described in complaint paragraph 10(b) prohibits the "unauthorized dispersal of sensitive Company operating materials or information. . . . This includes but is not limited to policies, procedures, financial information, manuals, or any other information contained in Company records."

The rule's reference to "financial information" might be construed to include wage and benefit rates, which employees have the Section 7 right to discuss. However, the rule itself does not refer to wage or benefit rate and its prohibition is limited to the dispersal of "sensitive Company" materials and information. The rule does not suggest that information appearing on an employee's pay stub would be such "sensitive Company" information.

I conclude that a person reading the rule in its total context would not understand it to prohibit employees from discussing and disclosing information about their wages, hours, and working conditions. Therefore, I further conclude that it does not violate Section 8(a)(1) of the Act.

For the reasons discussed above, I also conclude that the rule described in complaint paragraph 10(c) does not have a chilling effect on employees exercise of Section 7 rights. I further conclude that it does not violation Section 8(a)(1) of the Act.

Therefore, I recommend that the Board dismiss the unfair labor practice allegations which are predicated on the conduct alleged in complaint paragraphs 10(a), (b) and (c).

Complaint Paragraphs 11(a) and 11(b)

Complaint paragraph 11(a) alleges that about March 2012, Respondent, by Will Lawrence, by oral announcement, promulgated and since then has maintained a work rule prohibiting employees from engaging in solicitation at any time at its facility. Complaint paragraph 11(b) alleges that Respondent promulgated and maintained this rule to discourage its employees from forming or assisting a union or engaging in other concerted activities. Respondent denies these allegations and also raises a 10(b) timeliness defense.

Although complaint paragraph 10(a) alleges the promulgation of a no-solicitation rule, that description may cause confusion. No evidence, not even that presented by the government, suggests that Manager Lawrence announced a work rule, as such. The General Counsel's brief described the allegations as follows:

In March, Supervisor Lawrence orally announced and promulgated an unlawful and overly broad work rule when he told Massey and A. Ballew that it was illegal to solicit a union petition at the restaurant. (Tr. 100, 145) The promulgation of such a rule was clearly overly broad and thus presumptively invalid because it stated an absolute prohibition of employee solicitation at all times and places. Thus, the Judge should find that the oral promulgation of a no solicitation rule by Lawrence violates Section 8(a)(1) of the Act. *Mesa Vista Hospital*, 280 NLRB 298, 299 (1986); *Our Way, Inc.*, 268 NLRB 394, 394,395 (1983).

From the General Counsel's brief, it is clear that the government is alleging (1) that Lawrence told employees "it was illegal to solicit a union petition at the restaurant" and (2) that this statement amounted to a rule prohibiting employees from soliciting employees to sign a petition supporting the Union.

Allegations related to complaint paragraph 8(a) also attribute to Lawrence a statement that circulating a union petition in a restaurant was illegal. For the reasons discussed above, I have concluded that the testimony offered in support of these allegations is not reliable. Instead, I have credited Lawrence's specific denial that he ever made such a statement.

In addition to the testimony discussed above in connection with complaint paragraph 8(a), the record includes testimony which clearly is specific to complaint paragraph 11. The General Counsel's direct examination of Katie Massey includes the following:

> Q. Now, I want to direct your attention to a period March/April 2012. Again, did you have an incident there or a conversation on the patio involving any supervisor about the Union?
>
> A. Yes.
>
> Q. All right.
>
> JUDGE LOCKE. What complaint allegations is this that you're
>
> MR. BROWN. This goes to Paragraph 9 pardon me I believe it's Paragraph 11, Your Honor.
>
> JUDGE LOCKE: 11. Thank you.
>
> MR. BROWN: I believe it's Paragraph 11.
>
> Q. BY MR. BROWN: Okay. Now, this was on the patio. Who was present in this conversation? Who was there? Was a group gathered?

A. This day on the patio it was it was during the day between shifts. It was myself, Kevin Ballew, Autumn Ballew, and another server named Elias Bolero (ph.).

Q. Okay.

A. We were all sitting out at a table on the patio. Kevin was explaining Kevin Ballew was explaining to Elias Bolero about the Union. We were trying to get him to sign the petition and to, you know, support what we were doing, and we had been out there for probably I'm not real sure how long, but maybe 15, 20 minutes. And Will comes out

Q. Will Lawrence?

A. Will Lawrence comes out onto the patio.

Q. Okay.

A. He looks at us, glares us down, and walks back inside. I walked inside, you know, a few minutes later.

Q. Did he say anything while he was out there?

A. Will did not say anything.

Q. Okay. All right.

A. And I walked inside a few minutes later and he told me, you know, that it was illegal what Kevin was doing, and I informed Will that it was actually illegal that what he that what he himself, Will Lawrence, was doing was illegal by trying to interfere with this.

Autumn Ballew testified that she, Kevin Ballew, and an employee named Elias Balero were on the restaurant's patio on one occasion in early April 2012 when Lawrence came outside, saw them and glared. However, her testimony did not extend to the remainder of Massey's account, quoted above. Thus, Massey's testimony concerning what Lawrence told her is uncorroborated.

My observations of the witnesses lead me to resolve credibility conflicts between Lawrence and Massey by crediting Lawrence, but it also may noted that Massey's testimony itself falls short of the government's claims. Although the General Counsel's brief asserts that Lawrence said "that it was illegal to solicit a union petition at the restaurant," neither the word "union" nor the word "petition" appears in Massey's testimony about this matter.

Moreover, this testimony reasonably does not support an inference that the words Massey actually attributed to Lawrence—"it was illegal what Kevin was doing"—referred to union or protected, concerted activity. Nothing in the testimony indicates that Lawrence got close enough to the four people on the patio, or stayed long enough, to learn that they were discussing a union petition.

Additionally, the words attributed to Lawrence have an obvious meaning unrelated to union activity. In late February 2012, after Kevin Ballew had caused a disturbance at the restaurant, the Respondent had served him with a no-trespass letter. Even if Lawrence had said that "it was illegal what Kevin was doing," those words literally were true and referred to the crime of trespass.

The record indicates that Lawrence had learned about the union activity by sometime in May 2012, when he had the conversation with employee Victoria Ballard discussed above in connection with the allegations raised by complaint paragraph 9(d). However, that was well after the events described in Massey's testimony here. Credited evidence does not establish that Lawrence knew anything about a union organizing drive at that time.

The Respondent's posthearing brief, noting that the Union filed its representation petition in February 2013, and that the Board conducted an election on April 4 and 5, 2013, argues that a year earlier "there was no such campaign about which any supervisors or employees generally were aware." The record is consistent with a conclusion that, if the union organizing drive had been a snowball growing as it rolled downhill, it would have been quite small and unlikely to attract much notice in March and April 2012.

For example, the petition which the government introduced as General Counsel's Exhibit 6 bears 8 signatures. Of those, one is undated, four are dated in early January 2012, one is dated March 19, 2012, one is dated March 20, 2012, and the remaining signature is dated July 1, 2012. The gaps in the dates are consistent with periods of inactivity in which the petition did not circulate.

Moreover, this could not have been the showing of interest used to support the representation petition in Case 10–RC–098046, or at least not all of it. The Regional Director's Decision and Direction of Election in that case held that the bargaining unit consisted of about 47 employees, the same number sought by the Union. The 30 percent showing of interest necessary to support the representation petition would have required 15 signatures, almost twice the number on General Counsel's Exhibit 6.

The testimony of one of Respondent's employees, called by the General Counsel, supports a conclusion that there actually were two organizing efforts separated by months of inactivity. The witness, Zachary Scott Daniel, gave the following testimony on April 22, 2013, during cross-examination by Respondent:

Q. BY MR. FISHER: Mr. Daniel, you referred to a petition.

A. Umhmm.

Q. Did you see this petition?

A. Not the first time. Only the—there was a time in 2012 when I guess the petition was going around. I never saw it that time. But the most recent one I had I did see.

Q. And that was in January or February of this year?

A. Yes, sir.

The Decision and Direction of Election, dated March 7, 2013, stated that the Union "was organized about 14 months ago" and that it "consists of about 15 members, but additional members are being added." It also found that the Union was not affiliated with any other labor organizing, that it had not yet registered with any government agency and that its members "have ratified parts of its constitution and bylaws, but that too is an ongoing process."

These facts form a picture of a union getting started and picking up momentum slowly, which would be consistent with it having a low profile, and low visibility, in March and April 2012. This picture is fully consistent with a conclusion that Lawrence was unaware of the union organizing campaign in April 2012. Based on the credited testimony, I so find.

The credited evidence fails to establish that Lawrence ever said that soliciting a union petition or support for the union in the restaurant was illegal, and I find he did not make such statements. Therefore, I recommend that the Board dismiss the unfair labor practice allegations which are related to complaint paragraphs 11(a) and (b).

Complaint Paragraph 13(a)

Discharge of Katie Massey

Complaint paragraph 13(a) alleges that on about April 19, 2012, Respondent discharged employee Katie Massey. Respondent admits this allegation, but denies that it did so for unlawful reasons or violated the Act.

Massey first worked for Respondent as a server in 2008 then quit. She testified that Respondent rehired her in 2010. She then worked for Respondent as a server until her discharge in April 2012.

Respondent states that it discharged Massey for twice violating a work rule commonly called "ring it before you bring it." It enforces this rule by having a "key employee" conduct "drink audits." For brevity, I will describe this "drink audit" procedure in connection with an evidentiary issue raised by the General Counsel because the two subjects are related.

The General Counsel contends that Respondent failed to comply fully with the government's subpoena duces tecum and requests that sanctions be imposed for such asserted noncompliance. Specifically, the government asserts that Respondent failed to produce certain documents—"audit tickets"—described in the subpoena. The General Counsel argues that I should strike certain evidence, offered by Respondent, which relates to the audit tickets. The General Counsel also urges that I draw an adverse inference based on Respondent's failure to produce the subpoenaed documents.

When the General Counsel raised this matter during the hearing, I denied the request for sanctions, but did so subject to further consideration after I had reviewed the transcript and exhibits. The government sought such reconsideration in the General Counsel's posthearing brief.

Because the procedural issue concerns the Respondent's failure to produce the subpoenaed "audit tickets," I will begin by summarizing the relevance of these slips. Respondent has a strict policy that, when a customer orders a beverage, the server must enter the billing information into the computer before taking the drink to the customer. The slogan "ring it before you bring it" helps waiters and waitresses remember the policy. However, because of the penalty for breaching it, such a reminder may be unnecessary. A server receives a warning for a first violation, but is discharged for the second.

To enforce the rule, Respondent has a "key employee" circulate discreetly among the tables performing "drink audits." (The term "key manager" also refers to such an individual. Notwithstanding the title "manager," the person is not a statutory supervisor. The Regional Director's decision and direction of election in Case 10–RC–098046 included such individuals in the bargaining unit.)

The key employee observes whether the beverages on a certain table correspond to the information in the computer about the drinks which the customers at that table had ordered. If the beverage on the table appears to be tea or a soft drink but the computer indicates only water, that discrepancy suggests that the server failed to record the drink order properly.

A manager performing a drink audit begins by checking the computer terminal and then walks among the tables to make observations. When managers first started doing such audits, they either had to remember what they saw on the computer screen or else jot a note. More recently, the Respondent began installing a computer printer near each terminal, so that the key manager can print out an "audit ticket" to use as a memory aid. This "audit ticket" is different from the bill which the server delivers to the customer at the end of a meal.

On about April 19, 2012, Key Manager Courtney Stepp performed such an audit and detected a discrepancy between the drinks she observed on a customer's table being served by Katie Massey and the information in the computer, which indicated only water. She found a similar discrepancy on another table being served by Massey. Stepp testified as follows concerning the action she took:

> Q. What, if anything, did you do as a result of this audit?
>
> A. I went to print her ticket from the computer, *her receipt that she would take to the table*, and I stapled it and took it to the manager that was on duty at the time and told him that she didn't have her drinks rung in, and he told me to write a note and leave it for our owner. [Emphasis added.]

As the italicized words establish, the document which Stepp took to the manager in charge was not an "audit ticket" but rather the receipt—the "bill"—which Massey would deliver to the customer at the conclusion of the meal. The record does not reveal exactly what happened to the "audit ticket" which Stepp had carried with her while checking the tables, but no evidence contradicts Respondent's assertion that it does not keep such tickets in the course of its business.

Routinely conducting drink audits generates many such small slips of paper. Each serves a useful purpose for perhaps 10 minutes, but after that, there is no obvious need for their retention. The slips aptly could be called not "business records" but "litter." It is not surprising that they would be discarded.

Before the hearing, the General Counsel served a subpoena on the Respondent which sought production of a number of documents, including the audit tickets. In compliance with the subpoena, the Respondent provided the government with a substantial number of documents, but stated that it could not furnish the audit tickets because it had not kept them. During Stepp's testimony, the General Counsel moved to strike portions of it as a sanction for Respondent's failure to furnish the audit tickets pursuant to the subpoena. The government also argued that I should draw an adverse inference based on the failure to produce the subpoenaed documents. I denied these motions, but indicated that I would give the matter further consideration after reviewing the transcript and exhibits.

As noted above, the General Counsel's posthearing brief renewed the motions to impose sanctions and draw an adverse inference. A portion of that brief is quoted below. The name

"Walker" refers to the Respondent's highest ranking manager at the restaurant:

> At hearing, Respondent asserted that it did not maintain the audit tickets as part of its business records. [Tr. 275.]
>
> The evidence reflects that Walker relied on the customer receipts and other related documents to determine that Massey violated Respondent's drink policy. [Tr. 329, 332.] It is, therefore, submitted that the audit tickets showing Massey's service to guests on April 19, as well as Stepp's alleged note to Walker pertaining to this matter, are relevant to the Judge's decision in this case. Accordingly, counsel for Acting General Counsel renews his motion to strike all evidence elicited by Respondent and relied upon as a basis for its determination that Massey violated its drink policy. In this regard, the Board has long held that Respondent may not use relevant evidence it refused to produce pursuant [to] a properly issued subpoena to prove its case. *Bannon Mills, Inc.*, 146 NLRB 611, 613 fn. 4 (1964).

My consideration of the General Counsel's argument begins with the general principle that a party has a duty to comply with a subpoena seeking unprivileged documents if the subpoena is not revoked and if such records are within the party's custody or control. This duty of compliance bars a party from destroying subpoenaed evidence to prevent its use in the litigation. Similarly, it prohibits the subpoenaed party from claiming falsely that an extant document does not exist and from simply withholding it unilaterally. Instead, the party must challenge the subpoena by petition to revoke pursuant to Section 102.31(b) of the Board's Rules and Regulations, and, where applicable, by timely assertion of privilege. See, e.g., *Pioneer Hotel & Gambling Hall*, 324 NLRB 918 (1997).

The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party. See, e.g., *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1986) (precluding employer from introducing into evidence documents it had failed to produce in response to the General Counsel's subpoenas).

As the Board stated in *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394 (2004), its authority to impose such sanctions "flows from its inherent 'interest [in] maintaining the integrity of the hearing process.' *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970); see also *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998) (approving Board's application of the 'preclusion rule' as being necessary to ensure compliance with subpoenas)."

Thus, some form of sanction may be appropriate in response to a deliberate destruction of evidence or an intentional refusal to honor the subpoena because such willful acts undermine the integrity of the hearing process. However, I would be quite reluctant to impose a sanction without credible evidence that the party acted with such improper intent. Moreover, when a non-culpable destruction of a document has made compliance with the subpoena impossible, it clearly would be inappropriate to penalize the party for failing to do what it cannot.

A sanction serves to redress a party's misconduct which interferes with the Board's processes and the cause of justice, and to discourage similar misconduct in the future. In the absence of misconduct, a sanction neither is warranted nor appropriate. Accordingly, any decision about the imposition of sanctions must take into account both the party's intent and its ability to comply with the subpoena.

Although the government's brief does not explicitly accuse the Respondent of spoliation of evidence or of a contumacious refusal to turn over subpoenaed records in its possession, the brief includes language which arguably might imply such a claim. For example, in the passage quoted above, the General Counsel stated "the Board has long held that Respondent may not use relevant evidence it refused to produce pursuant a properly issued subpoena to prove its case."

The brief's use of the word "refused" rather than "failed" suggests that the General Counsel is accusing the Respondent of a refusal, an intentional act. However, during the hearing, the General Counsel explicitly disavowed, on the record, that he was accusing the Respondent of acting deliberately:

> MR. BROWN: Your Honor, with all due respect, I am not impugning the integrity of the Company. I am not saying this matter was willful. I don't know. But I am not making that allegation. I'm simply saying that it seems to me under the law, if it's subpoenaed, they have an obligation to produce it or to at least explain, you know, why it was not produced.
>
> In fact, the Respondent did explain why the audit tickets were not produced: Respondent does not make a practice of keeping them. This explanation is quite plausible and fully consistent with the record. Because the General Counsel is not accusing the Respondent of willful misconduct, and because the evidence certainly would not support such an accusation, I do not believe it appropriate to impose a sanction.

The General Counsel also argues that I should draw an adverse inference from the Respondent's failure to furnish the subpoenaed audit tickets. Although drawing an adverse inference may be characterized as a sanction, it also serves an evidentiary purpose by compensating for an unexplained deficit of documents or absence of a witness in circumstances which reasonably would create an expectation that the documents would be produced or a witness would be called. Thus, drawing an adverse inference might be appropriate even in some circumstances where there is no accusation of misconduct.

However, although misconduct is not a prerequisite to drawing an adverse inference, circumstances must be sufficiently abnormal to justify a departure from the bedrock principle that facts must be proven by evidence. No such circumstances exist here.

The Act does not require the Respondent to keep audit tickets and the record does not indicate that any law or regulation imposes such an obligation. Moreover, no evidence suggests that the Respondent has a practice of doing so. Considering the number of drink audits conducted, it would surprise me more if the Respondent did save such slips,

particularly in an era which relies on computer drives rather than shoe boxes to store information.

As quoted above, Stepp testified that when she discovered the discrepancy, she printed out Massey's "receipt that she would take to the table" and gave it to the manager. The Respondent's computer did preserve this data and a copy of that receipt is in evidence. In these circumstances, drawing an adverse inference would be unwarranted and I decline to do so.

Respondent previously had warned Massey that she should log the drink order in the computer before bringing the beverage to the customer. On October 22, 2011, which was well before the formation of the Union or the beginning of the union organizing campaign, Massey had received a written warning for failure to ring in drinks before serving them. The "Employee Counseling Report" noted that she and other servers had been "VERBALLY WARNED ABOUT THE CONSEQUENCES OF NOT RINGING IN DRINKS" and then repeated those consequences in capital letters: "IF THIS INSTANCE HAPPENS AGAIN WILL RESULT IN DISCHARGE."

Several employee witnesses referred this policy and the record leaves no doubt that Respondent took it seriously. Employee Daniel testified that management reminded employees of the policy once a week:

> Q. Okay. Did Will Lawrence ever give you a reminder, a verbal reminder after he told you what the policy was?
>
> A. Oh, yes. It was I mean every Friday or Saturday night we would gather together, all the servers, at the beginning of the shift, and that was given.

Massey admits that she violated the policy on the occasions in question. However, the General Counsel argues that the Respondent's real reason for discharging Massey was her union activity.

My analysis of whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Massey is governed by *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under the *Wright Line* test, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. The General Counsel meets that burden by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. See *Willamette Industries*, 341 NLRB 560, 562 (2004) (citations omitted). If the General Counsel makes this initial showing, the burden then shifts to the Respondent to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Id. at 563; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). See *El Paso Electric Co.*, above.

The record clearly establishes that Massey engaged in union activity which the Act protects. However, the credited evidence does not prove that Respondent knew about that protected activity at the time it discharged her. This evidence does indicate that Manager Will Lawrence had become aware of the union organizing campaign by sometime in May 2012, when he asked employee Ballard to keep him informed. However, that was after Massey's discharge.

As discussed above, I find that very little union activity took place during the first months of 2012 and tat Respondent was unaware of it. Certainly, Respondent knew that Kevin Ballew had come to the restaurant and created a disturbance, but it had no reason to believe that Ballew had formed a union and was trying to get Respondent's employees to join it.

My finding that Respondent did not know about Massey's union activity when it decided to terminate her employment necessarily means that such activity was not a motivating factor in the discharge decision. Therefore, the General Counsel has failed to make the initial showing required to shift the burden of proceeding to the Respondent. Accordingly, the Respondent need not show that it would have discharged Massey in any event, notwithstanding her union activity.

The General Counsel argues that Respondent's asserted motivation for terminating Massey's employment was pretextual, and that the existence of a pretext constitutes evidence of unlawful motive. To support the pretext argument, the government asserts that other employees, notably Michelle Reppe and Jennifer Kennedy, had violated the Respondent's "ring it before you bring it" rule twice without being discharged for the second violation.

The General Counsel adduced testimony from a key employee, Cheniece Porter, concerning drink audits she conducted. According to Porter, she reported to management on two separate occasions that Reppe had violated the rule but continued to work for the Respondent even after the second infraction.

Similarly, Porter testified that twice, she reported that Kennedy had broken the rule, but that Kennedy continued to be employed. However, apart from saying that she saw Reppe and Kennedy at work after their second violations, Porter did not know what discipline those employees had received.

Porter's testimony does not convince me that Respondent treated Massey disparately because it is unclear that Reppe and Kennedy broke the rule to the same extent. During her drink audits on April 19, 2012, Stepp observed Massey break the rule not once but twice. At one of the tables, Stepp counted six different glasses filled with either a soft drink or tea, rather than the six glasses of water indicated by the computer. As noted above, Massey already had received an earlier warning for failing to follow the rule.

As described above, the *Wright Line* framework imposes an initial evidentiary burden on the General Counsel, but this burden does not require the government to prove that an employer treated the employee more harshly than it had treated other employees in the same situation. Rather, *Wright Line* requires the General Counsel to establish that the employee's protected activities were a motivating factor in the employer's discipline decision. When an employee who had engaged in union or other protected activities receives harsher punishment than similarly situated employees who had not, it may be logical to attribute the disparate treatment to the protected activities.

However, drawing such an inference is logical only if the decision maker knew about the protected activities. Where, as

here, the credited evidence does not establish that Respondent knew about the employee's union activity when it discharged her, inferring unlawful motivation would involve more than drawing a conclusion from facts in evidence; it would require assuming a fact not in evidence.

In applying the *Wright Line* standard, the Board has held that as part of his initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 950 (2003) (citing *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997)). By "pretextual," the Board means a reason which is "either false or not in fact relied upon." *Rood Trucking Co.*, 342 NLRB 895 (2004).

The evidence clearly establishes that Massey violated the "ring it before you bring it" rule, so the reason given for her discharge cannot be deemed "false" in the sense of untrue. Was her violation of the rule "not in fact relied upon?" Because Massey did, in fact, break the rule, the most likely reason for her discharge is the stated one, that she broke the rule. Even were the evidence sufficient to establish that similarly situated employees had received more lenient discipline, that disparity only raises the possibility that another reason exists, but it does not establish what that reason might be. Disparate treatment would suggest that a respondent played favorites but it does not indicate way.

Favoritism can have many causes, most of which do not violate the Act. Assuming for the sake of analysis that the record is sufficient to establish that Reppe and Kennedy received more favorable treatment, the reason might have nothing at all to do with Massey's conduct. If the credited evidence established that Respondent had knowledge of Massey's union activities, then logically, there would but reason to suspect that disparate treatment had some relationship to that knowledge. But here, credited evidence does not establish knowledge

The General Counsel's brief also raises some arguments which go, essentially, to the "fairness" of the rule. For example, the government argues that Massey was particularly busy on this occasion and had little time to "ring in" the drink order before taking it to the table. However, the General Counsel cannot logically argue that because an action appears to be unfair, it must therefore be evidence of unlawful motive.

The General Counsel also argues that Massey eventually went back to the computer and entered the drink order, so the customer received a bill which included the price of the drinks and paid it. In this circumstance, the General Counsel contends, "there was no legitimate reason to discharge her."

Essentially, the government is arguing "no harm, no foul." Accepting that argument would require me to second guess the wisdom of the rule as written. However, the Act gives me no authority to substitute my judgment for the Respondent's or to sit as an arbiter of "fairness" in some abstract sense.

The General Counsel's brief also contends that the restaurant manager "failed to conduct a full and fair investigation." Although I do not agree with that conclusion, more fundamentally, the Act does not require an employer to conduct an investigation before imposing discipline.

The General Counsel further argues that the restaurant manager, Josh Walker, displayed no interest in ascertaining the facts at the time he told Massey she was discharged. The government's brief states:

> During the termination meeting, when Massey attempted to explain the events from the night before, Walker cut her off, told her he didn't believe her; and summarily terminated her. (Tr. 108.) Walker presumably had already concluded that Massey deliberately sought to cheat the Respondent out of the cost of the drinks, or that she was trying to get extra tips even though she was not accused of either infraction. [Tr. 373, 374, 376.] The April 19 termination document was clearly prepared prior to the meeting. [Tr. 107, 108.] [GC Exh. 7.]

However, uncontroverted evidence establishes that only one person, Respondent's chief executive officer, has authority to discharge an employee. Walker, the restaurant manager, only brought the news. Nothing about the termination meeting suggests that an unlawful reason was a motivating factor in the decision to discharge Massey.

For all these reasons, I recommend that the Board dismiss the allegations that Respondent's discharge of Massey violated Section 8(a)(3) and (1) of the Act.

Discharge of Autumn Ballew

Complaint paragraph 13(a) alleges that Respondent discharged employee Autumn Ballew on July 17, 2013. Respondent admits that it discharged Ballew, but states that it did so on July 16, 2013, rather than the next day. Respondent denies the related complaint allegations that the discharge of Ballew violated Section 8(a)(3) and (1) of the Act.

Ballew began work for Respondent as a hostess in 2007. For the last 2 years of her employment, she worked as a bartender.

In mid-July 2012, about a week before Ballew's discharge, a customer complained about her to the hostess on duty. The customer, Nicholas Soria, was a "regular" who came to restaurant two or three times a week. Soria credibly testified that he told the hostess "that your bartender keeps disappearing. She's not serving the customers. She keeps walking away, and I understand there's a long walk from the bar to the kitchen area to pick up food, but this was longer than usual."

The hostess with whom Soria spoke, Megan Scherbarth, corroborated his testimony:

> He was aggravated as to the service he was receiving. I asked him what had happened, and he said he was sitting there for a good amount of time and that she, Autumn, was texting on her phone rather than serving the customer, and that he didn't expect special treatment but he did expect to be treated as a normal customer and he didn't feel like he was. He felt like he was being ignored. He also asked me to tell my manager this.

Several days later, when Soria returned to the restaurant, he spoke with Manager Lawrence about the matter. According to Soria, he told the manager that Ballew "was disappearing from the bar area, taking her time serving the drinks and food."

Lawrence's testimony about this conversation is consistent with Soria's. Lawrence also identified a note he had made shortly after speaking with Soria. This note states, in part, as follows:

> On Wednesday 7/11 the bar guest, Nick, was back at the bar. I approached him and apologized for missing him the other day when he wanted to talk to me. He said it was no big deal he just had a problem. I told him it was a big deal to me and we walked outside on the patio to discuss his problem. He told me that every time Autumn works he and several of the guests are neglected. He said that she comes in gets on her cell phone, eats behind the bar and ignores the guests. I apologized to him for the bad service he had received and thanked him for bringing it to my attention.

During this same time period in early July 2012, Ballew was experiencing other work-related problems. She received a warning for being late to work and a warning for violating a work rule requiring employees with tattoos to cover them so that they weren't visible to customers.

Another bartender, Rebecca Mahan, testified that after Ballew attended a counseling session, she returned to the bar and said to some regular customers "Fuck Copper River." Mahan further quoted Ballew as saying, in the presence of customers, "I don't like this place. The managers are stupid. I don't know why I have to cover up my tattoo. It's not offensive."

For reasons discussed further below, I conclude that Mahan was a truthful witness and that her testimony is reliable. Crediting it, I find that Ballew made the comments Mahan attributed to her.

Additionally, it may be noted that the General Counsel has not contended that Ballew made these remarks in the course of protected activity. If, for example, Ballew had been discharged because of intemperate exclamations while on a picket line, the lawfulness of the discipline would need to be analyzed under a framework different from *Wright Line*. See, for example, *E. W. Grobbel Sons, Inc.*, 322 NLRB 304 (1996); *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). However, from all the circumstances, I conclude that Ballew was not engaged in union or concerted activity when she said "Fuck Copper River" and called the managers "stupid."

Mahan informed management about Ballew's outburst and also memorialized the incident in a two-page handwritten note which also described another problem with Ballew's work. According to Mahan, Ballew had a practice of giving customers free drinks. Mahan's note explained that Ballew's actions placed other bartenders, such as herself, in an awkward position when customers asked them for free drinks as well. Mahan's note continued as follows:

> Whenever working with her she often dispears [sic] from behind the bar for long periods of time when we are busy. She also takes smoke breaks in car during almost every shift. Last week she got written up for being late and having her tattoo showing. She came out of the office and behind the bar in a horrible mood saying stuff to regulars like, "fuck Copper River this place is stupid" and "the managers are horrible." Not only is it uncomfortable for me and other bartenders to work with but guests even regulars don't enjoy her constant complaining. It's not a positive environment for anyone, especially if they are new guests and hear her comments.

The note continued with more details of Ballew's conduct followed by Nahan's opinion that Ballew was "very unprofessional and has caused so much tension behind the bar." Mahan gave the note to Manager Lawrence.

The restaurant manager, Josh Walker, contacted Respondent's vice president and chief operating officer, Stephen Jackson. By telephone, they discussed her past instances of discipline, Soria's complaint against Ballew and the "Fuck Copper River" exclamation she made in front of customers.

Jackson then contacted Respondent's chief executive officer, Albert D. Angell. After a discussion, Angell directed that Ballew be discharged. The restaurant manager, Walker, then told Ballew that her employment was terminated. He also prepared an "Employee Counseling Report" memorializing the discharge. It included the following statement of reasons for the termination (with capitalization as in the original):

> AUTUMN IS BEING WRITTEN UP FOR THE FOLLOWING REASONS: SHE HAS BEEN WRITTEN UP IN THE PAST FOR BEING LATE, NO CALL NO SHOW 3/8,3/11, BAR SHORTAGES 12/1, BAR MISS RINGS 10/8, FAILURE TO CLOCK OUT 3/S, 3/7,4/2, FAILURE TO CLOCK IN OR OUT 3 OUT OF 4 SHIFTS ON PAYROLL 5/286/10.
>
> ON 7/11 A BAR REGULAR HAD A GUEST COMPLAINT ABOUT AUTUMN THE GUEST SAID ON A REGULAR BASIS THAT AUTUMN NEGLECTED HIM AND OTHER BAR GUEST. THE GUEST SAID SHE WOULD COME IN. TEXT ON HER CELL PHONE AND THE WOULD EAT IN FRONT OF THEM AND IGNORES THE GUEST.
>
> ON 7/6 AUTUMN WAS COUNCELED ON FAILURE TO CLAIM TIPS AND NOT CLOCKING OUT OR IN 3 OUT OF 4 SHIFTS AFTER SHE WAS COUNCELED AUTUMN GOES TO THE BAR TALKING TO REGULARS SAYING "FUCK COPPER RIVER THIS PLACE IS STUPID" AND THE MANAGERS HERE ARE HORRIBLE"
>
> WITH THESE LAST SEVERAL INSTANCES THAT AUTUMN HAS HAD AT COPPER RIVER GRILL WHICH HAS LEAD TO GUIDELINES FOR DISCIPLINE AND DISCHARGE #4 Insubordination to a manager or lack of respect and cooperation with fellow employees or guest. This includes displaying a negative attitude that is disruptive to other staff or has a negative Impact on guests.
>
> walker

When Ballew testified, she did not deny making the "Fuck Copper River" remark at work and in the presence of customers. The closest she came to such a denial is the following testimony, about her discharge interview with Manager Walker, which she gave on direct examination by the General Counsel:

> Q. And what did Mr. Walker say to you?
>
> A. He told me that I was being fired for being three minutes late one day, for showing my tattoo, for being caught on the patio smoking, and for a customer complaint.

Q. Did he say what the customer complaint was?

A. He said that I said "Fuck Copper River" in front of a customer.

Q. That you said "Fuck Copper River" in front of the customers?

A. Correct.

Q. Okay. And did he did you respond in any way?

A. Yes, I did.

Q. What did you say?

A. I explained the three minutes late, that I was sick that day. I was already at work on time; I was just sick in the bathroom, is why I clocked in late.

Q. Okay.

A. I explained that I had my tattoo covered up with bandaids. The smoking thing never happened, so of course I denied it. And then the customer complaint I knew nothing about.

Q. And did you deny making that statement?

A. Yes, I did.

As noted above, my observations of the witnesses leave me uneasy about the reliability of Ballew's testimony. An inaccuracy in her testimony, quoted above, adds to those doubts. According to Ballew, Walker said she was being fired for several reasons, including a "customer" complaint and explained that she had said "Fuck Copper River" in front of a customer. This testimony conflates two separate incidents.

The customer complaint did not concern language Ballew used but rather her absence from her work area and her failing to perform her job duties. That was entirely separate from her "Fuck Copper River" outburst. The discharge document prepared by Walker states that Ballew had made the "Fuck Copper River" remark on July 6, 2012, and that the customer had complained about Ballew texting on her cell phone rather than serving customers on July 11, 2012. Ballew's failure to recall the separate customer complaint concerning her failure to perform her job duties reinforces my impression that her apparent lack of interest in her work duties reflected a more general inattentiveness.

Beyond my general doubts about Ballew's testimony, I am skeptical about her claim that she told Walker that she did not make the "Fuck Copper River" statement. Her testimony on this point was unconvincing.

In the testimony quoted above, right after the General Counsel repeated, and Ballew confirmed, that Walker had accused her of saying "Fuck Copper River" in front of customers, the General Counsel asked Ballew what was her response. Ballew's answer to that question was not quite what I would have expected.

According to Ballew, during the discharge interview Walker cited a number of reasons for her termination. All of these work-related problems certainly were nontrivial, but the "Fuck Copper River" remark stands out as the elephant in the room, demanding attention and, if possible, denial. The remark's dramatic starkness and obvious impropriety would put it at the top of the list of accusations to be contested, and likely would evoke an immediate, emphatic denial by someone innocent. Yet when the General Counsel asked Ballew a nonleading question—"What did you say?"—her answer focused on the mice and ignored the elephant.

She testified that she told Walker that she really had not been late on a particular occasion but had been in the bathroom. She also told Walker that she had not violated the "no visible tattoo" rule because her tattoo had been covered with a bandage. Ballew further testified that "smoking thing never happened, so of course I denied it."

However, Ballew did not volunteer any similar testimony to the effect that the "Fuck Copper River" remark never happened and so she denied it. Ballew's brief answer to a follow-up question indicated that in the interview with Walker she had denied making the "Fuck Copper River" remark, but Ballew provided no specifics as to what she actually had said to Walker. Without such details, my doubts are undispersed.

Moreover, even if she did tell Walker that she had not made the "Fuck Copper River" remark, such a denial does not rise to the level of a denial under oath, on the witness stand. Ballew's testimony does not include an explicit, unequivocal denial that she made the "Fuck Copper River" remark in the presence of customers. Her September 6, 2012 affidavit, which is in evidence, also does not include such a denial.

Additionally, I credit the testimony of Rebecca Mahan that Ballew did say "Fuck Copper River" in an outburst in front of customers. At the time of hearing, Mahan no longer was working for Respondent. Although she had worked at Copper River Grill while in college, she had completed her education and had embarked on a nursing career. Thus, the outcome of this case would be of little consequence to her and unlikely to affect her testimony.

On cross-examination, Mahan was questioned about an error in her pretrial affidavit and about minor differences between her affidavit and other evidence. Her demeanor, and her willingness to admit the mistake, bolstered my conclusion that her testimony is reliable and should be credited. Therefore, notwithstanding any denial Ballew may have given Walker during the termination interview, I find that she made the statements and engaged in the actions which Mahan attributed to her.

Again, I will use the Board's *Wright Line* framework to determine whether Respondent's discharge of Ballew violated the Act, as alleged. As discussed above, under *Wright Line*, the General Counsel has the initial burden of establishing that employees' union activity was a motivating factor in the Respondent's taking action against them. He can satisfy his burden by showing that (1) the employees engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer bore animus toward the employees' union activity. *Vision of Elk River, Inc.*, 359 NLRB No. 5 (2012), citing *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3–4 (2011).

The government has proven that Ballew engaged in union activity. However, the credited evidence fails to establish that Respondent's officials who made the discharge decision knew she had engaged in any union or protected activity.

The three officials who recommended, made, and effectuated the decision to terminate Ballew's employment—Jackson, Angell, and Walker—all denied having any knowledge of Ballew's activities at this time. Based on my observations of

the witnesses, I conclude that their testimony is reliable and I credit it.

However, this finding, that the management officials who made the decision to discharge Ballew were unaware of her union activity, must be reconciled with another finding. Above, I found that Manager Lawrence learned about the union organizing drive sometime in May 2012. Respondent has admitted that Lawrence is its supervisor and agent. Applying agency law principles, the Board ordinarily would attribute to Respondent the knowledge which Lawrence possessed.

Board precedent does not require direct evidence that the manager who took an adverse employment action against an employee personally knew of that employee's union activity. Rather, the Board imputes a manager's or supervisor's knowledge of an employee's union activities to the decision maker, unless the employer affirmatively establishes a basis for negating such imputation. *Vision of Elk River, Inc.*, above.

Thus, in *State Plaza Hotel*, 347 NLRB 755 (2006), a supervisor, Aouli, left his employment with a company just a day after Aouli had learned about an employee's protected activity. Nonetheless, the Board imputed Aouli's knowledge to the higher-level manager, Rish, who made the decision to discharge the employee. The Board stated:

> It is true, as the dissent notes, that the Board does not impute knowledge of protected activity in the face of credited contradictory testimony. However, for whatever reason, the Respondent here chose not to present Rish to testify that he did not receive word from Aouli.

347 NLRB at 757.

In the present case, unlike *State Park Hotel*, the Respondent's chief operating officer and its chief executive officer—the management officials who, respectively, recommended and authorized Ballew's discharge—took the witness stand and denied having knowledge of her protected activities. The store manager who discharged Ballew also denied knowing about her union activities at the time.

Based on my observations of the witnesses, I have concluded they were telling the truth and have credited their testimony. Therefore, I do not impute Lawrence's knowledge of the union organizing drive, or of Ballew's role in it, to the Respondent or to its officials who decided to terminate Ballew's employment.

Frankly, I do not find it surprising that Lawrence would not communicate to higher levels what he had learned about the union organizing drive. If the effort had appeared to have had any realistic chance for success, I suspect that Lawrence would have let his superiors know about it. However, Ballew had alienated some of her fellow employees by doing things which made their work more difficult, such as "disappearing" while on duty, which meant that other employees had to finish what she had left undone. Her influence on other employees might well have seemed nil.

Moreover, the record suggests that both in May 2012, when Lawrence learned about it, and also in mid-July, when Ballew was discharged, the union organizing effort had about as much energy and visibility as a bear hibernating in a cave. The penultimate signature on the union petition bore the date March 20, 2012. More than 3 months then elapsed before the final signature on July 1, 2012. Of course, the dates of signatures on the petition hardly provide an exact measure of union activity, but other evidence does not contradict the impression that such activity had slumped into dormancy well before Ballew's discharge.

In sum, crediting the testimony of Jackson, Angell, and Walker, I find that they were not aware of Ballew's union activities at the time of the decision to discharge her. Therefore, I conclude that the government has not proven this element which is necessary to carry its initial burden.

The *Wright Line* analysis therefore ends at this point, with the conclusion that the General Counsel has not proven that Respondent's discharge of Ballew violated Section 8(a)(3) and (1) of the Act. However, I would note that the credited evidence also fails to establish the third element which the General Counsel must prove, that Respondent bore antiunion animus towards Ballew.

The General Counsel's brief argues that Respondent treated Ballew more severely than two other employees. Although the *Wright Line* analysis ended before the point at which evidence of disparate treatment would but evaluated, it may be helpful to address the General Counsel's argument briefly. The General Counsel's brief stated:

> A. Ballew . . . stated that she was present when a kitchen employee, whose name she knew only as Drago, got into a loud heated argument with a manager during 2012. [Tr. 167–168.] She stated that the two men cursed each other back and forth and were so loud that customers even complained about the profanity. [Tr. 167–168.] She was at the bar when this incident took place. The bar is approximately 20 to 30 feet from the kitchen area where the confrontation took place. She stated that Drago was not disciplined as a result of this incident. [Tr. 168.] She further testified that she had never received a complaint about using profanity in the presence of a customer. (TR 169) To the contrary, the evidence shows that in addition to the Drago incident, Respondent has allowed at least one other employee to continue their employment after use of profanity in such a manner. [GC Exh. 16.] In this regard, employee Ashley Albrecht called a customer an "asshole" and the profanity was overhead by a manager, yet she was only issued a written warning. [Tr. 356, 357.] [GC Exh. 16.] Walker admitted that while the offending comment was heard by a manager, it was loud enough that it could have been heard by a customer. (TR 357358) Walker stated that Albrecht was merely issued a written warning and was not discharged. [Tr. 357, 359.] [GC Exh. 16.]

Although the brief refers to an employee named "Drago," the name appears as "Draco" in the transcript of Ballew's testimony and I will follow that spelling. Ballew could not remember the name of the manager with whom Draco reportedly argued.

Because of my doubts about the reliability of Ballew's testimony, I am reluctant to take her report of the Drago incident at face value. As discussed above, her testimony tended towards the imaginative and the melodramatic, which raises some doubt about how loud and vehement the argument really had been. It also concerns me that Ballew, who had been

working at the restaurant for at least 4 and possibly 5 years when this shouting match supposedly occurred, could not remember the name of the manager who participated in it. An employee would be particularly likely to remember the name of a person in authority who loudly cursed another worker because that manager potentially could aim his venom in the employee's direction. The mind instinctively would file such information in the "watch out for" category and hold onto it.

However, even if the incident took place as Ballew described, the participation of the supervisor in the shouting match made it a much different situation from Ballew's outburst in front of customers. Moreover, and quite significantly, Ballew did not testify that Draco made any comment equivalent to "Fuck Copper River," disparaging the restaurant itself in front of customers.

As to the Albrecht matter, I likewise am not persuaded that the situations are similar. Calling a customer a vulgar epithet in front of a manager is not the same as using an even more offensive expression to refer to the employer in the presence of customers.

Moreover, in Ballew's case, a number of job-related performance problems came to management's attention at the same time. The two most serious—her neglecting customers to text on her cell phone, without even concealing herself from the customers' view, and her "Fuck Copper River" remark—came within 5 days of each other. Ballew had demonstrated not a single instance of unsatisfactory performance but an ominous pattern of such incidents.

Thus, even if the credited evidence established that Respondent's management knew about Ballew's protected activities, the evidence cited to establish disparate treatment is insufficient to prove antiunion animus. No other credited evidence indicates that animus was a motivating factor in the decision. Accordingly, the General Counsel has not carried his initial burden. I recommend that the Board dismiss the allegations that Respondent unlawful discharged Autumn Ballew.

There is one other matter related to Ballew's discharge which should be addressed. In the General Counsel's posthearing brief, the government moved to amend the complaint to allege another theory regarding why Respondent's discharge of Ballew violated the Act. The brief states:

> During the hearing, Walker acknowledged that A. Ballew was discharged pursuant to work rule 4, cited above. [Tr. 354.] [GC Exh. 2.] As detailed above, work rule 4 is overly broad and, therefore, violative of Section 8(a)(1) of the Act. In this connection, the Board has determined that where such an overly broad rule is applied to restrict the exercise of Section 7 rights, any discipline issued pursuant to such a work rule is similarly violative of the Act. See *Ridgeview Industries*, 353 NLRB 1096, 1114 (2009).
>
> Respondent's work rule 4 prohibits "a negative attitude that is disruptive to other staff or has a negative impact on guests." [GC Exh. 2.] On its face, the rule is subject to a reasonable interpretation by employees that it prohibits Section 7 activities. . . . In its discharge notice to A. Ballew, Walker wrote that in violating work rule 4 she displayed a "negative attitude that is disruptive to other staff or has a negative impact on guests." [R. Exh. 10.] This wording clearly refers to the prohibition of protected activity and is violative of Section 8(a)(1) of the Act. Respondent's discharge of A. Ballew, pursuant to an unlawfully overbroad work rule, is therefore violative of Section 8(a)(3) of the Act.
>
> To be sure, A. Ballew's termination pursuant to work rule 4 was not specifically alleged in the Consolidated Complaint as it is merely another theory of a violation. However, in an abundance of caution, Counsel for Acting General Counsel asserts that A. Ballew's termination pursuant to the overly broad rule is closely related to her termination which is alleged in the Consolidated Complaint. Moreover, the matter was fully litigated, and, accordingly, *we move to amend the Consolidated Complaint* at this time to include the allegation that A. Ballew was terminated pursuant to Respondent's overly broad work rule 4, as an independent violation of Section 8(a)(1) and (3) of the Act. [Emphasis added.]

First of all, the government should take more care to describe the facts correctly. The work rule in question does not prohibit "a negative attitude," as the General Counsel's brief states, but rather prohibits *displaying* a negative attitude, and it prohibits only such displays that are disruptive to staff or have a negative impact on guests.

Second, the General Counsel's brief cites *Ridgeview Industries*, above, a case which is not a valid precedent because decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, above.

Third, under extant precedent, the rule in question is lawful as written. See *Lutheran Heritage Village-Livonia*, above.

Fourth, the rule's obvious purpose is to prevent incivility and rudeness to other employees and guests. To argue that this rule cannot be applied when an employee says "Fuck Copper River" in the presence of employees and guests is absurd.

Fifth, Section 102.17 of the Board's Rules and Regulations provides that, at the hearing stage, complaint may be amended by the administrative law judge *upon motion*. Section 102.26 provides that a motion shall become part of the record. However, the record, as defined in Section 102.45(b), does not include briefs to the administrative law judge.

A motion should be filed, and served, as a separate document, to place the other parties on clear notice and afford them opportunity to respond. Finding it lacking in merit, I deny the General Counsel's motion to amend the complaint.

Complaint Paragraph 13(b)

Complaint paragraph 13(b) alleges that beginning about May 2012, Respondent? the work hours of and provided fewer closing shifts to its employee Ballew. The complaint elsewhere alleges that this alleged decrease in work hours and closing shifts violated Section 8(a)(3) and (1) of the Act. Respondent denies these allegations. The General Counsel's brief described these allegations, in part, as follows:

> After being observed with K. Ballew and Massey on the patio as they solicited support for the Union from another employee, A. Ballew stated she noticed a change in Lawrence's behavior toward her. [Tr. 147.] She testified that

> he became more hostile toward her and refused to respond to her when she had questions. [Tr. 147.] More significantly, she stated that her work hours were reduced and she received fewer closing shifts. [Tr. 147.] This reduction in hours and closing shifts resulted in A. Ballew receiving less compensation. [Tr. 147.] In this regard, A. Ballew stated that, starting in May, her compensation in wages and tips was reduced from approximately $300.00 per week down to about $40.00 per week. [Tr. 148.]

To establish these allegations, the government relies on Ballew's testimony and time records showing the hours she worked. However, this evidence fails to prove the alleged discrimination because management based its scheduling decisions on when Ballew said she would be available to work and she had reduced her availability during this time period.

When Respondent cross-examined Ballew, she admitted that she had informed management that she wouldn't be available for work during certain times, and those periods were blacked out on the scheduling sheets. Examining those sheets, she identified instances in which she wasn't scheduled for work after informing management that she would not be available for work at those times, and instances in which she was scheduled for work consistent with her availability:

> Q So on Friday, which would be a normal work shift, you requested to be off, correct?
>
> A. I did.
>
> Q. And on Saturday which would be your requested shift, you requested to be off?
>
> A. Yes.
>
> Q. Sunday, you requested to be off?
>
> A. Yes.
>
> Q. All right. The following week on Tuesday 6/12, which would be a normal work schedule shift, you requested to be off, correct?
>
> Correct.
>
> Q. And on Friday 6/15, which would be a normal work shift for you, you requested to be off, didn't you?
>
> A. Correct.
>
> Q. And on Saturday, which would be a normal shift that you would work, you requested to be off, correct?
>
> A. I was on vacation that whole week, yes.
>
> Q. All right. And on Sunday, which would be a normal shift, you requested to be off?
>
> A. Yes.
>
> Q. All right. The following week, 6/19, Tuesday, you're scheduled for a closing shift, correct?
>
> A. That's correct.
>
> Q. And then you're not scheduled on Friday, but you're scheduled on Saturday, correct?
>
> A. Correct.
>
> Q. Then the next week, 7/2, do you see this?
>
> A. Uhhuh.
>
> Q. And on Tuesday, 7/3, you're scheduled for your Tuesday shift, correct?
>
> A. Uhhuh.
>
> Q. And you're scheduled for your Friday shift, correct?
>
> A. Correct.

The manager in charge of the restaurant, Josh Walker, credibly testified that Ballew "would constantly change her availability for work." As noted above, my observations of the witnesses lead me to conclude that Walker's testimony is reliable. Moreover, in view of other evidence concerning Ballew's work behavior, the testimony is quite plausible. Based on Walker's credited testimony, I find that Ballew often changed the dates and times on which she would be available for work.

Section 8(a)(3) of the Act prohibits an employer from discrimination that encourages or discourages union membership. To establish a violation, the government must both plead and prove an act of discrimination "in regard to hire or tenure of employment or any term or condition of employment." See 29 U.S.C. § 158(a)(3). Here, the relevant term or condition of employment is being scheduled to work or in being scheduled to work a closing shift.

In a typical case, an employee's availability for work is simply presumed and does not become an issue. In the present case, it cannot be taken for granted. Credited testimony establishes that Ballew changed her availability often. However, the General Counsel has not identified a particular instance in which the evidence establishes that Ballew was available for work but was not placed on the schedule. The General Counsel's brief states:

> With respect to A. Ballew's loss of work hours and loss of closing shifts, the documentary evidence clearly demonstrates the factual basis for this allegation. [GC Exh. 12.] In this regard, a comparison of "Amber's" and A. Ballew's scheduled shifts, during the period of May through July, shows that A. Ballew received barely half the hours of her junior counterpart. [Tr. 149, 154.] [GC Exh. 12.]

This argument does not take into account the fact, established by reliable evidence, that Respondent scheduled bartenders for work based upon their stated availability for work. Making a meaningful comparison would require not only evidence about the information Ballew gave management concerning her availability for work, but also the information which "Amber" provided management concerning her own availability for work. In the absence of such information, it cannot even be concluded that the Respondent discriminated in scheduling, let alone the reason for or legality of such a decision.

Here, the General Counsel has not proven any instances of discrimination. Absent such an adverse employment action, any discussion of motivation takes the issue into the theoretical realm of philosophy, where the rarified air gives judges altitude sickness.

In view of my conclusion that the government has failed to prove any instance of discrimination, any further discussion may well be superfluous. Nonetheless, one other argument raised by the General Counsel might warrant discussion. The General Counsel's brief states, in part, as follows:

> The evidence reflects that when A. Ballew complained about her work hours, Lawrence responded by stating, "Well, why

> don't you just quit?" [Tr. 156.] This threatening and coercive statement proves the nature of Respondent's hostility toward A. Ballew's union involvement and evidences its unlawful motive and actions.

However, Ballew's testimony concerning the supposed "why don't you just quit" remark does not indicate that it occurred within any discussion of union activity or in any context which would suggest a reference to such activity. Moreover, I do not credit Ballew's testimony but instead conclude, based on Lawrence's credited denial, that he never made such a statement. In other respects, no credible evidence suggests that antiunion animus entered into any decision regarding Ballew's work schedule.

For all of these reasons, I recommend that the Board dismiss the unfair labor practice allegations related to complaint paragraph 13(b).

Complaint Paragraph 13(c)

Complaint paragraph 13(c) alleges that in about June 2012, Respondent issued verbal warnings to its employee Ballew. Respondent denies this allegation.

The General Counsel's brief could be clearer in identifying the conduct described in this complaint paragraph. It appears that the government is referring to one of the reasons which Walker gave, during the discharge interview, for the decision to terminate Ballew's employment. Ballew's testimony about this interview, quoted above, included that Walker "told me that I was being fired for being three minutes late one day." The following passage in the General Counsel's brief leads me to believe that complaint paragraph 13(c) relates to this incident:

> Likewise, the issuance of a verbal warning to A. Ballew for being late also violates the Act for several reasons. First, the evidence fails to show that A. Ballew was even aware that her discussion with Lawrence constituted a formal verbal warning under the Respondent's progressive disciplinary procedure. Second, to the extent that Respondent relied on the alleged verbal warning as a factor supporting her later termination, without specifically informing her that the warning existed, demonstrates Respondent's overall unlawful motive and animosity toward A. Ballew. Finally, that A. Ballew was present at the restaurant on the day in question and had only clocked in three minutes late because she stepped away to use the restroom, demonstrates that Respondent was grasping at straws and looking for reasons to terminate her employment. In this regard, to verbally warn an employee, who is actually present at the facility, about her failure to timely clock in, when the employee was simply using the restroom, clearly evidences the unreasonableness of the Respondent's actions and direct animus toward A. Ballew. Notably, Respondent failed to present evidence that other employees have been verbally warned under similar circumstances.

The General Counsel misapprehends the situation. As part of the discharge interview, Walker reviewed Ballew's past work performance, which included this incident. Certainly, it was minor compared to the other problems, but it formed part of an all too consistent and all too persistent pattern. It was one dot among many which, when connected, created a picture of an employee whose performance was sliding from unsatisfactory to worse than unsatisfactory.

Moreover, Ballew admitted that she had, in fact, been late on the day in question. Warning an employee who is late that she should arrive on time does not violate the Act.

Therefore, I recommend that the Board dismiss the unfair labor practice allegations related to complaint paragraph 13(c).

REMEDY

The record establishes one violation that a supervisor requested that an employee keep him informed of developments in the union organizing campaign. This violation must be remedied by posting the notice to employees attached hereto as appendix.

The General Counsel seeks an order requiring a management official to read the Notice out loud to employees. This is an extraordinary remedy reserved for extraordinary violations. *Chinese Daily News*, 346 NLRB 906, 909 (2006). The violation found here is not one of them. Accordingly, the usual posting of the Notice will suffice.

CONCLUSIONS OF LAW

1.The Respondent, Copper River of Boiling Springs, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. Respondent violated Section 8(a)(1) of the Act when its supervisor and agent asked an employee to keep him informed about the union organizing drive.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Respondent, Copper River of Boiling Springs, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking employees to keep it informed about employees' union and protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Within 14 days after service by the Region, post at its facilities in Greenville, South Carolina, copies of the attached

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these 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.

notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). 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 the Respondent at any time since May 1, 2012. *Excel Container, Inc.*, 325 NLRB 17 (1997).

[2] If this Order is enforced by a judgment of the 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."

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

Dated Washington, D.C. September 25, 2013

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 interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT ask any employee to keep us informed about employees' union activities or other protected concerted activities.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

COPPER RIVER OF BOILING SPRINGS, LLC