

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

BASHAS' INC.

and

**UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 99**

and

**UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL**

Case 28-CA-21435

Case 28-CA-21501

Case 28-CA-21590

28-CA-21592

28-CA-21639

28-CA-21640

28-CA-21646

28-CA-21676

28-CA-21739

28-CA-21785

28-CA-21803

**BASHAS' INC.'S
ANSWERING BRIEF TO THE GENERAL COUNSEL'S
CROSS-EXCEPTIONS AND
BRIEF IN SUPPORT OF CROSS EXCEPTIONS**

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STATEMENT OF THE CASE

In response to Bashas' Exceptions Brief, the General Counsel filed cross-exceptions to six of the ALJ's findings regarding allegations in the Complaint: (1) the ALJ's finding that Bashas' did not unlawfully suspend baler Ramon de la Torre on October 10, 2007; (2) the ALJ's finding that Bashas' did not unlawfully interrogate de la Torre on October 15, 2007; (3) the ALJ's finding that Bashas' did not unlawfully threaten de la Torre on October 23, 2007; (4) the ALJ's finding that Bashas' did not unlawfully ban Union agents from Bashas' Represented Stores for representational purposes; (5) the ALJ's finding that Bashas' did not unlawfully disparage the Union by calling night crew employees at Store 153 the "night crew infestation;" and (6) the ALJ's finding that Bashas' did not unlawfully solicit grievances from, and promise benefits to, baler employee Arturo Mendoza. Each of those exceptions should be rejected because the ALJ's findings were supported by the evidence and applicable Board law.¹

Additionally, the General Counsel excepted to the ALJ's decision to issue three separate notices to each of the three distinct groups of employees at issue and the ALJ's conclusion to award simple interest on the backpay amount. However, the ALJ followed Board precedent both in ordering three separate notices limited to the twelve locations at issue and ordering simple interest on backpay. Accordingly, in the event the Board determines that Bashas' violated the Act as alleged, the Board should sustain the ALJ's conclusions regarding a limited remedial posting and simple interest on the backpay award.²

¹ For ease of reading, Bashas' lists the exceptions in the order they are addressed in the General Counsel's Brief in Support of Cross-Exceptions, rather than in the order they are listed in the General Counsel's Cross-Exceptions.

² Throughout this brief, Bashas' has included the following citations: ALJ Decision ("D"); the Reporter's Transcript of Proceedings ("RT"); Respondent Exhibits ("R. Ex."); and General Counsel Exhibits ("G.C. Ex.").

ARGUMENT

I. EXCEPTION I: DE LA TORRE'S OCTOBER 10, 2007 SUSPENSION (COMPLAINT ¶¶ 6(K)-(L)).

A. Background Facts.

1. **Incidents Leading to Bashas' Decision to Discipline de la Torre.**

On October 10, 2007, Dry Shipping Supervisor Dennis Connors informed Dry Receiving Manager for the P.M. Shift Mel Kelley that the previous day he had observed de la Torre using another employee's number to access the Battery Maintenance System ("BMS") – in violation of the Company's rules – to change a battery on a stand-up forklift. [Kelley, RT at 191:2-22; 2739:10-13.] Kelley went to investigate the matter because de la Torre had not been trained or authorized to use a stand-up forklift, and should not, therefore, have been using the BMS. [Kelley, RT at 192:22-193:12; 2739:14-15.]

The BMS is a machine that authorized employees can access by using a computer; it is used when changing batteries only on stand-up forklifts. Accordingly, in 2007, only stand-up forklift operators were trained and authorized to operate the BMS.³ [Kelley, RT at 191:12-18; 2740:12-2741:2; 2743:6-13.] To change a battery on a stand-up forklift, the employee enters his personal code into the computer located on the BMS machine, and then uses a scanner to read a bar code on both the forklift and the dead battery he is removing (for identification and tracking purposes). [Kelley, RT at 2742:2-14.] The BMS then "directs" the employee to place the dead battery into a designated charging location and identifies which charged battery the employee should take to install in the stand-up forklift. [Kelley, RT at 2742:14-2743:5.]

On Kelley's way to speak with de la Torre, a lead mechanic at the DC, Fernando Estrada, saw Kelley and showed him a key that he had found in a burned-out pallet jack motor. [Kelley,

³ The BMS system is not used to change the batteries in sit-down forklifts. In 2007, however, employees used a battery changing machine somewhat similar to the BMS to change batteries on pallet jacks. [Kelley, RT at 2788:21-2790:5.]

RT at 192:2-4; 2739:15-18.] Kelley recognized the key as the baler lock key. [Kelley, RT at 192:7-9.] Kelley proceeded to the baler dock, and with Estrada present, asked de la Torre to change a stand-up forklift battery using the BMS. [Kelley, RT at 192:10-15; de la Torre, RT at 831:25-832:6.] De la Torre just “stood there” – presumably because he did not know how to start the process. [Kelley, RT at 192:16-19; 2739:1-2740:8.] Estrada then helped de la Torre start the process by entering his (Estrada’s) member code and allowed de la Torre to proceed. [Id.] Kelley stopped de la Torre immediately when he saw that de la Torre was about to remove the battery without first unplugging it, which would have damaged the equipment. [Kelley, RT at 192:20-22.]

At that point, de la Torre went to a stand-up forklift and started it using a “G-force” key (an individualized magnetic card key given only to employees who have been authorized to operate the stand-up forklifts). [Kelley, RT at 192:25-193:2; Grano, RT at 2675:23-2677:2.] A G-force key was necessary to start any stand-up forklift because Bashas’ had equipped all stand-up forklifts with the G-force devices in January 2007. [Id.]

The G-force System was a tool designed to reduce accidents and increase safety by helping the Company track and collect employee-specific data for stand-up forklift operators. [Kelley, RT at 164:14-25; Schrade, RT at 1619:3-12; Grano, RT at 2675:16-23.] The System has three main components: (1) a G-force key, which is the magnetic card key used to start the stand-up forklift and is read by the G-force computer to identify which employee is operating the forklift; (2) the G-force computer and equipment installed on each stand-up forklift; and (3) another G-force key assigned only to supervisors and managers.⁴ [Mendoza, RT at 548:22-549:8; de la Torre, RT at 812:11-24; Schrade, RT at 1619:3-12; Grano, RT at 2675:1-7; 2676:1-17; 2693:24-2696:2.] The G-force equipment installed on the stand-up forklift collects data on “hits,” which occur whenever the stand-up forklift hits something, such as in an accident, or

⁴ Art Mendoza testified that only the authorized stand-up forklift drivers were assigned and allowed to use G-force keys. [RT at 498:4-499:3; 540:4-541:25; 548:22-549:8.]

bumps into something at an inappropriate speed. [Grano, RT at 2675:13-23.] A strong enough hit can shut down or disable the stand-up forklift, requiring the attention of a supervisor. [Schrade, RT at 1619:3-12; Grano, RT at 2676:10-17.] Supervisors then use their G-force keys to unlock the stand-up forklift and collect data from the incident. [*Id.*]

When Kelley asked de la Torre about how he had obtained the G-force key, de la Torre said that he had found it in the trash. [Kelley, RT at 193:2-3.]

2. The Company's Decision to Suspend de la Torre.

Kelley met with Distribution Center Human Resources Manager Steve Schrade to discuss the issues concerning de la Torre's misconduct, namely, that: (1) de la Torre was operating a stand-up forklift with a key he found in the trash; (2) de la Torre used the BMS without authorization and used another member's number to access the machine; and (3) de la Torre was a lead baler responsible for the baler key that was found in a burned pallet jack motor. [Kelley, RT at 193:13-19; 2753:8-2754:6; Schrade, RT at 1618:2-1619:18.] Schrade, knowing that de la Torre was a Union supporter (and that the Union was likely to file a charge over any discipline), advised Kelley to carefully research the facts and recommend discipline consistent with past practice for comparable offenses. [Schrade, RT at 1619:19-1620:-9.]

Kelley advised Schrade that he had suspended an order selector (Michael Joyner) for two days in May 2007 for operating a stand-up forklift without proper training and authorization. [Schrade, RT at 1620:10-20; Kelley, RT at 2754:8-17; R. Ex. 104.] Kelley also reported that Jesse Medina, the employee who had provided de la Torre with a number to access the BMS, had been reminded that he was not to allow other employees to use his access number to use the equipment (documented in a Note to File). [Schrade, RT at 1620:10-20; G.C. Ex. 83.] Lastly, Kelley reported that de la Torre *knew* that he was responsible for reporting the baler key was missing because de la Torre had previously been instructed to make such reports and, in fact, had done so in the past. [Schrade, RT at 1620:21-1621:8.]

Schrade concluded that the evidence regarding de la Torre's unauthorized use of the forklift warranted a suspension as consistent with past practice. [Schrade, RT at 1621:8-10.] Taking into consideration de la Torre's other misconduct, as well as de la Torre's position as a lead baler, Schrade and Kelley determined that a 1.5 day suspension and Decision Making Leave ("DML") were appropriate.⁵ [Kelley, RT at 193:5-25; Schrade, RT at 1621:21-1622:2.]

3. October 10 Meeting with de la Torre.

Sometime in the afternoon on October 10, de la Torre met with Kelley, David Lizarraga (the lead baler), and Denise Sierra (shipping clerk). [de la Torre, RT at 835:22-836:11.] Kelley spoke in English and Sierra translated for him. [de la Torre, RT at 836:12-17.] Kelley informed de la Torre that he would be suspended, explained the basis for the suspension, and gave de la Torre the Member Conference Memorandum, which reflected his suspension. [Kelley, RT at 166:2-170:24, de la Torre, RT at 842:15-22; 854:4-11; 911:5-912:11; G.C. Ex. 2, at 1-2.] De la Torre admitted that he found the G-force key in the trash. [de la Torre, RT at 836:19-837:2.] He further claimed that he used the stand-up forklift only when the pallets got "bunched up" and that he had not used it with any "bad intentions." [de la Torre, RT at 837:20-838:3.] Kelley explained that de la Torre's "intentions" did not justify the unauthorized use, and de la Torre said that he understood. [de la Torre, RT at 838:3-5.] Although Lizarraga was sitting in the same room, de la Torre testified that he did not, at any time during that meeting, say that Lizarraga had given him permission to use the key. [de la Torre, RT 950:7-952:6; Kelley, RT at 2752:17-24.]

⁵ According to Company policy, as stated on the DML form, a DML is an opportunity for an employee to accept responsibility for his/her misconduct. [RT at 1625:10-13, 1626:2-14; G.C. Ex. 2 at pp. 3-4.] It is imperative for an employee who receives a suspension/DML to submit an appropriate response (acknowledging the misconduct) to continue employment. [*Id.*] It is undisputed that de la Torre prepared the handwritten responses on the Member Conference Memo [G.C. Ex. 2 at pp. 1-2] and the DML Form [G.C. Ex. 2 at pp. 3-4] after the October 10 meeting. [RT at 844:16-845:3; 853: 7-11; 912:8-11.]

Kelley and Sierra then provided de la Torre with the DML form and explained the DML process. [de la Torre, RT at 842:8-843:5; 855:1-14; 911:5-912:11; G.C. Ex. 2 at pp. 3-4.] De la Torre left the meeting knowing that he had to complete the DML forms and “explain to Bashas’ that [he] accepted ownership of the problem” that caused his suspension, and that he “had to provide a statement of [his] recommitment to [his] job, [his] coworkers and to Bashas’.”⁶ [de la Torre, RT at 813:2-10.] The Union was not mentioned during the meeting. [de la Torre, RT at 911:9-14.] De la Torre was suspended for the remainder of his shift on October 10, and his next scheduled workday, which was October 13. [de la Torre, RT at 876:8-877:3.]⁷

B. The ALJ Properly Found that Bashas’ Did Not Unlawfully Suspend De La Torre On October 10.

The ALJ properly found that Bashas’ met its burden under *Wright Line* of proving that it would have disciplined de la Torre even in the absence of any protected activity. [D at 71:25-49.] De la Torre admitted using the stand-up forklift and that he found the G-force key in the trash. [de la Torre, RT at 832:8-20; 836:8-837:2; 837:18-838:5; 846:12-848:5; 851:11-23; 856:6-857:12; 860:6-862:1; 919:1-23; Schrade, RT at 1621:14-20; G.C. Ex. 2 at pp. 2-4, 6, 8.] Moreover, as the ALJ properly found [D at 71:30-36], when de la Torre found the G-force key in the trash, he knew he was not authorized to use a stand-up forklift or the G-force key (which must be used to start it):

- The G-force policy was implemented in early 2007. [de la Torre, RT at 812:11-813:11; 921:6-922:18; Grano, RT at 2675:23-2677:2.]
- In early 2007 de la Torre declined an offer from Kelley to become an authorized stand-up forklift driver. [de la Torre, RT at 942:7-20; Kelley, RT at 2749:2-2750:6.]

⁶ De la Torre testified that Kelley gave him some documents so he could write, in his own handwriting, his opinion “about what had been happening there.” [RT at 842:18-22.]

⁷ While the Complaint alleges de la Torre received a three-day suspension, the General Counsel stipulated at trial that he received only a 1.5 day suspension. [RT at 877:4-12.]

- De la Torre testified that he did not use the stand-up forklifts as often after the G-force equipment was installed because he did not have a G-force key. Before the G-force system was installed he used the stand-up forklifts two to three times per week. [RT at 810:6-812:6] Afterwards, he used them one or two times every two to three weeks. [de la Torre, RT at 906:9-909:3.] After he found the G-force key in the trash, he claimed he returned to using them two to three times per week. [RT at 815:12-816:9.]
- De la Torre admitted that the Company never assigned him a G-force key. [RT at 812:3-813:13; 905:6-11; 922:16-18.]
- Supervisor Juan Grano provided un rebutted testimony that in September 2007 he warned de la Torre that he should not use the stand-up forklifts without authorization. [RT at 2684:4-2685:6.]
- De la Torre was never trained or authorized to operate the stand-up forklift. [Kelley, RT at 203:5-6; Grano, RT at 2681:19-2683:17.] In fact, *no* baler employee was ever trained or authorized to use a stand-up forklift. [Grano, RT at 2704:1-9; Kelley, RT at 2741:12-14.] The training de la Torre attended in early 2007 training was a general overview program, titled “Powered Industrial Equipment,” which all DC employees must attend. [de la Torre, RT at 819:3-820:21; 921:10-922:9; Flores, RT at 2643:12-2644:20; Grano, RT at 2697:24-2698:17; 2745:16-2747:24; R. Ex. 101.]
- De la Torre’s testimony that a lead man, Lizarraga, told him to keep and use the G-force key is not credible. He did not make that claim until submitting his DML response on October 15, despite Lizarraga being present on October 10 when Kelley met with de la Torre and told him he was being suspended, in part, because of his use of the G-force key. [de la Torre, RT 950:7-952:6; Kelley, RT at 2752:17-24.] Moreover, Kelley spoke to Lizarraga, and he denied telling de la Torre to keep and use the key. [Kelley, RT at 2752:17-2753:17.]

1. De la Torre violated Company policy by using the BMS without authorization.

On October 9, de la Torre used a BMS to change the battery on a stand-up forklift. [Kelley, RT at 191:2-22; 2739:10-13; de la Torre, RT at 826:21-829:25.] De la Torre testified that, after the BMS system was installed, employees needed a “personal number,” which the Company had not given him, to change stand-up forklift batteries. [RT at 825:20-826:20.] De la Torre testified that he was able to use the BMS on October 9 only after another member allowed de la Torre to use his (the other member’s) personal code. [RT at 826:21-828:23.]

2. The Company reasonably concluded that de la Torre violated Company policy by failing to report the missing baler key.

De la Torre admitted that he had worked as the lead baler on October 7 and 8, the day before a DC mechanic discovered the baler key in the burned pallet jack motor. [RT at 909:14-23.] De la Torre testified that lead balers were responsible for securing the baler area before and after every shift, and during breaks and lunches. [RT at 901:12-21; 902:3-9; 902:25-903:5.] De la Torre knew that as a lead baler he was responsible for reporting the baler key as missing, since he had previously been instructed to do so – and, in fact, had done so in the past. [Schrade, RT at 1620:21-1621:8.] Because de la Torre was the lead baler on October 7 and 8, and the key was discovered (in the pallet jack motor) the following day, the Company reasonably concluded that de la Torre knew or should have known its key was missing and that he failed to report it.

As the ALJ properly noted, the timing of de la Torre’s discipline just shortly after his misconduct supports the fact that Bashas’ would have taken the same action even in the absence of any protected activity. [D at 71:27-30.] Bashas’ “plainly had a right to insist on compliance with its rules relating to the use of its sophisticated and expensive equipment.” [D at 71:45-47.] The General Counsel did not produce any evidence that Bashas’ did not have an interest in enforcing such rules, that de la Torre did not violate known Company rules, or that de la Torre was treated worse than similarly-situated employees. While the General Counsel argues that Bashas’ treated Jesse Medina (an authorized stand-up forklift driver charged \$45 for a lost G force key) more favorably because Medina was not suspended even though he had “problems” operating equipment, Medina and de la Torre are not similarly-situated.⁸ [RT at 2773:1-2774:22; G.C. Exs. 84-88] Medina was an authorized stand-up forklift operator. [G.C. Ex. 89.] That Medina had problems operating equipment he *was authorized* to use is not comparable to de la Torre’s use of industrial equipment he *was not authorized* to use, and which the Company had

⁸ Supervisors complete forklift investigation reports (e.g., G.C. Ex. 84), after every G-force “hit.” [Kelley, RT at 2773:25-2774:22.] Because G-force devices are installed on stand-up forklifts only, these reports and related discipline are unique to authorized stand-up forklift operators.

gone to great lengths to keep him from using. Moreover, the difference between Medina *losing* a G-force key (and having to pay its replacement cost) and de la Torre's *failure to report* a missing baler key is one of both nature and degree. The loss of the G-force key posed no risk of damage; the baler key, on the other hand, could be used to gain access to the entire warehouse.

The most significant difference from Medina, however, is that de la Torre committed three different violations within a 24-hour period. It was the combination of all three violations that led Kelley to suspend him for a day and a half.⁹ Moreover, the Company's discipline of de la Torre was consistent with its past practice (*e.g.*, it suspended another employee for *two days* in May 2007 for unauthorized use of a stand-up forklift). [Schrade, RT at 1621:8-10; R. Ex. 104.] Accordingly, the ALJ properly concluded that Bashas' met its burden under *Wright Line*.¹⁰ The Board should adopt the ALJ's recommendation dismissing this allegation.

II. EXCEPTION II: KELLEY'S ALLEGED INTERROGATION OF DE LA TORRE ON OCTOBER 15 (COMPLAINT ¶ 6(X)).

A. Background Facts.

As described in further detail in the background facts for Exception I, de la Torre was suspended on October 10 for operating a forklift without authorization, using the BMS without authorization and failing to report a missing baler key. During de la Torre's October 10 disciplinary meeting, Kelley and Sierra provided him with the DML form and explained the DML process. [de la Torre, RT at 842:8-843:5; 855:1-14; 911:5-912:11; G.C. Ex. 2 at pp. 3-4.]

⁹ Following his October 2007 suspension, de la Torre received no other discipline for the remainder of his tenure as a Bashas' employee. [Schrade, RT at 1631:3-6.]

¹⁰ Contrary to the General Counsel's assertions, the ALJ's comment that including the lost baler key in de la Torre's written discipline was "in a sense piling it on" (D at 71:41-42) does not suggest that de la Torre's discipline was improper or unlawful. To the contrary, the ALJ specifically noted that including the lost key was not out of line with the other issues because Kelley's conclusion that he needed to get de la Torre's "full and undivided attention" was "a fair assessment of the situation" based on the Bashas' "right to insist on compliance with its rules relating to the use of its sophisticated and expensive equipment." [D at 71:43:48.]

De la Torre left the meeting knowing that he had to complete the DML forms and “explain to Bashas’ that [he] accepted ownership of the problem” that caused his suspension, and that he “had to provide a statement of [his] recommitment to [his] job, [his] coworkers and to Bashas’.” [de la Torre, RT at 813:2-10.]

On October 15, de la Torre met Kelley in his office and submitted his DML responses, including: (1) comments handwritten in Spanish on the second page of the Member Conference Memorandum [G.C. Ex. 2 at 2]; (2) comments handwritten in Spanish on the DML form [G.C. Ex. 2 at 3-4]; and (3) a two-page letter typed in English with a comment, handwritten in Spanish, on the second page.¹¹ [G.C. Ex. 2 at 7-8.] Denise Sierra was also present and translated during the meeting. [RT at 864:5-20.] Because Kelley knew that de la Torre did not speak or write English, he asked de la Torre if he had prepared the typed letter (de la Torre had given Kelley only the English version). [Kelley, RT at 165:1-167:25; de la Torre, RT at 863:3-17; 950:7-951:18; Kelley, RT at 2751:5-2752:9.] De la Torre responded that the “Union lawyer” had prepared the English typed letter. [RT at 2752:15-16.] De la Torre’s testimony was slightly different, claiming that Kelley asked him if someone from the Union had prepared the English typed documents, to which he responded that “it was something similar, that it had been an attorney.” [de la Torre, RT at 863:8-864:4; 915:17-19; 917:6-9.] While de la Torre was still in the room, Kelley called Schrade to discuss his DML responses because they were inconsistent. [de la Torre, RT at 864:8-13.] Kelley instructed de la Torre to return to work after ending the call with Schrade. [de la Torre, RT at 864:14-15; 917:3-5.]

¹¹ The Spanish version of the typed two page letter was not submitted as part of de la Torre’s “DML responses.” [G.C. Ex. 2 at 5-6.] Schrade and Kelley testified that they did not receive the Spanish typed letter. [RT at 1622:19-1624:4, 2751:5-17.] Indeed, de la Torre’s testimony suggests that the Spanish typed documents were not submitted to Kelley. De la Torre testified he did not remember providing the Spanish typed pages to Kelley. [RT at 913:19-20.] In addition, when the General Counsel asked de la Torre which documents Kelley asked him about during the meeting on October 15 de la Torre responded: “Just what was in English, that was it. *The ones that had been typewritten.*” [RT at 864:1-4 (emphasis added).]

B. The ALJ Properly Determined that Kelley Did Not Unlawfully Interrogate De La Torre On October 15.

As the ALJ properly noted, Bashas' "legitimate DML policies and processes . . . require employees to prepare their own written statement accepting responsibility and so forth for a deed." [D at 72:2-4.] Kelley had a legitimate reason for asking who had prepared the document. The DML response is a critical component of the suspension process; failure to provide an appropriate response – accepting responsibility – could potentially result in termination. [Schrade, RT at 1625:10-13; 1626:2-14.] Given the discrepancies between the handwritten Spanish statements and the type-written English statement, coupled with de la Torre's "limitations with the English language," Kelley's question was simply "a reasonable pursuit of his managerial responsibilities" to ensure de la Torre actually complied with the DML process of accepting responsibility for his actions. [D at 72:4-6.] It was not an unlawful interrogation regarding protected activities.

Furthermore, even accepting de la Torre's version of the conversation as true,¹² Kelley's alleged statements cannot constitute unlawful interrogation because they were not coercive. The fact that de la Torre openly supported the Union weighs heavily against a finding that Kelley unlawfully interrogated him even if Kelley did ask de la Torre if the Union wrote the English letter. *See George L. Mee Mem'l Hosp.*, 348 NLRB No. 15 at *4-*5 (2006) (not unlawful to ask a known union supporter about information on a pro-union flier); *U-Haul Co. of Cal.*, 347 NLRB No. 34 at *1-*3 (2006) (same). By October 2007, de la Torre had participated in several public

¹² De la Torre claims that Kelley asked him if the Union wrote his response, but that claim is not credible. Kelley's version of his discussion with de la Torre was more credible because it was more detailed and inherently plausible. First, Kelley knew that de la Torre could not read or write English, so he reasonably asked de la Torre if he wrote the document. Moreover, Kelley's testimony that de la Torre responded by saying the "union lawyer" wrote the response is highly plausible, given that the letter had been written by a Union representative within the past few days. Furthermore, Kelley's recollection of the conversation is bolstered by the fact that, when de la Torre met with Kelley and Schrade a week later to discuss which DML response de la Torre was going to submit, de la Torre again referred to the "union lawyer" when he was expressing his frustration that the "union lawyer" had written things in the letter de la Torre had not said. [Schrade, RT at 1627:25-1628:4.]

displays of Union activity, including both August 2007 efforts to meet with Mike Basha. [de la Torre, RT at 789:18-793:16.] In September 2007, he testified that he participated in an attempt to deliver the “safety petition” to Basha’s then Vice President of Human Resources. [RT at 793:17-795:1; G.C. Ex. 21.] De la Torre testified that he openly distributed Union information at the DC on a regular basis months before October 2007. [RT at 787:20-789:4.]

Moreover, there is no evidence that Kelley asked de la Torre about the Union views of other employees. Nor did Kelley follow up the question with any kind of threatened consequence. *See George L. Mee Mem’l Hosp.*, 348 NLRB at *5 (noting that employer’s questions did not contain threats or promises of benefits). In the circumstances of Kelley’s meeting with de la Torre, no reasonable person would have felt coerced. Accordingly, the Board should adopt the ALJ’s conclusion and dismiss this allegation.

III. EXCEPTION III: SCHRADE’S ALLEGED THREATS TO DISCHARGE DE LA TORRE AND OTHER UNSPECIFIED REPRISALS ON OCTOBER 23 (COMPLAINT ¶¶ 6(y)(1)-(3)).

A. Background Facts.

As explained in the background facts for Exceptions I and II, de la Torre was suspended on October 10 for unauthorized use of a forklift and the BMS, plus failing to report a missing baler key. After de la Torre submitted inconsistent handwritten Spanish comments and a typewritten English statement, the latter which he admitted was prepared by a Union lawyer, Kelley and Schrade met to discuss the inconsistent responses. [Schrade, RT at 1623:22-1624:14; G.C. Ex. 2 at 2-4, 7-8.] They focused on the inconsistencies between de la Torre’s handwritten responses in Spanish and the typed letter in English. For example, the Spanish handwritten responses state that de la Torre found the G-force key in the trash and that he had used the stand-up forklift without authorization. [Schrade, RT at 1624:17-20.] On the other hand, the English typed letter denied all wrongdoing, and specifically stated that the Company’s claim that de la Torre had found the G-force key in the trash was “so ludicrous that there [was] no response [he] could type in [the] letter that can even begin to address the illogical nature thereof.” [Schrade,

RT at 1624:21-25; G.C. Ex. 2 at 7.] Because the English typed letter was inconsistent with the Spanish handwritten comments, as well as de la Torre's verbal admissions to Kelley during the October 10 and 15 meetings, Kelley and Schrade decided to meet with de la Torre on October 23 to discuss the inconsistencies. [Schrade, RT at 1625:8-17.]

Prior to meeting with de la Torre on October 23, Schrade and Kelley asked Grano if he would interpret at the meeting. [Grano, RT at 2685:9-2686:18.] When Schrade explained that the issue involved de la Torre's unauthorized use of the stand-up forklift, Grano informed Schrade that he had warned de la Torre a few weeks earlier that he should not be using the stand-up forklift because he was not trained and authorized to do so. [*Id.*]

On October 23, Schrade, Kelley, and Grano met with de la Torre to discuss de la Torre's DML responses. [de la Torre, RT at 865:13-18; Schrade, RT at 1627:14-25; Grano, RT at 2686:15-18; G.C. Ex. 3.] Schrade and Grano reviewed the Spanish handwritten responses and the English typed letter with de la Torre and pointed out the inconsistencies. [de la Torre, RT at 917:21-25; Schrade, RT at 1627:14-25.] For example, Schrade and Grano noted that de la Torre had *apologized* for using the equipment in the handwritten responses, and that he had *denied* all wrongdoing in the English letter. [de la Torre, RT at 918:1-7.] Schrade and Grano noted that, in the handwritten responses, de la Torre had admitted finding the G-force key in the trash, but that the English letter called the Company's claim that he found the key in the trash "ludicrous." [de la Torre, RT at 918:8-21.]

During the meeting, de la Torre admitted that: (1) Grano had warned him about using a stand-up forklift without authorization in September 2007; (2) he was never trained or authorized to use a stand-up forklift; and (3) he had never been assigned the G-force key. [Schrade, RT at 1629:20-1630:23.] De la Torre apologized and said that he was only trying to help the Company by being more efficient. [Schrade, RT at 1629:24-1630:7.]

De la Torre also explained that he personally wrote the Spanish handwritten statements and that the "Union lawyer" prepared the English typed letter. [Schrade, RT at 1627:25-1628:4.]

When Schrade asked if de la Torre knew what the English typed letter said, de la Torre responded that he had not been given an opportunity to review that typed letter before he was told to sign it. [Schrade, RT at 1628:6-17.] De la Torre said he never told the Union that it was illogical or “ludicrous” for the Company to claim that he had found the G-force key in the trash. [de la Torre, RT at 919:1-20.] Rather, de la Torre said he had told “everyone” that he had found the G-force key in the trash. [de la Torre, RT at 919:21-23.] Indeed, de la Torre became visibly upset after learning that he had been misquoted in the English typed letter. [de la Torre, RT at 919:24-920:15; Schrade, RT at 1628:18-21.] De la Torre said he wanted to take the letter and confront the “union lawyer,” complain to the Union, and tell them what they did was wrong. [de la Torre, RT at 919:24-920:18; Schrade, RT at 1628:23-1629:4.]

After it was clear that de la Torre understood the documents were inconsistent, Schrade asked him whether he wanted to submit the DML form with his Spanish handwritten responses or the English typed letter. [de la Torre, RT at 918:22-25; Schrade, RT at 1629:6-11.] According to de la Torre, Schrade advised him that Schrade “could accept one document or the other but he could not accept two documents that were inconsistent.” [de la Torre, RT at 918:22-25.] De la Torre, without hesitation, responded that the DML form was his official response. [Schrade, RT at 1629:6-11.] Schrade then prepared an appropriate Note to File to document their discussion. [de la Torre, RT at 873:15-21; Schrade, RT at 1629:14-19; G.C. Ex. 3.] Grano translated the Note to File and de la Torre signed it after Grano translated the document for him. [de la Torre, RT at 873:15-21; G.C. Ex. 3.]

The Note to File de la Torre received on October 23 does not state or suggest that de la Torre was being disciplined in any way. It merely states, in pertinent part:

Today we discussed Ramon’s DML responses. There was conflict between Ramon’s response on Bashas’ [DML form] and the [English typed letter] submitted by Ramon. Because the [English typed letter] contained statements Ramon felt were inaccurate, he is withdrawing this document and allowing his response on [the DML form] to be his statement of accountability, which the company accepts.

[G.C. Ex. 3.]

B. The ALJ Properly Determined That Schrade Did Not Unlawfully Threaten De La Torre With Discharge Or Other Unspecified Reprisals On October 23.

As the ALJ pointed out, de la Torre's October 10 suspension was for legitimate reasons. [D at 71:25-49; 72:20-21.] Schrade's request that de la Torre choose which of two inconsistent documents he wanted to submit as his DML response to the October suspension was not only reasonable – it was in de la Torre's best interest. As the ALJ properly found, Schrade's statement to de la Torre that he would be fired if he insisted the Company accept the English typewritten letter denying all responsibility for the incidents was not unlawful. [D at 72:20-38; Schrade, RT at 1625:18-1626:14.] Rather, it was a legitimate warning regarding the lawful consequences of submitting a DML response that, under Bashas' policies, did not accept responsibility for the relevant violation. [D at 72:28-32.] Schrade "legitimately inquire[d] into the ambiguity created when de la Torre submitted two conflicting statements in response to the DML." [D at 72:31-32.]

Nor did Schrade unlawfully refuse to accept the typewritten statement in an effort to restrict de la Torre's Section 7 rights. An employee's DML response is a critical component of the suspension and DML process, and failure to provide an appropriate response could result in termination, as had happened to another employee. [Schrade, RT at 1625:10-13; 1626:2-14; D at 72:25-31.] The DML is a "last resort process" (D at 72:28-29), and any inappropriate DML response that fails to accept responsibility for wrongdoing can result in termination, regardless of who prepares it. Rather than an illegal threat or inappropriate refusal to accept de la Torre's written response to the DML, Schrade's conduct was in de la Torre's best interest: it kept him employed. The Board should adopt the ALJ's finding and dismiss this allegation.

IV. EXCEPTION IV: BASHAS' JUNE 1, 2007 LETTER BANNING UNION SALESPERSONS FROM ITS STORES (COMPLAINT ¶¶ 6(M), 9(E)).

A. Background Facts.

In 1993, Bashas' purchased seven stores from Arizona Supermarkets, Inc. ("ASI") and numbered them Stores 63 through 69. [Bashas' Amended Answer ¶ 2(e).] At the time of purchase, the Union was the collective bargaining representative of the ASI employees at those stores. [*Id.* ¶¶ 5(b), (d), (g), and (l).] Bashas' opened Stores 63 and 64 in its AJ's format, and opened Stores 65 through 69 in its Bashas' format.¹³ [*Id.* ¶ 2(e).] At the time of purchase, Bashas' informed all former ASI employees who wished to apply for employment with Bashas' that the Company would hire at Stores 63 through 69 under its own terms and conditions of employment, which were substantially different from those at ASI. [*Id.* ¶ 2(e).] The majority of the employees Bashas' hired at Stores 63 through 69, respectively, were formerly employed by ASI at those same stores. [*Id.* ¶ 2(e).] Accordingly, with respect to the purchase of Stores 63 through 69 in 1993, Bashas' became a successor employer to ASI with the legal right to impose its own hiring terms and the legal obligation to recognize and bargain with the Union on behalf of those employees. [*Id.* ¶¶ 5(c) and (g).]

In 2001, Bashas' purchased two stores from ABCO Markets and numbered them Stores 124 and 125. [*Id.* ¶ 2(f).] At the time of purchase, the Union was the collective bargaining representative of the ABCO employees at those stores. [*Id.* ¶¶ 5(m) and (o).] Bashas' opened Store 124 in its Food City format and Store 125 in its Bashas' format.¹⁴ [*Id.* ¶2(f).] Just as with the former ASI employees, Bashas' informed all former ABCO employees who wished to apply for employment with Bashas' that the Company would hire at Stores 124 and 125 under its own terms and conditions of employment, which would be substantially different from those at

¹³ Bashas' closed Store 68 in April 2007. *Bashas', Inc.*, 352 NLRB 391, 397 (2008).

¹⁴ In December 2006, Bashas' closed Store 125. In May 2007, that Store reopened as an Ike's Farmer Market. *See Bashas', Inc.*, 352 NLRB at 397.

ABCO. [*Id.* ¶ 2(f).] The majority of the employees Bashas' hired at Stores 124 and 125 had been previously employed by ABCO at those respective stores. [*Id.* ¶ 2(f).] Accordingly, with respect to Stores 124 and 125, Bashas' became a successor employer to ABCO. [*Id.* ¶ 5(m).]

Following Bashas' purchase of the seven ASI stores in 1993, Union representatives went into those stores to perform representative functions for approximately six months to one year, and then unilaterally decided to cease their efforts. [R. Ex. 82 at 126:20-25.] But the Union did not send representatives into the ABCO stores after Bashas' purchased them in 2001. [R. Ex. 82 at 127:1-6.] Moreover, the Union never sent representatives into *any* of the former ASI or ABCO stores (collectively "the Represented Stores") to adjust any employee grievances, nor did the Union assign stewards to any of those stores. [R. Ex. 82 at 125:5-7, 126:5-13, 127:1-6; Swanson, RT at 2455:25-2456:14.]

The Union and Bashas' bargained over the terms and conditions of employment for the employees at the Represented Stores on various occasions between 1993 and early 2002. [R. Ex. 82 at 128:7-9; R. Ex. 74.] However, the parties never reached an agreement and bargaining ceased in early 2002. [R. Ex. 82 at 130:13-18; Swanson, RT at 2455:22-24.] Bashas' did not hear from the Union again until May 2006. [U. Ex. 3.] Between early 2002 and May 2006, the Union engaged in *no* representational activities at the Represented Stores and appeared to have abandoned any interest it had in representing those employees. [R. Ex. 82 at 124:18-125:7, 126:5-13, 127:1-24; Swanson, RT at 2455:25-2456:14.]

1. Testimony of Union Organizer Antonio Rivera Sanchez.

On December 29, 2006, at approximately 4:00 p.m., Antonio Rivera Sanchez – an "Organizer" for the UFCW International Union – went inside Store 64 to hand out Union fliers.¹⁵ [Sanchez, RT at 1813:25-1816:22; 1828:5-18; G.C. Ex. 69.] The fliers were informational in

¹⁵ Sanchez began working as an Organizer for the International Union that same month, December 2006. [Sanchez, RT at 1814:3-4.]

nature and explained that the Union had filed ULP Charges against Bashas'. [G.C. Ex. 69.] Prior to that day, Sanchez had never entered any other Bashas' store – including Store 64 – to hand out Union literature. [Sanchez, RT at 1830:13-20.] Likewise, since that day, Sanchez has not been in any other Bashas' store. [Sanchez, RT at 1872:25-1873:13.]

Sanchez's sole purpose on December 29, 2006 was to hand out the Union's fliers to as many employees as he could. [Sanchez, RT at 1837:3-19; 1865:16-18.] He did not enter Store 64 to obtain any information relevant to the Union's representational role. [Sanchez, RT at 1865:16-25.] Sanchez was *not* a "business representative" for the Local or International Union. [Sanchez, RT at 1827:15-22.] He had not been hired to serve employees who were already represented by the Union. [Sanchez, RT at 1863:11-19.]

Store 64 was open for business and customers were present when Sanchez arrived at the store. [Sanchez, RT at 1831:14-20.] He had not contacted store management prior to his arrival. [Sanchez, RT at 1839:9-12.] Moreover, after entering the store, Sanchez did not contact store management to let them know of his intentions. [Sanchez, RT at 1848:13-24.] Instead, he walked straight to the Meat Department and attempted to hand Union fliers to two working employees. [Sanchez, RT at 1816:23-1818:23; 1832:7-1833:11.] Sanchez did not tell those employees that he worked for the Union or that he was an International Union organizer. [Sanchez, RT at 1840:1-10.] Both of those employees rejected the flier, and one of them called Store Director Gabe Flores. [Sanchez, RT at 1818:24-1819:1; 1833:6-11.]

Flores met Sanchez in the Meat Department and asked him to identify himself. [Sanchez, RT at 1819:2-6; 1845:16-20.] Sanchez *refused* to provide any identification, and Flores then asked Sanchez to leave Store 64. [Sanchez, RT at 1845:21-1846:5; 1850:5-6.] Sanchez ignored Flores' request. [Sanchez, RT at 1849:3-8.] Sanchez then walked to the Deli Department to distribute Union fliers to additional employees. [Sanchez, RT at 1819:20-1820:1; 1841:16-22.] Flores again asked Sanchez to leave the store and Sanchez again ignored Flores' request. [Sanchez, RT at 1820:2-13.]

Sanchez then walked to the “cashier area” and continued handing out the Union fliers. [Sanchez, RT at 1821:7-10.] He did not tell the cashiers his name or that he worked for the Union. [Sanchez, RT at 1843:24-1844:8.] Sanchez did not wait for the cashiers to finish their customer transactions before handing them the fliers. [Sanchez, RT at 1834:18-24; 1835:9-18.] He simply walked around the customers and handed the cashiers the fliers while customers were trying to pay for their groceries at the same time. [Sanchez, RT at 1836:1-7.]

Sanchez then walked to the “flower shop area” to hand out more Union fliers. [Sanchez, RT at 1821:11-12.] Sanchez did not tell any employees in the flower shop his name or that he worked for the Union. [Sanchez, RT at 1844:23-1845:2.] Another manager approached Sanchez in the flower shop area and asked him to leave the store. [Sanchez, RT at 1821:13-1822:7.] Sanchez ignored that manager’s request and continued handing out the fliers. [Sanchez, RT at 1852:25-1853:5.] At no point did Sanchez show that manager any identification or state that he worked for the Union. [Sanchez, RT at 1853:10-12; 1854:19-21.] Nor did Sanchez wear anything (*e.g.*, a Union T-shirt or name badge) that identified him as being with the Union. [Sanchez, RT at 1845:9-15.]

After leaving the flower shop, Sanchez returned to the cashier area and was met by two Phoenix police officers. [Sanchez, RT at 1823:3-7.] Management had called the police because Sanchez would not leave the store when asked. [Sanchez, RT at 1857:2-4.] The police officers asked Sanchez to leave Store 64 and he complied. [Sanchez, RT at 1823:8-12.] Sanchez could not remember whether he told the police that he believed he had the “right” to be in the store. [RT at 1861:18-20.] At that point, Sanchez left the property. [Sanchez, RT at 1825:19-20.]

No one from Bashas’ had given the Union or Sanchez permission to hand out fliers at Store 64 that day. [Sanchez, RT at 1848:21-24.] In fact, Sanchez’s unannounced visit to Store 64 on December 29, 2006 was a total surprise to both employees and management. [Sanchez, RT at 1839:16-19; 1841:7-15.] Sanchez never showed anyone his credentials as a Union organizer. [Sanchez, RT at 1839:20-22.] Nor did he tell any employees in advance that he was

planning to come to Store 64. [Sanchez, RT at 1839:13-15.] Moreover, every employee Sanchez approached was on working time. [Sanchez, RT at 1831:21-24; 1856:18-20.] Sanchez did not tell any of those employees who he was or that he worked for the Union. [Sanchez, RT at 1856:21-1857:1.]

Bashas' has a solicitation/distribution policy that provides:

Except for company-sponsored solicitations, no solicitation is permitted during working time and no solicitation is permitted on a selling floor during store hours. Should a[n employee] desire to engage in such activity, it must be confined to non-working time, such as breaks and meal periods and in the non-selling areas of the store, during store hours. Except for company-sponsored donation program information, no distribution of literature, pamphlets, documents or any other materials is permitted during working time and no distribution of any sort is permitted in any working area, at any time.

[R. Ex. 47 at 1465.] Bashas' uniformly enforces these policies with all third parties by first requesting that they cease soliciting/distributing inside the store and, if the individuals refuse to do so, asking them to leave the store. [Swanson, RT at 2429:16-2430:13.] If "they flat out refuse to leave, and are disrupting [Bashas'] business," the Company will call the police to have the third-party removed. [Swanson, RT at 2430:14-16.]

2. Testimony of Union Agent Lily Flores

On January 18, 2007, Lily Flores, Assistant to the Regional Director of the UFCW International Union out of Ontario, California, entered Store 124 with Union "Organizer" Jordan Coopersmith around 11:30 a.m.. [Flores, RT at 1880:19-20; 1881:9-11; 1928:2-14.] Her goal that day was to distribute copies of a ULP Charge the Union had filed against Bashas'. [Flores, RT at 1880:25-1881:5.] Flores brought enough copies of the Charge for each of Store 124's employees.¹⁶ [Flores, RT at 1935:2-6.] After entering the store, Flores began handing out copies

¹⁶ Between January and March 2007, Store 124 had approximately 50-60 employees. [Flores, RT at 1907:10-20.]

of the Charge to employees in the different departments. [Flores, RT at 1881:12-1882:2; 1882:24-1883:4.] Even though Flores brought Coopersmith for “mentoring” that day, he did not stay with her in the store. [Flores, RT at 1928:15-1931:6.] In fact, Flores had no idea what Coopersmith was doing inside Store 124 while she was handing out copies of the Charge. [Flores, RT at 1928:15-1931:6.]

When Store Director Mike Decker saw Flores in the Meat Department giving working employees copies of the Charge, he informed her she had to leave the store. [Flores, RT at 1883:9-1884:8.] Flores claimed she told Decker, “I have the right to be here,” and she continued distributing the materials. [Flores, RT at 1884:11-15.] Flores admitted that she entered non-public working space in the Meat Department to hand out the Charge to working employees. [Flores, RT at 1883:10-15.] Flores and Decker then moved to the Frozen Department, where Decker again asked Flores to leave and told her that, if she did not leave, he would contact the police. [Flores, RT at 1885:19-1886:16.] In response, Flores told Decker she “would leave [on her] own terms.” [Flores, RT at 1886:14-16.] Flores spoke with Decker for a few more minutes and, eventually, left the store. [Flores, RT at 1886:17-23.] Flores admitted that their conversation was cordial. [Flores, RT at 1884:11-15; 1895:14-16.]

Before entering Store 124 on January 18, 2007, Flores did not advise any managers or employees that she was coming. [Flores, RT at 1931:14-16.] She also did not announce her presence to management after arriving. [Flores, RT at 1931:23-1932:1.] Prior to arriving at Store 124, she did not ask anyone at the Union whether she was permitted to go inside the store and speak with working employees about Union business on the sales floor. [Flores, RT at 1932:14-18.] Flores claimed a “right” to be inside Store 124 based on “previous incidents [she had had] with ABCO,” but also later admitted that she had *never* engaged in Union business with working employees on the sales floor at ABCO. [RT at 1933:1-19.]

Prior to handing out copies of the Charge on Store 124’s sales floor, Flores did not try to distribute the Charge to Store 124’s employees by any other means. [Flores, RT at 1946:11-15.]

For example, even though the Union maintained a computer database with Store 124 employees' personal contact information – and, by January 1, 2007, had home addresses and telephone numbers for nearly *all* of Store 124's 50-60 employees – Flores did not mail copies of the Charge to the Store 124 employees. [Flores, RT at 1915:11-1916:14; 1934:20-22.] Flores also did not try to give copies of the Charge to employees *outside* Store 124, even though she admitted meeting with a number of Store 124 employees at restaurants, parks, hotels, bars, and employees' homes.¹⁷ [Flores, RT at 1903:19-1904:3; 1907:21-1908:8; 1909:8-16; 1912:12-17.] Flores admitted meeting with employees at their homes as much as twice a day, three to five times a week. [Flores, RT at 1904:15-18; 1906:8-18.] Flores also met with Store 124 employees outside the store in the parking lot and on public sidewalks. [Flores, RT at 1916:15-18.] Flores would speak with employees on the benches directly outside the front of Store 124 while they were taking a break. [Flores, RT at 1917:2-9.] Flores felt comfortable approaching employees sitting on those benches and talking to them about workplace issues. [Flores, RT at 1917:12-18.]

Flores did not identify herself to any of the Store 124 employees on January 18, 2007 because, in her words, they already knew who she was. [Flores, RT at 1917:19-24.] As she explained:

Yuma is a very small community and I'm from the same town. I was born and raised there. So, I know these people. They've known me before I was born. So, these individuals that work in the store know me and so I go to their homes and vice-versa and other union members, we have other stores that we represent in the town and other workers talk to each other. So, the town is very close-knit and I'm from the town. So, I can talk to anybody.

[Flores, RT at 1912:15-25.] Flores testified that most of the 50-60 employees at Store 124 would have known where to find her if they wanted to speak with her. [RT at 1914:15-18.]

¹⁷ Flores estimated that, between January and March 2007, she met with over 30 different employees from Store 124 in locations other than Store 124. [RT at 1911:8-24.]

On March 8, 2007, Flores again entered Store 124 for Union business unannounced. [Flores, RT at 1886:24-1887:3.] Flores claimed that she went to Store 124 that day to investigate a bakery employee's discharge. [RT at 1888:3-7.] However, no employee from Store 124 asked her to come to the store to conduct an investigation. [Flores, RT at 1888:10-12; 1940:10-14.] Flores admitted that management was not aware of her presence inside Store 124 between January 18 and March 8, 2008. [RT at 1807:19-23; 1947:25-1948:3.] Flores also did not advise managers or employees that she was coming to the store on March 8. [Flores, RT at 1931:17-19.] Nor did she announce her presence to any member of management after arriving at the store. [RT at 1931:23-1932:1.]

Instead, Flores walked straight into Store 124 and spoke with Nancy Thomas, another bakery employee, while Thomas was on working time.¹⁸ [Flores, RT at 1888:18-1889:14; 1939:19-24.] Flores spoke with Thomas for at least five minutes. [Flores, RT at 1940:4-5.] Even though there were customers in the Bakery Department at the time of their conversation, Flores did not make arrangements for Thomas to call her after work or suggest that they meet on Thomas' next break. [Flores, RT at 1939:23-24; 1940:15-19; 1941:5-10.] Flores had Thomas' home address and telephone number, but admitted making no effort to contact Thomas outside of work prior to speaking with her at Store 124. [Flores, RT at 1938:23-1939:5.]

While Flores was speaking with Thomas, Merchandise Manager Aaron Felix approached. [Flores, RT at 1889:22-1890:10.] Felix was not aware that Flores was a representative of the Union. [Flores, RT at 1942:8-10.] Flores claimed that she told Felix that she was at Store 124 to investigate the discharge of a bakery employee.¹⁹ [Flores, RT at 1955:2-4.] Felix told Flores

¹⁸ Flores admitted that the bakery employee whose claim she was allegedly investigating had been fired before March 8, 2007 and was *not* in the store when Flores arrived that day. [RT at 1938:7-15.]

¹⁹ That "fact" was not included in her June 29, 2007 Affidavit, which was prepared only three months after the alleged incident. [Flores, RT at 1955:5-20.] Moreover, Flores never filed a grievance regarding the bakery employee's discharge. [Flores, RT at 1957:2-9.] In fact, between 2002 and the time of Flores' testimony, the Union had not processed *any* grievances for

(Continued ...)

that she had to leave the store because she could not be speaking with Thomas while she was on working time. [Flores, RT at 1942:15-18.] Flores refused to comply with Felix's request, claiming she had an absolute, unconditional right to talk with Store 124 employees. [Flores, RT at 1890:12-1891:5; 1921:4-8; 1942:19-21.] In fact, Flores testified that she believed she could have gone into Store 124 at *any* time (day or night) and talked to employees as long as she wanted even if they were on working time. [RT at 1921:9-16; 1922:24-1923:21.]

Felix insisted that Flores leave the store and Flores kept refusing. [Flores, RT at 1943:6-9.] At one point, an unidentified female manager approached and asked Flores to leave the store. [Flores, RT at 1891:1-7.] Flores again refused, even though she was "getting [the customers] excited. . . ." [Flores, RT at 1891:8-10; 1892:9-13.] The female manager told Felix she was going to call another manager to find out what they should do. [Flores, RT at 1891:13-15.] When the female manager returned, she told Felix that they would call the police if Flores did not leave. [Flores, RT at 1891:18-21.] After repeatedly insisting she had an unlimited right to talking with employees on work time and on the sales floor, Flores eventually walked with Felix and the female manager to the front of the store and left. [Flores, RT at 1891:23-1892:24; 1894:4-5; 1943:10-11.] Felix never called the police. [Flores, RT at 1943:12-13.]

After leaving Store 124 on March 8, 2007, Flores continued her investigation of the discharged bakery employee by meeting with other employees both inside and outside Store 124. [Flores, RT at 1944:8-14.] In fact, despite being asked to leave Store 124 by Felix, Flores returned to Store 124 a week or two later to meet with another employee. [Flores, RT at 1944:15-1945:3.] Flores admitted that no member of management saw her when she returned to Store 124 and no one asked her to leave the store. [RT at 1945:4-7.] She also admitted that she did not tell anyone (supervisor or employee) that she was returning to Store 124 to continue her investigation. [RT at 1945:8-10.] Flores believed that, when management asked her to leave on

Store 124 employees. [Flores, RT at 1920:13-1921:3.] Thus, Flores' story is not credible. It is more likely that she was in the store to distribute additional Union fliers.

January 18 and March 8, 2007, they were only asking her to leave for those days – not permanently banning her from the store. [RT at 1948:4-16.]

While Flores claimed that she based her (erroneous) assumption of unlimited access on her dealings with prior ABCO store employees, she later admitted that she had *never* conducted any Union business with ABCO employees during working time on the sales floor. [RT at 1933:2-19.] Nor did Flores have any *personal* past practice of entering Store 124 to hand out informational fliers, especially to employees on working time on the sales floor and in non-public working areas. Rather, she simply frequented the store *as a customer*. [Flores, RT at 1877:22-1878:4.] While Flores claimed that she had entered Store 124 on multiple prior occasions as a Union representative [RT at 1946:21-1947:11], she admitted that management was aware of her presence *only once* prior to January 18, 2007, when she handed out the same flier to employees and Decker inside Store 124 on January 16, 2007. [RT at 1878:24-1879:4.]

3. May 2007 Organizational “Blitz” and Bashas’ June 1, 2007 Letter to the Union.

Beginning on the evening of Friday, May 18, 2007 and continuing throughout that weekend, Food City Vice President Tom Swanson received numerous phone calls from various store managers reporting that teams of Union organizers were disrupting operations by entering stores, soliciting working employees, and handing out fliers to employees on the sales floor.²⁰ [Swanson, RT at 2430:17-2431:13; 2444:6-23.] Specifically, he was informed that groups of Union organizers (many wearing UFCW T-shirts) entered 27 stores, and handed out fliers to working employees as they were helping customers.²¹ [Swanson, RT at 2431:22-2433:1;

²⁰ Store Directors regularly contact Swanson to report events at the stores. [Swanson, RT at 2427:6-2428:12.] Swanson provides his direct telephone number to all managers to ensure that they can reach him at any time. [Swanson, RT at 2428:13-2429:3.]

²¹ Store 124 in Yuma – one of the Represented Stores – was one of the stores targeted by the May 2007 “blitz.” [Swanson, RT at 2433:2-11; R. Ex. 84.]

2439:21-2440:12; 2441:2-6; R. Exs. 84, 85.] The Union’s fliers stated that “Workers in other supermarkets have a Union Contract that guarantees them legally enforceable rights . . . Food City workers deserve the same!” [R. Ex. 85.] The flier also solicited support for the Union by asking employees to provide personal data in order to receive “more information about La Union de Mi Gente and the Campaign for Respect at Food City.” [R. Ex. 85.] The Union organizers sometimes went behind customer service counters – non-public areas – to hand out their fliers to working employees. [Swanson, RT at 2440:7-12.] The Union organizers also interrupted cashiers to hand them fliers while they were checking-out customers, which increased the likelihood that the cashiers would overcharge or undercharge customers. [Swanson, RT at 2447:14-24.] These intrusions were particularly disturbing because the evening and weekend are busy times for the stores. [Swanson, RT at 2459:3-17.]

When approached by store management, the Union organizers announced: “We are with the Union” or “We are with Hungry for Respect.”²² [Swanson, RT at 2441:2-6.] Because the Union activities violated the Company’s solicitation/distribution policy, the managers asked them to leave the store.²³ [Swanson, RT at 2446:4-6.] While some of the Union organizers left, others refused and argued with the managers. [Swanson, RT at 2446:4-11.] The organizers who refused to leave were considered to be “trespassers.” [Swanson, RT at 2446:12-15.]

The Union did not give Bashas’ any prior notice of its intent to solicit and distribute leaflets inside Bashas’ stores that weekend; nor did the Union request reasonable access to

²² “Hungry for Respect” is a shell organization for the Union and shares the same mailing address as the Local Union. [R. Ex. 5.]

²³ Swanson described how the Company applies its no-solicitation policy. [Swanson, RT at 2429:4-2430:16; R. Ex. 47 at 1465.] He explained that the Company does not allow third-party organizations to enter the stores during working hours and solicit employees or handbill. [Swanson, RT at 2429:6-2430:6.] If an organization tries to solicit inside a store, Swanson informs store management to explain to the individuals that the Company does not permit third-party solicitation on its sales floor. [Swanson, RT at 2430:7-9.] If the individuals refuse to leave, store management contacts the police for assistance. [Swanson, RT at 2430:10-16.]

Bashas' stores ahead of time. [Swanson, RT at 2444:24-2445:8.] Accordingly, the Company was very concerned that the Union would engage in similar activities in the future. [Swanson, RT at 2447:2-13.]

Swanson met with other Bashas' officers and, collectively, in order to avoid future disruptions, they decided to send the Union a letter demanding that they stop sending their "salespeople" into Bashas' stores to disrupt operations. [Swanson, RT at 2447:25-2449:4.] On June 1, 2007, Bashas' Senior Vice President of Human Resources, Mike Gantt, sent the UFCW Local 99 and the UFCW International Union a letter. [G.C. Ex. 70.] That letter read:

Your respective organizations have recently repeatedly violated Arizona law by sending UFCW representatives inside Bashas' stores to try and *sell* your union memberships and messaging to Bashas' employees. As you are well aware from last year's civil trespass lawsuit by Bashas' against the UFCW, Bashas' limits access to its stores to employees, legitimate shoppers, vendors and a limited number of charitable representatives. Your union *salespeople* do not qualify in any of those categories. Consequently, your organizations and their *sales representatives* are not allowed to go into or send *union solicitors* inside Bashas' stores. Because of the flagrant violations of Arizona law by your *salespeople* who have already trespassed on Bashas' controlled property, those UFCW *salespersons'* license and invitation to enter any Bashas' format (*i.e.*, Food City, Bashas', AJ's, etc.) for any purpose, including shopping, is hereby permanently revoked.

[G.C. Ex. 70.]

On June 14, 2007, Local Union President James McLaughlin responded to Gantt by letter and wrote:

As the exclusive bargaining representative of the employees at nine of the stores operated by Bashas' Inc. in Arizona, UFCW Local 99 has certain rights of access to the stores under existing law and pursuant to the terms and conditions of the expired collective bargaining agreements and practices applicable at the stores. Although Bashas' has withdrawn recognition from Local 99, the National Labor Relations Board's General Counsel has determined that Bashas' withdrawal of recognition violates federal labor law. Local 99 has no intention of waiving any of its rights or

foregoing its responsibilities as the bargaining agent of the employees in the nine stores while the unfair labor practice proceeding against Bashas' is litigated.

With regard to your allegation that UFCW representatives have trespassed on Bashas' property in violation of Arizona law, please be advised that the union respects your company's legitimate property interests and has no intention to violate Arizona trespass law. In the future, if you believe that UFCW representatives have trespassed on company property, please contact me and I will attempt to resolve any legitimate concerns.

[G.C. Ex. 71.]

On June 21, 2007, Gantt responded to McLaughlin's June 14, 2007 letter and further explained Bashas' concern with the Union's actions:

Despite your assurances, the Union has not acted in recent months as if it respected Bashas' property rights *at those stores you are seeking to organize*. There have been numerous instances of your *organizers* entering those stores, not as customers, but for the purpose of engaging in *disruptive behavior, interrupting employees at work, taking photographs and videos, violating our solicitation/distribution policies, and trying to initiate confrontations with our managers and members*. We tolerated that behavior until it became repetitive, and then we began asking the *organizers* to leave the stores or be considered trespassers, but even that action failed to curb the intrusive conduct. That is why, in our June 1 letter, Bashas' withdrew, from all UFCW *professional organizers*, any license or invitation to shop in our stores. Further violations of our rights and policies will lead to court action. If, as you say, the Union will instruct its *organizers* to respect Bashas' property rights, and we see no further repetition of the objectionable conduct, we will reconsider our decision regarding your *organizers'* ability to shop in our stores.

[G.C. Ex. 72.]

Between 2002 and May 18, 2007, the Union had absolutely no presence in any of the Represented Stores and had never requested permission to enter those stores for any representational purposes. [Swanson, RT at 2455:13-2456:6.] The Union has also never asked to access the Represented Stores to conduct a survey or to tour the stores to observe employee

working conditions. [Swanson, RT at 2460:9-12.] Indeed, the Union has never explained to Bashas' *why* it needs to access the Represented Store employees inside the stores, nor why it cannot access those employees at locations outside the stores or by other less-intrusive means.²⁴ [Swanson, RT at 2460:13-22.]

B. The ALJ Properly Dismissed the Allegations Regarding the June 1 Letter.

The ALJ properly determined that it is “reasonable to infer that Gantt’s letter of June 1 and his subsequent correspondence with McLaughlin did nothing more than ban access to Bashas’ stores for purposes of engaging in ordinary solicitation and distribution activities that are organizational, rather than representational, in nature.” [D at 16:11-14.] As the General Counsel concedes, Bashas’ wrote its June 1, 2007 letter in response to the Union’s organizing activities between Friday, May 18 and Sunday, May 20, 2007. Bashas’ intended that letter to apply only to such activities at the Unrepresented Stores – not to legitimate Union business at the Represented Stores.²⁵ All but one of the 27 stores affected by the May 2007 “blitz” were Unrepresented Stores. [R. Ex. 81.] The only Represented Store affected by the May 2007 “blitz” was Food City Store 124 in Yuma.²⁶

The express wording of Bashas’ June 1, 2007 letter further demonstrates that Bashas’ intended to revoke only the Union’s right to enter the Unrepresented Stores for organizing

²⁴ On November 6, 2007, upon the Union’s request, Bashas’ provided the Union with personal contact information for all of the employees at the Represented Stores. [Swanson, RT at 2460:23-2461:2; R. Exs. 80, 81, 83.]

²⁵ The General Counsel’s assertion that the June 1, 2007 letter remains in effect today is completely misleading, given the General Counsel is well aware that Bashas’ and the Union negotiated two successive access agreements in January and July 2009 under which the Union has repeatedly accessed employees at the Represented Stores.

²⁶ The Union’s inclusion of Store 124 was likely a mistake because the organizers handed out the same Union propaganda and solicited employees to support the Union’s organizing drive just as they had done at the Unrepresented Stores – which would have been unnecessary at Store 124 because the Union was *already* the collective bargaining representative of those employees.

purposes. That letter focuses on the “sale” of Union memberships and referred to the Union agents responsible for the May 2007 “blitz” as “salespeople,” “sales representatives,” “salespersons,” and “union solicitors.” [G.C. Ex. 70.] Bashas’ further outlined its intentions in Gantt’s June 21, 2007 letter, which expressly focused on the Union’s “organizers” and was limited to revoking the Union’s right to enter “stores [it is] seeking to organize.” [G.C. 72.] Indeed, the General Counsel concedes that Bashas’ justification for the June 1, 2007 letter is based on the Union’s organizational activities, not any representational visits. The employees in the Represented Stores were already “organized.” Thus, it is diversionary for the General Counsel to argue that the June 1, 2007 letter applied to Bashas’ Represented Stores in light of the fact that that letter was actually a response to the Union’s organizing activities at Bashas’ Unrepresented Stores between May 18 and May 20, 2007.

Neither the General Counsel nor the Union challenged Bashas’ property interest in the Unrepresented Stores. Nor is there any evidence in the record demonstrating that the Union could not have contacted the employees at the Unrepresented Stores by other means. *See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978) (stating that “the union has the burden of showing that no other reasonable means of communicating its organization message to the employees exists”; the union’s burden “is a heavy one”) (emphasis added). Accordingly, Bashas’ was legally entitled to ban the Union’s organizers from engaging in organizing activities inside the Unrepresented Stores. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 537 (1992) (“Where reasonable alternative means of access exist, § 7’s guarantees do not authorize trespasses by nonemployee organizers. . .”).

Even construing the June 1, 2007 letter as applying to Bashas’ Represented Stores as well (which was not Bashas’ intention), the ALJ properly determined that “it is still lawful [as a]n employer may lawfully bar nonemployee union agents from *any* of its properties absent a proven need and prior request for access grounded on its employees’ Section 7 rights.” [D at 16:14-16.] Under *Holyoke Water Power Co.*, a union’s right of access to represented employees is analyzed

under a two-step balancing test. 273 NLRB 1369, 1370 (1985) (noting that “there is the right of employees to be responsibly represented by the [union] and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with”). When “a union can effectively represent its employees through some alternative means other than by entering on the employer’s premises, the employer’s property rights will dominate, and the union may properly be denied access.” *Id.* If a union cannot effectively represent its employees through alternative means of communication, “the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer’s operations.” *Id.* at 1370-71. It is “the General Counsel’s burden to establish the relevance of the information sought by the union, [while] it is the employer’s burden to show that there are alternative means other than access that would satisfy the union’s need.” *Nestle Purina Petcare Co.*, 347 NLRB No. 91, at *1 (2006).

Moreover, the General Counsel has recently recognized that:

In the absence of some qualifying circumstance such as a contractual agreement or established past practice, evidence that the Union cannot adequately reach the employees by alternative means, or a request related to obtaining information relevant and necessary to a union’s representational function, the Board has not recognized a generalized protected right of a union to be given access into work areas located on an employer’s property or premises for the purpose of communicating with employees.

The Washington Post, 2001 WL 34035992 (advising the Region to dismiss a ULP charge claiming unlawful withholding of union access because providing information *to* employees is “not related to obtaining relevant and necessary information *from* employees” (emphasis added).

Applying *Holyoke*, the Union had no absolute, unfettered right of store access because the Union had reasonable access to employees *outside* the Represented Stores. As noted above, Bashas’ employees tend to live close to their stores. Additionally, according to Union agent Lillian Flores, the Union already had the home addresses and telephone numbers for the employees at Store 124 – the only Represented Store affected by the May 2007 “blitz.” Yet there is no evidence in the record that the Union attempted to send its fliers to any Represented

Store employees at their homes. Nor did the Union attempt to access employees on the public sidewalks outside Store 124 prior to entering the store unannounced during the May 2007 “blitz.” The Union also could have arranged meetings with the Store 124 employees at restaurants, hotels, parks, or bars, just as Flores testified she had done in the past. Because the Union had a number of alternatives available to communicate with Store 124 employees, Bashas’ actions were lawful under *Holyoke*.

Second, even if the Union did not have the ability to access Represented Store employees outside the stores (which is not true), the May 2007 “blitz” was certainly not limited to reasonable access for representational purposes. See *Holyoke Water Power Co.*, 273 NLRB at 1370 (noting access “must be *limited to reasonable periods* so that the union can fulfill its *representation duties without unwarranted interruption* of the employer’s operations”); see also *Nestle Purina Petcare Co.*, 347 NLRB at *1 (noting that “it is the General Counsel’s burden to establish the relevance of the information sought by the union”); *The Washington Post*, 2001 WL 34035992 at *2 (a limited access right must be based on “some qualifying circumstance such as a contractual agreement or established past practice, evidence that the Union cannot adequately reach the employees by alternative means, or a request related to obtaining information relevant and necessary to a union’s representational function”).

Indeed, there is no evidence that the Union’s organizers entered Bashas’ stores in May 2007 to represent employees or to gather information to perform a representational function. Rather, the Union’s organizers passed out fliers that were *organizational* in nature – just as Sanchez had done at Store 64 and Flores had done at Store 124 months earlier. As stated above, Bashas’ did not have any past practice of allowing Union representatives to enter any of its stores (Represented or Unrepresented) unannounced to solicit and distribute propaganda to working employees on the sales floor. Such activity would have directly violated Bashas’ solicitation/distribution policy. Thus, even if employees – not third-party Union agents – had

engaged in the “blitz” activities in May 2007, Bashas’ would have been legally authorized to discipline those employees for violating Bashas’ lawfully enforced policies.

A Union’s representational status does not give it *carte blanche* authority to enter an employer’s premises at any time for any reason and unduly interrupt business operations. No Board case stands for such a proposition. To the contrary, industrial peace “is a fundamental aim of the Act.” *Independent Stave Co.*, 287 NLRB 740, 743 (1987). The Union ignored the spirit of the Act during its May 2007 “blitz.” Its conduct was offensive, disruptive, and unlawful. As the ALJ properly noted, “[a] union’s right of access to an employer’s private property does not flow automatically from certification or recognition as the employees’ bargaining agent.” [D at 16:23-25]; *see also Farm Fresh, Inc.*, 305 NLRB 887, 888 (1991) (finding that an employer did not violate the Act by threatening to have police eject a union representative suspected of scattering union literature in nonpublic areas); *Wilshire Foam Prods., Inc.*, 282 NLRB 1137, 1156 (1987) (denying a union rep access was lawful when he did not have an appointment, there was “not the slightest indication that it was necessary for the Union’s effective functioning” due to “any alleged contractual violation or other issue requiring his presence” and there was no showing that his “treatment varied from some established historical practice”).

Finally, the ALJ properly determined that the evidence did not warrant a finding that “Bashas’ had acquiesced in store access by union agents over the years to the degree necessary to conclude” that the June 1, 2007 unilaterally altered a past practice in violation of the Act. [D at 16:50-17:24.] Following Bashas’ purchase of the seven ASI stores in 1993, Union representatives went into those stores for representational purposes – not informational leafleting – for approximately six months to one year. Then, for the next twelve years, between 1994 and December 29, 2006, no Union agents entered any Represented Stores for representational purposes. Nor did they enter Store 64 to distribute any Union literature. To Bashas’ knowledge, no Union operatives entered the Represented Stores at any time during those twelve years of silence for any reason (except, perhaps, as customers).

The only other evidence regarding union access to the Represented Stores came from Sanchez, who admitted that December 29, 2006 was the first (and last) time he entered any Bashas' store, [RT at 1872:25-1873:13], and Flores, who claimed that she had entered Store 124 on multiple prior occasions as a Union representative, but admitted that management was aware of her presence only once prior to January 18, 2007, when she handed out the same flier to employees and Decker inside Store 124 on January 16, 2007 [RT at 1878:24-1879:4; 1946:21-1947:11]. Even taking the testimony of Flores as true, "access by union agents to the organized stores occurred at such random and infrequent times over the years" that such evidence is "insufficient to find that a binding past practice of store access by union agents existed here." [D at 17:26-34.] Further, as the ALJ properly noted, Flores' testimony regarding access was "murky and inconclusive," especially given she testified that she also shopped at Store 124 as a normal customer.²⁷ [D at 17:19-22.] Accordingly, the Board should adopt the ALJ's finding and dismiss all allegations concerning the June 1, 2007 letter.

V. EXCEPTION V: PIC RINCON'S PURPORTED STATEMENT TO STORE 153'S NIGHT CREW EMPLOYEES THAT THEY WERE CALLED "THE NIGHT CREW INFESTATION" (COMPLAINT ¶ 6(G)(2)).

A. Background Facts.

In April 2007, the Night Crew at Bashas' Food City Store 153 consisted of: (1) Teresa Cano; (2) Ruben Salazar; (3) Manuel Acevedo; (4) Paul Romero; and (5) Victor Cabrera. [Cano, RT at 335:9-17; R. Ex. 27.] The Night Crew was responsible for unloading, stocking, and ordering products. [Cano, RT at 228:20-23; Eagen, RT at 1291:12-16.] In April 2007, Baltazar

²⁷ Indeed, the ALJ properly recommended dismissing all allegations regarding Sanchez's unannounced visit to Store 64 on December 29, 2006 and Flores' unannounced visits to Store 124 on January 18, 2007 and March 8, 2007, including the allegations that excluding Sanchez and Flores from the Represented Stores on these days amounted to an unlawful unilateral change in a longstanding practice of store access. [D at 14:35-16:9.] That the General Counsel did not except to any of those determinations further demonstrates that the Union had no such longstanding practice.

Rincon was an Assistant Customer Service Manager or Person-In-Charge (“PIC”) at Food City Store 153. [RT at 1242:13-20.]

At the hearing, Cano testified that Rincon purportedly approached Cano, Salazar and Acevedo in the early days of April 2007 and asked if they had spoken to the Union [RT at 243:1-244:7] and, approximately 10 days later, if they knew that they were called “the night crew infestation.” [RT at 244:21-246:3.] However, Cano admitted that no one (not Rincon, Salazar, Acevedo, nor Cano) said anything about the “Union” during the “night crew infestation” comment. [RT at 355:13-356:2.] She further admitted that Rincon did not tell her what he meant by that phrase, nor did she tell him what she thought he meant. [RT at 355:10-12.] She further admitted that neither she nor her co-workers knew what Rincon meant by the phrase, and no one asked him. [RT at 355:10-12.] Cano admitted that the interaction was very brief – “that is all he told us and he withdrew.” [RT at 356:3-7.]

B. The ALJ Properly Determined That Rincon’s Alleged “Night Crew Infestation” Comment Did Not Violate The Act.

As the evidence showed, Rincon’s alleged “night crew infestation” comment made no reference to the Union or Cano’s, Acevedo’s, or Salazar’s Union activities, and no one even mentioned the word “Union” during that brief interaction. Rincon supposedly made the comment and did not even wait for a response – he simply “withdrew.” Thus, the only possible connection the General Counsel can draw between Rincon’s alleged comment and the Night Crew’s Union activities is Cano’s testimony that approximately 10 days earlier Rincon had, without follow-up, asked Cano, Salazar, and Acevedo if they had spoken to the Union. As the ALJ properly found, the comment was too “inherently ambiguous” to constitute disparagement. [D at 38:25-27.] Indeed, it could just as easily be interpreted as “praiseworthy words . . . similar to the ‘foot in the door’ metaphor.” [D at 38:23-25.]

Further, even if the Board were to find a causal connection between Rincon’s purported statement and the Night Crew’s Union activities, such a statement would be protected under Section 8(c). Section 8(c) provides that “[t]he expressing of any views, argument, or opinion . . .

shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains *no threat or reprisal or force or promise of benefit* . . . ‘Intemperate’ remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c).” *Rogers Elec.*, 346 NLRB 508, 509 (2006) (employer did not engage in unlawful disparagement by stating that “going to L&I” union was the “wrong way to make changes”; rather, employer was simply expressing his own opinion); *see also Trailmobile Trailer*, 343 NLRB 95, 95-96 (2004) (employer did not violate the Act by stating that he “could teach monkeys to weld” and that union people were “stupid”); *Forrest City Grocery*, 306 NLRB 723, 727 (1992) (employer’s insulting, but non-threatening, remarks made to an outspoken union adherent during robust and freewheeling argument about the union were not unlawful).

Thus, “disparaging remarks ‘that [do] not suggest that the employees’ protected activities are futile, [do] not reasonably convey any explicit or implicit threats, and [do] not constitute harassment that would reasonably tend to interfere with employees’ Section 7 rights’ do not violate Section 8(a)(1).” *Rogers Elec.*, 346 NLRB at 509. In fact, even referring to the union as a “cancer” was not enough to violate the Act. *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1368 (7th Cir. 1983); *see also Mount Ida Footwear Co.*, 217 NLRB 1011, 1013 (1975) (employer, in stating that signing union cards “could be fatal,” was simply lawfully expressing opinion that “employees would be better served in terms of benefits by rejecting the Union”). Even the cases relied on by the General Counsel do not find referring to the Union as “cockroaches” constituted unlawful disparagement. *See Jorgensen’s Inn*, 227 NLRB 1500, 1501 (1977) (no disparagement finding); *Tetrad Co.*, 125 NLRB 466, 475 (1959) (dismissing entire complaint).

The phrase “night crew infestation” is vague, ambiguous and benign. Nothing in that phrase reasonably suggested that supporting the Union’s organizing drive was futile or that employees who support the Union would be retaliated against. Nor could that comment constitute harassment, since Cano herself admitted that the comment was isolated, brief, and not followed by any further statements. *See Rogers Elec.*, 346 NLRB at 509. Indeed, the comment

“night crew infestation” is far less offensive than referring to the Union as a “cancer” – which has been held to be protected speech under Section 8(c). *See Village IX, Inc.*, 723 F.2d at 1368. Accordingly, the Board should adopt the ALJ’s finding and dismiss this allegation.

VI. EXCEPTION VI: HANSEN’S STATEMENTS TO MENDOZA IN SEPTEMBER 2007 (COMPLAINT ¶ 6(U)(3)).

A. Background Facts.

The allegations naming John Hansen, Refrigerated Receiving Manager at the DC, arise from a single conversation between Hansen and Mendoza, a well-known Union supporter, around September 2007. [Mendoza, RT at 500:16-501:13; Hansen, RT at 2618:4-10]. Hansen initiated a conversation with Mendoza by telling him that he had “been employed with Bashas for 23 years and . . . felt [Bashas’ was] a great company to work for,” that he knew Bashas’ “to be fair and honest with all employees, and that [he was aggravated by] what the union is saying about [the] company.” [Hansen, RT at 2619:6-10.] Mendoza responded: “If Bashas was union, we would have free medical.” [Hansen, RT at 2619:11-13.] In return, Hansen said: “Bashas offers a basic medical plan that is free to you, and if you pay for any medical at all, it’s because you optioned to upgrade your plan.” [Hansen, RT 2619:14-19.] Mendoza said “whatever” and went back to work, Hansen returned to his office. [Hansen, RT 2619:23-2620:4.]

Mendoza testified differently. Although Mendoza acknowledged that he was working on the dock when Hansen approached him, Mendoza claims that Hansen asked if he was involved with the Union. [Mendoza, RT at 501:5-18.] Hansen then allegedly asked what he and other employees were mad about and asked what they wanted since they already received good benefits. [Mendoza, RT at 501:23-25.] Mendoza allegedly responded that employees “get paid good, but that the benefits are not good.” [Mendoza, RT at 502:1-3.] Mendoza also said he was unhappy with the changes to the medical plans because he now had to pay \$80 per month. [RT at 502:9-13.] Mendoza testified that Hansen then said, “Companies have to make changes in order to compete with other companies,” and the conversation ended. [RT at 502:16-20.]

B. The ALJ Properly Determined That Hansen Did Not Implicitly Promise Increased Benefits And Improved Working Conditions If Mendoza Refrained From Union Activity.

Even after crediting Mendoza's testimony, the ALJ properly determined that Hansen did not unlawfully solicit grievances and implicitly promise benefits during his brief conversation with Mendoza. The only evidence Mendoza provided regarding this allegation is that Hansen supposedly asked him what he and other employees were mad about and asked what they wanted since they already received good benefits. [Mendoza, RT at 501:23-25.] However, asking a well-known Union supporter what he is mad about, or why he is mad at the company, does not constitute unlawful solicitation. *See Cont'l Indus., Inc.*, 279 NLRB 920, 920 (1986) (holding that it was not unlawful for a supervisor to ask an open union supporter "about this union" and "don't you think we can help" to which the supporter said "no").

Moreover, there is no evidence that Hansen promised to fix anything or remedy any grievances in exchange for Mendoza's allegiance. *Wal-Mart Stores, Inc.*, 348 NLRB No. 16, at *15 (2006), *enfd*, 519 F3d 490 (D.C. Cir. 2008) (for a promise to unlawfully dissuade employees from engaging in protected activity, it must be "linked to union activities"). To the contrary, the ALJ determined that, when Mendoza responded that employees were unhappy about benefits and detailed the changes in health care costs, Hansen supposedly responded that companies sometimes have to make such changes to stay competitive, that "the union is no good" and that "the Company would not 'budge' on economic issues," before the conversation ended. [RT at 502:16-20; D at 79:44-80:22.] Those statements do not logically carry any implicit or explicit promise to remedy grievances or change health care benefits if Mendoza refrained from union activity. [D at 80:20-22.] Absent such a promise, Hansen's alleged statements cannot constitute unlawful solicitation of grievances and implied promise of benefits. The Board should adopt the ALJ's finding and dismiss this allegation.

VII. EXCEPTION VII: THE ALJ PROPERLY TAILORED THE REMEDIAL NOTICES TO THE SPECIFIC LOCATIONS WHERE THE VIOLATIONS ALLEGEDLY OCCURRED.

The General Counsel requests a unified posting at all of Bashas' Arizona locations, which "would involve the vast majority of its 160 facilities." [D at 94:21-24.] As the ALJ properly found, such an unusual remedy is not warranted here. Indeed, common postings are the exception, not the rule. *See Wal-Mart Stores, Inc.*, 350 NLRB 879, 885 (2007) (reversing ALJ order requiring common posting at three stores when only one violation was common).

Fundamentally, the General Counsel's request is groundless because neither the Union nor the General Counsel alleged that any of the ULP Charges at issue occurred at or impacted all of Bashas' 160 facilities. In fact, only 12 Bashas' facilities are implicated (in any way) in these proceedings. The allegations regarding Bashas' Represented Stores involve only Stores 63, 64, 65, 66, 67, 69, 124, and 125. The allegations regarding Bashas' Unrepresented Stores involve only three stores: (1) Store 153; (2) Store 20; and (3) Store 162. The allegations regarding Bashas' Distribution Center involve only Bashas' Distribution Center – no other facility. The allegations regarding those 12 locations are not so egregious as to warrant a company-wide posting. *See Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 586 (2d Cir. 1994) (denying enforcement of Board order requiring multi-facility posting, relying in part on finding that many of the employer's unlawful acts were not the type of egregious or "hallmark" violations on which company-wide remedial postings are normally based).²⁸

Nor has the General Counsel presented any evidence indicating that the employees at any of Bashas' other facilities were even aware of the purported violations at these 12 locations. *See Albertson's Inc.*, 307 NLRB 787, 789 (1992) (in determining when a common notice is warranted, the Board may consider factors that create "reasonable cause for concern that the

²⁸ For example, the allegations involving Bashas' retail stores relate to a few employee transfers, minor discipline, and allocation of hours, but not to such "hallmark" violations as discharges, store closures, or systemic denial of compensation or benefits.

employees of one [location] would become aware of the [r]espondent's similar conduct at the other[s]"), *enforcement denied*, 8 F.3d 20 (5th Cir. 1993). If the employees at Bashas' other locations do not even know about the allegations at issue, those employees could not have been "chilled" in the exercise of their rights in any way.

The entire basis for the General Counsel's current request for a Company-wide posting is the prior existence of Cases 28-CA-214048, 28-CA-21220, and 28-CA-21319. Those cases, however, related to only eight unionized stores and arose out of the simple fact that the Union had not sought to negotiate with Bashas' regarding those stores for many years. Because the Union had not communicated with Bashas' or with the employees at those stores for so long, Bashas' assumed that the Union had waived any interest it once had in representing those employees. Once the Union returned to the scene and Judge Kocol confirmed that, as a matter of law, the Union remained the collective bargaining representative of the Represented Store employees, *see Bashas', Inc.*, 352 NLRB 391, 397 (2008), Bashas' began negotiating with the Union on a variety of issues, including wages, access, and employee benefits. That is not the conduct of a "repeat offender" or a "recidivist." It is the conduct of a responsible Company that is simply trying to comply with the law. Nothing in Bashas' actions necessitates a unified posting at all of its locations.

Nor did the ALJ err in requiring separate notices for the Represented Stores, the Unrepresented Stores and the Distribution Center, respectively, rather than one common notice at all twelve locations involved in the allegations. The Board orders a common notice among multiple facilities only when "it finds 'considerable similarity in the nature of the unfair labor practices' committed at the different locations." *Id.* Again, under that directive, each facility must have had at least one unfair labor practice committed at its location to determine whether such violation is "similar" to other violations at other locations. "Where, however, there is only one unfair labor practice common across different locations, the Board orders separate notices." *Earthgrains Co.*, 351 NLRB 733, 739-40 (2007) (multi-facility posting was not warranted where

the only common ULP was a prohibition of “union talk on company property”); *see also United States Postal Serv.*, 350 NLRB 441, 441 n.3 (2007) (reversing ALJ order requiring employer to post notice at all facilities in district and, instead, ordering the employer to post remedial notice only at the facilities where the violations occurred).

Here, the Represented Store Cases, the Unrepresented Store Cases, and the Distribution Center Cases are factually and legally distinct. The Represented Store Cases involve completely different witnesses, documentary evidence, and legal arguments from the Unrepresented Store Cases and from the Distribution Center Cases. There are clear differences among the issues involving Bashas’ unionized and non-unionized employees. The Represented Store Cases relate to two unique issues (denial of access and denial of a wage increase) at Bashas’ eight unionized stores. The Unrepresented Store Cases raise a variety of separate and distinct allegations arising out of the treatment of a couple of employees at three non-unionized stores. The Distribution Center Cases raise separate and distinct allegations arising out of Bashas’ non-unionized Distribution Center. In these three groups of cases, there are no common supervisors, no common employees, no common facilities, no common stores, and no common charging parties.

While the ALJ denied Bashas’ pre-hearing motion to sever this matter into three separate cases (Represented Store, Unrepresented Store, and the Distribution Center), he specifically noted that such separation made sense for remedial purposes. [D at 94:23-28.] Indeed, the ALJ agreed with Bashas’ that “a posting related to issues at the represented stores would most likely be confusing to the employees of the unrepresented stores. Similarly, the issues at the distribution center are only marginally relevant for remedial purposes to the issues involved at the retail stores, organized or unorganized.” [D at 94:29-33.] In the event the Board concludes that a posting is appropriate under these circumstances, it should adopt the ALJ’s approach of issuing a separate notice for each of the three separate groupings at issue (Represented Store, Unrepresented Store, and the Distribution Center).

VIII. EXCEPTION VIII: THE ALJ FOLLOWED BOARD PRECEDENT AND AWARDED SIMPLE INTEREST ON BACKPAY, RATHER THAN INTEREST COMPOUNDED ON A QUARTERLY BASIS.

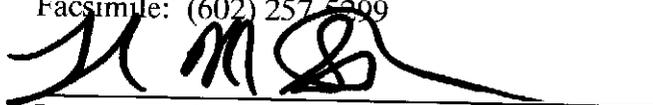
Finally, the General Counsel argues that the ALJ erred in failing to order that interest on backpay be compounded on a quarterly basis. However, the ALJ did not err on this point. To the contrary, the ALJ properly adhered to longstanding Board precedent that interest on backpay be simple interest computed using the short-term federal rate plus three percent. [D at 93:47-94:2]; *see also New Horizons for the Retarded, Inc.*, 283 NLRB 1173, 1173-74 (1987) (adopting method for computing interest based on the short-term federal rate plus three percent). The cases cited by the General Counsel arise in distinguishable contexts and demonstrate that compounding interest on a quarterly basis is not the only correct approach to calculating interest. Indeed, the Board has repeatedly declined to compound interest on backpay awards. *See, e.g., Eagle Ray Elec. Co.*, 354 NLRB No. 109, at *4 n.6 (Nov. 25, 2009) (“The General Counsel seeks compound interest computed on a quarterly basis for any backpay or other monetary awards. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest.”); *Compass Group N. Am.*, 354 NLRB No. 106, at *5 n.6 (Nov. 19, 2009) (same); *APS Events, LLC*, 354 NLRB No. 102, at *2 n.3 (Oct. 30, 2009) (same); *Haartzheim Dodge, Inc.*, 354 NLRB No. 100, at *3 n.5 (Oct. 30, 2009) (same); *DPI New England*, 354 NLRB No. 94, at *1 n.4 (Oct. 30, 2009) (same); *Glen Rock Ham*, 352 NLRB 516, 516 n.1 (2008) (same); *Rogers Corp.*, 344 NLRB 504, 504 (2005) (same); *Commercial Erectors, Inc.*, 342 NLRB 940, 940 n.1 (2004); *Accurate Wire Harness*, 335 NLRB 1096, 1096 n.1 (2001) (same). The General Counsel makes no new arguments why the Board should suddenly abandon its longstanding precedent on this issue. Accordingly, if the Board does not reverse the ALJ’s findings of alleged Act violations requiring backpay (as argued in Bashas’ Exceptions Brief), it should continue its existing practice of requiring simple interest on any backpay award.

CONCLUSION

For the foregoing reasons, the Board should adopt the ALJ's conclusions that Bashas' did not violate the Act as discussed above and should dismiss those allegations. If the Board reverses any of the ALJ's findings and determines Bashas' did violate the Act as alleged, then the Board should modify the ALJ's Order and accompanying Notice to Employees so that the Order and Notice are no broader than absolutely necessary. If the Board determines that backpay is warranted for a violation of the Act as alleged, it should maintain its longstanding policy of awarding simple interest and deny the General Counsel's request to deviate from current practice by compounding interest quarterly.

DATED this 4th day of January, 2010.

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