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

IN THE MATTER OF:

ALBERTSON'S, LLC,

Respondent,

YVONNE MARTINEZ, an Individual,

and **Case Nos. 28-CA-023387**
28-CA-023538

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1564,

Charging Parties.

RESPONDENT ALBERTSON'S LLC'S ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION

Respondent Albertson's LLC ("Albertson's" or "Company"), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this brief in answer to the Acting General Counsel's ("AGC") Exceptions to the Administrative Law Judge's ("ALJ") decision in the above-captioned case. As demonstrated below, the ALJ correctly recommended dismissal of all of the allegations discussed herein and the AGC has failed to establish a basis for overturning any of these findings.

II. ARGUMENT AND AUTHORITY

A. ALLEGED NO TALKING RULE

The ALJ properly recommended dismissal of the allegation in Complaint paragraph 5(k) that "[s]ince on or about May 7, 2011, the Respondent, at the Respondent's facility, orally promulgated and has since maintained an overly-broad and discriminatory rule prohibiting

employees from engaging in Union activities." (Decision at 13:23-25.) The AGC takes exception, arguing that Store Director Don Merritt began enforcing a "no talking rule" against cashier Talie Perea to stop her Union discussions with coworkers after she was observed engaging in Union activity. (AGC's Brf. at 5.) This argument is meritless and distorts the record with respect to the timing, nature and object of Merritt's conduct.

Merritt had a longstanding problem with what he calls "picnics" – groups of employees congregating in one place and neglecting their work tasks. (Tr. 531, 1477-78.) On the front end, for example, cashiers would huddle together near one cash register, making it difficult for customers to find them to get help checking out. (Tr. 351.) Merritt told Service Operations Manager Cindy Andablo and her assistants that when they saw a "picnic," they should remind the cashiers of the work they were supposed to be doing at their registers in between customers, such as straightening candy and magazine displays and "stepping out for service."[1] (Tr. 531-32, 1371, 1478.) Merritt himself broke up "picnics" in the same fashion. (Tr. 1478.)

The AGC asserts that Merritt noticed and began breaking up "picnics" for the first time in May 2011, a month after he observed and reported Union activity on the front end. (AGC's Brf. at 3.) In fact, in the testimony cited by the AGC, Merritt said that he encountered the problem of "picnics" as soon as he started at Store 917 in January 2010, long before the organizing campaign started. (Tr. 351.) His practice of breaking them up was not new in 2011; indeed, he had done it at when he worked at other stores before 2010. (Tr. 1479.) Thus, Merritt's breaking up "picnics" was not a reaction to any perceived Union activity.

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[1] The AGC confuses and conflates the concepts of "picnics" and "stepping out for service." "Stepping out" is a work responsibility, not a "practice" of "chatting" as described by the AGC. (AGC's Brf. at 3.) When no customer is in the checkout lane, a cashier is expected to "step out" or "step up" past the end of her lane to show customers her register is free. (Tr. 531.) "Stepping out" was one of the work tasks that cashiers were neglecting when they grouped together in a "picnic" at a single register. (Id.)

Further, there simply was no evidence that Merritt targeted Perea or Union activity in breaking up "picnics," as the AGC contends. (AGC's Brf. at 3, 5.) Again, this practice preexisted the organizing drive and was aimed at facilitating productivity and customer service. Merritt merely testified that one of the "picnics" he broke up involved Perea. (Tr. 352.) This does not prove that he singled her out or deviated from his regular practice in any way. There was no evidence that Merritt ever broke up a "picnic" when Perea or any other employee was discussing the Union. There was no evidence that any "no talking rule" was ever promulgated or enforced to curb discussion of the Union, in the context of "picnics" or otherwise. Cashier Albert Sanchez, a witness called by the AGC, testified that when cashiers were discussing the Union on the front end, they kept quiet when any manager approached so that the manager would not know what they were talking about. (Tr. 1032-33.) The employees were never told to stop talking about the Union at those times. (Tr. 1033.) Perea admitted that no one was disciplined for talking on the front end. (Tr. 989.)

A no talking rule violates the Act "'when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work.'" Sam's Club, 349 NLRB 1007, 1009 (2007) (quoting Jensen Enters., 339 NLRB 877, 878 (2003)). Thus, in the cases cited by the AGC, employers announced rules explicitly banning union discussion or activity while permitting employees to discuss other subjects during work time. See Orval Kent Food Co., 278 NLRB 402, 405, 407 (1986); Larid Printing, Inc., 264 NLRB 369, 374, 376 (1982); Olympic Medical Corp., 236 NLRB 1117, 1122 (1978). Here, notwithstanding her bald arguments, the AGC utterly failed to prove the existence of a discriminatory rule that prohibited employees from discussing the Union but allowed them to talk about other non-work matters. The ALJ correctly dismissed this allegation.

B. BLANKENSHIP'S ALLEGED SOLICITATION OF GRIEVANCES

Paragraph 5(e) of the Complaint alleged that Mark Blankenship, Albertson's Director of Human Resources, violated Section 8(a)(1) by soliciting grievances and promising increased benefits in a series of employee meetings held on September 20, 2010, after the Union organizing effort began. (See Decision at 14:14-20.) The ALJ properly dismissed this allegation on the merits but did not need to take the analysis that far. As Albertson's argued in its post-hearing brief, the 8(a)(1) allegations stemming from employee meetings in August and September 2010 were time-barred. The ALJ agreed as to the August meetings held by Angel Seydel, (Decision at 10:7-21, 10:38-11:2), but he did not address the time bar with respect to Blankenship's September meetings.

The statute of limitations contained in Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge." 29 U.S.C. § 160(b). The original charge, alleging only an 8(a)(3) discriminatory discharge violation involving cashier Yvonne Martinez, was filed on March 3, 2011. The amended charge adding the Blankenship meeting allegation was filed on April 29, 2011. Thus, the Complaint attempted to assert an 8(a)(1) violation that occurred seven months before the filing of the charge that first alleged it. This allegation clearly was barred by the six-month statute of limitations.

Under longstanding Board law, an alleged violation not contained in a timely charge may be prosecuted only if it is closely related to the allegations in a timely filed charge. Ross Stores, Inc. v. NLRB, 235 F.3d 669, 672 (D.C. Cir. 2001). Allegations are closely related for purposes of this analysis only if they involve the same legal theory and arise from the same factual circumstances or sequence of events. Id. In this case, the time-barred 8(a)(1) allegation was not

closely related to the original 8(a)(3) charge because the two allegations asserted different legal theories and arose from different factual situations. See WGE Fed. Credit Union, 346 NLRB 982, 983 (2006). The original charge alleged that Martinez was suspended and discharged on November 30, 2010 and December 4, 2010, respectively, because of her Union activities in violation of Section 8(a)(3). The amended, untimely charge alleged that Blankenship violated Section 8(a)(1) by making coercive statements to employees in group meetings on September 20, 2010, two and a half months before Martinez's discharge. These two allegations were completely unrelated factually, legally and temporally. "The coincidence of the two separate violations during the same organizing campaign does not of itself create a close factual relationship. . . . To permit the Board to pursue the untimely charged 8(a)(1) violation based on the timely charged but . . . unrelated 8(a)(3) violation would be tantamount to allowing the Board to enlarge its jurisdiction beyond that given it by Congress." Ross Stores, 235 F.3d at 674-75 (citation and internal quotation marks omitted). Section 10(b) requires the Board to affirm the dismissal of the Blankenship meeting allegation without considering its merits.

In any event, the ALJ correctly recommended dismissal on the merits because Blankenship did not promise benefits or announce any new practice of soliciting employee grievances in his meetings. (Decision at 15:12-40.) Blankenship's presentation did include reminders about Albertson's established channels for addressing employee concerns, including the toll-free Associate Hotline on which the AGC focuses. (Resp. Ex. 10 at 3; Tr. 1093-94, 1165.) As the ALJ found, however, overwhelming evidence at the hearing showed that the Hotline was posted and well known to employees (including Martinez and Perea) for years before the meeting and before any organizing activity was reported at Store 917. (Decision at 14:31-33, 14:36-37; Resp. Ex. 9; Tr. 659, 934, 1094-99, 1528-29.) "It is well established that an

employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign." Wal-Mart Stores, 340 NLRB 637, 640 (2003). The AGC failed to prove that the Company "significantly alter[ed] its past manner and methods of solicitation during the [organizational] campaign," as required to show an 8(a)(1) violation. Carbonneau Indus., 228 NLRB 597, 598 (1977). Even if Albertson's had not held similar meetings at Store 917 before, the ALJ aptly noted that Board law permits an employer to promote existing benefits and procedures in communications overtly intended to counter a union organizing campaign. (Decision at 15:14-33 (citing Raley's, Inc. v. NLRB, 703 F.2d 410, 414 (9th Cir. 1983) & Kingsboro Med. Grp., 270 NLRB 962 (1984)).) Thus, the ALJ properly concluded that "[n]othing in Blankenship's September 20 presentation or the testimony concerning his remarks at those meetings establishes that he did anything other than highlight existing employee benefits and longstanding problem-solving practices." (Decision at 15:12-14.)

Furthermore, it is not the solicitation of grievances itself that violates the Act, but rather an employer's explicit or implicit promise to remedy the grievances that suggests to employees that union representation is unnecessary. Wal-Mart, 340 NLRB at 640. There was no evidence that Blankenship promised in any way to resolve or remedy employee concerns reported via the Hotline. The AGC repeatedly cites testimony by Dominguita Gutierrez that Blankenship "guaranteed" employees a response if they called the hotline. (AGC's Brf. at 2, 7.) However, as Gutierrez vividly recalled, Blankenship made clear that he was not making any promise to remedy employees' concerns: "He said that he would be sure that we got an answer back. We might not care for the answer, but he would be sure that we got a response back." (Tr. 1258 (emphasis added).) With this disclaimer, Blankenship's statement could not reasonably have

been interpreted as a promise to remedy employees' grievances. The ALJ correctly found his conduct lawful.

C. EMPLOYEE BARBECUE

The AGC continues to insist that an innocuous employee barbecue held at Store 917 on May 20, 2011 was an unlawful benefit intended to dissuade employees from supporting the Union, as alleged in Complaint paragraph 5(p). The ALJ properly dismissed this allegation based on facts that were completely undisputed. The barbecue was planned in a department heads' meeting after Merritt and Grocery Manager Jeromy Garcia proposed having it for employee appreciation. (Tr. 1229, 1483.) Merritt understood that the store had held similar barbecues in the past and intended for this to be the same type of event. (Tr. 1483-84.) There had been two similar barbecues at the store in Santa Fe where Merritt previously worked. (Tr. 1485.) The Union was not discussed at all in connection with planning the barbecue. (Tr. 1230, 1262.) Mike Mares, the Meat Manager and a Union member, attended the meeting and agreed to bring his own grill for the barbecue. (Tr. 1229-30, 1501.) A flyer was posted on the time clock advertising the barbecue as an employee appreciation event. (Tr. 1053.) It was held outside behind the store, in the afternoon. (Tr. 1230.) The store provided the food and supplies for the event, and Merritt grilled the food. (Tr. 1230, 1484, 1501.) Employees were not required to clock out to attend the barbecue. (Tr. 1053, 1230.) They simply ate and socialized. (Tr. 1054.) Management did not give any presentation or speech at the barbecue, and no manager mentioned the Union during the event. (Tr. 1053-54, 1231, 1484.) Company stores throughout New Mexico commonly hold employee barbecues once or twice a year. (Tr. 1546.) Five witnesses, including two called by the AGC, testified that Store Directors before Merritt had held similar employee barbecues at Store 917. (Tr. 726, 1021, 1231-32, 1262-63, 1374.) In addition, as

Perea admitted, Store 917 under Merritt had held potlucks for employees on Thanksgiving and Christmas where the store provided the main course. (Tr. 948, 1231, 1485-86.)

Board law requires the AGC to prove that a benefit was granted for the "express purpose" of persuading employees to reject the Union. NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964). Even if the evidence permits an inference that employees would reasonably view the benefit as an attempt at coercion, the employer may rebut that inference with proof of a legitimate business reason for the granting of the benefit. Jewish Home for the Elderly, 343 NLRB 1069, 1088 (2004). "Such a persuasive business reason . . . is not necessarily limited to an established past practice or even a course of conduct that was planned prior to the advent of the Union on the scene." Noah's Bay Area Bagels, LLC, 331 NLRB 188, 191 (2000).

Here, the ALJ did not "assume" that the Company acted lawfully, as the AGC contends. (AGC's Brf. at 10.) Instead, the ALJ correctly credited the uncontroverted testimony that Albertson's had a past practice of holding barbecues and similar events for employee appreciation both companywide and at Store 917 in particular. (Decision at 18:19-23, 18:38.) Further, contrary to the AGC's argument, (AGC's Brf. at 9), the ALJ did expressly consider the timing of the barbecue in relation to the Union organizing campaign. He accurately found that it took place nearly ten months after the Company learned of the organizing drive in August 2010, undermining the claim that it was timed to dissuade Union support. (Decision at 18:33-34.) As the ALJ also noted, the sparse evidence presented by the AGC did not support her theory that Union activity "slowed down" and then rebounded in April 2011. (Decision at 18:34-35.) A single e-mail from Merritt labeling the activity as "aggressive" does not show that he viewed it as a "resurgence" of the campaign. (GC Ex. 30.) The ALJ recognized as well that an event calculated to deter Union support would not logically have included already-organized members

of the meat department. (Decision at 18:39-41.) Indeed, mingling Union members with potential new recruits at a social event would only invite further Union proselytizing. Thus, under all of the circumstances, the ALJ appropriately concluded that the AGC "failed to meet his burden of proving that the May 2011 barbeque was motivated for the express purpose of defeating the Union's organizational effort." (Decision at 18:31-32.)

D. ALLEGED INTERROGATION OF SEBASTIAN MARTINEZ

The AGC takes no exception to the ALJ's finding that Company attorneys Danny Ma and Thomas Stahl gave dairy clerk Sebastian Martinez the Johnnie's Poultry assurances in the first two of four interviews preparing him to testify in this case. (Decision at 34:15-20.) However, the AGC contends that an 8(a)(1) violation should have been found because Ma and outside counsel Glenn Beard did not repeat the assurances to Mr. Martinez in the third and fourth interviews they conducted. The ALJ correctly recommended dismissal of this allegation.

The central flaw in the AGC's case here, not fully addressed by the ALJ, is that Johnnie's Poultry assurances were never required in the first place given the subject matter of the interviews. In the first interview, Ma asked Mr. Martinez questions only about statements that Company managers had made during PowerPoint presentations in employee meetings. (Tr. 1614-15; see Decision at 30:48-31:10.) This questioning related to allegations in the underlying unfair labor practice charge that Albertson's representatives announced unlawful rules and solicited employee grievances in the employee meetings. (See Complaint ¶ 5(a)-(c), (e)-(h).) In the second interview, Stahl asked Mr. Martinez about two topics: (1) managers' statements in the same employee meetings; and (2) Mr. Martinez's knowledge of Company policies governing the handling of Catalina Coupons. (Tr. 1643-44; see Decision at 32:17-18.) The coupon policies

were relevant to Albertson's defense to the 8(a)(3) charge involving the suspension and termination of Yvonne Martinez. (See Complaint ¶ 6(a)-(b); Decision at 32:18.)

In the third and fourth interviews, conducted after issuance of the Complaint and in preparation for the unfair labor practice hearing, Beard used Stahl's outline from the second meeting and covered the same two subjects – managers' statements in the employee meetings and Catalina Coupon policies. (Tr. 1655, 1658; see Decision at 33:34-35, 34:3-4.) One additional topic covered briefly in the final interview was Mr. Martinez's voluntary report to Grocery Manager Jeromy Garcia that he had been approached by a non-employee Union organizer in the store and found it inappropriate. (Tr. 1658; see Decision at 34:5-7.) This incident had come up during the first four days of hearing that preceded the interview. (Decision at 34:7.) It was undisputed that Ma, Stahl and Beard never asked Mr. Martinez a single question related to his or other employees' Union sympathies or activities. (Tr. 1550, 1616, 1656, 1659.)

"[T]he rule of Johnnie's Poultry does not apply to every interview an employer conducts with his employees," even where the purpose of the interview is to prepare the employer's defense to an unfair labor practice charge. Delta Gas, Inc., 282 NLRB 1315, 1325 (1987). If the interview "does not touch on any protected activities, the Johnnie's Poultry rule does not apply." Id. "To make out a violation of Section 8(a)(1) by coercive interrogation the General Counsel must prove, at a minimum, that there were questions asked of an employee. And these questions must relate to the employee's Section 7 rights." Drug Plastics & Glass Co., 309 NLRB 1306, 1311 (1992) (emphasis added).

The Board's decision in Safelite Glass, 283 NLRB 929 (1987), is directly on point and dispositive of the AGC's Johnnie's Poultry allegations against Albertson's. In Safelite, the employer's attorney interviewed several employees about what company managers had stated to

them during certain employee meetings. Id. at 949. The sole purpose of the interviews was to prepare the employer's defense to an unfair labor charge alleging that management's conduct in the employee meetings violated Section 8(a)(1) and (5) of the Act. Id. There was a factual dispute regarding whether the attorney gave Johnnie's Poultry assurances to all of the interviewees. Id. at 949-50. However, the Board ruled that the employer's alleged failure to comply with Johnnie's Poultry "did not matter because the alleged illegal interrogation did not pertain to any conduct protected by Section 7 of the Act." Id. at 929, 950.

> It is clear . . . that in formulating the Johnnie's Poultry standards for those situations where an employer is engaged in questioning employees in order to defend itself against unfair labor practice charges, that the Board assumed that the standards would be applicable only to those situations which involved an employer's interrogation of employees about matters involving their Section 7 rights. . . .
>
> In the instant case it makes no sense to apply the Johnnie's Poultry rules because the employees were not questioned about their union sympathies or activities or about any other activities guaranteed by Section 7 of the Act. Nor was their interrogation reasonably calculated to interfere with the Board's statutory obligation to carry out the Act's mandate to protect the employees' Section 7 rights inasmuch as Respondent did not ask the employees if they had spoken to a Board agent or whether they had submitted affidavits to the Board. The employees were only asked to furnish a statement to Respondent's attorney which would inform him of what had been stated to the employees by representatives of management and Respondent's attorney during the meetings previously held by management which the employees attended. This interrogation was not reasonably calculated to inhibit the employees from engaging in any of the types of protected concerted activity encompassed by Section 7 of the Act, nor was it reasonably calculated to interfere with the Board's investigatorial and prosecutorial processes. In other words the alleged illegal interrogation by Respondent's attorney in preparing a defense to Local 1621's unfair labor practice charge did not pertain to the employees' involvement in conduct protected by Section 7 of the Act.

Id. at 950-51 (emphasis added). On this basis, the Board affirmed the administrative law judge's dismissal of a Section 8(a)(1) coercive interrogation allegation. Id. at 929, 951.

Here, just as in Safelite, the attorneys' questions of Mr. Martinez concerned communications by management and had nothing to do with his or other employees' protected activities. Specifically, Mr. Martinez was asked about managers' statements in employee meetings and the Company's dissemination of policies regarding the handling of Catalina Coupons. He was asked about nothing else except an occasion when he voluntarily reported to management that he had been approached and bothered by a non-employee Union organizer. This also did not pertain to Mr. Martinez's involvement in protected activity, as he clearly was avoiding involvement and reporting what he perceived as inappropriate conduct by a non-employee. Thus, because the attorneys' interviews of Mr. Martinez did not touch on employee activities protected by the Act, they did not trigger the protections of Johnnie's Poultry in the first instance. Ma and Stahl actually provided the assurances when they were not required. Although the ALJ did not fully articulate this rationale for dismissal, he correctly found that "nothing occurred at any of the meetings warranting a conclusion that the questioning of Martinez ever became coercive." (Decision at 35:16-17.)

The ALJ's dismissal of the "coercion" allegation against Merritt should likewise be affirmed because the interview with Ma and Beard to which Merritt summoned Mr. Martinez was not an interrogation about protected activity. Indeed, consistent with Delta and Safelite, the ALJ properly found that Merritt had no duty to provide Johnnie's Poultry assurances to Mr. Martinez because "Merritt never questioned Martinez about substantive matters or his protected activities." (Decision at 35:29-31.) Moreover, Merritt did not make any comment to Mr. Martinez that could be construed as an "implied threat of unspecified reprisals" if he refused to

cooperate. (Tr. 1177-79.) The AGC cites no authority for the proposition that Merritt's merely saying "you have to go" constituted an unlawful threat of reprisal.

Even assuming, as the ALJ apparently did, that Johnnie's Poultry assurances were required in the first two interviews (which they were not), the ALJ correctly found that the unusual and special circumstances of this case excused or mitigated Albertson's not giving the assurances to Mr. Martinez in or before the third and fourth interviews. (Decision at 34:25-35:37 (citing Le Bus, 324 NLRB 588 (1997)).)[2] In addition to the fact that Mr. Martinez was never asked about protected activities, those mitigating circumstances included: (1) Mr. Martinez had already proven himself to be aligned with management and a willing informer against the Union, (Decision at 28:18-21); (2) he was given Johnnie's Poultry assurances in the first two meetings, (Decision at 34:15-20); (3) the third and fourth interviews occurred in preparation of the same case and were essentially "refresher courses" covering exactly the same topics, with one minor exception not involving protected activity, (Decision at 35:17-24); (4) he voluntarily and repeatedly agreed to participate and testify for the Company, (Decision at 30:38-41, 32:15); (5) he understood throughout all of the interviews and the encounter with Merritt that there would be no reprisals for refusing to participate, (Decision at 30:41-43; Tr. 1219); and (6) his only concern when Merritt summoned him to the third interview was that he would be perceived as neglecting his department if he did participate in the interview, (Decision at 32:34-33:19; Tr. 1216-18). Considering the totality of these circumstances, "[t]o require [the Company] to repeat the Johnnie's Poultry warning ad nauseum, during preparation for defense to the charge . . . is an

[2] Contrary to the AGC's assertion, the ALJ did not find that "the Johnnie's Poultry exception was inapplicable to this case." (AGC's Brf. at 15.) Rather, he simply noted that the "single case" cited in footnote 4 of Le Bus is not factually on point here. (Decision at 34:28.)

obsessive and unwarranted extension of Board law." Douglas & Lomason Co., 253 NLRB 277, 280 (1980). The ALJ properly recommended dismissal of Complaint paragraph 5(s) and (t).

III. CONCLUSION

For all of the foregoing reasons, PNM respectfully requests that the Board deny the AGC's exceptions, affirm the ALJ's decision and adopt his recommended order as to all of the findings and conclusions challenged by the AGC.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____

Thomas L. Stahl
Glenn A. Beard
Post Office Box 1888
Albuquerque, NM 87103
(505) 768-7264
(505) 768-7395 [fax]
Attorneys for Respondent

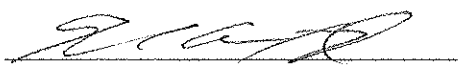
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Respondent Albertson's LLC's Answering Brief to Acting General Counsel's Exceptions to Decision of Administrative Law Judge was served on this 5th day of July, 2012 as follows:

David Garza and Sophia Alonso, via e-mail
david.garza@nlrb.gov
sophia.alonso@nlrb.gov

Joe Allotta, via e-mail
joelocal1564@comcast.net

Yvonne Martinez, via first class mail
1200 Juanita Drive SW
Albuquerque, NM 87105



Glenn A. Beard