

Sam's Club, a Division of Wal-Mart Stores, Inc. and Local 400 of the United Food and Commercial Workers Union, AFL-CIO. Cases 5-CA-24369, 5-CA-24618, and 5-RC-14036

November 8, 1997

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

On April 22, 1996, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions, a supporting brief, and a brief in reply to the answering briefs of the General Counsel and the Charging Party, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has reviewed the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

1. We adopt the judge's recommendation to sustain Objection 7, which alleges that the Respondent discriminatorily promised better wages and benefits to employees. We find, in agreement with the judge, that the Respondent engaged in objectionable conduct by announcing openings for promotion and transfer, delaying filling the positions, and attributing the delay to the union election. In so finding, we do not rely on the Respondent's postelection announcement of employee promotions and retroactive grant of salary increases as anything other than contextual evidence supporting the judge's conclusion that the Respondent's prelection conduct was intended to send a message to employees that support for or opposition to the Union would be taken into account in filling the positions. We also find it unnecessary to pass on the judge's finding that certain employees were tacitly assured they would receive promotions or transfers for their loyalty to the Respondent.³

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's overruling of Objection 8, or to the judge's dismissal of unfair labor practice allegations alleging that Andre Saunders was unlawfully disciplined, that Arnetta King's evaluation was unlawfully motivated, and that the Respondent engaged in unlawful surveillance.

²We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³We find without merit the Respondent's contention that the judge's findings pertaining to Objection 7 are based on evidence relevant only to overruled Objections 11 and 12. It is clear from the

2. The Respondent excepts, inter alia, to the judge's grant of the General Counsel's motion to amend the complaint to allege that the Respondent's operations manager, Stan Harris, threatened that the Respondent would close if the Union won the election. The Respondent contends that the amended allegation is time barred under Section 10(b) of the Act. We find, for the reasons set forth below, and in agreement with the judge, that the General Counsel's amendment to the complaint is not time barred and, thus, the motion was properly granted.

The Union filed a timely charge on April 28, 1994, alleging, inter alia, that in March 1994, the Respondent's finance supervisor, Deborah Belt, told employees that it would close its facility if the employees ever chose the Union to be their collective-bargaining representative.⁴ On the fifth day of the hearing, the General Counsel moved to amend the complaint to further allege that, on several occasions in June 1994, the Respondent's operations manager, Stan Harris, told Union Representatives Tracie Burris and Terry Adgerson, in the presence of employees, that the Respondent would close its facility if the Union won the election.

In *Redd-I, Inc.*, 290 NLRB 1115 (1988), the Board held that the General Counsel may add complaint allegations that fall outside the 6-month 10(b) period if they are closely related to allegations in a timely filed charge. In determining whether the new allegations are closely related, the Board considered the following factors:

First, we shall look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the al-

record that the Union elicited the testimony concerning the promotions, at least in part, in support of the allegations set forth in Objection 7.

⁴We adopt the judge's finding that Belt's statement to an employee, that the Respondent would "probably close the warehouse because they didn't tolerate unions," violated Sec. 8(a)(1) of the Act. We do not, however, adopt the judge's suggestion that the comment, standing alone, might have been inconsequential.

legations in the timely pending charge. [290 NLRB at 1118.]

Applying these principles, we find that the General Counsel's amended allegations are closely related to the timely filed charge concerning Supervisor Belt's statements about the possible closure of the Respondent's facility. First, we note that, like the timely filed charge, the amended complaint alleges that an official of the Respondent threatened that the Respondent's facility would close if the Union was chosen as the employees' bargaining representative. Further, both statements are alleged to have occurred during the same period, i.e., during the Union's organizing campaign. Thus, it is clear that the amended complaint presents an 8(a)(1) allegation that is factually similar to the 8(a)(1) allegation in the original charge, and would likely require a similar defense, i.e., that the Respondent's officials did not make statements concerning the closure of the facility.

We also find that the Respondent was not prejudiced by the move to amend the complaint at the hearing. On April 6, 1995, at the close of the General Counsel's case-in-chief, and 1 day after the General Counsel's motion was granted, the judge adjourned the hearing for 2 weeks, until April 20, 1995. Thus, the Respondent had ample time to prepare a defense to this additional allegation.

For all these reasons, we find that the General Counsel's amendment to the complaint is permissible. In addition, we find, for the reasons stated by the judge, that Harris' comments were violative of Section 8(a)(1) of the Act.⁵

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sam's Club, a Division of Wal-Mart Stores, Inc., Landover, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

“(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline imposed on employee Tony Perez, and within 3 days thereafter notify the employee in writing that this has been done and that the discipline will not be used against him in any way.”

2. Substitute the following for paragraph 2(b).

⁵ We also find that Harris' remarks constitute unfair labor practice conduct warranting the setting aside of the election. See, e.g., *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138-1139 (1988). Accordingly, we find it unnecessary to pass either on whether the judge properly permitted the Union to amend its Objection 13 to include the allegations concerning Harris' remarks, or whether the judge—in her consideration of other allegations contained in Objection 13—correctly found that the statements of employee Reddgo Long constituted objectionable conduct.

“(b) Within 14 days after service by the Region, post at its facility in Landover, Maryland, copies of the attached notice marked “Appendix.”¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1994.”

3. Substitute the following for paragraph 2(c).

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

4. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid and protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn you that we will close the facility in the event that Local 400 of the United Food and Commercial Workers Union, AFL-CIO or any other labor organization wins a representation election.

WE WILL NOT direct you to curtail your union activities.

WE WILL NOT discipline you in retaliation for your union activities.

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

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to a day of discipline against Tony Perez, and WE WILL, within 3 days thereafter, notify Perez in writing that this has been done and that the discipline will not be used against him in any way.

SAM'S CLUB, A DIVISION OF WAL-MART STORES, INC.

Brenda Valentine Harris, Esq., for the General Counsel.¹
Paul Thompson, Esq. and *Michael Oates, Esq.* (*Hunton & Williams*), of Richmond, Virginia, for the Respondent.
George Wiszynski, Esq. (*Butsavage & Associates*), of Washington, D.C., for the Charging Party.

DECISION

PROCEDURAL STATEMENT

ARLINE PACHT, Administrative Law Judge. This case was tried in Washington, D.C., on March 21 through 23, April 4 through 6, and concluded on April 20, 1995. The original charge in Case 5-CA-24369, filed on April 28, 1994,² alleged that Respondent, Sam's Club, a Division of Wal-Mart, Inc., had engaged in conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act.³ On August 3, the Union filed a charge in Case 5-CA-24618, as amended on November 14, alleging further violations of Section 8(a)(1) and (3).⁴

On July 29, a complaint issued in Case 5-CA-24369, as amended on February 22, 1995; on November 30, a second complaint issued in Case 5-CA-24618. The complaints were consolidated for hearing by order of December 23.

Following an election held on July 8, the Union filed Objections to Conduct Affecting the Results of the Election on July 15. The Regional Director's Supplemental Decision issued on January 6, 1995, in which some of the objections were dismissed and others were set for hearing with the consolidated complaint.⁵

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Sam's Club, a Division of Wal-Mart Stores, Inc. (Respondent or Sam's Club), a Delaware corporation, with an office and place of business in Landover, Maryland (Respondent's facility or the Club), is engaged in

¹ Hereinafter, referred to as the General Counsel.

² All events took place in 1994, unless otherwise indicated.

³ The Act.

⁴ References to sections of the Act will be abbreviated as Sec. in footnotes.

⁵ This case had an extensive pretrial procedural history which is detailed in R. Br. 1-8.

the retail sale of food, nonfood products, and goods, where, based on a projection of its operations since on or about January 1, 1994, it expected to derive gross revenues in excess of \$500,000 annually. In conducting its business operations at the Landover facility during a relevant time period, Respondent purchased and received goods and products valued in excess of \$5000 directly from points outside the State of Maryland. The consolidated complaint alleges, Respondent admits, and I find, that Sam's Club is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The amended consolidated complaint alleges, and Respondent denies, that its officials and agents:

- (1) Engaged in unlawful surveillance.
- (2) Discriminatorily terminated, suspended, or altered the work schedule of four union supporters.
- (3) Threatened to close the facility if the Union won the election.
- (4) Threatened to issue a low performance evaluation, then issued such an evaluation and denied a wage increase to the employee because of her union activities.⁶
- (5) Engaged in other conduct affecting the outcome of an election held on July 8.

B. Background

Sam's Club, a Division of Wal-Mart, reported to be the world's largest retailer, operates more than 400 warehouses throughout the United States. In January 1994, it purchased a facility in Landover, Maryland, the only one involved in this proceeding, from Pace Membership Warehouse, retaining approximately 95 percent of the predecessor's employees and supervisors.

Soon after this purchase, the Union, under the direction of business agent, Max McGhee, launched an organizing campaign among Respondent's employees, or "partners" as they are called in Wal-Mart terminology. An election took place on July 8, which the Local lost by a vote of 88 to 52.

C. Allegations of Unlawful Discipline

1. Andre Saunders

In early March, Respondent notified its staff that a new attendance policy would be implemented as of April 1. Under the policy, employees would be subject to a progressive disciplinary system, with written warnings issued for a first, and second violation, followed by a day of decision; that is, a 1-day suspension, with pay, after a specified number of absences. In addition, the policy required employees to report a prospective absence no later than 15 minutes before the start of their shift. The first failure to comply with this "no call-no show" rule called for a day of decision.

Andre Saunders, a stockman in Respondent's freezer/cooler area, was one of the key activists in the union

⁶ At the outset of the hearing, over Respondent's objection, I granted the General Counsel's motion to amend the complaint to add the allegation of the unlawful withholding of the wage increase.

campaign. This was not Saunders' first organizing experience for he had been a union proponent in two earlier campaigns under Pace's management, a fact known to Respondent at the time he was hired.

Record evidence shows that Saunders was suspended on April 4 for failing to comply with Respondent's no-call/no-show rule on April 2. The parties offer dissimilar versions of the events leading up to Saunders' discipline, causing the General Counsel and the Charging Party to maintain that he was treated in a discriminatory manner, while Respondent asserts that it acted for just cause.

a. *Saunders' account*

Saunders testified on direct examination that his father, with whom he lived, had been experiencing pain throughout the night of April 8, leading to a family decision to transport him to a hospital in the early morning hours of April 9. Aware of Respondent's no-call/no-show rule, Saunders stated that he tried to telephone the Club unsuccessfully several times before 4 a.m., the starting time of his shift, while arranging for his father's transfer and admission to the hospital. He testified that when he finally reached Supervisor Emma Mack a few minutes after 5 a.m., he told her of his father's medical emergency and that he had tried to contact her earlier.

Saunders further stated that he was summoned to General Manager Kent Kramer's office on April 11 where, in the presence of Comanager George Fassitt, Kramer advised him that he was being given a day of decision for failure to comply with Respondent's no-call/no show rule. Saunders asserted that he told both men why his phone call to Mack was delayed. Although he claimed that he protested the imposition of discipline in light of his father's medical emergency, Saunders signed a coaching form given to him during this interview since another employee, Tony Perez, had warned him he would be disciplined if he refused to do so. On returning to work following his suspension, Saunders supplied the requisite "plan of action," stating that "I now know to call a manager 15 minutes before the shift starts in order to avoid future violations." (G.C. Exh. 5.) He explained that he omitted any reference to his father's hospitalization in his plan of action since management already had disregarded his earlier protest of a decision day.

b. *Respondent's version*

Respondent's witnesses tell a different tale. Supervisor Emma Mack acknowledged that Saunders telephoned her just after 5 a.m., but said that his call came on April 2, not April 9, as Saunders' alleged. Moreover, contrary to Saunders' testimony, she denied that he offered an excuse for his absence. Respondent's daily callout log, introduced into evidence as Respondent's Exhibit 2, supports Mack's testimony that she recorded his call on April 2 at 5:04 am. with the terse notation, "won't be in."

General Manager Kent Kramer and Comanager George Fassitt agreed that they met with Saunders, reminded him of the no-call/no-show rule and imposed a decision day on April 4, a date confirmed by the coaching form Saunders signed at the time. Both men denied that Saunders told them about a medical emergency. In addition, they noted that the "plan of action," Saunders submitted after returning to

work, stated only that "I now know to call a manager fifteen minutes before the shift starts" in order to avoid future violations."

In resolving these conflicting accounts, it is useful to consider the affidavit Saunders gave to a Board agent just weeks after the dates in question. In that document, Saunders claimed that he took his father to the hospital on April 9. As noted above, however, Respondent's unchallenged business records establish conclusively that Saunders' absence was on April 2 and the coaching session took place 2 days' later. When confronted with this inconsistency, Saunders insisted that his father's crisis occurred on the same date he called in late, but then admitted he was uncertain of the dates of either event. Moreover, although he stated in his affidavit that he told Mack of his father's medical crisis, Saunders did not add that he also relayed this information to Kramer and Fassitt. In an effort to document the relevant dates involved, I suggested that Saunders produce any real evidence which might establish the precise date of his father's admission to the hospital. He failed to do so. Thus, Saunders presented no written confirmation of his version of this incident which might have contradicted the documented and corroborated testimony of Respondent's witnesses. Accordingly, I conclude that the evidence is insufficient to establish that Saunders complied with Respondent's no-call/no-show rule on April 2.

Conclusions Concerning Saunders

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981); cert. denied 455 U.S. 989 (1982), the Board announced that in mixed motive cases, in order to prove that an employee was disciplined for discriminatory reasons, the General Counsel must prove in his case-in-chief that the employee engaged in concerted, protected activity, that the employer knew of that activity and disciplined the employee for that reason. In the instant case, I am constrained to conclude that the General Counsel has failed to present evidence sufficient to establish a prima facie case.

Saunders clearly was involved in union activity. Since Kramer knew of his union activism in prior campaigns, it is reasonable to assume that at some point, he became aware of Saunders' role in the 1994 organizational drive, although it is uncertain whether he found out as early as April 2 when this incident occurred. However, even assuming that Respondent knew or suspected that Saunders again was playing a key role in the organizing effort, no credible evidence was adduced that he was treated disparately or disciplined for his union activity. In fact, Respondent's records disclosed that five other employees, most of whom were thought to be promanagement, were disciplined under the no-call/no-show rule, just as Saunders was. In light of these considerations, the allegation that Respondent discriminated against Saunders does not pass muster.

2. Tony Perez

Lawrence (Tony) Perez, like Saunders, was a union activist while working for Pace, and continued his advocacy as a member of the in-house organizing committee after he was hired by Sam's Club. Perez openly displayed his prounion sympathies. For example, early in the campaign, at a meeting of receiving department employees called by his supervisor,

Bill Black, and in the presence of his team leader, Tom Davis, Perez publicly stated that the Union would benefit the employees. A similar declaration occurred at another meeting, when Manager Frank Goodrich addressed some 40 or more employees and, with reference to the Union, suggested they “should all stick together and work together as a team.” (Tr. 285.) As the meeting concluded, Perez rattled Goodrich by asking if he had said, “Teamsters” rather than “team.” Later that day, Black admonished Perez to “tone down” his union activity.

On March 30, Perez received a decision day suspension. The General Counsel claims that Perez was sanctioned for discriminatory reasons, while the Respondent counters that Perez was properly disciplined for insubordination. The differing versions of the facts regarding this incident, as related first by Perez and then by Respondent’s witnesses, follow.

The Situation According to Perez

Perez testified that after working for 5 or 6 hours on March 30 without a break, he asked his team leader, Davis, if he could take a break, assuring him that he had completed all of his assignments up to that point. Another employee asked for a break at the same time. After initially authorizing a break, Davis reversed himself and told Perez to wait on the dock until the other employee returned. Telling Davis that he was not feeling well, Perez disregarded his supervisor’s instruction and left for on a 15-minute break.

At the end of the day, Black called Perez to his office, told him he had to respect those in charge and gave him a final decision day for failing to obey his order. Black further instructed Perez to return from his suspension with a written plan of action. Perez refused to sign the coaching form, believing he had done nothing wrong. In explaining his actions, Perez testified that receiving department employees regularly took their breaks two at a time, as long as their work was completed. He could not recall an occasion, even if it was busy, when employees were prohibited from taking their breaks together.

When Perez returned to work, he submitted a written plan of action, as the Company required, but failed to express any contrition for his behavior. Instead, he offered his version of the event, explaining that he told his supervisor he was not feeling well and had completed his assignments at the time. When he was given another disciplinary notice for the same March 30 incident, he asked Black what consequences he would face if he refused to sign both forms. On being advised that he would be discharged, Perez decided to sign the notices.

Davis offered a different account of this episode. He claimed that Perez had worked for just a few hours when he asked for a break, saying he was tired. Davis explained that with other employees already on break, and several trucks still unloaded, he asked Perez to wait until the other employees returned. Disregarding Davis, Perez left the dock without permission. Immediately thereafter, Davis prepared a performance coaching form which Perez refused to sign. Another supervisor, Black, as well as General Manager Kramer became aware of this incident and converted the coaching form into a final day of decision for Perez.

Like Saunders, Perez was a member of the in-plant organizing team. His prouion leanings obviously were known to the Respondent in light of Black’s admonition that he tone

down his union activity. Regardless of which version of this incident is credited and even if I were to accept Perez statement of the facts and conclude that Davis acted in an arbitrary manner, I perceive nothing patently discriminatory in the fact that he gave Perez a coaching form for disregarding his order. After all, Davis did not deny, but merely delayed his break. In spite of that, Perez admittedly defied his instruction.

What is suspect is Black’s and Kramer’s decision to impose a more stringent sanction,—a final day of decision—when they had no direct knowledge of Perez’ conduct, and had not considered the merits of his position with him. Indeed, they offered no reason for penalizing him a second time for the same offense. Their overreaction contrasts with the behavior of a supervisor who withdrew a second coaching form given at the same time for the same incidents.⁷ Thus, the day of decision meted out to Perez for what was a first infraction appears to be arbitrary and vindictive. There is no evidence that Kramer would have imposed a second, more stringent form of discipline on Perez were it not for his known union sympathies. In fact, the evidence is to the contrary. It follows, therefore, that Respondent’s treatment of Perez violated Section 8(a)(1) and (3) of the Act.

3. Arnetta King

Arnetta King became an enthusiastic union supporter and member of the in-house organizing committee in March, following her demotion from membership team leader to membership clerk. Her duties in the latter position included handling the refund and cash registers, selling and renewing memberships to patrons, and responding to members’ inquiries. King’s immediate supervisor was team leader, Kimberly Upchurch; her coach, was Assistant Manager of Membership and Marketing Robert Caruso. In July, King received a standard score of 2.83 on her evaluation, and consequently, was denied a raise. The complaint alleges that King’s treatment was in retaliation for her union activism.

Respondent contends that to a great extent, King’s poor evaluation was occasioned by her behavior during an incident which occurred the previous April. Specifically, Supervisor Jesse Hatton testified that he was called to the membership desk on April 12 to assuage a customer who was complaining that his membership fee renewal had not been credited to his account. After assuring the customer that the record would be corrected, Hatton asked King who was stationed at the nearby membership desk, to handle the matter. According to Hatton King declined to step in, and within earshot of the customer snapped, “I’m not a team leader, give it to Kim (Upchurch).” (Tr. 511.) King maintained that the customer was 5 to 10 feet away from her when she said this and did not overhear her. Hatton disagreed, claiming that he and the customer were only three feet away, and that on hearing King’s comment, the member turned to Hatton with “a puzzled look on his face.” (Tr. 1462.)

Hatton reported King’s behavior to Upchurch who, in turn, called King to a coaching session, intending to give her a written warning for insubordination and discourteous service

⁷ See testimony of Arnetta King who testified, without dispute, that her supervisor withdrew a second coaching form he administered for the same set of absences, after he stated that he discussed the matter with Kramer. (Tr. 446–448, 474, 506.)

to a patron. King reacted by berating Upchurch, claiming that the incident would not have happened if she, Upchurch, had been at her post. When the team leader ascerbically told King she was aware of her responsibilities, King stalked out of the meeting. Upchurch reported the incident to Caruso, after which they both brought the matter to Kramer's attention. On Kramer's advice, King received a day of decision the next day for poor membership service and insubordination.

On receiving this penalty, King again protested that it was the team leader's job, not hers, to deal with a dissatisfied customer. In the responsive statement required of employees when returning from a decision day, King wrote: "My intent was to follow through on normal practice and procedure. My awareness of procedure for the membership department based on how I was trained in January; the team leader should be there to take part in handling unhappy members at the counter." (R. Exh. 9.) Apparently, King was relying on the Respondent's associate handbook which advises that "[i]f you need help with an unhappy customer, its OK to ask your supervisor for assistance." (C.P. Exh. 2.) Her reliance was misplaced, for this language permits, but does not compel, resort to a supervisor. At trial, King rationalized that she could not have assisted the complaining patron since she did not possess the security code needed to enter the computer system. However, she had not mentioned this to Hatton at the time. Moreover, Upchurch maintained that King was capable of curing the customer's account without resort to a security code.

King's Evaluation and Wage Freeze

Typically, Respondent evaluates its employees annually, close in time to their anniversary date of hire. The team leader drafts the initial report after which is reviewed by the assistant manager, and then by the general manager. An employee will be eligible for a wage increase only on receiving a score of 3.0 or higher. An employee who receives a below-standard score is entitled to a reevaluation 30 days after the initial assessment.

Upchurch prepared the first draft of King's 1994 evaluation some 60 days prior to her July 27 anniversary date. On reviewing King's evaluation form, Caruso and Kramer revised two of the scores Upchurch had assigned, increasing King's productivity grade from 2.5 to 3.0, but lowered her cooperatives score from 3 to 2.83 because of her rude and insubordinate conduct at the membership desk. Fearing that King would be dismayed at receiving such a relatively low rating, Upchurch obtained Caruso's permission to meet with her in late June to review the evaluation informally ahead of time.

King testified that during this preliminary review, Upchurch told her that everyone in the department, indeed, in the entire building, was watching her, and that management thought she had a bad attitude.⁸ As the meeting progressed, they moved to the personnel office, where Upchurch

⁸The amended consolidated complaint alleges, in essence, that Upchurch told King that management felt she had a bad attitude and kept her under surveillance because of her union activities.

King's testimony does not support these allegations.

further advised her to "cut out that union activity." (Tr. 490.)

Upchurch denied mentioning the Union, or referring to King's union activity. She claimed that she used the private session to forewarn King that she would receive a low evaluation score in some areas and explain the reasons for her assessment. For example, she stated that she informed King she would receive a low rating for dependability because of her frequent absences and tardiness. She further advised King that she lacked good judgment because of intemperate remarks made to coworkers and members, and displayed little initiative by frequently failing to assist others.

On July 27, Caruso and Upchurch met with King to review her written evaluation. At this time, Upchurch explained that since her score fell below 3.0, she was ineligible for a wage raise which normally accompanied an acceptable evaluation score of 3.0 or better. However, Caruso commented that he had noted an improvement in her performance over the last 6 to 8 weeks, finding that she was more cooperative with her fellow workers and had reduced her absenteeism. He assured her that if she continued to improve, she would be eligible for a raise when she was reevaluated in 30 days, as required by company policy. In fact, King was reevaluated a month later by Freda Hogue, Upchurch's replacement, and on earning a score of over 3.0, subsequently received a pay raise.

Conclusion: King's Evaluation Was Not Unlawfully Motivated

The consolidated complaint alleges, in substance, that King received a substandard evaluation and consequent wage freeze in retaliation for her union advocacy. To prove this contention, counsel attacked the legitimacy of several critical comments in the evaluation. For example, the Charging Party insists that if King had a "consistent call-out and attendance problem" as Upchurch claimed, she could have verified such reports by examining King's timecard, a step she admittedly did not take. However, another of King's supervisors, Robert Caruso, did issue a coaching form which detailed her numerous late arrivals between April 11 and 19. Upchurch was aware of this form since she signed it. Moreover, King also admitted that she had accumulated a number of unexcused absences. At the same time, she insisted that she failed to report to work for 2 weeks when her children had chicken pox. It is difficult to comprehend why King would not have reported her children's illness since it would have removed any onus attached to her absenteeism.

The Charging Party challenges another comment in King's evaluation concerning her "rudeness to members." This is, of course, a reference to her refusal to resolve a member's complaint the preceding April, for which she received a decision day. Whether or not the member in question actually found King rude, there is no dispute that King resisted serving the customer and then faulted Upchurch for not being present to handle the situation. Thus, Upchurch had a valid reason for regarding King's conduct as offensive on that occasion. I also note that whether intentional or not, King exhibited a testy, even hostile manner during both her direct and cross-examination. It would be no surprise, therefore, to find that she projected an equally abrasive manner in other circumstances, particularly when asked to perform a task she

believed should have been handled by the woman who had taken her position as team leader.

The fact that 3 months elapsed between the April date of King's untoward conduct at the membership desk and the reference to it in her annual evaluation in July does not necessarily mean that Respondent dredged up a stale event to bolster its case against her. Employees are evaluated only once a year. Thus, conduct which takes place any time within that year may be relevant. An event which occurred less than 3 months prior to the review certainly is not so dated as to be irrelevant. In addition, Upchurch's observation that King "has also shown improvement in this area" does not negate the preceding comment that she "exhibited . . . rudeness to members." Rather, it forms the basis for the subsequent comment that she "should be evaluated at a later date."

In an effort to prove that Respondent treated King disparately, the General Counsel introduced evidence which purportedly showed that four other employees received performance scores below 3.0, yet, were not denied pay raises as she was. On closer examination, the evidence does not support the Government's hypothesis. One of the four employees in the General Counsel's survey, received a wage increase only after he was reevaluated—a situation identical to King's experience. Another of the four received a wage raise only upon convincing management that his original low evaluation was incorrect. A third employee was granted a wage increase, notwithstanding a below-average evaluation, when management realized his original pay scale had been set at a lower level than appropriate for employees with his seniority. The fourth employee simply benefited from errors made in his favor by several supervisors soon after the facility was acquired and before Respondent's policies were firmly in place. Thus, the evidence indicates that the treatment of three of the four employees represented unintentional exceptions to the rule, while a fourth employee's experience, identical to King's, tends to confirm Respondent's contentions regarding its normal practices with regard to below-standard evaluations. In sum, the evidence does not persuade that King was treated in a purposefully disparate manner. In the final analysis, I conclude that Respondent demonstrated that its supervisors handled King's evaluation in a manner consistent with its usual procedures, and would have acted no differently, even if she were not a known union proponent.

D. *Upchurch's Unlawful Warning*

Notwithstanding the foregoing findings, I credit King's testimony that Upchurch admonished her to curtail her union activity. King described certain details in recounting this incident that were too precise to have been invented. For instance, King recalled that Upchurch delivered this remark after shifting the interview to a second room. It also is noteworthy that King refused to attribute other unlawful comments to Upchurch although they were alleged in the complaint.⁹ While I cannot say that all of King's testimony was as convincing, her attribution to Upchurch of a cautionary remark about her union activity rang true. Accordingly, I find

⁹In complaint 24618, Upchurch is charged with telling King that management was watching her closely and thought she had a bad attitude because of her union support. King's testimony did not support these allegations.

that Upchurch violated Section 8(a)(1) in warning King to limit her union activities.

E. *Alleged Threats of Club Closure*

1. The Porter-Belt incident

Evidence of a conversation about the Union between employee Danielle Porter and team leader, Debra Belt, was in much dispute, but not because the two women's testimony was in conflict. Rather, at trial Porter rearranged her testimony, retracting the account of her exchange with Belt that she had provided in her affidavit of May 5. Respondent did not call Belt to testify or explain its failure to do so.¹⁰

Porter, as reluctant a witness as one could find, testified that during their meeting, she told Belt that she wished Porter had the opportunity to vote on the Union, and then mused that Sam's might close the facility if the union won the election. Porter then claimed that Belt simply agreed with her, commenting, "Yeah, you are probably right." (Tr. 186-187.) However, Porter also stated that Belt told her that Respondent did not tolerate unions.

In other words, Porter claimed at trial that it was she, not Belt, who speculated about the Respondent's probable reaction to the Union. The General Counsel impeached Porter by having her read the following relevant portion of her own affidavit into the record: (Tr. 194):

[A]bout the first week in March, I was talking to Deborah Belt, the finance supervisor . . . about getting a union. I told her that I hoped we would get a union or at least vote on it.

She told me that's not what I wanted, because Sam's would probably close the warehouse because they didn't tolerate unions.

Porter conceded that the account in her affidavit was correct. However, she failed to explain the contradiction between her written statement and her testimony and, indeed, appeared not to comprehend the inconsistency between the two accounts.

The General Counsel urges that the reliable version of this incident is the one which Porter offered in her affidavit. I concur. There can be little doubt that Porter was extremely reluctant to testify against her Employer's interests, and distorted her trial testimony for that reason. Her affidavit, on the other hand, was given in a neutral setting, outside the presence of the Respondent, and much closer in time to the events described. For these reasons, I chose to rely on her out-of-court statement as the one that is credible. Therefore, I conclude that Belt initiated the ominous opinion that Respondent would close the facility in the event the Union was victorious.

Citing cases such as *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1257 (5th Cir. 1978); and *NLRB v. M & W Marine Ways, Inc.*, 411 F.2d 1070 (5th Cir. 1969), Respondent contends that even if Belt made the statement Porter initially attributed to her in her affidavit, it was "isolated and innocuous," made during a casual conversation. Respondent fur-

¹⁰I granted the General Counsel's motion to examine Porter pursuant to 611(c) of the Federal Rules of Evidence, after she acknowledged that she was testifying under compulsion of a subpoena.

ther argues that if Belt is held accountable, her remarks were those of a low-level supervisor. As such, Respondent submits that they “might appear to be independent conclusions of the supervisors rather than the product of organized company resistance.” *NLRB v. Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 3310–3311 (5th Cir. 1978), cert denied 440 U.S. 960 (1979).

Belt’s comments were made privately, behind the closed doors of an office. This setting already constitutes some indication of the furtive bent of her remarks. Further, Porter referred to Belt as a finance supervisor, suggesting a status beyond that of a “low level” team leader. If any evidence could be cited as proof of the chilling effect of Belt’s remarks, it would be Porter’s attempt to hold her blameless and assume personal responsibility for the offending comments. Porter’s obvious reluctance to testify adversely to her employer provides telling proof of how threatening and coercive Belt’s comment was. See *Interstate Truck Parts*, 312 NLRB 661 fn. 3 (1993) (only statements that “would reasonably tend to interfere with employee rights under the Act” are regarded as unlawful threats).

Respondent argues that it cannot be held liable for Belt’s comments (assuming she made them) since the conversation occurred in March, ostensibly before management knew of the union campaign. This argument is without merit. Obviously, Belt knew of the Union’s advent, since the women’s conversation focused on how Respondent would react in the event the Union won an election. In light of remarks detailed below that another higher ranking supervisor, Harris, also threatened that Respondent would move the facility in the event of a union victory, Belt’s virtually identical remark does not appear isolated or inconsequential. Given these considerations, I conclude that Porter’s assertion that Respondent would close the facility should the Union prevail constituted a threat violative of Section 8(a)(1).

2. Other threats of closure

The Amendment of the Complaint and Objections to the Election

On the fifth day of trial, the Charging Party produced two witnesses, Tracie Burris and Terry Adgerson, who testified that Operations Manager Stan Harris told them on a number of occasions that Sam’s Club would close if the Union won the election. Over Respondent’s objection, I granted the Charging Party’s and the General Counsel’s oral motions to amend the pleadings to add these allegations.

The Respondent protests that the testimony presented by Burris and Adgerson should not have been admitted, much less believed. As a procedural matter, Respondent contends that an amendment of the complaint in Case 5–CA–24369 to permit such testimony is time barred under Section 10(b) of the Act, in that the allegedly unlawful conduct occurred several months after the underlying charge was filed. However, under *Redd-I, Inc.*, 290 NLRB 1115 (1988), a complaint may be amended where the allegedly unlawful conduct occurred within 6 months of a timely charge and the allegations are closely related to those set forth in the charge. Contrary to Respondent’s contention, the *Redd-I* exception remains available even where the alleged misconduct occurred after, rather than before the date the underlying charge was filed, as long as the 6-month period is not exceeded. In addition, I find that

the amendment differs from allegations in the complaint and the objections only by substituting agents for Respondent other than those previously named.

Like Respondent, I am troubled that the General Counsel and the Charging Party were not advised of the two women’s testimony at an earlier stage in this proceeding so that they could have offered their amendments in a more timely manner. Notwithstanding my reservations in this regard, evidence that is relevant and probative should not be rejected because of inadvertence or imperfect communication between client and counsel. See *BJ’s Wholesale Club*, 319 NLRB 483 (1995) (JD at 505 citing *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139 (1988)), where the administrative law judge was enjoined to consider “all evidence revealed during the course of the inquiry.” Consequently, with some consternation, I granted counsels’ motion to amend the complaint and election Objection 13.

3. The evidence

Burris and Adgerson worked as “SPURS,” an acronym for special project union representatives; that is, Local 400 members who took leaves of absence from their regular employment elsewhere to assist the Union in its organizing drive at Sam’s Club. Burris testified that she was stationed at the Club from morning to night, 6 days a week from the latter part of May until the election. While there, she and Adgerson answered employees’ questions about the Union, encouraged them to sign authorization cards, distributed union buttons and generally toured inside and outside the facility to demonstrate a presence.

Both women stated that they frequently encountered Operations Manager Stan Harris, who often would make comments, within earshot of other employees, that “Wal-Mart is such a powerful company. . . . they would never be organized by any union. . . . they would close down before [the Union] would ever get a contract.” (Tr. 1073.) Burris further said that Comanager George Fassitt often accompanied Harris, but seldom spoke. Her perception of Fassitt as a an individual who was more reserved than Harris accords with my own observation of both men.

Adgerson confirmed much of what Burris said, except that she claimed that Fassitt joined in making some of the comments about closing the Landover facility. (Tr. 1159.) Harris and Fassitt, in turn, acknowledged that they saw Burris and Adgerson at the Club several times a day, every day, prior to the union election, and would exchange innocuous greetings with them. They also noted that they received training in how to comport themselves during the union campaign, and as a consequence, never referred to the Union or commented that the Club would close if the Local won the election.

Concluding Findings

Burris and Adgerson should not be discredited simply because procedural niceties were not observed, as long as Respondent was not prejudiced by the delay. I found these women spoke simply, directly and without affectation. They could have attributed a host of unlawful statements to a wide number of management officials, but they pinpointed Harris, whose duties admittedly put him in their path on a daily basis.

In contrast to Adgerson's and Burris' unassertive demeanor, Harris appeared to be an extroverted, confident individual who would have little hesitation in attempting to impress two unsophisticated union volunteers with the power of his employer. If Burris and Adgerson had concocted their testimony, they also could have marshalled the names of some employees who allegedly overheard Harris' remarks. Their inability to identify such witnesses by name, other than those on the organizing committee, or to offer completely consistent versions of their encounters with the store supervisors tended to reinforce rather than derogate from the authenticity of their testimony. Moreover, their lack of familiarity with the names of employees who were close enough to overhear the supervisor's comments, was understandable since they did not work for Respondent and were testifying to events occurring a year before. In sum, I credit Burris and Adgerson's accounts that Operations Manager Harris threatened that the Landover store would close if the Union won the election. His comments violated the Act, and also constituted objectionable conduct affecting the outcome of the election.

F. Allegations of Unlawful Surveillance

The complaint in Case 5-CA-24369 alleges, and Respondent denies, that management officials and off-duty Prince George's County policemen, some of whom worked as security guards for the Landover Mall landlord, and others for Sam's Club, engaged in unlawful surveillance.

1. Surveillance attributed to Respondent's management officials

From the earliest days of the organizing campaign in September 1993, Local 400 organizer, Max McGhee established his unofficial campaign headquarters at the China Restaurant located several stores away from Respondent's facility in the same strip mall. Sam's Club, the largest facility in the mall, was located at the far left end of the property. Adjacent to the Club, from left to right was a photography shop, the China Restaurant, a liquor store, a third world food store and a barber shop. Witnesses agreed that the restaurant was small, unadorned, and inexpensive. The facade consisted of a glass window and door, while the interior housed a pickup food counter and nine tables. Other than a concession stand in Sam's Club, it was the only establishment in the mall to serve food.

Beginning in March, McGhee became a China Restaurant regular, remaining there for several hours each weekday to meet with members of the organizing committee, as well as other employees during their breaks. He customarily sat at a table nearest the window, which gave him a good view of the parking lot.

McGhee testified that from January to the end of March, he saw Caruso and several other supervisors straggle into the restaurant from time to time. However, he asserted that as the union campaign became more spirited, a number of supervisors, including Kramer Fassitt, Hatton, and Caruso began to frequent the restaurant as a group. McGhee related that on one occasion in particular, possibly April 23, while he was meeting with organizing committee members, a number of management officials entered, including, among others, Marion King and a woman from Respondent's Arkansas

headquarters. According to McGhee, the group spent more time watching them than eating food they had ordered and remained in the restaurant for their lunch, spending their entire lunch hour looking at, but not speaking to the employees.

Perez differed with McGhee about the date and frequency of management's visits to the restaurant. He maintained that after he began to frequent the restaurant in early April, he saw supervisors there on only one occasion. One Saturday in April, while he was reviewing union literature with another employee, Managers Hitt, Kramer, and Fassitt entered the establishment, greeted Perez and his companion, ordered and then devoured their meal for the next 30 minutes or so. As Perez put it, "I observed them, as they observed me." (Tr. 302.) He did not see any officials patronize the restaurant until after the election.

King testified that she began to visit the restaurant in mid-March, but did not recall seeing any supervisors there until April 21. On that date, Caruso came in, saw her, and later that day gave her a first and second coaching form for tardiness and attendance infractions, as previously described. King returned to the restaurant later that day and while turning over the forms to McGhee, found another supervisor, Jonathan Lee, watching her. The next day, as previously noted, Caruso withdrew the second coaching notice. King was convinced that revocation came about because Lee told Caruso about her conference with McGhee.

2. Alleged surveillance by security guards

From March through the July 8 election, off-duty police officers, who were moonlighting as security guards at the Mall, stationed themselves on a rise at the edge of the parking lot closest to the street, approximately 200 feet away from the Chinese restaurant. McGhee stated that from this vantage point, the guards had a direct view into the restaurant. He further maintained that whenever a Sam's Club employee, identifiable by his or her bright red vest, entered or left the restaurant, the security guard then on duty would speak into a walkie-talkie. From the date of the election to September, McGhee continued to frequent the Chinese restaurant in connection with another union campaign at a neighboring company, but saw no police cars similarly positioned during that time period.

Organizing committee member Perez generally confirmed McGhee's testimony, stating that beginning in early April and thereafter until the union election, security guards parked their cars at the crest of the hill bordering one end of the mall. He also corroborated McGhee's testimony; that the front of the cruiser was pointed diagonally downhill in the direction of the China Restaurant. Perez was certain he had never seen a police cruiser stationed at that location prior to April, and also believed the vehicle did not remain there after the election. He did not recognize the officer in the cruiser either.

Respondent's witnesses explained that the firm which manages the Mall property retains off-duty police officers who provide security in the parking lot and common areas. These guards sign in on a sheet posted for that purpose at one of the stores at the mall at the start of the shift. For a period of time the sign-in sheets were maintained near the entrance of Respondent's facility. Later they were transferred to the liquor store. After signing in, the guards patrolled the

exterior of the Mall, covering shopping center common areas both on foot and in their vehicles.

In addition to the security guards who worked for the mall landlord, and secured the exterior portions of the property, Respondent employs other off-duty policemen to protect the interior of its facility. To enhance their visibility and deterrent value, Sam's Club guards park their marked vehicles conspicuously in the fire lane immediately in front of the facility. They log in and out on Respondent's timeclock, just as other employees do, and spend their shift patrolling the Club.

King testified that on a single occasion, one of Respondent's house security guards, an Officer Dolan, walked by the China Restaurant and looked in at her and other union activists who were conferring at a table within. Shortly after passing in one direction, he passed by again headed the opposite way toward Sam's Club and again peered into the shop.

To refute King's account of his alleged surveillance, Dolan testified that, as was his custom, he merely walked from Sam's Club past the China Restaurant to a shop a few stores away where he purchased a soda. He then retraced his steps to return to the facility.

3. Concluding findings as to surveillance allegations

Since the China Restaurant was the only eating establishment in the Landover Mall, and the Local's business agent and employees met there openly, the fact that supervisors occasionally patronized the place at times that brought them into contact is with union proponents is not, on its face, remarkable. The General Counsel correctly recognizes, therefore, that in order to establish that Respondent's agents violated the Act, the evidence must demonstrate that Sam's Club officials conducted themselves in a manner which departed from their usual practices. See *Days Inn*, 306 NLRB 92 (1992).

To varying degrees, McGhee, Perez, and King were quite suspicious of the movements and purported surveillance of their gatherings in the China Restaurant by Respondent's managers, supervisors, and security guards—both those working for Sam's Club and others employed by the Landover Mall landlord. After scouring the record, I am compelled to conclude that their fears were unsubstantiated; their testimony, based on suspicion, led to nothing more compelling than speculation.

McGhee's testimony on the surveillance issue was ambiguous. He was clear that some supervisors occasionally ate at the restaurant before the union campaign intensified. What is not clear is whether he meant to say that Respondent's supervisors frequently arrived in groups at the China Restaurant as the union campaign grew more intense, or in agreement with Perez and King, only one instance of alleged surveillance by a number of managers occurred between April and July.

The weight of the evidence establishes convincingly that Respondent's agents avoided the China Restaurant, with one notable exception, in the months before the election. It is important to bear in mind that the restaurant was open to the public, and the only place to obtain a meal in the mall. Any passerby or patron hardly could avoid seeing whomever else was there. Respondent's agents were not obliged to avoid the restaurant as long as their purpose was simply to savor the cuisine. Given undisputed testimony that the place was very

small, a patron's gaze would have to fall on other occupants. Short of avoiding the restaurant completely, which is what Respondent's supervisors almost succeeded in doing, patrons would have to gaze at the ceiling or into their plates to avoid watching others. In *Gossen Co.*, 254 NLRB 339, 353 (1981),¹¹ the Board offered this common sense dictum:

Not all instances where employer representatives are at or in the vicinity of the union activities of their subordinate employees amount to unlawful surveillance. Thus, where purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act.

King, was convinced, based on the proximity of timing, that Lee's alleged surveillance followed by her supervisor's rescission of a redundant coaching form were causally connected. Although the Board often relies on close timing as proof of a nexus between an employee's union activity and subsequent discipline, in this case, the incidents were too marginally related to establish that Lee's entry into the China Restaurant amounted to unlawful surveillance. It is just as likely that Caruso changed his mind about the second form because King threatened to protest his conduct to Kramer, as it was because Lee reported on her meeting with McGhee. Consequently, I the General Counsel has failed to provide convincing evidence that Lee engaged in unlawful surveillance.

By the same token, King's assumption is pure conjecture that Officer Dolan was engaged in unlawful surveillance when he walked in one direction and then the other past the China Restaurant. Without additional proof that he was engaged in surreptitious activity, nothing could be more innocent than Dolan's stroll past the restaurant to purchase a soda. If people sit behind a plate glass window in full view of passers by, how can they expect that they will not be noticed. Indeed, congregating in that manner is a virtual invitation to be observed.

Testimony from government witnesses of surveillance by security guards working for the Landover Mall property manager, is almost as insubstantial as the evidence of supervisory surveillance. McGhee and Perez were appropriately leery when a police cruiser began to park pointedly in the direction of the China Restaurant during the preelection period. But apart from logging their attendance on a form sometimes maintained at Respondent's facility, the evidence fails to show that these guards were acting as Respondent's agents. McGhee said that he observed the occupants of these vehicles talk into their car radios whenever a Sam's Club employee entered or left the restaurant. The Government and the Charging Party would have me infer that the guards were informing Respondent about the identity of employees who were meeting with union representatives. I cannot leap to such a conclusion because the undisputed evidence establishes that the police radios operate on special frequencies which are inaccessible to those among Respondent's managers who carry walkie-talkies. Accordingly, based on the foregoing considerations, I conclude that the General Counsel

¹¹ Citing *Atlantic Gas*, enfd. in part 719 F.2d 1354 (7th Cir. 1983).

has failed to prove that the Respondent engaged in unlawful surveillance.

III. OBJECTIONS TO THE CONDUCT OF THE ELECTION

As noted above, a week after losing the July 8 election, Local 400 filed Objections to the Conduct Affecting the Results of the Election. In a Supplemental Decision, the Regional Director dismissed a number of the objections and set for hearing with the unfair labor practices discussed above, Objections 1, 3, 4, 7, 8, 10, and 14. The Union did not appeal the Regional Director's Decision and subsequently, withdrew Objections 1, 3, 4, 10, and 14. Thus, the Union introduced evidence solely with respect to Objections 7, 8, and 13 which are considered below.

A. *Objection 7*

In Objection 7, the Union contended that “[b]efore the election Sam’s Club discriminatorily promised better wages and benefits to its employees, including, but not limited to, raises and better health insurance.” (G.C. Exh. 1Z.) In assigning this objection for a hearing, the Regional Director wrote: “In support of this objection, Employee C asserts a number of named employees were told by Employer general manager Kent Kramer that they would be taken care of after the election, and certain named employees received pay increases before their anniversary dates in exchange for a no vote.” *Id.*

The evidence is uncontroverted that in mid- to late-June, Respondent posted notices just above the employees’ timeclock announcing that seven supervisory positions and two transfers to other departments were available, but would not be filled until after the election. On July 21, 2 weeks after the election, Kramer executed a change of status form authorizing promotions and payraises retroactive to July 9, for seven employees, six of whom were considered company loyalists. On the same date, Kramer approved the transfer of two employees to the receiving department, positions which were considered more desirable than most because they did not involve nighttime or weekend assignments. The circumstances attending the promotions and transfers of each of the nine employees (in alphabetic order) are outlined below.¹²

(1) After being trained as a checkout supervisor (COS) and occasionally helping out in that position, Felencia Barner (Fortune)¹³ told Kramer that she liked that work very much. After the job was posted, she relayed her interest to Manager Stan Harris. Although Harris explained that the position would not be filled until after the election, Fortune felt after speaking with him, that her chances were good. She was right. Although she had received a below-standard evaluation in May, she was promoted to the COS position on July 21 with a retroactive raise.

(2) Employee Kewana Black also spoke with Manager Stan Harris about her interest in a COS position both before and after it was posted. Harris assured her that he “personally thought [she] would get the job.” (Tr. 1036.)

(3) Angela Brown made her interest in a promotion to COS known to Kramer both before and after the notice was posted. When she told Harris of her ambition, he indicated

that “she would make a good supervisor.” (Tr. 979.) Brown spoke to Kramer again after the position was posted, and while she maintained that he did not promise her the position, he did encourage her with the comment that “she would make a good COS.”

(4) Dwaine Davis spoke to his team leader on a number of occasions in the spring of 1994 about transferring from his current position in the “Center Department” to receiving, which he believed would be more compatible with holding a second job. When the opening in the receiving department was posted in June, Davis brought his interest in the job to the attention of Assistant Manager Hatton. Sometime prior to July 8, Hatton told Davis what his job duties would be in receiving and indicated it was likely he would receive the transfer. Kramer, too, discussed the position with Davis prior to the election. Davis did not advertise his position vis-a-vis the Union, but acknowledged he might have expressed his views to Hatton.

(5) Lisa Freeman’s views on the Union were not known since she took no part in the union campaign. She spoke to Harris about the COS position in June but remembered little of the conversation except that he made no commitments about her obtaining the promotion.

(6) Freda Hogue had a supervisory role when she worked for Pace, and campaigned vocally for a supervisory position with Respondent. As interested as she was in advancing, she claimed that she did not learn about the availability of the team leader position until after the election. Moreover, she also maintained that she did not apply for it. Hogue either forgot or chose not to remember that a notice for the position was posted conspicuously by the timeclock in June. She also denied knowing that, the vacancy would arise several months prior to the posting, although Upchurch, whose place Hogue took, stated that she told everyone in May, that she was resigning to return to school.

(7) Reddgo Long, an employee in the grocery department, testified that as early as February, he expressed his interest in advancing within Respondent’s hierarchy. At one point he told Fassitt that he wanted to “own” a Sam’s Club and would do whatever it took to reach that goal. Subsequently, Long was selected to attend a Wal-Mart shareholder’s meeting in Arkansas and on his return, shortly before the election was given the floor at a staff meeting to describe the experience.

Long recalled that when affirming his interest in the grocery team leaders position, soon after the job was posted, Kramer simply smiled and said, “[O]kay.” He also remembered that during an employee meeting sometime before the election, either Kramer or Fassitt mentioned that there “was a kind of freeze on everything . . . until after . . . the results of the election” and that he was given no advance notice of the appointment. (Tr. 816.)

(8) Gloria Robinson, whom Kramer acknowledged as procompany, was awarded a transfer to a coveted position in the receiving department.

(9) Following the union election, Abu Sesay, like the eight employees named above, became a team leader on July 20, accompanied by a pay increase effective as of July 9. Sesay was regarded as a company man.

To be sure, the evidence does not establish that Respondent’s managers explicitly promised promotions or transfers to anyone in return for a vote against the Union. However, they

¹² The employees are listed in alphabetic order.

¹³ Barner’s name became Fortune in 1995.

came as close as possible to doing so. At least five of the above-named employees—Bamum, Black, Brown, Davis, and Long—were tacitly assured that they would be rewarded, in part for their loyalty to the Company.

The Respondent argues that it appropriately withheld announcing promotions and transfer decisions to avoid prejudicing the outcome of the election. This argument is disingenuous. If Respondent had planned to fill a number of supervisory positions without regard to the Union's advent, it was at liberty to do so. See *DTR Industries*, 311 NLRB 833 (1993) (an "employer's legal duty during a pending representation campaign (is) . . . to proceed with the granting of benefits in the normal course of business as if the union were not on the scene").

Alternatively, if Respondent genuinely wished to maintain a neutral posture, it could have delayed posting the positions until the election was over. To announce the openings shortly before the election, and then delay filing them, while attributing the delay to the union election, constitutes the most devious, albeit subtle, course Respondent could have chosen—it was tantamount to dangling a prize just beyond the bidder's reach until the desired outcome was achieved. This is the same carrot and stick approach condemned by the Board in *DTR*, supra, for it surely sends a message to would-be candidates for promotion to refrain from any sort of union activity.

In evaluating the propriety of Respondent's conduct, other factors must also be taken into account. Consider, for example, the fact that Respondent hired 90 percent of its predecessor's staff—both rank-and-file employees and supervisors. In March and April, the Club's supervisory work force remained fairly constant—only two employees were promoted in that period. Yet, the grocery team leader position had been available for months. Upchurch's departure was known in May. No explanation was provided to explain how a vacancy in receiving came about in June, rather than May or July. Notwithstanding these inexplicable circumstances, Respondent selected a period of time shortly before the elections to announce that nine choice positions were available. The need to fill these slots could not have been pressing since Respondent permitted them to remain vacant for a month.

In light of the foregoing facts, a rhetorical question arises: [W]hy did Respondent find it necessary to advertise the promotions and transfers in June and then announce that they could not be filled for some weeks? The answer is obvious. Respondent posted the positions and targeted candidates for them according to a timetable which maximized its advantage against the Union as the election neared.

Respondent's decision to award the pay raises retroactively to the date immediately following the election to the nine promoted or transferred employees casts further doubt on the legitimacy of Respondent's conduct. Kramer claimed that the wage increases had to be backdated because of the peculiarities of Respondent's computerized bookkeeping system. His claim makes no sense since record evidence shows that other employees have received pay raises on the effective dates of and even *after* their promotions or annual job evaluations. Given Respondent's manipulation of the promotions and transfer process, it is fair to infer that the retroactive pay raises also were intended to send a message not just to the recipients but to the entire work force that Re-

spondent was in sole control of determining the level of, when and to whom rewards would be dispensed.

Based on the foregoing considerations, I conclude that the Charging Partys Objections 7 and 13 have merit. This is not to say that the persons selected for promotion or transfer were underserving. Rather, the harm lies in the process Respondent employed to announce and fill the positions.¹⁴ While only nine employees were directly involved, the promotions and transfers were posted and the appointments deferred in a most conspicuous manner which could hardly escape notice by the entire staff. Bluntly speaking, Respondent's handling of this matter discloses a deliberate design to adversely impact the outcome of the election.

B. Objection 8

Objection 8 alleges that "[j]ust prior to the election, Sam's Club conducted unscheduled oral reviews of its employees and granted raises. In the normal course, the reviews, if they occurred at all would have taken place sometime later this year." This objection, consolidated with and corresponding to allegations in Case 5-CA-24618, discussed above, refers to the warning Kim Upchurch issued to Ametta King that she curtail her union activity. Although I found that Upchurch told King she was being watched and that management thought she had a bad attitude, I concluded that neither these remarks nor the poor evaluation and attendant temporary wage freeze were related to her union activity. Accordingly, I further conclude that the Charging Party has not produced sufficient proof to sustain Objection 8.

C. Objection 13

In Objection 13, the Union alleged: "On election day, Sam's Club influenced the election by promising to take care of certain employees after the election, directing employees to vote no, threatening employees by emphasizing how powerful Wal-Mart—Sam's Club's affiliate—is, and threatening to close the store if the employees voted for Local 400.

In his supplementary decision, the Regional Director stated that the evidence initially presented by the Union to support this objection identified Kent Kramer as the supervisors who allegedly advised employees that they would be taken care of after the election if they voted no while Human Resources Director Marion King was accused to telling employees that Wal-Mart was powerful and would never close the Landover store if the Union prevailed. However, as detailed above, this objection and paragraphs 6(a) and (b) of the complaint were amended on oral motion during the hearing to attribute the coercive and threatening statements to management officials, Stan Harris and George Fassitt. As I concluded above, based on Burris' and Adgerson's credited accounts, Operations Manager Harris, alone and in the company of Fassitt, threatened that the Landover store would close if the Union won the election on more than one occasion. His comments violated the Act, and also constituted objectionable conduct affecting the outcome of the election.

In further support of Objection 13, the Union alleges that employee Reddgo Long acted as Respondent's agent when at a storewide meeting held shortly before the election he told

¹⁴Evidence reviewed as well as findings and conclusions reached with respect to this objection are relevant only to Objection 7, not to Objections 11 and 12 which the Regional Director dismissed.

his fellow employees that "I don't think anybody is going to make Wal-Mart, Inc. do anything." (Tr. 839.) The circumstances giving rise to his role at this meeting, and Long's candid explanation of his meaning, support the Union's contention that his words had an untoward affect on the election.

Bear in mind that: (1) Long did not conceal his desire to rise in the Wal-Mart world; (2) sometime in mid- to late-June, he applied for a posted position as grocery department team leader; (3) toward the beginning of June Kramer selected Long as a delegate to attend a Wal-Mart shareholder's meeting in Arkansas; (4) at the time, Kramer told him he "would be a good representative for the Club;" and urged him to take notes because he would be expected to report to the employees about what he learned at the meeting;" (Tr. 800, 818); (5) on his return, management called upon him to describe his experience in Arkansas at a meeting attended by all Sam's Club's employees and chief managers, shortly before the election.

Long testified that among other things, he spoke of Wal-Mart's growth, adding, "I don't think anybody is going to make Wal-Mart, Inc. do anything." (Tr. 839.) When asked what he meant by that, Long explained "I guess that I meant it. . . . according to the election," Long added that he was responding to some employees' claims about what the Union would accomplish, when he expressed the view that "I don't think that from what I see that nobody was going to make them do anything." (Tr. 839.)

The issue here is less whether Long's comments were objectionable than whether Respondent is liable for them. It is

The definition of an "agent" under the Act is both general and broadly construed. Section 2(13) of the NLRA provides:

In determining whether any person is acting as an "agent" of another person so as to make that other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

See also *Longshoremen ILA (Costal Stevedoring Co.)*, 313 NLRB 412, 415 (1993) ("agency principles must be broadly construed in light of the legislative policies embedded in the Act"). In determining whether an agency relationship existed between a union that asked other unions for assistance in a dispute with some stevedoring companies, the Board held the requesting respondent union liable for the acts of the others who acted as its agents because of the respondent's request and because it "did nothing to disavow or halt the [agent's] threats . . . [and took] full advantage of the benefits of the agent's actions." *Id.* at 416.

Even if the evidence does not demonstrate that Respondent specifically requested Long to act as its agent or asked him to deliver his objectionable comments, he certainly comes within the meaning of an "apparent agent." In *Southern Bag Corp, Ltd.*, 315 NLRB 725 (1994), the Board instructed that:

[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the agent to perform the acts in question. . . . The test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." [Citations omitted.]

Kramer was responsible for sending Long to the shareholder's meeting and knew weeks in advance that he would be asked to speak to his coworkers about his experience. According to plan, and at Respondent's specific request, Long was introduced by management and addressed a store-wide assembly of employees. Although Respondent did not prepare his script, it is not surprising that Long, recently returned from such an experience, would be impressed by and speak favorably of the Company's wealth and power. Neither is it surprising that he would say that the Union would be powerless to compel Sam's Club or Wal-Mart to do anything it did not wish to do. If Respondent did not coin Long's words, it took full advantage of and did nothing to disavow them. Given these circumstances, it is fair to infer that the employees "would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Id.* Consequently, under the test of apparent authority outlined in *Southern Bag Corp*, supra, I find merit to Objection 13.

In the final analysis, although only two of the Union's objections ultimately were sustained, they involved numerous employees and a series of separate incidents. Thus, with respect to Objection 7, nine employees were immediately involved. However, the Employer pointedly posted vacancy notices at spots which had to be noticed by every employee in the facility. The subsequent announcement that the positions would not be filled until after the Union election also was broadcast in a way which had to reach most of the employees. Similarly, Objection 13, involving repeated threats of plant closure by a senior member of management over a period of time, were directed specifically to two individuals who were not members of the bargaining unit. However, the threatening remarks were overheard by a much broader audience of employee bystanders. It is difficult to imagine any comment more threatening, intimidating and coercive than one which suggests to an employee that the store at which he works will close. Thus, Respondent's objectionable conduct was widespread and coercive enough to have a reasonable tendency to interfere with employee free choice and interfere with the exercise of their Section 7 rights. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). Accordingly, the election of July 8 should be set aside and a second election scheduled.

CONCLUSIONS OF LAW

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

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

3. Respondent violated Section 8(a)(1) of the Act in the following manner:

(a) Directing its employees not to engage in union activities.

(b) Threatening employees that Respondent would close the facility in the event the Union lost the election.

(c) Warning employees to curtail their union activities.

4. Respondent violated Section 8(a)(1) and (3) by disciplining an employee, Anthony Perez, more harshly because he engaged in union activity.

5. The Respondent engaged in conduct which affected and interfered with the out come of the election held on July 8, 1994, requiring that the election be set aside.

6. The Respondent did not further violate the Act as also alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices and conduct affecting the results of the election, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, as set forth in the attached notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹⁵

ORDER

The Respondent, Sam's Club, a Division of Wal-Mart Stores, Inc., Landover, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that the facility will close if the union prevails in an election.

(b) Warning employees to curtail their union activities.

(c) Disciplining employees in retaliation for their union activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(a) Remove from its files any reference to the unlawful day of discipline imposed on its employee, Tony Perez, and notify him in writing that this has been done and that the discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facility in Landover, Maryland, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted on July 8, 1994, be set aside and a new election held at such time as the Regional Director for Region 5 decides that the circumstances permit the free choice of a bargaining representative.

IT ALSO IS ORDERED that the complaint be dismissed in so far as it alleges violations of the Act not specifically found.

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."