Wild Oats Markets, Inc. *and* Local 371, United Food and Commercial Workers International Union, AFL–CIO. Cases 34–CA–9243 and 34–CA–9278

May 29, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On November 20, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wild Oats Markets, Inc., Norwalk, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge found that the Respondent did not violate Sec. 8(a)(5) of the Act by failing to pay any profit-sharing bonuses after a majority of the employees had voted for the Union. The General Counsel contends that the Respondent had discretion over these bonuses and that the Respondent, therefore, was obligated to bargain with the Union before taking unilateral action. We agree with the judge's conclusion.

In *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court was presented with the question of whether the employer violated Sec. 8(a)(5) of the Act by unilaterally granting merit wage increases during the course of negotiations for a first contract. Rejecting the employer's argument that the increases were the continuation of its past practice, the Court found the employer violated the Act because "the raises . . in question were in no sense automatic, but were informed by a large measure of discretion." *NLRB v. Katz*, supra at 746. Here, in contrast, the payment of the profit-sharing bonuses was essentially automatic, provided that certain objective criteria were met, and involved only limited discretion. The bonuses were paid when stores met specific numerical targets set out for each store in advance. Although the Respondent's chief financial officer (CFO) had some discretion to pay bonuses even when the targets were not met, the record contains evidence of only two instances in which she did so. In both instances, one of which involved the March 2001 payment to the Norwalk store in question, the store came close to its target number and the CFO expected the target would be met in the subsequent month. There is no evidence that the Respondent ever paid a bonus where the target numbers were missed beyond a single month, which is the case with the Norwalk bonuses at issue from April though July 2001. The record, therefore, supports the Respondent's argument that the CFO's narrow discretion to grant increases did not cover the situation at issue herein. In these circumstances, we agree with the judge's conclusion that the Respondent's failure to pay the bonuses was consistent with its past practice and did not constitute an unlawful change in the terms and conditions of employment.

Thomas E. Quigley, Esq., for the General Counsel.
Thomas R. Gibbons, Esq. (Jackson, Lewis, Schnitzler & Krupman), of Hartford, Connecticut, for the Respondent.
Brian Truini, Union Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on February 14, 15, and 22, 2001. Local 371, United Food and Commercial Workers Union, AFL–CIO (the Union) filed the charge in Case 34–CA–9243 on April 11, 2000, and amended it twice, on July 31, 2000, and September 29, 2000. The Union filed the charge in Case 34–CA–9278 on May 11, 2000. An order consolidating cases, consolidated complaint, and notice of hearing issued on September 29, 2000, alleging that the Respondent, Wild Oats Markets, Inc., violated Section 8(a)(1), (3), and (5) of the Act. On October 13, 2000, the Respondent filed its answer to the consolidated complaint denying, inter alia, that it committed any of the alleged unfair labor practices.[1]

At times relevant to the complaint, the Respondent owned and operated a retail grocery store in Norwalk, Connecticut. During that time, the Union was successful in organizing the Respondent's employees at the Norwalk store and was certified by the Board as their exclusive collective-bargaining representative on May 31, 2000.[2] The consolidated complaint alleges, and the Respondent denies, that it interfered with, restrained and coerced its employees during the organizing drive through threats, implied promises, and other verbal acts committed by admitted supervisors and agents. Resolution of these allegations is essentially a question of credibility. The General Counsel also alleges, and the Respondent denies, that it discontinued its monthly profit-sharing bonus in April, in violation of Section 8(a)(3), because the employees had voted for the Union. Because the Union was ultimately certified by the Board, the complaint alleges that the Respondent's unilateral action in discontinuing the bonus also violated Section 8(a)(5) of the Act. The Respondent denies that it discontinued its profit-sharing program after the election, contending that the store did not meet the nondiscriminatory criteria for payment of a profit-sharing bonus in the months succeeding the union election. Resolution of this issue turns primarily upon documentary evidence.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] The General Counsel amended the consolidated complaint at the hearing to withdraw one allegation, add another alleged 8(a)(1) violation, and to reflect the correct description of the Respondent's business. The Respondent answered the new unfair labor practice allegation at the hearing by amending its answer to specifically deny the new allegation.

[2] All dates are in 2000 unless otherwise indicated.

[3] Counsel for General Counsel's unopposed motion to correct the transcript is granted.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, operated a retail natural food store in Norwalk, Connecticut, until August 7, 2000. During the time that it operated this store, the Respondent annually derived gross revenues in excess of $500,000 and purchased and received at the store goods valued in excess of $50,000 directly from points located outside the State of Connecticut. Although the Respondent sold the Norwalk store, it continues to operate other stores throughout the country. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent operates a chain of natural food stores throughout the United States and Canada. According to Mary Beth Lewis, the Respondent's chief financial officer, vice president of finance, and corporate secretary, the Respondent began calendar year 1999 with 63 stores and ended that year with 110 stores. During its expansion in 1999, the Respondent acquired an existing store in Norwalk, Connecticut, operated under the name "Food for Thought." The acquisition was effective on April 30, 1999. The Respondent continued to operate the store under the "Food for Thought" name until August 7, 2000, when it sold the store to Grange Investments, an unaffiliated entity which was still operating the Norwalk "Food for Thought" store at the time of the hearing. Lewis testified that, by the end of calendar year 2000, the Respondent had 106 stores.

Michael Gilliland is the Respondent's founder, president, and chief executive officer. Peter Williams has been the Respondent's vice president of human resources since May 1997. During the period of time relevant to the complaint, Gregory Seymoure was the Respondent's northeast regional director with responsibility for nine stores, including the Norwalk store; Robert Church was the Norwalk Store director; Ahmed Abbas was the food service manager in charge of the kitchen and deli at the Norwalk store; and Sal Sabatino was the store's produce manager. In its answer, as amended at the hearing, the Respondent admitted that Gilliland, Seymoure, Church, Abbas, and Sabatino were its supervisors and agents within the meaning of the Act prior to the sale of the store.

The parties stipulated that, on February 8, the Union filed a petition to represent all the full-time and regular part-time employees at the Norwalk store, with the exclusion of office clerical employees, and guards, professional employees, and supervisors as defined in the Act. A hearing on the petition was scheduled at the Board's Hartford Regional Office for February 18. On that date, the parties executed a Stipulated Election Agreement setting April 3 as the date for the union representation election. The tally of ballots at the April 3 election showed that the majority of employees voted in favor of representation by the Union. The Respondent filed timely objections to the election, which were resolved on May 31 when the Board, in a "Decision and Certification of Representative," overruled the objections and certified the Union as the employees 9(a) representative. There is no dispute that, until April 2000, no Union had ever successfully organized any of the Respondent's employees.

Two of the Respondent's top officers, Lewis and Williams, conceded at the hearing that the Respondent is generally opposed to union representation of its employees. The Respondent furnished to the General Counsel pursuant to subpoena a company document with the heading "The Early Signs of Union Organizing Activity." This document instructs store managers and supervisors that

> it is extremely important that a Company's managerial and supervisory personnel react in a quick, and aggressive manner following the first signs of union organizing. A delayed reaction is almost always damaging and often fatal to later efforts to remain union-free.

There is no dispute that the Respondent reacted swiftly upon learning of the Union's campaign in early February. Seymoure and Williams held meetings at the store to convey the Respondent's position to the employees. In addition, literature was posted and distributed to employees encouraging them to vote no in the April 3 election. The Respondent's message to the employees in this literature was that the employees already had good wages and benefits, including the profit-sharing program, and that the employees did not need a union. The General Counsel does not allege that any statements contained in this campaign literature went beyond the Respondent's permissible speech under Section 8(c) of the Act.

The General Counsel does allege that the Respondent violated Section 8(a)(1) at one of the meetings Seymoure held in February; by harassment, threats, and other statements Abbas made in conversations with employees during the campaign and soon after the election; and by statements made by Gilliland when he visited the store shortly before the election. It is undisputed that, after touting the profit-sharing program in preelection campaign literature and distributing profit shares to Norwalk employees every month before the election, the Respondent paid no profit sharing in the months following the election through the sale of the store on August 7. What is in dispute is whether the Respondent made a unilateral change in employees' terms and conditions of employment by discontinuing profit sharing, and whether its action was motivated by antiunion considerations.

The undisputed evidence reveals that the new owner of the store, Grange Investments, retained a majority of the management, supervisory, and nonsupervisory employees when it assumed ownership on August 7, and that the store has remained open. The new owners have not only recognized the Union, but have entered into a collective-bargaining agreement covering the unit. Of the witnesses who testified at the hearing, for both the General Counsel and the Respondent, only two are still employed by the Respondent, Lewis and Williams. Two of the General Counsel's three witnesses are still working in the Norwalk store for the new owners. The third worked there until he left voluntarily for another job in October. Seymoure, who

testified for the Respondent, left the Respondent in May, shortly after the election, under admittedly unhappy terms. The Respondent's remaining witness, Abbas, is still working as the food service manager at the Norwalk store, employed since August 7 by the new owners.

B. The 8(a)(1) Allegations

1. Seymoure

As noted above, Seymoure and Williams conducted meetings with the Norwalk employees after learning of the Union's petition. The complaint alleges that, at one of these meetings on February 16, Seymoure made an implied promise of benefits by soliciting employees' complaints and grievances. Employees Rosette Louis and Libya Silveira testified for the General Counsel about this meeting. Employee Rock Michel, who is the employee no longer working at the Norwalk store, testified about an individual meeting he had with Seymoure in February. Seymoure and Williams testified for the Respondent.

Louis has worked at the Norwalk store since 1996, for all three owners. She has always worked in the kitchen and deli.[4] Ahmad Abbas is and has been her supervisor throughout the relevant time period. In response to a leading question from the General Counsel, Louis testified that she attended a meeting at work in the middle of February at which Seymoure spoke to the employees. When asked more directly if she recalled when the meeting occurred, Louis said she could not remember because Seymoure and Williams met with the employees regularly in the time leading up to the election. She recalled that the meetings took place in the basement office with small groups of employees. She attended the meeting in question with about five–six other kitchen employees. Louis had never seen either Seymoure or Williams before the union campaign.

On direct examination, Louis testified that, at this meeting which the General Counsel told her was in mid-February, Seymoure said, "[D]on't vote for the Union, we're going to have bad times and we're not going to get good money." When asked if she recalled anything else, Louis said she could not remember what he told the employees. On cross-examination, Louis volunteered that Seymoure came to the meeting and told the employees, "any problem you guys got, it's okay to come to see me" but after the Union won, she never saw him again. On further cross-examination, in responding to leading questions, Louis acknowledged that Seymoure spoke about the upcoming election, told the employees when and where the vote would be, and that the Company hoped the employees would vote no. On further questioning by the Respondent's counsel, Louis repeated that Seymoure told the employees to vote no because the Respondent did not like unions. Louis also agreed with the statements of the Respondent's counsel that Seymoure told the employees that the Respondent liked the idea of teamwork, and that the Respondent didn't think it needed to have a union in the store. Finally, Louis said that, at every meeting, Seymoure and Williams told the employees not to vote for the Union because the Union was not right for the employees or the store.

[4] The transcript reads "dairy" instead of "deli." This is an obvious error that I shall hereby correct.

Silveira has worked at the Norwalk store continuously, through the changes in ownership, since April 1997. She is a cook in the kitchen working under Abbas' supervision. After the election, Silveira became a union steward. She testified that she attended a similar meeting in the basement at which Seymoure and Williams talked to the employees about the Union and the upcoming election. Her best recollection is that the meeting was in early February. Silveira also recalled that there were about 10 employees present. As with Louis, this was her first occasion to meet Seymoure and Williams.

Silveira testified that Seymoure told the employees that the Respondent had 113 stores and no unions. He asked the employees to give the Respondent a chance. On direct examination, she recalled that Seymoure also said, "[I]f you have any problem with your schedule, you must come in directly to talk to me, you must come to see me. We will do everything we can. You must vote no on April 3." Silveira testified further, on direct, that she spoke up at this meeting about her schedule being changed and about the Respondent hiring people with no experience and no customer skills. She recalled that Seymoure responded by saying that the Respondent would provide training to new employees with people from the Colorado home office. On cross-examination, counsel for the Respondent elicited, with much difficulty, the concession that Silveira did not remember everything that was said at this meeting. Silveira also acknowledged, with some difficulty, that other employees voiced complaints like she did and that they did so spontaneously. When asked specifically if Seymoure solicited employees to raise these complaints, Silveira replied that she could not remember.

Michel was employed at the Norwalk store from January 1999 until he left voluntarily in mid-October. He was hired as a dishwasher in the kitchen but was promoted to food service clerk after the Respondent acquired the store. Abbas, who was Michel's supervisor, confirmed the fact that he promoted Michel from dishwasher to prep cook, with an increase in pay, in mid-1999. Unlike Louis and Silveira, Michel testified that Seymoure met with him one-on-one in February. According to Michel's recollection, Seymoure held similar individual meetings with other employees. He did not identify anyone else, such as Williams, being present when he spoke with Seymoure. According to Michel, the meeting lasted 20–25 minutes.

Michel testified that Seymoure told him he had heard that the main problem in the store, and the reason employees wanted the Union, was the schedule.[5] According to Michel, Seymoure asked what Michel could tell him about that. Michel responded by telling Seymoure that some people appeared to have "the advantage" regarding scheduling. Seymoure then said, "[O]kay, I take note, I will correct that." According to Michel, Seymoure then asked if that was the only reason the employees wanted the Union and Michel replied that there were other reasons. He did not testify whether he told Seymoure what the other reasons

[5] The transcript, again, erroneously indicates that Michel said, "they scare you" instead of "the schedule." Because it is clear from the entire context of Michel's testimony that he and Seymoure spoke about scheduling concerns and not any fear among the employees, I shall correct the transcript accordingly.

were. Michel testified further that Seymoure told him that the Respondent was strongly opposed to the union. Michel could not recall how the meeting ended or what else was said.

Seymoure was employed as the Respondent's regional director for about a year before his "unhappy departure" in May. At the time of the hearing, Seymoure was no longer in the retail grocery business. He appeared at the hearing pursuant to a subpoena from the Respondent. Seymoure acknowledged that he did not often visit the Norwalk store before learning of the Union's petition because he was busy with store openings in the Boston area. He also acknowledged that, once he learned of the Union's organizational campaign, he visited the store one–two times a week until the election. During these visits, Seymoure met with store management and held meetings with groups of 10–12 employees. He would typically hold three–four such meetings a day. The meetings generally lasted 15–30 minutes. All the meetings were in the buyers' office in the basement. Seymoure testified that he was always accompanied at these meetings by Williams or the Respondent's regional human resources manager. According to Seymoure, Williams did most of the talking when he was present. Although Seymoure acknowledged that the Respondent did have scripts for use in talking to employees about the Union, he denied using a script during any of these meetings and did not see Williams reading from any script.

Seymoure testified that he recalled attending at least one meeting at which Louis and Silveira were present. According to Seymoure, he and Williams told the employees at the beginning of the meeting that the Respondent could not threaten, interrogate, promise, or spy on the employees. This is what Seymoure had learned during "TIPS" training provided by the Respondent's in-house counsel. He or Williams then talked about the Respondent's history, including the number of stores the Respondent had all over the country. Seymoure testified that the meeting was then opened up for questions from the employees. Although this was met by silence at first, employees began speaking up, asking questions, and expressing their concerns. On direct examination, Seymoure recalled that employees raised issues about scheduling, bonuses, and holidays and reported promises that the Union was making during the campaign. According to Seymoure, he or Williams responded to these questions and concerns by saying that there were things they could not talk about at that time, and that they couldn't make any promises. Seymoure denied soliciting these complaints or grievances from the employees. He testified that they arose spontaneously from the employees. Seymoure also denied meeting individually with Michel or any other employee and denied making the statements attributed to him by Michel. On cross-examination, Seymoure conceded that he could not recall everything that he said at these meetings. Although Seymoure could not recall Williams asking the employees to give the Respondent a chance, Seymoure admitted that he might have used those words. Seymoure also admitted telling the employees that the Respondent was doing very well and that this was due to the flexibility it had because it did not have to deal with a union.

Williams testified that he attended meetings before the election with Seymoure and groups of 5–10 employees in the buyers' office in the basement of the Norwalk store. These meetings generally lasted 15–20 minutes. Although Seymoure spoke at the meetings, Williams did most of the talking. Williams testified specifically about one of these meetings at which he recalled Louis and Silveira being present. This meeting was held sometime between the filing of the petition on February 8 and the February 18 hearing date. According to Williams, he introduced himself and started talking about the history of the Company, its founders, and the number of stores it operated. He then spoke about things employees could expect now that the petition had been filed, that there was going to be an election and how many votes were needed to win the election. Williams told the employees that the Respondent was opposed to the Union and explained the reasons.[6] He also told the employees that the Respondent was not allowed to and would not make any promises. After this, the employees were asked if they had any questions about the material just covered. Williams recalled that, at some meetings, there were no questions. At other meetings, including the one at which Louis and Silveira were present, employees spoke up about issues they had. He recalled in particular that employees expressed concerns about one of the managers in the store and that they asked questions about policies and benefits. Williams denied asking employees what there problems were and denied saying anything about employees' hours or the schedule. According to Williams, when employees spontaneously raised issues or concerns, he told them that he was not allowed to make any promises at this time. On cross-examination, Williams acknowledged reviewing a script before meeting with employees, but he denied reading from it. Williams conceded that he asked the employees to "give us a chance." He also acknowledged telling the employees how successful the Respondent was. Although Williams testified that he prepared notes which he used as an outline at the meeting, he no longer could find them.

The General Counsel bears the burden of proving the complaint's allegation that the Respondent, through Seymoure, promised employees benefits by soliciting grievances at a meeting in February. The testimony of Louis, Silveira, and Michel is not sufficient to meet this burden in the face of Seymoure's denial and Williams' testimony. All three of the General Counsel's witnesses had difficulty testifying in English, which is not their native language. They often appeared confused and did not even understand some of the questions asked by the General Counsel. In addition, there were internal inconsistencies in their individual testimony and inconsistencies among them regarding what Seymoure said. These inconsistencies make the testimony unreliable as proof of an unfair labor practice. Louis did not even testify that Seymoure solicited grievances until cross-examination. Her recollection of the meeting was generally poor. Although Silveira did testify on direct to a solicitation of grievances, on cross she appeared to admit that employees spoke spontaneously when they raised issues about the schedule and other matters. Silveira also demonstrated poor recall regarding the meeting and other events. In addition, I note that Louis and Silveira both identified Williams as being

[6] Williams did not identify in his testimony the reasons he gave to the employees for the Respondent's opposition to the Union.

present at the meeting at which Seymoure allegedly violated the Act. Seymoure and Williams credibly testified that Williams did most of the talking at these meetings. Thus, because Louis and Silveira did not know either gentleman before the meeting, it is possible that it was Williams rather than Seymoure who made the questionable statements. It is also possible that, because Williams and Seymoure conducted the meeting in English and Louis and Silveira had difficulty understanding English at the hearing, they may have misunderstood or misinterpreted Seymoure or Williams' speech. I do not believe that either witness testified falsely. Rather, their testimony was so unreliable that it does not support a finding by a preponderance of the evidence that Seymoure committed the violation alleged at any meeting at which they were present.

Whereas Louis and Silveira described group meetings with Seymoure and Williams, Michel said he only had a one-on-one meeting with Seymoure. I credit Seymoure's denial that he met individually with Michel or any other employee. Seymoure is no longer employed by the Respondent, was unhappy with his departure from the Respondent's employ, and would seem to have no reason to commit perjury in support of the Respondent. Michel may very well have confused his alleged meeting with Seymoure for the meeting he did have with Gilliland, which will be discussed later. Michel did not know either man before attending the preelection campaign meetings held by the Respondent. He could easily have mistaken Gilliland for Seymoure when describing this one-on-one meeting. Again, I do not believe that Michel fabricated this testimony. Because his testimony is inconsistent with the other evidence in the record and may have resulted from confusion or mistaken identity, it is not sufficiently reliable to support a finding of a violation.

Accordingly, based on the above, and in particular, the more reliable testimony of Seymoure, I shall recommend dismissal of this allegation of the complaint.

2. Abbas

As noted above, a hearing on the Union's petition to represent the Respondent's employees was scheduled for Friday, February 18, in Hartford. The Union subpoenaed Michel and Silveira to attend the hearing as potential witnesses.[7] Michel and Silveira testified that they informed their supervisor, Abbas, in advance that they had been subpoenaed and would not be in work on February 18. Abbas conceded that he had received this information. Silveira testified that the following Monday, February 21, she received a phone call at work. Abbas answered the phone in the kitchen and called her over, saying "it must be the government calling for Libya." According to Silveira, it was her husband on the phone. Silveira testified that for some time after this, Abbas would similarly remark that the Government was on the line whenever she received a phone call at work. On cross-examination, Silveira acknowledged that she had stated in her pretrial affidavit that Michel told her that Abbas was making such a comment and that she overheard Abbas telling other employees that the Government was calling for Silveira.

Michel corroborated Silveira's testimony that, for a time after he and Silveira went to the hearing, Abbas said, whenever Silveira received a phone call, "it's the government calling." Louis also testified that she heard Abbas make similar comments when Silveira received phone calls in the kitchen. Although all of the General Counsel's witnesses testified that this conduct continued for a time, none could recall with any certainty how long Abbas continued making such comments.

Abbas testified that Silveira and Louis were two employees who received a lot of personal phone calls at work during that time period. According to Abbas, employees are only permitted to receive phone calls in the kitchen for an emergency. Abbas testified that he spoke to both Silveira and Louis about their receipt of personal calls. With respect to Silveira, Abbas claims he told her that personal calls were interfering with her job and that, if she needed to make a phone call, she could do it on her break using the phone in the store. Abbas admitted speaking to Silveira about her phone calls publicly in front of other employees. Abbas specifically denied telling Silveira, or anyone else, that the government was calling for her.

As previously noted, none of the witnesses is still working for the Respondent. However, Silveira and Louis still work under Abbas' supervision and took some risk testifying adversely to him. At the same time, Abbas acknowledged being aware that the Respondent was in the process of building a new store not far from the Norwalk store that was scheduled to open around the time of the hearing. Thus, Abbas may have wanted to remain in the Respondent's good graces in the event he wished to work in the new store. The inconsistency between Silveira's direct testimony and her pretrial affidavit that was brought out on cross-examination, while relevant to the issue of credibility, is not fatal. See *Electrical Workers Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062, 1065–1066 (1970). Although she may have testified differently as to whether Abbas said, "government calling" directly to her, Silveira was consistent in her affidavit and testimony that she herself heard Abbas make these statements. As against the mutually corroborative testimony of the General Counsel's witnesses, I did not find Abbas denial persuasive. I thus find that Abbas did, for a time after Silveira went to the hearing, comment that the Government was calling for her when she received phone calls at work. Because these comments singled out Silveira derisively in front of her coworkers as a union supporter, I find that they had a reasonable tendency to chill employees' exercise of their Section 7 rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint by Abbas' conduct in this regard.

The complaint also alleges that Abbas interrogated employees on March 27, threatened employees with a reduction in hours on several occasions before the election and made statements creating the impression among employees that their union activities were under surveillance shortly before and soon after the election. Michel testified that on Monday, March 26, the day after a meeting at the union hall, Abbas approached him and said he heard the employees had a pizza party at Local 371. Michel told Abbas that it was not a pizza party but a meeting.

[7] Michel and Silveira did not have to testify because the parties reached agreement for a stipulated election. Michel and Silveira testified that they waited for several hours in the lobby of a nearby hotel while negotiations for the stipulation went on at the Board's Regional Office.

Abbas then asked Michel why just the people from the kitchen attended the meeting. Michel disputed this, telling Abbas that employees from all over the store were at the meeting. According to Michel, Abbas then asked for the names of the people who were at the meeting. When Michel did not respond, Abbas said, "[I]f you want, I can give you the names."

Abbas admitted being aware that the Union held a pizza party for the employees at its office. Abbas said he learned of the party from employees. He identified three employees, including Louis, who told him about the party. Abbas said he also overheard these employees talking about it. Abbas did not mention Michel as a source of his information about the party. Abbas denied asking employees any questions about the party or making any remarks about it beforehand. Abbas conceded that, the day after the party, he asked employees generally "how was the pizza." He denied saying anything else beyond this and specifically denied questioning Michel about who was at the party. On cross-examination, Abbas could not remember whether he had any conversation with Michel about the party, but admitted that if Michel was working that day he would have asked him how the pizza was. Abbas testified further that he knew that it was illegal to ask such questions of employees or spy on them from training he received from Seymoure or the store managers. At the same time, he acknowledged being told at the training meetings that the Respondent did not want the Union in the store. He also admitted talking to the employees in the weeks leading up to the election about the Respondent's position, but he denied saying anything illegal.

I credit Michel's testimony over that of Abbas. Of all the witnesses, only Michel and Seymoure had no conceivable interest in the outcome of this proceeding. Moreover, Michel impressed me as an honest hard-working immigrant who was not likely to lie about such a conversation. As noted above, Abbas had a possible reason to testify favorably for the Respondent, his former employer. I also note that no witnesses corroborated Abbas' testimony that the pizza party or meeting was a subject of open conversation in the kitchen before the meeting. Based on Michel's credible testimony, I find that Abbas, during this conversation with Michel on March 27, interrogated Michel and created the impression that the employees attendance at the union meeting had been under surveillance. The Board has consistently held that an employer's questioning of employees about the union activity of other employees is unlawful interrogation *Medicare Associates, Inc.*, 330 NLRB 935 (2000). Similarly, statements by an employer's supervisors and agents that would reasonably convey the impression of unlawful surveillance by the employer have routinely been found to violate Section 8(a)(1) of the Act. *Flexsteel Industries*, 311 NLRB 257 (1993). The General Counsel has thus met his burden as to these allegations.

Michel testified that, later in the same week, he had a conversation with Abbas on the loading dock. Abbas told Michel he knew how everybody in the kitchen was going to vote and he asked Michel for help convincing the employees to vote no. Michel admitted telling Abbas that he intended to vote no and that all the employees in the kitchen would support Abbas by voting against the Union. In his pretrial affidavit, and at the hearing, Michel conceded that he lied to Abbas when he said this. Abbas testified to a similar conversation with Michel. According to Abbas, Michel called him outside one time and told Abbas that he was not going to vote for the Union because the Union was not good for the store. Store Manager Church was walking by at the time and Abbas told Michel that he should tell Church that he was going to vote no. Again, I find Michel's testimony about the conversation on the loading dock credible. The fact that he may have attempted to mislead his supervisor regarding his union sympathies does not mean Michel would lie under oath in a Board proceeding. It is not unusual for employees to engage in such a deception when faced with an employer's opposition to union representation of its employees. Moreover, Abbas' testimony tended to corroborate the fact that he and Michel did have a conversation in which Michel indicated his intentions to vote against the Union. Although the complaint does not specifically allege that this conversation was unlawful, the conversation is relevant background to other allegations to be discussed.

Michel testified further that, sometime after the conversation on the loading dock, Abbas came in to the kitchen and told the employees that he knew they were not all going to vote no even though they said they were. Abbas then told the employees that the Union can not guarantee the employees any full-time jobs. He told the employees that union-represented employees at Grand Union all have part-time jobs.[8] Louis corroborated Michel in this regard. She testified that about a week before the election, Abbas told the employees that if they voted for the Union, they would have part-time jobs and make less money. Louis recalled that Abbas said this at different times before the election. Silveira also testified to similar statements by Abbas. According to Silveira, Abbas told the employees on several occasions during March that if they voted for the Union, they would all be part time. When Silveira asked Abbas why the employees would have to be part time if they had a union, Abbas replied that the Union doesn't give 40 hours. Abbas denied telling employees that their hours would be reduced if the Union won. According to Abbas, he knew that such a threat would be illegal. Abbas also denied having any conversation with Silveira about full-time or part-time jobs and claimed to be unaware of the hours worked by union employees at Grand Union. Abbas did acknowledge speaking to employees about the Respondent's opposition to the Union and telling employees that the Respondent provided good benefits and that the Union could not guarantee this because benefits have to be negotiated. The Respondent also distributed campaign literature in response to union literature dated March 20 that compared the Respondent's wages, benefits, and working conditions with those of employees the Union represented at Grand Union and Stop & Shop. This particular leaflet specifically states that the Union cannot guarantee it will deliver anything it promises. The leaflet also states that the Union did not get the employees

[8] On cross-examination, Michel appeared to agree that Abbas' comments about hours of work occurred in the context of a discussion about collective bargaining and negotiations. However, on further questioning, it was clear that Michel did not understand the questions from Respondent's counsel. At one point, Michel testified that Abbas said the Union couldn't guarantee the employees full-time jobs because it is the company that determines the hours.

at Grand Union and Stop & Shop the kind of wages and benefits that the Respondent provided to its employees. The alleged threats attributed to Abbas by the General Counsel's witnesses are consistent with the points made in this campaign literature. Because I found the testimony of Michel, Louis, and Silveira more credible than that of Abbas, I find as alleged in the complaint, that the Respondent did threaten employees with reduced hours if they voted in favor of union representation. See *El Rancho Market*, 235 NLRB 468 (1978).

The General Counsel amended the complaint at the hearing to allege that the Respondent violated Section 8(a)(1), on or about March 20, through a promise of benefits made by Abbas. Michel's testimony also supports this allegation. Michel testified that, within a week or two before the election, he met with Abbas for his performance review. According to Michel, Abbas told him he was doing well and that he was going to receive a $1 raise. Abbas said this was not because of the Union but because Michel was a good worker. Abbas then told Michel that if there was any way he could convince the employees to support the Respondent in the election, Abbas would make Michel his assistant. Abbas denied making such a promise to Michel. He further denied having any meetings with Michel before the election to give him a performance review or a raise. Abbas said he would not have discussed Michel becoming an assistant manager because Michel was not qualified for such a position and worked another job that would conflict with his hours. Abbas did acknowledge that Michel was a good, hard worker and that he promoted Michel from dishwasher to prep cook in mid-1999. Abbas also acknowledged giving Michel another raise when he asked Michel to take on the additional job of cleaning the floors. On direct examination, Abbas testified that the last raise was given to Michel 3 to 4 months after his promotion to prep cook and before the union organizing drive. However, on cross-examination, Abbas conceded that it was possible that Michel received a raise 2 to 3 weeks before the election because that was about the time employees receive their 6-month reviews. According to Abbas, if Michel got a raise, he would definitely have spoken to him about it at the time. Abbas had no specific recollection whether he in fact gave Michel a raise shortly before the election. The Respondent did not produce any payroll records which would have shown whether Michel received a raise in March. The Respondent's compensation handbook does indicate that employees' performance is reviewed at 6-month intervals. Having considered the respective testimony and the absence of documentary evidence that would contradict Michel's testimony, I shall credit Michel over Abbas and find that a promise of benefit was made by Abbas as alleged in the amendment to the complaint.

The complaint also alleges that Abbas created the impression of surveillance and made additional threats after the Union won the election on April 3. Louis testified that the day after the election, Abbas came into the kitchen and said he didn't trust anybody in the kitchen after Monday, the day of the election, that everybody in the kitchen was a "big" liar. In her pretrial affidavit, Louis stated that she heard from another employee that Abbas called the employees "professional" liars. When confronted with this discrepancy at the hearing, Louis admitted that Abbas made this statement to another employee. She explained further that Abbas used both the words "big" and "professional" to describe the type of liars employees were. Louis testified that the two words mean the same thing to her. Abbas denied calling employees "liars," "big liars" or "professional liars." He did admit posting a notice in the kitchen, which is dated April 15, that refers to another employee's accusation that Abbas had called the Haitian employees "liars."[9] In the notice, Abbas denied this accusation. The fact that Abbas posted such a notice around the time Louis heard about Abbas' accusation that the kitchen employees were liars tends to corroborate her testimony. This notice demonstrates that there was a report that Abbas made such a statement circulating in the store before any unfair labor practice charge about it was filed. Nevertheless, the only evidence to rebut Abbas denial that he accused employees of being liars is hearsay. I shall credit Abbas denial of this allegation because it is consistent with the denial he made before the unfair labor practice allegation was filed. Accordingly, I shall recommend dismissal of the allegation that the Respondent created the impression of surveillance through Abbas' statement on April 4.

Finally, Louis and Michel testified to the alleged threats Abbas made on April 10. Louis recalled that about a week after the election, Abbas told the employees in the kitchen that the store was going to be sold again, that it was not going to have any kitchen and that everybody would lose their job because of the Union. In her pretrial affidavit, Louis omitted any reference by Abbas to the Union when he made this alleged threat. Michel testified that Abbas came into the kitchen a week after the election and said to the employees, "since you all voted for the Union, what are you going to do now? The store is going to be closed now. I told you the company would do anything not to have a Union." Abbas denied telling the employees after the election that the Respondent was selling or closing the store because of the Union. According to Abbas, he learned about the sale when the Respondent was negotiating with the purchaser. At that time, some employees asked questions about what would happen to their jobs if the store was sold. Abbas testified that he answered these questions by telling employees that businesses are bought and sold all the time, that nothing would change, that they would be doing business the same as always.

It is undisputed that the store was in fact sold, but it has remained open since Abbas allegedly made these statements. According to Lewis, the decision to sell the Norwalk store was made in the April–May time period. In evidence is a resolution of the Respondent's board of directors dated May 15 authorizing the Respondent's officers to take the necessary steps to complete the sale of the Norwalk store, as part of a package of three stores, to Grange Investments. This resolution indicates that the Respondent had already planned to close the Norwalk store when it opened a new store in the same vicinity before considering the sale. There is no allegation in the complaint that the decision to sell was unlawfully motivated.

After considering the testimony in the context of the information contained in the board of director's resolution, I find that Michel and Louis are more credible than Abbas regarding

[9] Many of the kitchen employees at the Norwalk store were Haitian immigrants.

his statements about a sale or closure of the store. It appears that the Respondent was at least in the process of deciding to close or sell the store, even if a decision had not been made, in mid-April when Abbas made these statements. Abbas admitted being aware of the negotiations to sell the store before the sale was formally announced in the store. Because the Union had only recently won the right to represent the employees, it is reasonable to believe that Abbas would have linked these events in his mind and conveyed that to the employees whom he felt had betrayed him. After all, Abbas had spent the weeks before the election being trained in the Respondent's antiunion philosophy and knew that the Respondent's management in Colorado did not want a union in the store. When he conveyed his belief as to the Respondent's motives in selling the store to the employees, he violated Section 8(a)(1) of the Act even if the Respondent was not in fact unlawfully motivated.[10]

3. Gilliland

The complaint alleges that the Respondent, through its CEO Gilliland, unlawfully promised its employees increased benefits and improved terms and conditions of employment by soliciting their complaints and grievances on or about March 31. Michel testified that, on the Friday before the election, which would have been March 31, he was called down to the office in the basement by Gilliland. He had never met Gilliland and had not seen him in the store before. Gilliland met with Michel alone and, after introducing himself, told Michel that the Respondent was strongly opposed to the Union and wanted the employees to vote no. On direct examination, Michel testified that Gilliland then said that the Company would do whatever it can to prevent a union from coming into the store. Michel acknowledged on cross-examination that this statement is omitted from his pretrial affidavit. Michel testified further on direct examination, that he told Gilliland that his reason for supporting the Union was that the Jamaican employees who worked in the front of the store were treated better than the Haitians. Michel is Haitian. According to Michel, Gilliland thanked him for this information and said he was going to talk to the store manager. Gilliland then gave Michel a business card with his home and office phone number and fax number and told Michel to call him anytime he wanted to let Gilliland know what was going on. On cross-examination, Michel testified that he was aware that Gilliland met with other employees and also gave them the same business card. In response to a series of leading questions from the Respondent's counsel, Michel answered affirmatively that it was Michel who brought up the unfair treatment of the Haitian employees, that Gilliland "did not draw that out of him," and that, after Michel "volunteered" this information, Gilliland thanked him, said he was going to talk to the store manager, and gave Michel his card. On redirect, Michel testified that he told Gilliland about the problem because Gilliland asked him "what is the problem that we need a union for." In his pretrial affidavit, Michel did not specifically state that Gilliland asked him what the problem was. Instead, Michel stated that, in response to his statement about the Jamaican employees, Gilliland said it was good that Michel told him that because Gilliland wanted to know what the problems were so he could take care of them.

Respondent chose not to call Gilliland to testify about this meeting. No explanation was given for his failure to testify. However, Abbas testified that Gilliland did visit the store shortly before the election and met with him individually. Abbas claimed no knowledge whether Gilliland had similar meetings with other employees. Abbas testified that Gilliland asked Abbas how he liked the store and what he thought of the Union. Based on this testimony I find that Gilliland was in the store prior to the election. Because I have already found that Michel was a generally truthful witness, I believe that he met with Gilliland during this visit. I also find, based on Michel's testimony elicited on cross that other employees showed him the same business card that Gilliland gave to Michel, that Gilliland held similar one-on-one meetings with other employees. I find it highly unlikely that the Respondent's CEO would travel all the way from Colorado to Norwalk, Connecticut, to just meet with Abbas, or Abbas and Michel. A visit to the store by the founder and CEO of the Company and individual meetings with eligible employees is consistent with the type of campaign conducted by the Respondent to convince the employees that they did not need a Union because the Respondent was their benefactor. My finding that Gilliland in fact met with Michel on March 31 is also based on his absence from the hearing and the lack of any evidence to contradict either Michel or Abbas. As the CEO and founder of the Company, Gilliland would be expected to testify favorably for the Respondent. I may thus draw an adverse inference from his unexplained failure to testify. *Grimmway Farms,* 314 NLRB 73 fn. 2 (1994).

Michel's testimony regarding what was said during his meeting with Gilliland is not entirely consistent with his pretrial affidavit. However, I find any inconsistency not fatal to his credibility. As noted previously, Michel is not a native English-speaker and he may not have entirely understood the questions that were asked by either the Board's investigating agent or the Respondent's counsel.[11] He was consistent in testifying that, after he told Gilliland about the difference in treatment of the Jamaican and Haitian employees, Gilliland said he was going to talk to the store manager, he gave Michel his business card and invited Michel to call him anytime. Thus, Gilliland implicitly, if not explicitly, promised he would take care of this problem. Such a promise, implicit or explicit, would have the reasonable tendency to interfere with, restrain and coerce an employee in his choice regarding union representation, regardless of whether the employee "volunteered" his complaint, or it was solicited by the employer. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint, by Gilliland's implied promise of benefit to Michel. *Laboratory Corp. of America Holdings,* 333 NLRB 284 (2001).

[10] Because Abbas was a front-line supervisor with no involvement in the decision to sell the store, his statements to the employees do not establish an unlawful motive. *Alexian Bros. Medical Center,* 307 NLRB 389 (1992).

[11] It's also conceivable that he misunderstood what Gilliland said to him during the meeting. However, without the benefit of Gilliland's testimony, the only version of the conversation I have is that provided by Michel.

C. Allegations Regarding the Respondent's Profit-Sharing Plan

The Respondent has maintained a corporatewide profit-sharing plan for a number of years. The plan is described in its staff handbook and compensation handbook distributed to employees. There is no dispute that the Respondent provided this benefit to employees at the Norwalk store from the time it assumed ownership and that employees received a profit-sharing check each month from August 1999 through March.[12] It is also undisputed that the employees received no profit-sharing checks after the Union won the April 3 election for the remainder of the time that the Respondent owned the store. The General Counsel alleges that the Respondent's failure to pay any profit sharing from April though August was discriminatorily motivated in violation of Section 8(a)(3) and a unilateral change in violation of Section 8(a)(5) because the Union was ultimately certified. The Respondent counters that it continued to apply the profit-sharing plan at the Norwalk store after the April 3 election in the same way it had applied the plan before the election. According to the Respondent, the only reason the employees did not receive any shares of the store's profits after April 3 is that the store did not meet its neutral, preexisting criteria for the employees to be eligible to receive profit shares.

According to the written plan descriptions contained in the two handbooks, the Respondent will distribute 15 percent of pretax profits on a monthly basis to regular full-time employees "in those stores that have achieved their budgeted store contribution percent (before profit sharing) on a year-to-date (TD) basis." Lewis testified that the store contribution percent is also referred to as the store contribution margin. Even if a store achieves its budgeted contribution margin, employees may not receive the full 15 percent each month. Under the plan, 25 percent of any profit-sharing pool will be deferred for those stores that do not achieve budgeted gross sales amounts. Once it is determined that a store has met its budget and whether any portion will be deferred, the Respondent's regional directors have the discretion to temporarily defer profit sharing in stores in their territory that they believe have other issues in addition to the margin that need to be addressed. If a regional director chooses not to exercise this discretion, then the regional director will notify the store director of the amount of profit sharing to be distributed that month. The store director then prepares a worksheet showing how much each employee will receive out of the total. The store director receives 20–30 percent of the amount to be distributed, depending on the store's average weekly sales. The remainder is divided among full-time supervisors and employees according to the number of "shares" each has. The number of shares is determined by the store director based on job performance, tenure, and department profitability. Employees receive their profit shares, if any, 2 months in arrears. According to Lewis, the purpose of holding back profit sharing for 2 months is to see the trend in the store's performance by looking at the next month's results.

The Respondent's accounting department in Colorado, under Lewis' supervision, analyzes each store's performance on a monthly basis, as reflected in the monthly profit and loss statements (P&L) filed by the stores. This analysis is done on a computer using an Excel spreadsheet. These spreadsheets, which are in evidence for the entire period that the Respondent owned the store, were referred to at the hearing as "profit-sharing worksheets." The supporting P&Ls for the same period are also in evidence. Lewis explained, in considerable detail, where the numbers on the worksheet come from and how the amount making up each month's profit-sharing pool is calculated. It is undisputed that employees' receipt of any profit sharing is based only on their store's performance against its budget and not on the performance of any other stores or the Respondent as a whole. It is Lewis who approves the payment of profit sharing to each store after reviewing the worksheets prepared by her staff analyst. Lewis testified that she does have discretion to authorize profit sharing for a store even if it does not meet the threshold criteria for eligibility, i.e., meeting or surpassing its budgeted store contribution margin. She will exercise this discretion if there are "unusual factors" that might have caused the store to fall below budget, particularly if the store trend has been improvement and it is close to budget. Lewis testified further that, at mid-year, stores that have had their profit sharing deferred because of a consistent failure to meet budget have the option of wiping the slate clean and starting over. Lewis referred to this option as amnesty. If a store chooses this option, it will forego any profit sharing that has been deferred to date, with the expectation that its performance will be sufficient to earn a profit share for the remainder of the year.

A review of the P&Ls and worksheets in evidence shows that the Respondent's Norwalk store met its budgeted store contribution percent, or margin, each month from June 1999 through December 1999. However, even though the store achieved its budgeted margin, 25 percent of its profit-sharing pool was regularly deferred because it did not meet its sales budget. Summaries of payroll records in evidence show that supervisors and employees at the Norwalk store received a profit-sharing check each month, in varying amounts, from August 1999 through March. These checks were normally distributed at the end of the month. The P&Ls and worksheets also show that the Norwalk store did not meet its budgeted contribution margin for the first time in January and that it failed to meet the margin each month thereafter. Because the Respondent pays profit-sharing bonuses two months in arrears, the first month that employees should not have received any profit sharing under the Respondent's plan, as it is described in the handbooks, would have been March, i.e., the month before the election. Lewis admitted that the Respondent's Norwalk employees received a profit-sharing check at the end of March, even though the store was not eligible under the Respondent's criteria, because Lewis exercised her discretion to authorize a dis-

[12] Under the Respondent's plan, as described in the written materials, profit sharing is paid to the employees 2 months in arrears. Thus, the first checks Norwalk employees received in August 1999 were for the store's performance in June 1999. Lewis, the Respondent's CFO, testified that the Respondent did not count the store's first full month in operation, i.e., May 1999, in order to give the new store time to adapt to its accounting methods and reporting requirements.

tribution of the profits because of "unusual factors."[13] The unusual factors, according to Lewis, were the arrival of a new store manager, Church, in January and the fact that the store had shown a positive trend in profit sharing. Lewis testified that when she looked at the profit-sharing worksheet for the February bonus to be paid in April, she saw that the Norwalk store was still below its store contribution margin, by a larger amount. Although Lewis had made an exception for the previous month, she decided not to make any further exceptions because of this downward trend. As the store continued to fall short of its budgeted margin in the succeeding months, its employees received no further profit-sharing checks.[14] Although Lewis admitted being aware of union activity at the Norwalk store beginning in February, and conceded that the Respondent opposed unionization of its stores, she denied that the employees' union activity or support had anything to do with her decisions regarding the application of the profit-sharing plan to the Norwalk store.

The documentary evidence is consistent with Lewis' testimony. The monthly P&Ls for 1999 show that the Respondent had budgeted the Norwalk store's contribution margin at about 14 percent. Each month, the store exceeded this amount, showing an actual contribution margin at or near 16 percent. For calendar year 2000, the Respondent budgeted the store's contribution margin in the range of 16 to 17 percent. According to Lewis, the budgets are prepared in the fall and usually finalized by December for the next calendar year. Based on the store's actual performance in 1999, the 16-percent figure was not an unreasonable projection. The store's actual performance in 2000, however, began almost 4 percent below the budgeted amount. The actual dollar variance for January was $40,000. Although the store narrowed the gap in February, missing its budget by less than half a percent and about $20,000, it took a significant drop in March and each month thereafter. By the time the Respondent closed on the sale in August, the store was falling short of its budgeted contribution margin by almost $160,000 year to date. While the Respondent concedes that the store was "profitable" throughout its ownership, in the sense that it was not operating at a loss, it clearly was not meeting the requirements set forth in the profit-sharing plan documents, which existed before the advent of any union activity.

The General Counsel, while not disputing the authenticity or accuracy of the documentary evidence offered by the Respondent, attempted to show that the Respondent's failure to meet its target in March and April was due to extraordinary expenses for professional services and travel and lodging in those months. These months coincided with the filing of the Union's petition, the preelection campaign, and the Respondent's filing and pursuit of its postelection objections. Because the Respondent probably accrued higher than anticipated expenses for legal fees and travel after the Union filed its petition, particularly during the month of March which immediately preceded the election, it is not surprising that these items were expensed in that period. Even had the Respondent not had such extraordinary expenses associated with the union campaign, it would still have fallen short of its budget under the profit-sharing criteria. Thus, I find nothing suspicious in the appearance of these expenses in those months.

The General Counsel also offered the testimony of Louis regarding a conversation she had with Produce Manager Sabatino in April. According to Louis, she was at the timeclock with Sabatino one morning after the election and asked him what happened to the profit sharing. At first, she testified that Sabatino said, "[N]o profit check from the employer." Later, after further thought, she testified that she was at the clock when Sabatino asked Donovan Ewart for his check. According to Louis, Ewart went into the office, came out and handed Sabatino a check. Louis then asked, "[W]here's my check?" and was told there was nothing for her. On cross-examination, when repeating this conversation, Louis testified that she was told "nothing for you, only for the managers." It is not clear from her testimony whether it was Ewart or Sabatino who made this statement. In her pretrial affidavit, Louis stated that she asked Sabatino on April 29 why the employees didn't get a profit-sharing check and that Sabatino's sole reply was, "there was no profit this month." The summary of payroll records in evidence reveals that neither Sabatino nor Ewart received a profit-sharing check in the months after March. As noted above, only the store manager and his assistant received a bonus in the months after the election based on a contractual guarantee. I do not credit Louis' testimony that she was told that only the managers got a bonus. Her testimony regarding this conversation was internally inconsistent and inconsistent with her affidavit. Her recollection as shown in the affidavit she gave soon after this event is more reliable than her confusing and unclear testimony at the hearing.[15]

The test for determining whether the Respondent's postelection failure to pay a profit-sharing bonus to the Norwalk employees violated Section 8(a)(3) is the Board's *Wright Line* test.[16] Under this test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that protected activity was a motivating factor in the Respondent's action. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden

[13] The complaint does not allege that Lewis' exercise of her discretion to pay a profit-sharing bonus in March, although the employees were not entitled to one, was discriminatorily motivated. The Respondent offered evidence showing that Lewis exercised her discretion in a similar manner several months later for a store in Santa Fe, New Mexico, where there was no union activity.

[14] The summary of payroll records shows that Store Director Church and his assistant, Jack Seeno, continued to receive $1000/month, designated as profit sharing, after the other employees stopped receiving profit-sharing checks. Lewis testified that this was pursuant to their individual employment contracts that required the Respondent to pay them that amount as a bonus each month. The offer letters in evidence, which are business records, corroborate this testimony.

[15] It is axiomatic that a witness may be believed as to some but not all of his testimony. See *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

[16] See *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982)

through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. If the General Counsel meets his burden, then the burden shifts to the Respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity. *Naomi Knitting Plant*, 328 NLRB 1279 (1999), and cases cited therein.

There is no question that the Respondent, and in particular its CFO Lewis, were aware of the employees' support for the Union when it ceased paying a profit-sharing bonus to employees at the Norwalk store. By the time Lewis was reviewing the profit-sharing worksheet that would determine whether a bonus would be paid at the end of April, the Union had already won the election. The independent violations of Section 8(a)(1) committed by Abbas and Gilliland, as found above, establish the existence of antiunion animus. In addition, the Respondent's admitted policy of opposing union representation among its employees, although lawful, is further evidence of animus. See *Meritor Automotive, Inc.*, 328 NLRB 813 (1999); *Cla-Val Co.*, 312 NLRB 1050 fn. 3 (1993). The timing and circumstances surrounding the Respondent's actions would support an inference of unlawful motivation. It is an established fact that the employees received some profit sharing every month from the time they were first eligible until they voted for the Union. The first time they failed to receive a share of the store's profits was the first month after the union vote. Moreover, Lewis admitted "overruling" the profit-sharing rules and authorizing payment of a bonus to the Norwalk employees, even though the accounting documents showed they were not eligible for one, in the month immediately before the election when the Respondent was campaigning for its employees to vote against the Union. The campaign literature in evidence touts the profit-sharing plan as one of the benefits already provided by the Respondent without a union. I find, based on this evidence, that the General Counsel has met his initial burden of proving that the employees' support for the Union was a motivating factor in the Respondent's action in failing to pay any profit sharing to the unit employees after the election.

The evidence offered by the Respondent, however, was sufficient to meet its burden of proving that no profit sharing would have been distributed to the Norwalk employees from April through the sale of the store in August even if there were no union activity. The numbers in the P&L statements do not lie. It is clear that the Norwalk store did not meet the criteria to be eligible to receive profit sharing under the nondiscriminatory guidelines contained in the staff and compensation handbooks which predated any union activity. Although Lewis had the discretion to override these guidelines and authorize profit sharing when a store did not meet the criteria, and she had in fact exercised this discretion in order to pay a bonus to the employees just before the election, I credit her testimony that she was not motivated by any union activity when she decided not to exercise this discretion in the following months. As noted above, the P&Ls show a steady decline in the performance of the Norwalk store with respect to its contribution to profits beginning in January. Just because Lewis decided to overlook this the first time it happened does not mean she had to keep paying a profit-sharing bonus each month as the store's performance declined. The employees' vote for the Union did not entitle them to receive a profit-sharing check when the store failed to meet its plan. Because the Respondent's actions were consistent with its profit-sharing plan, I find that it would have taken the same action even absent union activity. Accordingly, I shall recommend dismissal of the 8(a)(3) allegation of the complaint.

I find further that the Respondent did not unilaterally change any term or condition of employment for the Norwalk employees when it failed to pay a profit-sharing bonus after a majority of the employees had voted for the Union. The Respondent continued to apply the criteria of its preexisting, corporatewide profit-sharing plan to determine whether any bonus should be paid. The failure to pay a bonus was not a change, but in fact was consistent with the plan. Accordingly, I shall recommend dismissal of the Section 8(a)(5) allegation of the complaint as well.

CONCLUSIONS OF LAW

1. The Respondent, on or about March 31, 2000, through its CEO Michael Gilliland, violated Section 8(a)(1) of the Act by implicitly promising its employees improved wages and benefits if they rejected union representation through solicitation of their complaints and grievances.

2. The Respondent, through its supervisor and agent, Ahmed Abbas, violated Section 8(a)(1) of the Act, during the months of February, March, and April 2000, by harassing employees because of their support for the Union, interrogating employees regarding the union activities and sympathies of other employees, by creating the impression among employees that their protected activities were under surveillance, by threatening employees with reduced hours or the sale and closure of the store, and by promising employees benefits if they voted against union representation.

3. By engaging in the conduct described above, the Respondent has committed unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not violate Section 8(a)(1) through any statements made by Gregory Seymoure during meetings with employees in February 2000.

5. The Respondent did not violate Section 8(a)(1), (3), or (5) through its failure to pay profit-sharing bonuses to employees at its Norwalk store after they voted in favor of representation by the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent has sold the Norwalk store, I shall recommend that it be required to mail a copy of the notice to each employee who was employed at the Norwalk store at any time between February 21, 2000, when the first unfair labor practice was committed, and August 7, 2000, the date it completed the sale of the store to Grange Investments.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Wild Oats Markets, Inc., Norwalk, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Harassing employees by making derisive comments about their union activities or support.

(b) Coercively interrogating any employee about the union support or union activities of other employees.

(c) Creating the impression among employees that their union activities were under surveillance.

(d) Threatening employees with reduced hours, sale or closure of the store if they voted for representation by Local 371, United Food and Commercial Workers International Union, AFL–CIO, or any other union.

(e) Promising employees benefits, either directly or implicitly through the solicitation of their complaints and grievances, if they vote against representation by the Union.

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

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

(a) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"[18] to all full-time and regular part-time employees who were employed at the Respondent's store in Norwalk, Connecticut, excluding office clerical employees and guards, professional employees, and supervisors as defined in the Act, at any time from the onset of the unfair labor practices found in this case until the sale of the Norwalk store to Grange Investments. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT harass you by making derisive comments about your activities or support for Local 371, United Food and Commercial Workers International Union, AFL–CIO, or any other union.

WE WILL NOT coercively question you about the union support or activities of your fellow employees.

WE WILL NOT make statements that create the impression that your union activities are under surveillance.

WE WILL NOT threaten you with reduced hours, or the sale or closure of the store if you vote for union representation.

WE WILL NOT promise you benefits, either directly or implicitly through the solicitation of your complaints and grievances, if you vote against union representation.

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

WILD OATS MARKETS, INC.

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[17] 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.

[18] 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."