

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BASHAS', INC., d/b/a FOOD CITY

and

**Cases 28-CA-18482
28-CA-18585**

**UNITED FOOD AND COMMERCIAL
WORKERS' INTERNATIONAL UNION,
LOCAL 99, AFL-CIO, CLC**

Mitchell S. Rubin, Esq., Phoenix, AZ, for the
General Counsel.
Thomas J. Kennedy, Esq., and *Gregg J. Tucek, Esq.*,
Phoenix, AZ, for the Respondent.
Jennifer S. Wedel, Esq., San Francisco, CA, for the
Charging Party.

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, from August 18 through 22, 2003. United Food and Commercial Workers' International Union, Local 99, AFL-CIO, CLC (the Union or the Charging Party), filed unfair labor practice charges in cases 28-CA –18482 and 28-CA-18585 on February 3 and March 14, 2003, respectively. Based on those charges, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a consolidated complaint on May 21, 2003. The complaint alleges that Bashas', Inc., d/b/a Food City (the Respondent or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,¹ I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent is an Arizona corporation, with its principal office and place of business in Chandler, Arizona, where it has been engaged in the retail sale of groceries and related products at various stores and warehouses located in the State of Arizona. Further, I find that during the 12-month period ending February 3, 2003, the Respondent, in the course and conduct its business operations, derived gross revenues in excess of \$500,000; and that during the same period, the Respondent purchased and received at its facilities located within the State of Arizona goods valued in excess of \$5,000 directly from points located outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. The Dispute

The Respondent operates approximately 138 grocery stores, primarily in the State of Arizona. Certain of these stores, including the two involved in this proceeding, are managed under the name Food City. Jose Parra is an employee of the Respondent who was employed as a meat cutter at the Respondent's Store No. 106. According to the complaint, Parra and other employees concertedly complained to the Respondent about, among other matters, alleged racist attitudes, poor quality meat sold, and unhealthy and unsafe working conditions at Store No. 106. Also, the complaint alleges that Parra and another employee filed a lawsuit against the Respondent regarding equal pay and requested class action status under Title VII of the Civil Rights Act of 1964. Further, it is alleged that Parra engaged in extensive activity on behalf of the Union, which was conducting an organizing campaign among a group of the Respondent's meat department employees.

¹ The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

The complaint alleges that on August 10, 2002, the Respondent issued Parra an undeserved and unwarranted written warning, and on February 8, 2003, transferred him to the Respondent's Store No. 132. These adverse employment actions were allegedly taken because Parra engaged in union and protected concerted activities as noted above. Further, the complaint alleges that the Respondent's supervisors and agents promulgated an overly-broad and discriminatory rule regarding employee complaints, interrogated employees regarding union activities and sympathies, created an impression that employees' union and concerted activities were under surveillance, and threatened employees with discharge for engaging in union activities.

The Respondent's answer denies the commission of any unfair labor practices. It is the Respondent's position that its actions in issuing a written warning to Parra and transferring him to a different store were totally unrelated to any union or protected concerted activities which he may have engaged in. The Respondent contends that any disciplinary action taken against Parra was a direct result of his misconduct, which included a pattern of insubordinate, disruptive, profane, and disrespectful conduct directed toward various supervisors. According to the Respondent, this pattern of misconduct culminated in an altercation with meat department manager Jesse Contreras, which necessitated transferring Parra from Store No. 106 to Store No. 132. The Respondent argues that it harbors no animus toward Parra because of any union or concerted activity that he may have engaged in, and it denies that the actions of its supervisors and agents have in any way violated the Act.

B. Facts and Analysis

1. Background

The Respondent's grocery store chain operates under three different names and formats, those being A.J.'s Fine Foods, Bashas' and Food City, respectively. At the time of the hearing, the Respondent operated approximately 53 stores under the Food City name. Tom Swanson, Vice President, Food City Retail Operations, is responsible for the Respondent's Food City division. Each Food City store has a meat department comprised of a meat manager, meat cutters, meat wrappers, counter help, and clean up personnel. During the time of the events in question, the meat departments in the Food City division stores employed approximately 53 meat managers and 250 other employees.²

Jose Parra is a meat cutter who was employed by the Respondent at its Food City Store No. 106 from 1996 until his transfer to Food City Store No 132 on February 8, 2003. Store No 106 was acquired by the Respondent from Mega Foods in 1996, and Parra continued to work at that location where he had been employed since approximately 1988. Since the time of its acquisition, the Respondent has had a number of different meat department managers at Store No. 106 (the store), including Ken Kessler, Burt Iniguez, and most recently, Jesse Contreras. At the time of the events in question, the Respondent employed approximately 20 – 25 employees in the store meat department.

On June 4, 2001, the Union filed a representation petition seeking to represent a single unit consisting of all meat department employees employed by the Respondent in its 17 stores operating under the Food City name in Maricopa County, Arizona.³ At the same time, the Union

² It should be noted that the Respondent refers to its employees as "members."

³ I take administrative notice that most of the greater Phoenix, Arizona metropolitan area is located in Maricopa County.

5 filed two separate petitions for identical units of the Respondent's meat department employees employed by the Respondent at its single Food City store in Apache Junction, Arizona, and its single Food City store in Tucson, Arizona, respectively. A representation hearing in these cases took place on various days in June and August of 2001. The Regional Director for Region 28 issued a Decision and Direction of Election on August 23, 2001, in which he found the petitioned for units appropriate. Subsequently, elections were held in the petitioned for units, however, the ballots were impounded because the Board had granted the Respondent's request for review of the Decision and Direction of Election. Thereafter, on June 26, 2002, the Board in *Bashas', Inc.*, 337 NLRB No. 113 (2002), found that the petitioned for Maricopa County Food City unit was not an appropriate unit. On July 3, 2002, the Union requested permission to withdraw its three petitions, which request was approved by the Regional Director on July 10, 2002. (See the parties' oral stipulations, as well as Jt. Exh. 1.)

15 Jose Parra testified on behalf of the Union at the representation hearing. While a number of the Respondent's supervisors and managers testified over the course of the hearing, no other employees did so. In addition to testifying, Parra was physically present during each day of the representation hearing.

20 On April 4, 2002, Parra and Gonzalo Estrada, another Food City employee, filed a lawsuit in Federal District Court against the Respondent regarding equal pay, and requested class action status under Title VII of the Civil Rights Act of 1964. The suit alleges that the Respondent's stores operated under the name Food City employ predominantly Latino employees, who are paid less by the Respondent than the Caucasian employees who are employed at the Respondent's other stores operated under the A.J.'s Fine Foods and Bashas' names. Further, it is alleged that Latino employees at Food City are required to work under conditions that are generally less safe and less hygienic than the conditions found at A.J.'s Fine Foods and Bashas'. The plaintiffs allege that this disparate treatment is the result of purposeful discrimination. (See *Jose Parra and Gonzalo Estrada v. Bashas' Inc.*, Complaint CIV' 02 0591 PHX RCB, and G.C. Exh. 8.) The Respondent has denied that it has discriminated against its Latino employees in terms of wages, benefits, working conditions, or in any other way. (See Answer CIV 02-0591-PHX-RCB, and G.C. Exh. 9.) At the time of this hearing, the matter was still pending in United States District Court in Phoenix, Arizona.

35 Also on April 4, 2002, Parra, Estrada, and some union officers and agents participated in a press conference at the Union's Phoenix office. A number of local television stations reported on the press conference. Shortly thereafter, a memo issued to the Respondent's employees from Mike Gantt, Senior Vice President, Human Resources, making reference to the press conference and the Union's involvement in the lawsuit. According to the memo, "The Union has provided the media with inflammatory misstatements." Further, Gantt stated, "the UFCW's support of the lawsuit arises from the failure of its organizing campaign last year and the resulting loss of union dues, assessments, and initiation fees." (G.C. Exh. 7.) On April 9, 2002, another memo from Mike Gantt was sent to the Respondent's store directors and vice presidents again mentioned the Union's involvement in the press conference. According to Gantt, the lawsuit was the first "shot" the Union might take in their effort to "extort a contract from Bashas' without our members being allowed the opportunity to vote." (G.C. Exh. 24.)

50 Parra was very active in the Union's organizing campaign. This is not in dispute. Nor is the Respondent's knowledge of his active involvement. Preliminarily, it should be noted that counsel for the Respondent stated at numerous times during the trial of this case that the Respondent was willing to acknowledge that it had been aware of Parra's activity on behalf of the Union and his concerted activity during the events in question. Of course, a number of the Respondent's supervisors and managers had observed Parra's participation in the

5 representation hearing on behalf of the Union. Also, Parra's support for the Union was vocal and constant, and he apparently never attempted to keep his pro-union sentiments secret. Further, as is obvious from the above-mentioned lawsuit and Gantt's correspondence, the Respondent was well aware of Parra's status as one of the two named plaintiffs and of the Union's support for the lawsuit.

10 For the most part, the unfair labor practices alleged in the complaint are premised on the testimony and contentions of Jose Parra. Frequently, his testimony stands alone, challenged by the testimony of various managers and supervisors of the Respondent. In this matter, it was often necessary for the undersigned to determine which of two versions of events I believe occurred, that version reported by Parra, or a contrasting version as told by the Respondent's witnesses.

15 In this regard, I generally found Parra to be an incredible witness. He testified in a rather edgy, hostile manner, especially on cross-examination. Frequently his testimony was illogical and contradictory. It was often inherently implausible, and he seemed to exaggerate and embellish those events that he believed would place him in the best possible light. Following his very extensive examination, both on direct and cross, I was left with the clear impression that for Parra, this matter had become very personal. He appeared to put his own slant on the events in question, and I doubt that he had the ability to view the events testified about with any degree of objectivity. Simply put, much of his testimony did not have the ring of authenticity to it.

25 From the evidence presented, there is no doubt that in addition to his union activity, Parra was, throughout the course of his employment at the Respondent's Store No. 106, also engaged in protected concerted activity. He would on a regular basis discuss with his fellow employees in the meat department matters of mutual concern, such as the scheduling of work, safety issues, cleanliness of the work area, and quality of the product being sold. Additionally, on a weekly, and sometimes daily basis, Parra would direct complaints about specific working conditions to his meat department manager. The Respondent does not deny this. However, it contends that while it had no problem with Parra raising these issues, it objected to the manner in which he raised them. It is the Respondent's position that Parra raised these issues, not with a genuine interest in resolving the problems but, rather, with the intention of embarrassing the meat department manager, and making it difficult for him to run the department. According to the Respondent, these complaints by Parra were made to a number of department managers in a profane and disrespectful manner, usually in the presence of other employees. However, whether the complaints were made directly to a manager, or "behind his back," the purpose was allegedly to undermine the manager's authority in the eyes of fellow employees.

40 Burt Iniguez was the meat department manager at Store No. 106 from April 2000 to February 2002. In August of 2001, while Iniguez was still the manager, Tom Swanson held a meeting with the meat department employees. Swanson testified at length about this meeting, as well as other matters. I found Swanson to be a credible witness. He appeared to me to be a no nonsense manager, who tended to say and see things as they actually were, without exaggeration or embellishment. I found his testimony genuine and reliable. According to Swanson, at this meeting, Parra and other employees complained about Iniguez and the store director. Their complaints concerned equipment such as saws needing repairs, floors which were cracked, employees not getting enough hours of work in a week, and other working conditions. Iniguez and the store director had been asked to leave the room so that employees would be less inhibited about giving their opinions, and a number of employees had spoken. 50 Rojelio Garcia, a meat cutter at the store, testified that besides Parra, he and a number of other employees voiced complaints about working conditions. There is no allegation that any of these employees were subsequently disciplined for complaining.

Counsel for the General Counsel spent considerable time at the hearing questioning witnesses about this meeting. There is no complaint allegation concerning this meeting, and in response to an objection from the Respondent's counsel, counsel for the General Counsel represented that he was only presenting this evidence as background information. However, it appears that he was attempting to offer evidence that outside the 10(b) period, the Respondent solicited and remedied grievances in an effort to discourage support for the Union. In his post-hearing brief, counsel for the General Counsel argues that this testimony should be considered evidence of animus. While conduct outside the 10(b) period can sometimes be evidence of animus, the meeting in August of 2001 does not establish any such thing. The first alleged disciplinary action taken against Parra was the written warning issued to him on August 10, 2002, approximately one year after the meeting conducted by Swanson. In my view, this is too remote in time to constitute evidence of animus. Further, from the evidence presented it is not at all clear that the Respondent's agents were soliciting and remedying grievances. Swanson denied any such effort and because of its remoteness in time, the undersigned did not allow exhaustive litigation of this issue. However, to the extent that this issue was raised, and evidence presented, I conclude that the General Counsel did not establish that there was anything unlawful about the meeting in August of 2001.

Burt Iniguez was the meat department manager at Store No. 106 from approximately April 2000 to February 2002. It is important to note that he is not alleged in the complaint to have committed any unfair labor practices. Never the less, counsel for the General Counsel in questioning Parra elicited testimony that in early 2001 Iniguez prohibited employees from signing union cards, passing out union material, or talking about the Union during "working hours." Further, Parra testified that on June 6, 2001, Iniguez threatened employees that if they selected the Union to represent them that certain benefits would be eliminated and they would have more onerous working conditions. Although counsel for the General Counsel initially indicated that he was offering this evidence of incidents outside the 10(b) period as background information, it again appears from his post-hearing brief that the evidence was actually being offered to establish animus. The Respondent did not offer significant rebuttal evidence to this testimony, which was not unreasonable in light of counsel for the General Counsel's indication that this was merely being offered by way of background information. Thus, these alleged incidents were not fully litigated. In my view, they are too remote in time to constitute evidence of animus, occurring approximately 14-18 months prior to the date the written warning was issued to Parra on August 10, 2002. Further, while these alleged incidents were not fully litigated, the testimony that was given came from Parra, who I have concluded was an incredible witness. They concern a meat department manager, Iniguez, who was gone from the store for 6 months at the time of the first disciplinary action against Parra. Accordingly, I conclude that to the extent that these allegations were raised, and limited evidence presented, that the General Counsel has failed to meet his evidentiary burden and establish that Iniguez had engaged in unlawful conduct.

According to Tom Swanson, Iniguez requested a transfer from Store No. 106 because of Jose Parra. Swanson testified that Iniguez spoke to him about Parra's "insubordination, a total lack of respect for him as a department head, questioning every little thing that went wrong in the department." Parra would allegedly blame Iniguez for problems in the department, and would do so "in front of all of the other members." Swanson testified that Iniguez told him that Parra would make statements to him like, "you don't know how to run your fucking department, you don't know how to write a fucking schedule, you don't know what the fuck you're doing." Swanson indicated that Iniguez had approximately five conversations with him where Iniguez spoke about problems with Parra. Allegedly, Parra was complaining "about the way the department was run, about how the schedule was written, about ordering, the merchandising, questioning Bert's experience, Bert's knowledge." According to Swanson, what particularly

upset Iniquez was that Parra made his complaints “in a forum where the co-workers were all around and belittling the manager,” and also the use of “foul language, abusive language, and disrespect.” Ultimately, in approximately February of 2002, Iniquez’ request was granted, and he was transferred as a meat department manager to another store.

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As a replacement for Iniquez, Jesse Contreras was transferred into Store No. 106 as meat department manager. Prior to his transfer, Contreras had been a meat department manager at another of the Respondent’s stores, where he had been awarded recognition for his superior performance as a manager.

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I was very impressed with Contreras as a witness, although that was not initially the case. He testified on two separate dates, originally called by counsel for the General Counsel as an adverse witness, and then called by Respondent’s counsel. When he first appeared as General Counsel’s witness, he seemed extremely nervous, with an impaired memory. He took an inordinate amount of time before responding to questions, and appeared overly concerned with not “saying the wrong thing.” He did not seem to want to be helpful, especially in answering the General Counsel’s questions, and frequently responded with, “I don’t remember.” Had his examination ended at that point, I would not have been favorably impressed. However, when he next testified, he candidly admitted that he had never previously testified in any kind of a court or administrative hearing and had been extremely nervous and stressed, and was still nervous. Further, he acknowledged frequently being unable to remember, which caused him in the interim to attempt to refresh his recollection by reviewing the two affidavits that he had previously given to the Board, an outline of events that he and his store director previously prepared, and the written warning given to Parra.

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Overall, Contreras impressed me as being a sincere, sensitive individual. I am convinced that he genuinely tried to get along with Parra, and was hurt by what he perceived as Parra’s disrespect toward him. Of more significance, I am of the belief that he ultimately testified in a truthful, accurate manner, without any attempt to exaggerate or embellish. His testimony was inherently probable, and was, for the most part, supported by the testimony of other witnesses. This young man left me with the impression of having tried to do his job for the Employer to the best of his ability, while also trying to be fair to those employees whom he supervised, including Parra. He was, in my opinion, a credible witness.

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Contreras testified that his problems with Parra started shortly after he arrived at the store and escalated through the summer. According to Contreras, “it was a constant talking behind my back, putting me down, you know, right off the bat. He said he got rid of two other meat managers; he’s going to get rid of me, too. You know, just always talking behind my back right from the beginning.” Contreras testified that Parra was “always complaining about every little thing,” and that he had tried to listen to Parra’s complaints and act on them. However, according to Contreras, what upset him was not that Parra made complaints, but the way in which Parra presented his complaints. In part it was the “swearing, cuss words” used by Parra. He gave examples. Contreras testified that Parra referred to him in Spanish⁴ as “hoto,” slang for homosexual. Other profanity or derogatory names allegedly directed by Parra to Contreras included “buey,” Spanish for ox or beast of burden, “fucking buey,” and “suck my dick,” which are the English translations of the Spanish terms allegedly used by Parra. According to Contreras, some of these references were made “behind my back,” and he learned of them when informed by meat department employees. However, he claims that Parra would “constantly” refer to him as a “buey” directly to his face, “almost on a daily basis.” Also, in

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⁴ Parra and Contreras each testified that they were bilingual in English and Spanish.

conversations between the two men, Parra allegedly told Contreras to his face that he “didn’t know how to write a fucking schedule,” he “didn’t know what the hell” he was doing, and he “didn’t give a shit about anybody” in the meat department.

5 Contreras felt that Parra was always trying to, “put me down,” especially in front of the other meat department employees. Other employees advised Contreras that Parra had said that Contreras was not deserving of his job, and had been made a meat department manager only because Al Macaraeg, the Respondent’s Meat Specialist, liked him. Further, Parra had allegedly been insubordinate toward Contreras on several occasions, telling Contreras in
10 response to a direct order to cut meat, to do it himself. According to Contreras, he asked for Parra’s cooperation on a number of occasions, and asked him not to say things denigrating him and his authority in front of other employees. He indicated to Parra that he was more than willing to discuss complaints with him and explain why things were being done a certain way, but that Parra should not be disrespectful of him in front of the other employees. However,
15 according to Contreras, Parra’s attitude did not change, and it became increasingly difficult for Contreras to operate the department.

Alfred Ramirez is the Store Director⁵ for Store No. 106, and has held that position since December of 1996. He testified primarily about the problems between Parra and Contreras. I
20 found Ramirez to be a credible witness. He gave me the impression of being a hard driving manager, who tended to view problems and people in a practical way. Ramirez impressed me with his memory for detail, and he appeared to be trying to be helpful regardless of which party was asking the questions. His testimony was inherently probable, was supported by other testimony, and appeared genuine and truthful. I believe that he testified accurately about the
25 incidents in question without exaggeration or embellishment.

Ramirez testified that he has known Parra since approximately 1993, when they both worked for Mega Foods. According to Ramirez, within a few weeks of Contreras’ arrival at Store No. 106, he became aware of difficulties between Parra and Contreras. Contreras
30 informed him that Parra was insubordinate toward him, disrespectful, argumentative, and used profanity. As the situation did not seem to be improving without his intervention, Ramirez decided to hold a meeting with Parra and Contreras. The three men met on July 13, 2002 to discuss the conflict. At the meeting Parra raised concerns with the way Contreras was running the department. Specifically, he complained that the meat department was not being kept
35 adequately clean, concerns about the way Contreras scheduled work for the employees, and even how Contreras cut meat. Contreras and Parra discussed their dispute, and according to Ramirez, the men appeared to work out their differences. At the end of the meeting, Ramirez counseled Parra and reminded him that he was expected to have a cooperative attitude and be
40 “part of the team” in the meat department. Ramirez was optimistic that a spirit of cooperation would, thereafter, replace the prior confrontation. However, unfortunately, that apparently did not happen.

According to both Ramirez and Contreras, Parra’s attitude toward Contreras did not improve, and he continued to show Contreras disrespect in front of the other employees and use profanity. One particular incident in early August of 2002, especially upset Ramirez and
45 Contreras. Allegedly Parra misinformed a meat department employee named Rosa about Contreras’ view that her work was not good, when the opposite was true. Rosa became upset with Contreras, who then became upset with Parra for allegedly spreading misinformation and

50 ⁵ The Store Director is the person with overall on site authority at each of the Respondent’s stores.

dissent among the department employees. It was at approximately this time that Ramirez decided that because of Parra's failure to correct his conduct toward Contreras and adopt a cooperative attitude, as expressed by Ramirez in the July 13, 2002 meeting, that it was necessary for the Respondent to institute disciplinary action. Ramirez, in consultation with the human resources department, decided to issue a written warning to Parra.

2. The Written Warning of August 10, 2002

On August 10, 2002, a meeting was convened for the purpose of counseling Parra. Present for the meeting were Ramirez, Ray O'Connor, human resource specialist, and Parra. According to Ramirez, he was particularly concerned with Parra's habit of showing disrespect for Contreras in front of the other meat department employees. He testified that Parra liked to have an audience when he confronted Contreras, what Ramirez referred to as the "grandstand effect." He felt that this caused "dissent in the department," and that if it continued, Contreras "would lose control of the whole shop." Ramirez was also concerned about Parra's continued use of profanity, especially when directed at Contreras. Ramirez expressed his concerns to Parra, and presented him with a written warning. This document is known as a Member Conference Memorandum. (G.C. Exh. 14.) Parra was obviously not pleased with the warning and refused to sign the memorandum. Ramirez testified that he told Parra that he did not have to like Contreras, but he needed to respect Contreras during working hours. Further, Ramirez asked Parra to be a leader, and requested that Parra cooperate with Contreras in a constructive way.

The Member Conference Memorandum given to Parra is a two-page document dated August 10, 2002. It bears the signatures of Ramirez and Ray O'Connor. For the most part, it contains the matters of concern that Ramirez orally raised to Parra at the meeting. The memo characterized Parra's attitude toward Contreras as insubordinate, argumentative and disrespectful. It indicated that Contreras was willing to discuss with Parra any complaints Parra had about the department, but that Contreras had requested that Parra discuss them with Contreras "privately, one on one." The memo went on to direct that when making complaints, Parra should follow the "chain of command," beginning with Contreras and going in order through the supervisory hierarchy, until finally reaching the Respondent's Chairman. The memo concluded with a warning to Parra that if he failed to correct his behavior, he would be subject to further disciplinary action, including termination.

Complaint paragraphs 5(c), 6, and 7 allege that the Respondent issued Parra an underserved and unwarranted written warning on August 10, 2002, in violation of Section 8(a)(1) and (3) of the Act. The General Counsel contends that Parra's activity on behalf of the Union, and his protected concerted activity in filing a lawsuit against the Respondent and in raising numerous complaints with fellow employees about wages, hours, and working conditions were the real cause for the Respondent's issuance to him of the written warning. As was noted above, the Respondent has acknowledged that Parra engaged in union activity and that it was aware of that activity. Further, the Respondent was clearly aware that Parra was one of two named plaintiffs in a lawsuit claiming discrimination against Latino employees. It is equally obvious that the Respondent was aware that Parra was continually making complaints about Contreras and the way in which he ran the meat department. However, the Respondent contends that it was not this union or concerted activity that upset management but, rather, the way in which Contreras made his complaints and his conduct toward his supervisor.

As I indicated earlier, I find Parra to be an incredible witness. After hearing him and Contreras testify, I am convinced that, for whatever reason, he enjoyed making matters difficult for Contreras. I believe that as testified to by Contreras, other meat department employees

5 were frequently reporting to him that Parra was saying derogatory things about him behind his back, and was using profane language when referring to him. Parra was questioned at length about his alleged use of obscenity by both counsel for the General Counsel and counsel for the Respondent. I found his testimony to be confusing, contradictory and implausible. At first he seemed to say that he did not use profanity directed at Contreras and acknowledged that such language directed at Contreras in the presence of coworkers, or behind Contreras' back, would be inappropriate. Later he admitted using certain inappropriate language, but claimed that it was directed not at Contreras, but to the particular situation.⁶ He contended that his use of profanity was no greater than other employees and even managers. However, after extensive cross-examination, and much confusing testimony, Parra finally indicated that while it was improper to direct profanity to Contreras' face, it was not inappropriate to do so behind his back.

15 Parra seemed to go out of his way to antagonize Contreras, and I believe that Ramirez and Contreras were correct in their assessment that Parra particularly liked to do this in front of other employees. This is no question that Parra was raising complaints that were of interest to other employees and that concerned matters which involved the wages, hours and working conditions of the meat department employees. However, the manner in which these issues were raised was intended to upset Contreras, undermine his authority and create dissension among employees. I am of the view that Parra did this intentionally, and despite being warned by Ramirez in July of 2002, Parra continued to do so.

25 In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

35 In the matter before me, I conclude that the General Counsel has not made a *prima facie* showing that Parra's union and protected concerted activity was a motivating factor in the Respondent's decision to issue a written warning to him on August 10, 2002. In *Tracker Marine, L.L.C.*, 337 NLRB No. 94 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line*. Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place, even in the absence of the protected conduct. See *Mano Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); and *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

50 ⁶ Parra testified that, for example, he might refer to poor quality neckbones and say, "look at this shit, they brought this shit in green again," or in reference to a pancreas say, "look at this damned pancreas, man, they're no good."

5 There is no doubt that Parra had been engaged in substantial union activity. He had been very vocal and open about his support for the Union. As set forth above, he testified on behalf on the Union at the representation hearing and attended each day of the proceeding, apparently the only employee to attend or testify. Further, as one of two named plaintiffs in a discrimination lawsuit against the Respondent, Parra was engaged in protected concerted activity. His protected concerted activity also included numerous complaints that he registered with the Respondent's supervisors and managers on behalf of himself and other employees regarding such matters as cleanliness and safety issues, scheduling of work, quality of the product sold, and general working conditions in the meat department. However, to the extent 10 that some of Parra's complaints were filled with profanity, they would lose the protection the Act would normally afford such complaints. See *Honda of America Mfg., Inc.*, 334 NLRB 746 (2001). In any event, certainly not all of his complaints were laced with profanity, and registering these complaints constituted legitimate protected concerted activity.

15 Knowledge of Parra's union and protected concerted activity is not in doubt. The Respondent admits that it was well aware that he was a union supporter and, of course, that he participated in the representation hearing on behalf of the Union. Obviously, the Respondent was equally well aware that Parra was a plaintiff in the discrimination lawsuit, and that over the course of his employment he made repeated complaints to management about matters which 20 were also of interest to other employees, some of which clearly involved wages, hours, and working conditions.

25 There is also no doubt that Parra sustained an adverse employment action. He was issued a Member Conference Memorandum (G.C. Exh. 14.), which constituted a written warning, a disciplinary action. The memo indicated on its face that failure to follow its instructions could result in further disciplinary action, including termination.

30 Regarding the question of whether there exists a link or nexus between Parra's union and protected concerted activity and the issuance of the written warning, I am of the view that the General Counsel has failed to establish such a connection. There is an absence of the kind of union animus on the part of the Respondent as would serve as that link or nexus to the discipline. It is true that the Respondent opposed the Union's organizing campaign, but clearly an employer has the right to take such action, as long as it does so without violating the Act. *Action Mining, Inc.*, 318 NLRB 652, 655 (1995); also see *Birmingham Chrysler Plymouth Jeep Eagle, Inc.*, 326 NLRB 1175, 1176 (1998). While counsel for the General Counsel has raised 35 alleged conduct outside of the 10(b) period as evidence of animus by the Respondent, I have noted above that in my view the evidence presented at the hearing to support these allegations, namely the testimony only of Parra, is inadequate to establish unlawful conduct. Further, as detailed at length above, the incidents alleged are too remote in time to establish that any 40 perceived animus influenced the Respondent's decision to discipline Parra, especially as there are no independent violations of the Act within the 10(b) period.

45 The General Counsel is of the view that references to Parra as a "trouble maker" and "ringleader" by Contreras and other supervisors shows that the Respondent harbored animus toward Parra. There is very little doubt that the Respondent was not happy with Parra. He was perceived by the Respondent's supervisors as a "trouble maker" and Contreras so testified. Contreras characterized Parra as somebody who "likes to stir things up." I doubt that Parra himself would have denied that characterization. He was a named plaintiff in a discrimination lawsuit against the Respondent, and was the author of numerous complaints against his 50 supervisor. However, viewing somebody as a "trouble maker," who also is engaged in protected activity does not by itself establish animus based on that protected activity. Further, Parra acknowledged that Contreras' reference to him as a "ringleader" was in the context of

Contreras' effort to enlist Parra's support in uniting as a team to run the department. I believe that any reference by Contreras to Parra being a "trouble maker" or "ringleader" must be viewed in the atmosphere of personal animosity, which clearly existed between the two men. I will have more to say about this later in this decision.

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Having failed to establish animus by the Respondent toward Parra because of his union or protected concerted activity, the General Counsel has also failed to connect the disciplinary action taken by the Respondent with Parra's protected activity. It follows, therefore, that the General Counsel has failed to meet his evidentiary burden and make a *prima facie* showing that Parra's protected activity was a motivating factor in the Respondent's decision to issue him a written warning. However, even assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have issued Parra a disciplinary warning, even absent his protected activity.

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Parra's conduct was egregious. He seemed to delight in giving his supervisor a hard time, especially in the presence of other employees. I have credited Contreras' testimony that Parra's complaints were laced with profanity directed at him, and that other employees frequently informed him that Parra was saying derogatory things about him behind his back. Parra himself does not deny referring to Contreras to his face as a "beuy." Contreras testified that he did not appreciate being referred to as an "ox" or "beast of burden," and I accept his testimony that other employees did not refer to him in this way. Parra ignored Contreras' requests that any complaints Parra wished to raise with Contreras be conducted in private, rather than in the presence of other employees. Further, Contreras credibly testified that on several occasions, Parra had failed to carry out a direct order about cutting meat, and instead had indicated that Contreras should cut the meat himself. After hearing the testimony of Parra and Contreras, I have no doubt that Parra wanted to embarrass Contreras in front of the other employees. He enjoyed doing so. Parra's conduct toward Contreras was certainly insubordinate, argumentative, and disrespectful. It appeared intentional and purposeful, and if allowed to continue it would likely result in Contreras' loss of control over the entire meat department.

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In my view, the Respondent was faced with a serious problem in the store meat department. If left unattended, Contreras might very well have been unable to effectively run the department, resulting in a decline in service to customers and a corresponding decline in revenue. Store Director Ramirez took what appears to be a very measured response, and issued a written warning to Parra. Parra was merely directed to modify his behavior toward his supervisor, so as to show him the proper respect that a subordinate would normally give a superior in a work setting. He was not asked to discontinue either his union or protected concerted activity, including the registering of complaints with the Respondent. The Respondent had a legitimate interest in ensuring that Parra would not embarrass Contreras in the presence of other employees. Its issuance of a written warning to Parra was intended to do just that. I am convinced that the Respondent would have issued the warning to Parra because of his improper behavior, even in the absence of Parra's union and protected concerted activity. See *Yokohama Tire Corp.*, 303 NLRB 337, 338 (1991). The Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision to discipline Parra, even without any protected activity. See *T & J Trucking Co.*, 316 NLRB 771 (1995).

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In summary, I find and conclude that counsel for the General Counsel has failed to establish a *prima facie* case that protected conduct was a "motivating factor" in the Respondent's decision to issue a written warning to Parra. Further, I find that assuming the evidence is viewed as having established a *prima facie* case, the evidence still supports a

finding that the Respondent would have disciplined Parra, even in the absence of his union and protected concerted activity. Accordingly, I shall recommend that complaint paragraph 5(c) and, to the extent that they relate to it, paragraphs 6 and 7 be dismissed.

5 3. Alleged Overly-Broad and Discriminatory Rule on Complaints

10 Complaint paragraphs 5(d) and 6 allege that in the written warning issued to Parra on August 10, 2002, the Respondent promulgated an overly-broad and discriminatory rule requiring employees to address their complaints only to their supervisors and managers, in violation of Section 8(a)(1) of the Act. It appears from counsel for the General Counsel's post-hearing brief that he objects to the statement in the written warning that Contreras had verbally instructed Parra "on several occasions to address any concerns or complaints to him privately one on one ...". Further, the General Counsel apparently believes that there is something wrong with the written warning instructing Parra to use the Respondent's chain of command when 15 registering complaints. (G.C. Exh. 14.) According to counsel's brief, these words limit employees to directing their complaints to supervisors, and "not other employees." However, I read no such prohibition into the written statement.

20 When considering the context in which the written warning was issued to Parra, it is very apparent that what upset Contreras and Ramirez was Parra's habit of trying to embarrass Contreras in the presence of other employees, under the guise of raising legitimate complaints. Neither Contreras nor Ramirez were attempting to limit or restrict employees from discussing among themselves any complaints or concerns that they may have had with their supervisor, or with the Respondent's policies or procedures. There is nothing in the written warning that says 25 any such thing, and no reasonable reading of the warning could be so construed. Rather than trying to restrict employees from discussing work related issues among themselves, the Respondent was merely trying to prevent Parra from continuing with his chosen practice of embarrassing Contreras in the presence of other employees, under the guise of raising complaints. Parra was being directed to raise complaints with Contreras in private, a request that Contreras had made unsuccessfully on a number of previous occasions. Further, Parra 30 was directed to follow the chain of command when making complaints to the Respondent's supervisors and managers. (Underscoring added for emphasis.) In my opinion, this was not an unreasonable request in view of Parra's obvious intention of embarrassing Contreras in front of the other meat department employees. There was nothing unlawful about the Respondent 35 deciding how employee complaints would be registered with its supervisors and managers.

40 The written warning issued to Parra on August 10, 2002, did not attempt in any way to limit the Respondent's employees' Section 7 right to consult among themselves about issues of concern regarding their wages, hours, or other terms and conditions of employment, or to consult with any outside entity such as the Union or the Board. I am of the view that only a rather contorted and unreasonable reading of the written warning could lead an employee to such a conclusion. Therefore, I conclude that the written warning in question did not interfere with, restrain, or coerce the Respondent's employees in the exercise of their Section 7 right to consult among themselves about issues of mutual concern, or to consult with third parties. 45 Accordingly, I shall recommend that complaint paragraph 5(d) and, to the extent related, paragraph 6 be dismissed.

4. Alleged Impression of Surveillance

50 Complaint paragraphs 5(e)(1) and (6) allege that on February 2, 2003, the Respondent, through Jesse Contreras, created an impression among its employees that their union or other concerted activities were under surveillance in violation of Section 8(a)(1) of the Act. Counsel

for the General Counsel's post-hearing brief makes it clear that this allegation involves only one incident, that being a conversation on February 2, 2003, between Contreras and Parra.⁷ Both men agree that such a conversation occurred, however, they disagree as to some of the specifics that were discussed during this conversation. As I have previously, I continue to find
5 Contreras the more credible of the two men, and his version of events the more inherently plausible. Therefore, I accept Contreras' version of the conversation, although there is really not a great variance between the two. To the extent that Parra claims the conversation was more extensive, with his long colloquy on the benefits of union representation, I find this highly implausible.

10 According to Contreras, Parra started this conversation. The two men were cutting meat and working in close proximity when Parra commented that if the Union were in the store "everything would be so much better," employees would be "happier," and there would be "better wages." Contreras responded with a "who knows," and he proceeded to tell Parra that
15 his neighbor's daughter, who works at Safeway, a union represented grocery, had given her father a union newsletter. The newsletter made reference to the Union trying to organize the Respondent and, as the neighbor knew that Contreras worked for the Respondent, he had given Contreras the newsletter. Contreras testified that he commented to Parra, "You never know, the Union might come back."⁸

20 Board law is clear. The test for determining whether an employer has created the impression of surveillance among its employees is whether the employees would reasonably assume from a respondent's supervisor's questions or statements that their union activities had been placed under surveillance. *Grouse Mountain Associates*, 333 NLRB 1322, 1323 (2001).
25 Regarding the conversation in question, according to the credible testimony of Contreras, Parra himself brought up the subject of the Union. All Contreras did was to offer Parra some information that Contreras had been given by a neighbor. He told Parra that the information came from a union newsletter. Contreras did not question Parra about the Union or its intentions about future organizing efforts. As I have accepted Contreras' version of the
30 conversation during which he asked no questions about the Union, and merely commented on a union newsletter, there would be absolutely no reasonable basis upon which Parra could have concluded that his union activity was under surveillance. Further, Contreras explained to Parra how he came to be in possession of information about the Union from a union newsletter. Such a "fortuitous" acquisition of information by Contreras, which he shared with Parra, cannot
35 reasonably be considered by an employee as an indication that the Respondent has placed the employee's union activity under surveillance. *Stead Industries, Inc.*, 282 NLRB 1348 (1987). This is all the more true where the employee is an active and open union supporter who makes no secret of his on going support for the Union, as was the case with Parra.

45 ⁷ While counsel for the General Counsel's brief makes reference in a footnote to conversations Contreras allegedly had about the Union with employees William Neff and Rogelio Garcia, these conversations apparently did not take place on February 2, 2003, and counsel does not allege any violation of the Act regarding these conversations.

50 ⁸ This conversation occurred approximately six months after the Union withdrew its representation petitions seeking to represent certain of the Respondent's meat department store employees.

I conclude that the General Counsel has failed to establish by a preponderance of the evidence that during the conversation in question, the Respondent, through Jesse Contreras, created an impression among its employees that their union or protected concerted activities were under surveillance. Accordingly, I shall recommend that complaint paragraph 5(e)(1) and, to the extent related, paragraph 6 be dismissed.

5. Alleged Interrogation

It is alleged in complaint paragraphs 5(e)(2) and (6) that on February 2, 2003, the Respondent, through Jesse Contreras, interrogated its employees about their union activities and sympathies. From counsel for the General Counsel's post-hearing brief, it is clear that he takes the position that Contreras interrogated Parra about the Union in the same conversation between the two men as is mentioned above. As I indicated, I credit Contreras' version of this conversation.

The Board has traditionally looked to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his union activities were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties relationship, the nature of the information sought, the identity of the questioner, the place and methods of interrogation, and the truthfulness of the reply.

As noted earlier, Parra was an open, vocal union supporter, who initiated the conversation about the Union with Contreras. Contreras, of course, was Parra's immediate supervisor and the men had, at best, a "strained" relationship. The men were working, cutting meat in close proximity at the time of the conversation. However, most significant, according to Contreras' credited version of the conversation, he asked no questions of Parra. Thus, there was no interrogation. Following Parra's initial statement about how having the Union in the store would make things better, Contreras merely offered information about the union newsletter, which he had obtained from his neighbor. Finally, Contreras made the comment that the Union might come back.

Based on the version of the conversation that I have accepted, Contreras asked no questions of Parra. As there was no interrogation of Parra about his union activities or sympathies, his Section 7 rights were not interfered with, restrained, or coerced by the Respondent. Accordingly, I shall recommend that complaint paragraph 5(e)(2) and, to the extent related, paragraph 6 be dismissed.

6. The Altercation Between Parra and Contreras

The relationship between Parra and Contreras, which had been tense for some time, was about to take a turn for the worse. On approximately February 3, 2003, Parra did not report for work. His wife had become ill and he needed to obtain medical care for her. Apparently, Parra called the store, spoke to another meat cutter, and explained that his wife was ill and he would not be coming in to work. Contreras was given this information when he arrived at work. After a while, he decided that he needed to find out whether Parra would be coming to work on the following day and, so, he called Parra's home. Parra was not home, and Contreras spoke with Parra's 10-year-old son, who explained that his mother was ill and his dad had taken her for medical treatment. Contreras asked the boy to tell Parra to call the store when he got the

chance, which Parra subsequently did. The two men spoke by telephone, and Parra explained that his wife was ill and that he would not be coming to work that day. Contreras indicated that there was no problem with Parra attending to his sick wife, but that Contreras needed to know whether Parra would be coming to work the following day, because Contreras would need to
5 obtain a replacement meat cutter. Parra promised to call the store later that day and indicate whether he would be at work the next day. Parra did call, indicating that he would not be at work the next day, after which Contreras obtained a replacement. The following day Parra was absent, and did not further call the store. The day after, February 5, 2003, he returned to work.

10 There is a considerable variance between Parra and Contreras as to the specifics of the events that followed on February 5. For the reasons that I have set forth above in detail, I continue to credit Contreras' version of these events. However, I will note, that even had I accepted Parra's version of these events, it would not have altered the legal conclusion that I have reached in this case.

15 Contreras testified that upon seeing Parra that morning, he approach him and asked Parra how his wife was doing. Parra responded by saying that Contreras should not ask that question, because he did not care about Parra, his wife, or about any of the people who worked in the department. Parra raised his voice and said, "You don't give a shit about nobody in here."
20 There were other meat department employees present at the time. Contreras admitted that he got mad at that point, since he was making the inquiry about Parra's wife out of genuine concern, and not simply because it was expected. In any event, Contreras did not want to discuss the matter in front of other employees and, so, he asked Parra to go with him to the produce area where it is more private. The two men went outside, and Parra indicated to
25 Contreras that he was upset with Contreras having called him at his home two days earlier, which he characterized as giving him the "third degree." Parra said that he was not going to further discuss this matter with only Contreras, and he wanted to continue any discussion with the Store Director, Alfred Ramirez. Contreras agreed.

30 According to Contreras, he was upset, but he told Parra that he was not going to let Parra get under his skin. However, apparently Contreras let his emotions get the better of him, as he admits that when he went through the swinging doors in the produce area, he pushed them open with more force than was necessary. Further, as he walked down an aisle on the way to Ramirez' office, he punched a box of bananas. Contreras denies Parra's assertion that
35 on the way to the office, he turned quickly in a threatening manner toward Parra, making Parra fear that Contreras was about to punch him. In any event, neither Contreras nor Parra threw a punch.

40 Upon reaching Ramirez' office, Parra accused Contreras of giving him the "third degree" about his wife's illness, and of allegedly harassing Parra's son. Further, Parra said that Contreras was acting in an unprofessional manner, slamming doors and hitting boxes on the way to Ramirez' office. Contreras indicated to Ramirez that he couldn't understand why Parra was so upset, when all he had done was to ask how Parra's wife was doing. Both men were obviously highly agitated at this point, and Contreras asked what he needed to do to get Parra
45 to be cooperative. According to Contreras, Parra responded by saying, "Well then do something about it." Both men were apparently standing and facing each other when Contreras said, "You've been talked to, you've been written up, we've done everything we could with you.

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Why don't we just take it outside?"⁹ Parra responded by saying, "If we go outside, you're going to start it and I'm going to finish it." At that point, Ramirez stepped in and told them to "knock it off."

5 Ramirez credibly testified that he said, "What we'll do is I want you guys to return to your work stations, and I'll get back with you on how we're going to handle this matter." According to Contreras, prior to departing from the office, he said to Ramirez, "I cannot come to work like this anymore. You need to either do two things. Either I go, or he's going to have to go because we cannot do this in front of our people for the better of the company, the store and everything."
10 Ramirez testified that as Parra was leaving the office, Ramirez called him back. According to Ramirez, with only him and Parra present, Ramirez said, "Joe, bottom line, personality conflict?" Allegedly, Parra responded, "yes."¹⁰ Ramirez told Parra to go back to work, and he would get back to Parra later. That ended the confrontation in Ramirez' office.

15 **7. The Alleged Threat to Terminate Parra**

Complaint paragraphs 5(f) and 6 allege that on February 8, 2003, the Respondent, by Tom Swanson, threatened employees that they could be fired for engaging in union activities. From the testimony of Parra, and the post-hearing brief from counsel for the General Counsel, it is obvious that this allegation arose from the matters discussed with Parra at the time he was informed of the decision to transfer him.
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According to Swanson, he made the decision to transfer Parra out of Store No. 106. The decision was allegedly based on a number of different factors and information that he had received over a period of years. Swanson testified that a number of managers and supervisors had complained about Parra's attitude for years, including Bert Iniquez, Jesse Contreras, and Al Ramirez. The complaints were the same as those, which have been listed above, namely being insubordinate, disruptive, and using foul and derogatory language. Swanson was aware that Contreras had been having problems with Parra from the time he became the store meat department manager. Specifically, Swanson testified about the type of foul and derogatory language that he had heard was being used by Parra.¹¹ He indicated that this was very inappropriate language to use in the presence of fellow employees, and certainly should not be used in referencing a supervisor. Further, Swanson was concerned that Parra's behavior was undermining Contreras' authority and making it difficult for him to run the meat department. He was aware that in August of 2002, Parra had been issued a written warning for his improper conduct. Then, in addition to everything else had come the incident between Parra and Contreras in Ramirez' office.
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⁹ According to Parra's version of the incident, Contreras' posture and movements were very threatening and he seemed on the verge of punching Parra. Also, Parra contends that Contreras asked him to step outside and fight three times. Contreras denies these assertions, and Ramirez' version of events is closer to that told by Contreras. As noted, I credit Contreras' version. However, even if Parra's testimony was correct, it would not alter my legal conclusion.
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¹⁰ Parra denies that there was anything said by Ramirez about a personality conflict. For the reasons expressed earlier, I continue to credit Ramirez over Parra. Further, considering the context of the comment, it is inherently much more plausible than not that the remark was made.
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¹¹ Swanson's testimony about the obscene and derogatory language used by Parra comports with the testimony of Ramirez and Contreras, which specified the alleged words used.

Both Ramirez and Contreras had informed Swanson separately about the altercation in Ramirez' office. He understood that the meeting had gotten very heated, and that Contreras and Parra had challenged each other to a fight. He was aware that Contreras had acted inappropriately by using excessive force to open a swinging door, by punching a box of bananas, and by suggesting that Parra step outside and fight.¹²

Swanson viewed the altercation as "the final straw." He perceived the conflict between Parra and Contreras as a personality conflict. According to Swanson, he had already transferred one meat department manager, Burt Iniguez, out of the store because of problems with Parra, and he did not want to have to transfer another. Swanson testified logically that it is much easier to transfer a meat department employee to another store than it is to transfer a meat department manager. While the Respondent has a meat department manager in each of its 138 stores, it has 10 to 15 times that number of employees in its system and, thus, many more vacancies.

Having made the decision to transfer Parra, Swanson conducted a meeting for the purpose of so informing Parra. The meeting was conducted on February 8, 2003, at the store, and attending were Swanson, Ramirez, Al Macaraeg, Director of Food City Meat Merchandising, and Parra. Swanson informed Parra that he was being transferred to Store No. 132, and Swanson listed the reasons for the transfer, as noted above. Parra argued that it was not fair, and that Contreras had allegedly been the person who had acted unprofessionally. Swanson explained to Parra that the decision to transfer him was not based on simply the one incident but, rather, on the problems that had accumulated over a number of years. Parra complained that he would have a transportation problem getting to Store No. 132, but Swanson indicated that the Respondent had a need for Parra at that store.¹³

Near the end of the meeting, Parra made the statement that he was only being transferred because he was a union supporter. Swanson testified that he denied that assertion, telling Parra that the transfer "has nothing to do with that." According to Swanson, this was the only time during the conversation that the Union was brought up.

Al Ramirez testified that he recommended to Swanson that Parra be transferred. Further, he testified that he was present at the meeting where Parra was advised of the reasons for his transfer, and he generally supported Swanson's testimony. According to Ramirez, when Parra voiced his opinion that he was being transferred because of his support for the Union, Swanson responded by saying, "This has nothing to do with that. It has nothing to do with it at all. You're free to do whatever you want to do with that."

As was true throughout the hearing, Parra's version of events was at variance with the Respondent's witnesses' version. According to Parra, when he mentioned his belief that the Respondent was transferring him because of his support for the Union, Swanson allegedly responded that, "it's got nothing to do with that. If it was we would have just fired you." As I have throughout this decision, I continue to credit Swanson and Ramirez over Parra. I have

¹² It should be noted that both Ramirez and Swanson orally counseled Contreras about his improper behavior. He was told that in the future he needed to conduct himself in a more professional manner, to not let his emotions get the better of him, and to stay calm when confronting employees. According to Ramirez, Contreras admitted that the frustration had gotten the better of him, and he apologized.

¹³ The un rebutted testimony of the Respondent's witnesses was that Store No. 132 was approximately the same distance from Parra's home as Store No 106, and also that Store No. 132 was located on a major City of Phoenix bus route.

5 already expressed in detail my reasons for discrediting Parra. Further, I would specifically note that in this instance I believe it inherently implausible that Swanson would have responded to Parra's statement about the Union by making a totally gratuitous statement, which essentially threatened Parra with discharge because of his union activity. Swanson is an astute manager who was present at the meeting to carefully explain to Parra why he was being transferred. Swanson understood that Parra was an open and vocal union supporter who was already involved in a discrimination lawsuit against the Respondent. In my view, it is extremely unlikely and implausible that in such an environment, Swanson would have made a cavalier statement, which he would have understood would likely result in some charge or legal action being filed against the Respondent. For all the above reasons, I do not believe that Swanson made any such statement.

15 The General Counsel has failed to meet his evidentiary burden and establish that on February 8, 2003, Tom Swanson threatened to fire Parra because of his union activities. Accordingly, I shall recommend that complaint paragraph 5(f) and, to the extent related, paragraph 6 be dismissed.

8. The Transfer of Parra

20 It is alleged in complaint paragraphs 5(g), 6, and 7 that the Respondent transferred Parra from Store No. 106 to Store No. 132 on February 8, 2003, because of his union and protected concerted activity in violation of Section 8(a)(1) and (3) of the Act. The specific events leading up to the transfer have been fully set forth above.

25 Applying the standards and factors as set forth by the Board in *Wright Line, supra*; and *Tracker Marine, supra*, I conclude that the General Counsel has failed to establish a *prima facie* case that Parra's union and protected concerted activity were a motivating factor in the Respondent's decision to transfer him. As noted and detailed above, there is no doubt that Parra was engaged in significant union and protected concerted activity. Further, there is no doubt that the Respondent was well aware of Parra's protected activity.

30 However, the question of whether Parra's transfer constituted an adverse employment action is not as obvious. The un rebutted testimony of the Respondent's witnesses establishes that Parra's wages and benefits did not change following his transfer. Store No. 132 was smaller than Store No. 106, and the General Counsel argues that with a smaller meat department there was less opportunity for Parr to advance.¹⁴ Also, Store No 132 was apparently older, with less modern equipment, and with the absence of air conditioning, a not insignificant matter considering the severity of Phoenix summers. The General Counsel contends this resulted in Parra having to adjust to inferior working conditions. In any event, as the transfer was clearly involuntary, I will conclude that it did constitute an adverse employment action.

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50 ¹⁴ This argument is not entirely logical, as each meat department, regardless of its size, has only one supervisory employee, that being the meat manager. The Respondent does not employ an assistant manager in its meat departments. Although there were some references to a "second man" at Store No 106, his wages and benefits are no greater than other meat cutters. Further, Parra had made it clear to Tom Swanson on an earlier occasion that he was not interested in a managerial position with the Respondent.

Regarding the question of whether there exists a link or nexus between Parra's protected activity and his transfer, I have already indicated in detail above my conclusion that there is an absence of animus in this case as could establish the requisite link. As detailed earlier, there is an absence of any violation of the Act within the 10(b) period. Those incidents outside the 10(b) period alleged by the General Counsel to establish animus are, in my view, too remote in time, and the evidence offered is insufficient to show animus. Further, as I have noted, the Respondent's rigorous opposition to the Union's organizing campaign does not by itself establish animus. The Act protects the Respondent's right to oppose the Union, so long as the Respondent's efforts do not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The credible evidence has failed to demonstrate that any statements by the Respondent's supervisors or managers, written or oral, constituted anything other than a legitimate expression of opinion as provided for by Section 8(c) of the Act. See *Meaden Screw Products Co.*, 325 NLRB 762, (1998). Without some independent evidence of unlawful conduct, the General Counsel cannot rely on what are otherwise, completely lawful Section 8(c) expressions of ant-union sentiment.¹⁵

The timing of Parra's transfer does not support the General Counsel's contention that there is a link to Parra's protected activity. The transfer occurred three days after the altercation between Parra and Contreras in Ramirez' office. While Swanson testified that the decision to transfer Parra was based on problems that Parra had been creating with his supervisors at Store No. 106 for sometime, it is obvious that the altercation was "the straw that broke the camels back." This incident clearly precipitated the transfer. Parra's ongoing protected activity was extensive, but there was nothing particularly significant happening at about the time of the transfer. The discrimination lawsuit had been filed ten months earlier, and the Union had withdrawn its representation petitions seven months earlier. Thus, the timing of the Respondent's transfer of Parra does not support the General Counsel's theory of the case.

The Board has held that the "record as a whole" must be examined to determine whether there is motivating union animus. *Meaden Screw Products Co.*, *supra*. As was noted above, opposition to unionization is insufficient by itself to establish union animus. This is true even when the person against whom the adverse employment action is taken is the lead union organizer, as was apparently the case with Parra. See *Birmingham Chrysler Plymouth Jeep Eagle, Inc.*, 326 NLRG 1175, 1176 (1998). Accordingly, I conclude that the General Counsel has failed to meet his burden of establishing that the Respondent's action in transferring Parra was motivated by animus toward his union and protected concerted activity. As there is no evidence of animus, it follows that there is no nexus between Parra's protected activity and his transfer. Therefore, I find that the General Counsel has not made a *prima facie* showing that Parra's protected activity was a motivating factor in the Respondent's decision to transfer him.

However, even assuming, for the sake of argument, that the General Counsel had established a *prima facie* case, the evidence is clear that the Respondent would still have transferred Parra, even absent his protected activity. In my view, Parra was not disciplined because of his union or protected concerted activity but, rather, because of the inappropriate manner in which he made complaints, his regular use of profanity, insubordination, and his constant, disrespectful treatment of Contreras. An employee who engages in protected conduct

¹⁵ For example, Parra testified that at the time the Union withdrew its representation petitions, Contreras expressed pleasure over the withdrawal. Allegedly, Contreras referring to the Union said, "They're not getting in," that they "didn't make it in." Such a statement does not rise to the level of an unfair labor practice, nor does it establish animus. At most, it constitutes a simple expression of anti-union sentiment.

is not simply for that reason insulated against disciplinary action taken by his employer for cause, such as violations of company policies and procedures. See *Westside Community Mental Health Center*, 327 NLRB 661 (1999); and *Yokohama Tire Corp.*, *supra*.

5 Contrary to Parra's contention that the issues between him and Contreras were not personal, the credible evidence demonstrates beyond any doubt that the dispute was most certainly personal. Having viewed both Parra and Contreras testify at length, I am convinced that Parra had a big "chip on his shoulder." While the reason for Parra's attitude is not readily apparent to me, I have the strong perception that Parra seemed to delight in making life difficult, if not miserable, for Contreras. Swanson had a legitimate interest in ensuring that Contreras' ability to effectively operate the meat department was not undermined by Parra's open disrespect for Contreras. Of course, Swanson knew from earlier experience with former meat department manager Burt Iniguez what a disruptive influence Parra could be. Having honored Iniguez' request to transfer him out of the store, Swanson was faced with the prospect of losing yet another meat department manager.

10 Following the confrontation between Parra and Contreras in Ramirez' office, it would have been apparent to any reasonable manager that in order to maintain the efficiency of the meat department, at a minimum, one of the men had to be transferred. The situation had already festered for too long. Counsel for the General Counsel seems to suggest that if anyone needed to be transferred, it should have been Parra, who counsel contends was the principal protagonist. However, this is simply not the case. From the time Contreras replaced Iniguez as store meat department manager in approximately March of 2002, Parra was engaged in a constant effort to embarrass him in the presence of other employees. Parra's insubordinate, argumentative, disrespectful, and profane conduct has been fully noted above. It resulted in the issuance of a written warning to him in August of 2002. However, Parra was not through with his efforts to undermine Contreras' authority, and I believe the credible evidence demonstrates that Parra baited Contreras. Unfortunately for Contreras, he took the bait and clearly lost his temper with Parra on the way to Ramirez' office and again in the office. For his loss of temper, Swanson and Ramirez orally reprimanded Contreras. However, this reprimand does not detract from the totality of the situation, and the fact that the evidence demonstrates that the true protagonist in this matter was Parra.

20 There are numerous Board cases where an employer has been found to be justified in disciplining a union supporter who had engaged in inappropriate conduct toward either a supervisor or another employee. See *L.W.D., Inc.*, 335 NLRB 241 (2001); and *Mack's Supermarkets, Inc.*, 288 NLRB 1082, 1102-03 (1988). Michael Vital, the Respondent's Meat Specialist, who has administrative control over 26 meat departments, credibly testified about the Respondent's transfer policy and practice. His testimony was un rebutted. Vital testified about eight specific instances where the Respondent transferred to different stores meat department employees who were, for various reasons, not getting along with their managers. He was able to recall the names of the employees, managers, stores involved, and specific reasons for the transfers. Further, he credible testified that it was the Respondent's practice to transfer the employee, rather than the manager, because, among other reasons, there are many more meat department employees than department managers, and it is much easier to find a vacancy at another store for an employee.

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The evidence establishes that Parra was treated no differently than the eight transferred employees mentioned by Vital. His transfer was consistent with the Respondent's policy and past practice.¹⁶ As such, his transfer did not constitute a violation of the Act, even assuming that his protected conduct was also a motivating factor in the decision. See *Great Lakes Window, Inc.*, 319 NLRB 615, 617 (1995); and *Synergy Gas Corp.*, 290 NLRB 1098, 1102 (1988).

In my view, the Respondent's stated reason for transferring Parra is not pretextual. It is important to continue to note that in this case, I have found no independent violation of Section 8(a)(1) of the Act. The Board has held that the absence of any evidence that an employer has interfered with protected activity strongly supports the conclusion that the employer's alleged reason for the disciplinary action is not pretextual. See *Taos Ski Valley, Inc.*, 332 NLRB 403 (2000). I conclude, therefore, that the Respondent transferred Parra for good cause. Also, I find that the Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision, even in the absence of Parra's union and protected activity. See *T & F Trucking Co.*, 316 NLRB 771 (1995).

In summary, I find and conclude that counsel for the General Counsel has failed to establish a *prima facie* case that protected conduct was a "motivating factor" in the Respondent's decision to transfer Parra. Further, I find that even if the evidence is viewed as having established a *prima facie* case, the evidence still supports a finding that the Respondent would have transferred Parra, even in the absence of his protected activity. Accordingly, I shall recommend that complaint paragraph 5(g), and to the extent they are related, paragraphs 6 and 7 be dismissed.

Conclusions of Law

1. The Respondent, Bashas', Inc., d/b/a Food City, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers' International Union, Local 99, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

¹⁶ The Respondent does not entirely concede that the transfer constituted a disciplinary action, as Parra's wages and benefits remained the same. However, as noted above, I consider an involuntary transfer, under these circumstances, was disciplinary in nature. Still, it could certainly be argued that considering the egregious nature of Parra's long-term conduct toward his supervisor, an involuntary transfer was a rather mild disciplinary action.

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.

ORDER

The complaint is dismissed.

5 Dated at San Francisco, California, on November 4, 2003.

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Gregory Z. Meyerson
Administrative Law Judge

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