Yoshi's Japanese Restaurant, Inc. d/b/a Yoshi's Japanese Restaurant & Jazz House *and* Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 32–CA–16527

April 27, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On September 18, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross exceptions and a supporting brief. Thereafter, the Charging Party filed an answering brief to the Respondent's cross-exceptions, and the Respondent filed a reply brief. The Respondent also filed an answering brief to the General Counsel's and the Charging Party's exceptions, and the Charging Party filed a reply 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 record in light of the exceptions and briefs, and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Yoshi's Japanese Restaurant, Inc. d/b/a Yoshi's Japanese Restaurant & Jazz House, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN dissenting in part.

I agree with the judge's findings except her finding that the Respondent's owner, Yoshi Akiba, unlawfully interrogated employees Belinda Peitso and Jesse Kupers.

As fully recounted by the judge, Akiba asked two employees, who were open and active union supporters, why employees were organizing. In my view, Akiba's general questions, directed to open union advocates, were not coercive. See *Rossmore House,* 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985).

Gary M. Connaughton, Esq., for the Acting General Counsel.
Philip E. Drysdale, Esq., Michael S. Ward, Esq., and *Beth E. Aspedon, Esq. (Fitzgerald, Abbott & Beardsley LLP),* of Oakland, California, for the Respondent.
Joni S. Jacobs, Esq. (Davis Cowell & Bowe LLP), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Oakland, California, on May 6, 7, and 8, 1998. The charge was filed by Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) on December 23, 1997, [1] and amended on January 7, 1998. The complaint was issued February 23, 1998. At issue is whether Yoshi's Japanese Restaurant, Inc., d/b/a Yoshi's Japanese Restaurant & Jazz House (Respondent or Yoshi's) committed misconduct which allegedly tended to undermine the Union's majority strength and impede the Board's election processes.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel

[1] The Respondent excepted to the judge's rejection of the written speech of Yoshi Akiba from evidence. In the absence of testimony that Akiba read the prepared speech to the employees she addressed, we find that the judge's decision to exclude it does not constitute an abuse of discretion.

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

In agreeing with the judge that owner Yoshi Akiba unlawfully threatened employee Jesse Kupers by stating her concern that the Respondent may not be able to stay open if the employees unionized, we do not rely on the judge's find that Akiba, as the speaker, was in a better position to recall her statement. Rather, we find that, regardless of whether Akiba's version or Kupers' version of Akiba's statement is credited, the statement constitutes a threat to close the facility in violation of Sec. 8(a)(1).

[3] Although we agree with the judge that the General Counsel has not shown that a bargaining order under *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), is a necessary remedy in the in the particular circumstances of this case, we do not adopt all of her rationale. We do not adopt her conclusion that a bargaining order is not warranted because the Respondent's threats of closure, grants of benefits, and remedying grievances did not indicate outright animosity towards unions in general, or a desire to rid itself of the Union, but rather a "misunderstanding of the law." It is well established that the motive behind employer statements regarding the consequences of unionization is not relevant; rather, such statements violate Sec. 8(a)(1) if they have a reasonable tendency to interfere with, restrain, or coerce union activities. See *NLRB v. Illinois Tool Works,* 153 F.2d 811, 814 (7th Cir. 1946) ("[T]he test of interference, restraint and coercion under Sec. 8(a)(1) of the Act does not turn on the employer's motive. . . . The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act"). In addition, the Respondent's ignorance of the law does not excuse or otherwise mitigate the discriminatory impact of the wage and benefit increases on its employees. Moreover, we do not rely on the judge's determination that Akiba's implied threat to the assembled group of employees is not a hallmark violation. Nevertheless, we agree with the judge that, in the particular circumstances of this case, the General Counsel has not shown that our traditional remedies would be inadequate to mitigate the effects of the Respondent's unfair labor practices and make the holding of a second election possible.

[1] All dates are in 1997 unless otherwise indicated.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credi-

for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a California corporation, with an office and place of business in Oakland, California, is engaged in the operation of a restaurant and entertainment facility. During the 12 months preceding February 23, 1998, Respondent derived gross revenues in excess of $500,000 in the course and conduct of its business operations and purchased and received goods or services valued in excess of $5000 which originated outside the State of California. 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

Yoshi's, located in Jack London Square in Oakland, California, is a jazz club and Japanese restaurant. There is sufficient seating for 200 dining patrons and 340 jazz patrons. The facility also offers a bar and cocktail lounge. Its owners, Yoshi Akiba, Kasuo Kajimura, and Hiro Hori, are the "hands-on" managers. Kajimura is the general manager. Yoshi Akiba is the restaurant hostess and is in charge of publicity while Hiro Hori runs the kitchen. Yoshi's is typically open 7 days each week, serving lunch and dinner. There are two jazz shows each night.

In October, employees held meetings and had discussions regarding unionization. Between October 10 and November 12, a majority of employees in an appropriate bargaining unit signed single-purpose authorization cards. In a meeting with Kajimura on November 10, prounion employees explained that they wanted to organize and asked Respondent to sign a neutrality agreement. Respondent refused to sign the agreement but Kajimura stated Respondent would abide by the terms of the agreement.

The bargaining unit is:

> All full-time and regular part-time employees employed by Respondent at its Oakland, California location in box office, food and beverage classifications, including but not limited to cooks, food and beverage servers, dishwashers, sushi chefs, buspersons, hosts, bartenders, ticket takers and office clericals; excluding all other employees, guards, and supervisors as defined in the Act.

Despite this majority support for the Union, no election was held because alleged unfair labor practices intervened. These allegations will now be considered in order to determine whether a fair election may be held or whether the chances of a fair election are slight because the alleged misconduct tended to undermine the Union's majority strength and impede the Board's election processes. Among the allegations of misconduct to be considered are several threats of closure, interrogation, implied threat of closure, solicitation of grievances with an implied promise to remedy them, wage increases to union advocates, a change in wait staff rotation practice through the sushi bar, bonuses, and increased "tip-outs" to an outspoken union advocate.

bility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

A. Threats to Close the Facility if Employees Chose the Union

1. Facts

Deedee Bollong, bartender, testified that on November 13, while working the opening shift, she overheard a conversation between owner Yoshi Akiba and bartender, Belinda Peitso. At first, Bollong noticed that Akiba was crying and seemed upset and distraught. This caught her attention and she listened to Akiba tell Peitso that she was upset about the Union and concerned that if the Union came in there would be no more Yoshi's. Peitso, who was called by Respondent, corroborated Bollong. Peitso testified that Akiba told her that "if the union came in that she was afraid that they would loose Yoshi's and that they would have to close."[3] Akiba testified that she told Peitso, "We are really having hard time. We are in a dangerous zone. So, if anything is separated we may not make it. We may not make it." Akiba admitted that she was concerned about whether Yoshi's could continue to operate if employees unionized. I find based upon the substantial agreement of Bollong and Peitso, as well as Akiba, that Akiba said she was concerned that Respondent would have to close if the employees unionized. Bollong discussed the conversation with Peitso and also repeated Akiba's remarks to Patty Carroll, bartender; Odessa Donovan, cocktail waitress; and Jesse Kupers, expediter.

On this same evening, Akiba spoke with Andrea Bacigalupo, food server, at around 9 p.m. Eric Zivnuska, a coworker, was in the immediate vicinity and may have overheard the conversation. According to Bacigalupo, Akiba was crying when she approached Bacigalupo. Akiba said that she was concerned that Kupers (perceived by Akiba as the main organizer) was young and did not know what he was doing. Akiba continued that Yoshi's would have to sell the business if the Union came in. Akiba added because she is Buddhist, she was going to turn her turmoil over and whatever happens, happens. No other witness was questioned regarding this conversation. I find, based on the unrebutted testimony of Bacigalupo, that Akiba told her, in the presence of coworkers Zivnuska, that she was concerned that Kupers did not know the consequences of his action and that Respondent would have to sell the business if the employees unionized.

Later that evening, Akiba spoke with Jesse Kupers, expediter. Initially, according to Kupers, Akiba told Kupers that unions were bad. She asked Kupers what problems the employees had and why they were trying to unionize. He told her he was in the middle of his shift. However, they continued the conversation following completion of his shift. According to Kupers, Akiba explained the financial difficulties faced by the owners[4] and told Kupers that if Yoshi's went union they would

[3] Akiba also said, according to Bollong, if the Union came in, Yoshi's would close its doors and there would be no more Yoshi's. Bollong added this further statement after she testified that Akiba's words were that Akiba was "concerned" there would be no more Yoshi's if the Union came in. It is unclear to me whether Bollong added this later statement in clarification of her understanding of Akiba's first statement or whether she attributed this statement to Akiba. In any event, I credit Bollong's initial recollection that Akiba was "concerned" but not Bollong's further testimony that Akiba said Yoshi's would close if the union came in. This credibility resolution is based in part on failure of Peitso and Akiba, both of whom I judged to be reliable witnesses, to corroborate Bollong's statement and is also based on Akiba's credible disavowal that she made such a statement.

[4] Kupers testified that Akiba told him that Respondent was loosing tens of thousands of dollars a week and the only reason Respondent

not be able to stay open. Akiba agreed with much of Kupers' testimony. However, she denied that she told him that Yoshi's would close if the Union came in. Rather, Akiba explained she told Kupers that Yoshi's was financially, "in danger zone right now." She told Kupers that she did not know if the restaurant could make it or not, financially. Based upon the totality of the circumstances, the import of Akiba's admitted statement is that she feared that Respondent was endangered by the employees' effort to unionize. On balance, I credit Akiba's recollection of the conversation and find that Akiba said, in effect, that she did not know if Respondent would be able to stay open if employees unionized.[5]

On November 15, Akiba addressed 30 to 40 employees at a prearranged meeting. According to employee witnesses, she told them that Yoshi's was in financial danger and she was concerned that unionizing was not the best solution. She wanted to talk about what kind of changes could be made to remedy the situation so that there would not be a third party at Yoshi's. Akiba urged employees to think about what they were doing. She asked employees to, "help us keep Yoshi's alive," and think about what is best for Yoshi's before you go union. Akiba asked employees to give management a chance and listen to them.[6]

2. Arguments

Counsel for the Acting General Counsel notes that an employer may permissibly predict closure of a business as a consequence of unionization only in narrowly delineated circumstances; that is, such a prediction must be, "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618–619 (1969). Counsel contends that Akiba's statements fail to meet these requirements because (1) the Union had made no demands; (2) even if the Union had made demands, there is no demonstrably probable consequence that Respondent would have to close; and (3) Akiba did not objectify a basis for her predictions.

Counsel for the Charging Party notes that Akiba did not specifically deny making the statements to employees but instead, claimed that she did not intend that employees understand her statements, "that way;" that is, as threats. Counsel for the Charging Party contends that Akiba's words reasonably tended to restrain, coerce or interfere with employees' rights regardless of Akiba's subjective intent.

Counsel for Respondent notes the "undisputed" evidence that Yoshi's was at the brink of economic failure. Counsel also argues that none of the alleged remarks indicate retaliatory intent or implication that employees would be punished for their union activity. Rather, Respondent argues, Akiba's statements are, "lawful, albeit fearful, fact-based predictions of economic consequences beyond Respondent's control."

Analysis

In assessing the credited evidence, I have taken into account the economic dependence of employees on their employers with special awareness of an employee's attentiveness to intended implication of his or her employer's statements which might be more readily dismissed by a disinterested party. *NLRB v. Gissel Packing Co.,* 395 U.S. at 617. *Gissel* further teaches that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." Id. at 618–619.

Certainly, there is no dispute that Akiba believed that Respondent's financial condition was precarious.[7] However, there is also no dispute that employees were not aware, until the union effort became known by Respondent, of Akiba's fear that the future of Yoshi's was in doubt.[8] When Akiba sincerely and sometimes tearfully conveyed to employees her fear that unionization might take Respondent over the brink and into closure, she did not cite any objective facts. Nor does the record reflect that she was aware of any such facts other than her belief regarding Respondent's financial condition. Akiba admitted she was unaware of wage scales in union contracts. Even had she been knowledgeable regarding union wage scales, there is no evidence of demands by the Union regarding wage increases. Moreover, even had demands for higher wages been made, the give and take in bargaining was not considered when Akiba expressed her concerns for the impact of unionization on Respondent.[9]

The clear implication of Akiba's remarks was that she was afraid the fate of Yoshi's would be thrown into question if employees chose to be represented by the Union. I note specifically that *Gissel* does not differentiate between absolute statements predicting plant closure and statements which equivocate

could stay open was because her husband had solicited donations and the owners had cashed their IRAs.

[5] Akiba was a candid and generally credible witness. She exhibited a sharp intelligence and forthright demeanor. Although Kupers exhibited a sincere demeanor, in this instance, as between Akiba and Kupers, I credit Akiba because she was in a better position, as the speaker, to clearly recall the statements which she made. Moreover, the inherent probabilities favor Akiba's version of the conversation as well. Akiba, by her own admission, was indeed worried about the continued viability of Yoshi's if the employees unionized. Under these circumstances, and given her admitted distraught state of mind, I find it probable that her statements were made in the context of her fears, rather than in the context of concrete predictions.

[6] Akiba's testimony was generally in agreement with the recollection of employees. For instance, Akiba testified that she said, "[O]ur business is really dangerous right now and we may not really make it, but we have to do it, because we have responsibility. So, please help me to keep alive. So, I'm open for anything to keep Yoshi's alive. And we have to come together. And let's talk. And if we need to improve. And if we try a service first and if it doesn't work then by all means you can go to union." When there is disagreement between Akiba's recollection and the employees' recollection of this particular conversation, I credit the employees. Specifically, I credit the testimony of Mia Ellis, who took notes at the meeting. Ellis credibly testified that she wrote some of Akiba's statements verbatim, indicating these statements in quotations.

[7] After a 2-month closure to move from its old space, Respondent opened at Jack London Square in May. Its jazz shows from July 9 through November 16 had profits during only 4 weeks. Cash flow problems were remedied by the owners drawing from their retirement accounts and depositing $45,000 in Respondent's account in early October. Nevertheless, according to Kajimura, Respondent was "in the red" by approximately $20,000 in early November. The managers and owners had discussed these economic realities and Kajimura had informed them that another month of heavy losses could or might mean closure.

[8] Employees were aware that business was slow or very poor. However, there was no indication from Respondent that Yoshi's was in danger of closing until the employees unionized.

[9] See, e.g., *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (simple fact of waiving union contract in front of employees insufficient objective evidence as there is no evidence unit employees would have been covered by such agreement).

about whether plant closure will result. Rather, pursuant to *Gissel* an employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless the eventuality of closing is capable of proof. I find that Akiba's remarks fall into the category of a sincere belief that unionization may result in closure. However, under all the circumstances, these statements reasonably tended to interfere with, restrain, or coerce employees in the free exercise of their rights under the Act because they were not based on facts capable of proof.[10]

Respondent submits that its financial situation formed the objective basis for Akiba's concern that Respondent might not be able to continue in operation due to circumstances beyond her control. In my view, Respondent's argument must fail. *Gissel* does not anticipate that a prediction of plant closing be verifiable by later-produced evidence of financial difficulties. Rather, *Gissel* requires that a prediction of plant closing be based upon simultaneously stated objective facts. Akiba's statements (we are having a hard time; we are in a danger zone) do not satisfy this requirement because she tied her statements to unionization (and I fear we will lose Yoshi's if the Union comes in). There is no evidence that the Union would take Respondent over the brink.

B. Interrogation

1. Facts

Akiba testified that when she initially approached Peitso on the evening of November 13, she asked, "What's happened, Belinda?" and Peitso responded that it was the Union–like a growing pain. Akiba then asked, "Why?" The same colloquy with Kupers proceeded, "[W]hat is happening?" and Kupers responded, "[S]ome employees are trying to unionize Yoshi's." Akiba queried, "[W]hy?"

2. Arguments

Counsel for the Acting General Counsel contends that because these questions arose in owner-initiated conversations containing threats of closure only days after employees publicized their unionization effort and because they were clearly intended to elicit extensive information about the union effort, the interrogations were coercive. In agreement, counsel for the Charging Party further notes the absence of any legitimate reason for the questions and the lack of assurances that no reprisals would be taken against employees.

Respondent, on the other hand, claims that Akiba's questions to Kupers and Peitso were innocuous and devoid of coercion or threat. Respondent further notes that Akiba did not ask Kupers or Peitso about their own or others' personal views regarding unions.

Analysis

Interrogation is not, by itself, a per se violation of Section 8(a)(1). Interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.,* 324 NLRB 1005 (1997); *Emery Worldwide,* 309 NLRB 185, 187 (1993). Under this totality of circumstances approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House Hotel,* 269 NLRB 1176 (1984), enf. 760 F.2d 1006 (9th Cir. 1985).

Peitso and Kupers were open and active union supporters whose names appeared on a November 10 letter of support for the Union. Akiba and Peitso enjoyed a friendly relationship while Akiba and Kupers had never spoken before. The conversations took place at the employees' workstations rather than in a management setting. Akiba was obviously distraught and crying. At one point, Peitso gave Akiba the bar rag to dry her tears because Akiba's own handkerchiefs were too damp. Akiba sought information regarding the reasons employees had decided to unionize. During these same conversations, Akiba told Peitso and Kupers about her concern that unionization might cause Yoshi's to close.

Assuredly, *Rossmore House* recognizes some flexibility for questioning open union advocates about the benefits of union representation. However, neither Peitso nor Kupers was given a choice about discussing the matter with Akiba, neither of them received assurances about retaliation, and both of them were confronted with Akiba's fears and concerns for Yoshi's future should employees unionize. The fact that Akiba, one of the owners, questioned Peitso and Kupers and displayed a sincere and tearful manner would only heighten the fear and anxiety of the employees in reacting to such a confrontation. Under the totality of these circumstances, I find the questioning coercive. See, e.g., *Koronis Parts, Inc.,* 324 NLRB 675 (1997); *Stoody Co.,* 320 NLRB 18, 18–19 (1995).

C. Solicitation of Grievances with Implied Promise to Remedy

1. Facts

At a meeting on December 3, Kajimura invited employees to express anything on their minds. This was the first time such a meeting had been held. Members of the wait staff voiced their discontent about the amount of their tips they had to share with the sushi chefs. The wait staff also expressed unhappiness with the existing rotation through the sushi bar. Female bartenders complained that the recently hired male head bartender was not as competent as female bartenders who were passed over for promotion to head bartender.

Jesse Kupers, whom Kajimura perceived as a leader of the union effort, complained that he felt he should be promoted from expediter to waiter. Kupers had been making this complaint for several months. For about 2 months (October and November) Kupers was the only expediter employed by Respondent. Kajimura' response prior to December 3 had been

[10] See, e.g., *Eldorado Tool,* 325 NLRB 222(1997) (UAW Wall of Shame displaying plant closings in UAW represented plants by tombstones and showing Eldorado's name in middle with question mark constituted unlawful threat because company offered no objective facts that, for reasons beyond its control, selection of UAW would cause plant closure); *Caterpillar, Inc.,* 321 NLRB 1178, 1181 (1996) (statement that if union did not accept contract, employer would close plant went beyond employer's legitimate position that cost savings were necessary to keep plant open because it failed to show acceptance of last contract offer was only was to keep plant open and failed to acknowledge the role of collective-bargaining in cost savings); *Weldun International,* 321 NLRB 733, 746 (1996) (CEO statement that he was afraid if employees unionized it would doom the division and other similar phrasings indicating doom constituted threats rather than free speech); see also *Sage Dining Service,* 312 NLRB 845, 846 (1993) (threat conveyed friend to friend by owner is of greater impact in view of the source).

that Kupers had not been with Respondent long enough for such a promotion.

2. Arguments

Counsel for the General Counsel argues that in the context of Akiba's "give us a chance" remarks at the November 15 employee meeting, the December 3 meeting constituted an implied solicitation of grievances. He notes specifically that Kajimura told employees it was their meeting and directed them to express whatever was on their minds. Counsel for the Charging Party further notes that on November 15, Akiba specifically told employees that she was open to their suggestions on how to keep Yoshi's alive without the interference of a third party. Finally, she contends that even though no express commitment was made to remedy the problems, the expectation of improved conditions is nevertheless present.

Counsel for Respondent characterizes the meeting as little more than an employee gripe session. He notes that Respondent took no action on issues not already under review and states that there was no implication that grievances would be remedied.

Analysis

Respondent had no continuing practice of holding "gripe" sessions. On November 15, Akiba asked employees to help keep Yoshi's alive by giving management a second chance. On December 3, Kajimura told employees to tell him what was on their minds. This constituted a solicitation of grievances.[11] Solicitation of grievances upon learning of union activity among employees raises an inference that the employer is making a promise to correct the problems brought to his attention.[12] This inference may be rebutted by a showing, for instance, that its actions were a continuation of prior practice. *Capitol EMI Music,* 311 NLRB 997, 1007 (1993), enf. mem. 23 F.3d 399 (4th Cir. 1994). Respondent has not rebutted the inference and, in fact, there was no precedent for such a meeting. Accordingly, I find that Respondent solicited grievances and impliedly promised to remedy them in reaction to its employees' union activity and with hopes of dissuading them from supporting the Union.

D. Change in Rotation Through Sushi Bar, Sushi Bar-Shift Bonus, Wait-Staff Increase in "tip out" to Expediter, and Wage Increases

1. Facts

According to Kajimura, within a week after the December 3 meeting, he instructed Roy Yang, headwaiter at that time, to adjust the sushi bar wait staff rotation stating, "We've tried this and that and this didn't work and that didn't work, and so we're going to try another one. . . . just do it in a very fair way."[13]

In addition, shortly after the December 3 meeting,[14] Kajimura instituted or reinstituted a $20-tip bonus for wait-staff sushi bar duty. According to Allan Teng, the restaurant manager, this was not the first time such a bonus was introduced. In May, the wait staff complained to Teng that they were making less money during their rotations through the sushi bar. According to Teng, when he presented this complaint to Kajimura, Kajimura decided to subsidize the sushi bar rotation with a $20 differential. According to Teng, this subsidy was immediately implemented. Teng, who opposed the subsidy, told the wait staff about the new policy but explained it only during the first week it was implemented. He stated that he did not believe the policy continued in effect when he left in late October. According to him, the policy, "start to fading, start to die down," by the end of May.

Two promotions occurred within days of the December 3 meeting. Roy Yang was promoted to the position of headwaiter shortly after the December 3 meeting. He received a $2-per-hour-wage increase in connection with this promotion. Yang was outspoken at the December 3 meeting and signed the November 10 notice to the employer regarding unionization.

The recently hired male head bartender was discharged shortly after the December 3 meeting.[15] According to Kajimura, practically from his first day on the job, there were complaints that his drinks were not good and he did not fill orders quickly. Jill Denyes, a senior bartender and the first member of the union delegation to address Kajimura on November 10, received a $2-per-hour-wage increase in connection with being made head bartender. Bartender Belinda Peitso received a wage increase from $9 to $10 an hour on January 1. She testified that she received this raise in the context of a conversation she had with Kajimura about becoming head bartender. Although she told him she was not interested in the head bartender job, she did ask for a raise. Peitso had previously received a raise in May. This occurred shortly after the December 3 meeting.

According to Kajimura, Respondent typically grants wage increases in January of each year. Respondent's payroll records indicate that generally the kitchen staff receives pay increases in the first payroll period of the year.[16] The record also reveals that wait staff and cocktail servers do not typically receive pay increases during the first payroll period of each year.

There is no dispute that in December, cooks Salomon Ortiz and Gabriel Rodriguez (a/k/a Gomez) received wage increase

[11] See, e.g., *Fieldcrest Cannon, Inc.,* 318 NLRB 470, 519–521 (1995) (asking employees to express concerns, problems or questions which employer characterized as "gripe" sessions constituted solicitation of grievances).

[12] See, e.g., *DTR Industries,* 311 NLRB 833 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994) (suggestion boxes and hotline constituted implied promise to remedy grievances).

[13] There is a credibility conflict regarding the pre-December 3 rotation practice. According to Estow, the most senior waiters were omitted from the rotation prior to December 3. According to Kajimura, prior to December 3, all wait staff rotated through the sushi bar except for new hires. Moreover, Estow recalled the December 3 complaint being aimed at failure to rotate senior wait staff through the sushi bar while Kajimura recalled the complaint being failure to rotate junior-wait staff through the sushi bar. In any event, both agree the rotation was changed shortly after the December 3 meeting to accommodate the complaint raised at the meeting. Accordingly, it is unnecessary to resolve the exact nature of the pre- and post-December 3 rotation.

[14] At one point, Kajimura stated the $20-shift bonus was implemented within 1 week of the December 3 meeting. At another point, Kajimura stated the bonus was implemented in late December or early January.

[15] The male head bartender was hired on November 13. At that time, it was the view of the club manager that none of the current bartenders was qualified to be head bartender. (This testimony was received through a question and answer offer of proof which I rejected. Counsel for the Acting General Counsel has withdrawn his objection to this testimony and it is now accepted.) However, 1-month later, both Denyes and Peitso were given consideration.

[16] Shi Nan Chen received pay raises during calendar years 1996 and 1997 as well as receiving pay raises during the first payroll period of each year. Another kitchen employee, Minao Sako, did not receive any increase in calendar year 1998. However, I note that this employee worked a minimal number of hours.

from $11.25 to $13 an hour. Normally, kitchen staff raises were given in January. Both had received raises in the prior January. Kajimura testified that he learned that Minoru Watanabe's departure as a cook at Yoshi's on November 22, as well as, an anticipated increase in business created a need to restructure the kitchen. Kajimura consulted with Hiro and they decided to rely on Andy Hua, the head cook, and Ortiz and Rodriguez. However, when Hiro and Kajimura examined their pay, "we were a little shocked that we hadn't really given attention to their pay and their pay was very low." Accordingly, raises were given to Ortiz and Rodriguez in December rather than waiting for the regular January raises.

There is no dispute that shortly after the November 10 delegation for the Union, Respondent increased by 1 percent the percentage of tips, known as a "tip-out," that the wait staff shared with the sole expediter Jesse Kupers. The "tip-out" had previously been 3 percent and it was increased to 4 percent. The restaurant manager, Nikki Lamb, spoke with Kupers during the week of November 17 and told him about the "tip-out" increase.

On or about December 5, Kajimura responded to Kupers' complaints about wanting a promotion to waiter by telling Kupers that he would receive a $2-per-hour-pay increase and would be promoted to waiter after the holiday season. In addition, Alejandro Padilla, a busperson, received $1-an-hour-wage increase on or about January 1, 1998. Padilla was also part of the November 10 delegation and his name appeared on the request for neutrality.[17]

2. Arguments

As to changes in the sushi bar, counsel for the Acting General Counsel argues that changing the rotation through the sushi bar and instituting a shift bonus in response to complaints constitutes a grant of benefits in order to dissuade employees from supporting the Union. Counsel relies generally on *Acme Bus Corp.,* 320 NLRB 458, 476 (1995), and *Capitol EMI Music,* supra, 311 NLRB at 1012. Counsel for the Charging Party notes that Respondent was unable to articulate a legitimate business reason for the timing of the change in rotation and implementation of the shift bonus and requests that an unlawful motive be inferred, relying on *Holly Farms Corp.,* 311 NLRB 273, 274 (1993), enf. 48 F.3d 1360 (4th Cir. 1995), and *Ideal Elevator Corp.,* 295 NLRB 347, 351 (1989).

Respondent claims that problems regarding rotation and compensation for wait staff through the sushi bar had been a source of constant discussion and revision and was not targeted for new changes because employees voiced concern at the December 3 meeting. Counsel for Respondent contends that restoration of the $20-shift bonus was part of an ongoing adjustment to the relocation to Jack London Square. From Respondent's perspective, the original bonus implemented in May was, unbeknownst of Kajimura, not continuously utilized. When Kajimura was informed of this on December 3, he revived the policy. Respondent relies upon *Ideal Macaroni Co.,* 301 NLRB 507 (1991), enf. denied on other grounds 989 F.2d 880 (6th Cir. 1993), for the principle that publication of an existing benefit of which employees were unaware is lawful unless the benefit was purposely hidden as an election strategy. As to the sushi bar rotation, Respondent claims that senior-wait staff who were union supporters removed themselves from the sushi bar rotation and the only change that occurred was that when management became aware of this situation, it was rectified.

Regarding wage raises, counsel for the Acting General Counsel argues that no business justification exists for the wage raises and promotions which followed on the heels of the December 3 meeting. He also notes that although Respondent typically granted wage increases to the kitchen staff at the first of each year, those increases averaged 61 cents in 1997 versus 92 cents in 1998. Counsel for the Charging Party's analysis of the wage information revealed no pattern of raises. She argues that the granting of wage increases were random both in amounts and timing.

Respondent contends that its established policy, from which it did not deviate, contemplates that wage increases be granted on January 1. In 1998, these increases were granted to kitchen staff, a couple of senior waiters, and buspersons. As to Ortiz and Gomez, Respondent argues that departure of Watanabe caused inspection of their wages. Respondent notes that Denyes' promotion to head bartender is not alleged to be unlawful. Given the promotion, Respondent urges that the pay increase merely gave her parity with her departed predecessor. Accordingly, Respondent claims that these actions were taken when expected or requested and that there was no obligation to postpone the changes.

Finally, as to Kupers' increased tip-out, counsel for the Acting General Counsel notes that although expediter Kupers complained about his pay and requested promotion to the wait staff from the beginning of his employment in August, it was not until he was identified as a leader of the union movement that his complaints were remedied. Counsel for the Charging Party urges that an inference of improper motivation be attributed to Respondent's increase in the tip out due to the timing of the grant of the increase.

Respondent argues that the facts do not support this allegation. Although agreeing that a 1-percent increase in the amount the wait staff tipped the expediter was implemented, Respondent claims this resulted in less money for union activist Kupers because he was no longer the sole expediter.

Analysis

When benefits are granted upon the advent of a union campaign, the employer bears the burden of overcoming a presumption that the benefits were meant to influence employees to relinquish their support for the union.[18] Under these circumstances, the employer must provide a legitimate explanation for the timing of the grant of benefits.

The timing of the implementation of the change in sushi-bar rotation and the institution or reinstitution of the sushi-bar bonus raises an inference that the reason these changes were made was because Respondent wished to dissuade its employees from unionizing. Respondent argues that these changes were legitimately made. It notes that the sushi bar had been a source of complaints from the wait staff since Respondent relocated to Jack London Square. The record supports this assertion by Respondent. However, it appears that Respondent had not taken any action to remedy the sushi-bar situation for at least 6 months prior to the December 3 meeting. The bonus certainly

[17] Respondent's payroll records indicate that of the 35 wait staff employees, 6 received increases on or about January 1, 1998. In addition to Padilla, these employees were Estow, Lillian Ortiz, Pei-Yu Weh, Andrew Contreras, and Eric Zivnuska. Padilla, Estow, and Yeh signed the union statement presented on November 10.

[18] See, e.g., *B & D Plastics,* 302 NLRB 245 (1991); *Speco Corp.,* 298 NLRB 439, 443 (1990).

had not been announced since late May according to Teng and it was disused immediately thereafter. Respondent claims that as soon as it realized the problem, it implemented a solution and that this was consistent with its past practice. However, what Respondent overlooks is the explanation for the timing of the change. Had Respondent not solicited grievances in response to the appearance of the union, it would not have known of the continued problems with the sushi bar rotation and compensation. It may not bootstrap its timing defense by referencing the December 3 meeting. I find that implementation of sushi-bar wait staff changes were motivated by employees' union activities and constitute an unlawful grant of benefits.

Typically Respondent utilizes two expediters on the weekend and one expediter during the week. During the time that Kupers was the only weekend expediter, he was paid 1-hour extra pay and the entire 3-percent tip-out from the wait staff. Kajimura was well aware of Kupers' complaints about his pay; "that was clear to me all along." Kajimura also admitted that he perceived Kupers as a leader of the November 10 delegation. Within a week thereafter, the amount of the tip-out to Kupers was increased.

I infer that a desire to mollify Kupers because of his union activity motivated Respondent's grant of this increase. Further, I do not accept Respondent's argument that Kupers' tips were actually decreased. A second expediter, Angel Perez, was hired on November 18. To the extent that Kupers and Perez worked together on weekends, it is true that Kupers would have received less money than if he had worked alone because the tip out was divided among all expediters.[19] However, on weekdays when only one expediter was present, the increased tip out inured to that expediter. I conclude that the increase in the tip-out constituted a grant of a benefit—not an adverse change in working conditions—that that it was motivated by the employees' union activity.

Moreover, Kupers and Padilla, both members of the wait staff and both part of the November 10 delegation, received pay increases after the December 3 meeting. The timing of these increases is highly suspicious. Wait-staff wages are tied to minimum wage laws according to Respondent. The evidence reveals no pattern of wage increases to members of the wait staff. I find that the timing of both Kupers' and Padilla's raises is unexplained except for their union activity.

Regarding the remaining wage increases, once again, the timing raises an inference that union activity served to motivate Respondent's actions. Yang had formerly been headwaiter but had resigned from the position. There is no explanation for Respondent's need for a headwaiter 2 days after the December 3 meeting nor is their any explanation for the timing of the discharge of the male head bartender immediately after the December 3 meeting. Both Yang and new head bartender Denyes received $2-per-hour-wage increases in connection with their promotions. Respondent is unable to offer a legitimate reason for the timing of the promotions and the actions taken consistent with employees' complaints about the former head head bartender. The specific complaint was that qualified women were passed over when the male head bartender was hired. Respondent was aware of the complaints about the new male head bartender from the beginning of his employment. Yet, despite this, no action was taken until the union arrived on the scene. Then suddenly, employees who were deemed unqualified for the position were considered and promoted. In this same vein, Peitso received a $1-per-hour increase although she was working only one shift per week. There was no pattern of wage increases for bartenders and the only explanation remaining is the Union.

The wage increases to the kitchen staff were given in December rather than in January. I find that the explanation for the timing of these increases does not rebut the inference that they were a direct result of the employees' union activity. Although departure of a talented chef and anticipated increase in business may have required examination of the kitchen staff, as Kajimura testified, the explanation regarding his "shock" at the wage levels is not credible. Moreover, such "shock" does not explain why the raises had to be given 1 month prior to the ordinary time of wage raises, especially in light of Respondent's stated financial situation. Rather, it appears that the union was the reason for the timing of these increases.

CONCLUSIONS OF LAW

1. By threatening to close its facility, interrogating employees, and soliciting employee grievances in order to discourage employees from supporting the Union, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By granting wage increases to numerous employees, changing its existing sushi-bar wait-staff rotation practice, granting a $20 sushi-bar wait-staff shift bonus, and increasing the wait staff tip-out to the expediter by 1 percent because its employees supported the Union and engaged in concerted activities and/or in order to discourage employees from engaging in such activities, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and has discriminated in regard to hire, tenure or terms or conditions of employment thereby discouraging membership in a labor organization and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that 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. Specifically, counsel for the Acting General Counsel and counsel for the Charging Party seek the extraordinary remedy of a bargaining order based upon the nature and extent of Respondent's unfair labor practices. They assert that the flagrant nature of the unfair labor practices, especially the hallmark violation of an owner immediately threatening plant closure, is likely to destroy election conditions for a longer period of time than other unfair labor practices. Counsel also rely upon the grant of wage increases and benefits, noting that the effect of such unfair labor practices is not easily remedied by traditional means because it is not the Board's policy to require such benefits to be rescinded. Moreover, counsel argue that this "buying off" of union advocates, both in wage in-

[19] The record does not reflect whether Kupers and Perez worked together on the weekends. Perez began training on November 18. Contrary to Respondent's claim that Kupers was working at another job on November 15, I understand the record to reflect that could not attend the November 15 employees meeting because he was scheduled by Respondent for work at that time. Accordingly, it would appear that he may have benefits from the increased tip-out during that weekend as it predated Perez' employment.

creases as well as systematically remedying every concern raised by employees, erodes support for the Union. Finally, counsel note the pervasiveness of the unfair labor practices: within days of the beginning of the union drive, over half of the employees had been exposed to threats to close if the employees unionized; 30 to 40 employees were present when Kajimura unlawfully solicited grievances and implied promised to remedy them; thereafter, 23 employees were given unlawful wage increases within 2 months and other grievances were immediately remedied.

Counsel for Respondent argues that even if all allegations in the complaint are found to be meritorious, no bargaining order is required because there was minimal impact on the election machinery. Respondent does not argue that passage of time or changed circumstances have eliminated the effect of the unfair labor practices.

Although the appropriateness of a bargaining order depends on the nature and extent of Respondent's misconduct, there are no mechanical or per se rules. Rather, each case must be fully examined for the, "infinitely various circumstances which will influence employee perceptions of such prohibited conduct." *General Stencils,* 195 NLRB 1009, 1112 (1972) (Chairman Miller, dissenting).

Some violations, however, are so likely to undermine majority strength and impede the election processes that a bargaining order may be justified in the absence of extenuating or mitigating circumstances. Such "hallmark" violations include discharging employees for union activity,[20] closing or threatening to close,[21] and granting benefits.[22]

In this case, Respondent threatened employees with closure of the facility, interrogated employees about their reasons for unionizing, solicited their grievances, impliedly promised to remedy them and, indeed, immediately remedied them, and granted wage increases to the main union activists. For the reasons stated below, I find that the only hallmark violation which would support a bargaining order in this case is the grant of benefits. In the particular circumstances of this case, I find that the Board's traditional remedies including the customary notice posting and cease and desist order can create an atmosphere in which a free and fair election may be held.

I do not rely upon the specific threats of closure made to Peitso, Bacigalupo, and Kupers to support a bargaining order because these threats were not transmitted widely to other employees. Akiba's statement to assembled employees that she was concerned that unionization was not the best solution for Respondent's precarious financial situation, which I have found to be an implied threat of closure, does not rise to the level of a hallmark threat of plant closure.

On the other hand, the significance of wage increases coming on the heels of the employees' announcement of their unionization effort is not lost on employees. The Supreme Court has found that employees are quick to understand the "fist inside the velvet glove" inherent in such tactics. *NLRB v. Exchange Parts Co.,* 375 US 405, 409 (1964). Wage increases are not required to be withdrawn pursuant to traditional Board remedies. *Adam Wholesalers,* 322 NLRB 313, 314 (1996). Accordingly, because they are not erased, their effect will continue to be felt.

Moreover, I note that Respondent did not simply increase the wages of all employees. Rather, it predominantly targeted the union activists. Those employees who did not support the Union were generally not given increases. This divide and conquer tactic remains in effect as far as the record reflects. Similarly, other benefits granted shortly after the November 3 meeting—a $20–shift differential for the wait staff when they worked in the sushi bar, alteration of sushi-bar rotation practice, discharge of the recently hired male head bartender and promotion of one of the female bartenders to head bartender—are hallmark violations. Respondent had earlier turned a deaf ear to these problems.

On the other hand, a bargaining order remedy deprives employees of the Board's election process and deprives the Union of the Board's certification process. Although it has long been recognized that the election process is not the sole means of determining majority status[23] and, specifically, that authorization cards may adequately reflect employee sentiment when the election process has been impeded, this is warranted only when widespread hallmark violations are combined with the likelihood that traditional remedies will not erase their effect.

Here, in addition to the fact that there were no discharges or widespread threats of plant closure, Respondent's actions do not indicate a desire to rid itself of the Union, but rather, a misunderstanding of the law. There were no statements that indicated Respondent's policy was to remain nonunion or that it would close rather than operate as a union establishment. Rather, it appears that Respondent was alarmed due to its precarious financial situation and misunderstood that unionization automatically meant spending more money. Respondent's actions in granting benefits and remedying grievances, although they interfered with employees' rights to organize, appear more the result of misunderstanding of the law rather than outright animosity toward unions in general. I find, based upon the nature of the violations as well as Respondent's misunderstanding of the law, that the chances of creating a level playing field for the holding of a fair election through the Board's traditional procedures are more than slight and that a bargaining order based upon employee authorization cards would not effectuate the policies of the Act more effectively.[24]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

[20] *Intersweet,* 321 NLRB 1 (1996), enf. 125 F.3d 1064 (7th Cir. 1997); *Davis Supermarkets,* 306 NLRB 426 (1992), enf. 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 511 US 1003 (1994); *Amazing Stores,* 289 NLRB 163 (1988) as modified 290 NLRB 1131 (1988), enf. 887 F.2d 328 (D.C. Cir. 1989), cert. denied 494 U.S. 1029 (1990).

[21] *Weldun International,* 321 NLRB 733, 735–736 (1996); *Gerig's Dump Trucking,* 320 NLRB 1017 (1996), enf. 137 F.3d 936 (7th Cir. 1998); *Lasar Tool,* 320 NLRB 101, 111 (1995).

[22] *Adam Wholesalers,* 322 NLRB 313, 314 (1996).

[23] In *United Mine Workers v. Arkansas Flooring Co.,* 351 U.S. 62, 72, fn. 8 (1956), the Court noted that an NLRB election is not the only method by which an employer may determine a union's majority status.

[24] Cf., *Skyline Distributors v. NLRB,* 319 NLRB 270 (1995), revd. in part and remanded 99 F.3d 403 (D.C. Cir. 1996) (bargaining order based solely on grant of economic benefits).

[25] 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 Respondent, Yoshi's Japanese Restaurant, Inc. d/b/a Yoshi's Japanese Restaurant & Jazz House, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening or impliedly threatening to close its facility, interrogating employees, soliciting employee grievances, and impliedly promising to remedy them in order to discourage employees from supporting the Union.

(b) Granting wage increases to numerous employees, changing its existing sushi-bar wait-staff rotation practice, granting a $20-sushi-bar wait-staff shift bonus, and increasing the wait staff tip-out to the expediter by 1 percent because its employees supported the Union and engaged in concerted activities and/or in order to discourage employees from engaging in such activities.

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

(a) Within 14 days after service by the Region, post at its facility in Oakland, California, copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 13, 1997.

(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.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT threaten or impledly threaten to close our facility, interrogate our employees, and solicit employee grievances and impliedly promise to remedy them in order to discourage employees from supporting Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Emloyees and Restaurant Employees International Union, AFL—CIO, or any other Union.

WE WILL NOT grant wage increases to numerous employees, change our existing sushi-bar wait-staff rotation, and increase the wait staff tip-out to the expediter by 1 percent , or grant a $20-sushi-bar wait-staff shift bonus because you supported the Union and engaged in concerted activities and/or in order to discourage you from engaging in such activities.

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.

YOSHI'S JAPANESE RESTAURANT, INC. D/B/A YOSHI'S JAPANESE RESTAURANT & JAZZ HOUSE

[26] If this Order is enforced by a judgment of the 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."