JD(SF)–08–04
Las Vegas, NV

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

**WAL-MART STORES, INC.**
**The Respondent**

**and** **Cases 28-CA-18508**
**28-CA-18644**

**UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC**
**The Charging Party**

*Mary C. Teer, Esq., and Gerald H. Sequiera, Esq.*, of Las Vegas, Nevada for the General Counsel.

*Timothy Sears, Esq.*, of San Francisco, California, for the Charging Party.

*Steven D. Wheeless, Esq., and Tom M. Standeck, Esq.,* of Phoenix, Arizona for the Respondent.

## DECISION

### Statement of the Case

**CLIFFORD H. ANDERSON, Administrative Law Judge:** I heard the above captioned cases in trial in Las Vegas, Nevada, on November 4 and 5, 2003, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 28 of the National Labor Relations Board on November 27, 2002. The complaint is based on charges filed by the United Food & Commercial Workers International Union AFL-CIO, CLC (the Charging Party or the Union) against Wal-Mart Stores, Inc. (the Respondent). The first charge was filed on February 13, 2003, and docketed as Case 28-CA-18508. The second charge was filed on April 3, 2003, and docketed as Case 28-CA-18644. On August 27, 2003, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing.

The complaint, as amended, alleges, and the answer denies, inter alia, that the Respondent in the months of February, March and April 2003, at its Las Vegas, Nevada store engaged in various acts and conduct violating Section 8(a)(1) of the National Labor Relations Act (the Act).

## Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent, the Charging Party, and the General Counsel, I make the following findings of fact.[1]

### I. Jurisdiction

The Respondent is a Delaware corporation with its headquarters in Bentonville, Arkansas and retail stores throughout the United States, including its store number 2884 located on Tropicana Parkway in Las Vegas, Nevada (herein the Tropical Parkway store or the store), where it is engaged in the retail sale of consumer products. In the course of its business operations, the Respondent annually enjoys revenues in excess of $500,000 and annually purchases and receives at its Tropicana Parkway store, goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Nevada.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### II. Labor Organization

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

#### A. Background

The Respondent, a retailer with many large retail general merchandise stores throughout the United States, operates stores in the Las Vegas, Nevada area including its Tropical Parkway store. The store employees are not represented by a labor organization. The Charging Party at relevant times has been attempting to organize the store's employees and this fact has been know to the Respondent's management.

At relevant times the Respondent's Store Manager was Mr. Dan Holland, its Assistant Managers were Messrs. Vincent Santos, Fred Sawyer and Bryce Blackburn. Mr. Fred Hoelzle was the night-shift maintenance supervisor. Messrs. Kirk Williams and Garth Gneiting were, at all relevant times, Corporate Labor Managers based at the Respondent's Bentonville, Arkansas, headquarters who travel to various stores, including the store, as part of their duties. The Respondent amended its answer at the hearing to admit, there is no dispute, and I find that each of these individuals was at relevant times a supervisor and agent of the Respondent.

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

## B. Events

### 1. The *Weingarten* Allegations of the Complaint – paragraphs 5(a) through 5(d)

### The February 2, 2003 Events

Early on the morning of February 2, 2003, store maintenance employees Messrs. Tody Hymon and Shawn Beckwith had an altercation at work in which words were exchanged and a blow to Beckwith struck by Hymon. Supervision learned of the event and the two were separated and removed from the area. Mr. Hymon testified that Assistant Manager Vincent Santos and Support Manager Roxanne Perez initially took him to the invoice office, an administrative area of the store. There a variety of the Respondents' supervisory staff was present and Hymon asked "for a smoke" at which time Support Manager Chris Corpus was summoned to the area and took Hymon to the portion of the employee break room where smoking was allowed (sometimes referred to as the smoking room or as the break room). There the two were apparently alone. Hymon smoked and Corpus remained with him. Hymon testified no questions were asked of him by Corpus. Corpus did not testify. After about 45 minutes the two returned to the invoice office.

Supervision in the invoice office was not finished with Beckwith and after a short time, during which no questioning occurred, Hymon was again escorted to the smoking area by Santos. The two each smoked a cigarette. Hymon recalled he was still upset and kept saying: "I cannot believe this happened." He was unable to recall with certainty if Santos asked him what happened earlier, but recalled no specific questioning by Santos.[2] Hymon placed fellow employees Phenix Montgomery and Nicky Fish in the smoking area seated at a separate table.

Hymon testified that while Santos smoked nearby, he had a conversation with Montgomery across the tables. Montgomery asked him what had happened. Hymon told him he had gotten in an altercation with Beckwith. Montgomery, in Hymon's recollection, asked: "Do you want me as a witness?" and Hymon answered, "Yes, I do." Hymon further recalled that after this exchange Santos told him that as "long as I agreed to [Montgomery] wanting to be my witness, he didn't have a problem with it, he was okay with it." At this point, Santos directed Montgomery to obtain the statement of another individual regarding the events and Montgomery left the area.

Under examination by the General Counsel, Hymon described what followed:

> Q. Okay. What happened after Mr. Montgomery -- after Vince told Mr. Montgomery to go retrieve the statement?
>
> A. We just stayed in a break room, nothing was being said. just kept talking to myself, saying, "I can't believe this."

Under further questioning Hymon testified:

> Q. So what happened after Mr. Montgomery left the smoke room?

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[2] Regarding the specifics, when being examined as to the possibility Santos may have made particular statements to him in the break room, Mr. Hymon testified: "Well, it could have been, I don't know. My mind wasn't there. I was in a daze, in shock."

A. Nothing, no questions was being asked. I was just talking to myself, in disbelief that I'd gotten into an altercation with another associate.

Q. Did manager Vince say anything to you?

A. No, he didn't, he didn't ask me any questions at that time.

Q. What happened next while you were there in the smoke room?

A. Well, he -- he had walked out, and then assistant manager Fred walked in --

Q. What do you mean? he had walked out.

A. Vince, assistant manager Vince, had walked out.

Q. So assistant manager Vince walked out of the meeting room?

A. The break room, yes, he did.

Montgomery returned to the break room and Santos left soon thereafter to be replaced by Assistant Manager Fred Meyer. Thereafter Hymon was returned to the administrative area where he wrote a statement. Upon completion and submission of his statement, Hymon was told by Santos that he would be suspended pending further investigation.

Mr. Montgomery, who remained a store employee at the time of his testimony, recalled that early in the morning of February 3, 2003, as he prepared to enter the break room, he was met by Hymon who “proceeded to tell me that there was an investigation getting ready to be under way and that he wanted me there as his witness.” The two proceeded into the smoking area where Assistant Manager Vince Santos, Maintenance Supervisor Fred Hoelzle, and overnight stocker employee Nicky Fish were present. There in Montgomery’s recollection Hymon told Santos that Montgomery was “in with him as his witness” and that Santos simply said “whatever”. Mr. Montgomery’s contemporaneous notes recite: “Tody and Shawn had a fight. I asserted my rights to be present for Tody. Vince said, ‘whatever.’”

Shortly thereafter an employee came into the room and stated that an affidavit from another employee was available that Santos desired. Santos asked Montgomery to go obtain the document and Montgomery left to do so. Montgomery quickly learned the document was not in fact available and, in his estimate within two minutes of his departure, he returned to the break room. As he was entering the room, Montgomery testified he heard Santos asking Hymon “What did Shawn [Beckwith] do?" Almost immediately thereafter, Montgomery testified that Supervisor Sawyer came into the room and asked Montgomery if he was a witness to the altercation. Montgomery testified:

I said that I wasn't a witness to that particular incident but I was a witness to many other -- as I put it, many other racist occurrences that was brought forth by Shawn.

Q. And did Mr. -- assistant manager Fred say anything?

A. He said, "Phenix, you don't have the right to be here and you have to leave."

Q. Did you say anything?

A. I said -- I said, "Fred, I thought about Wal-Mart's policy" -- "I have the right to be here as Tody's witness," as well as law, that "I have the right to be here."

Q. Did Fred say anything?

A. Yes, he did. He said, "Phenix, you have to leave, so please go."

Q. What happened then?

A. I left.

Mr. Vince Santos testified that as part of the separation of the two disputants, Hymon was sent to the invoice office to work on his statement. Santos joined him there and Hymon asked to go to the smoke room for a cigarette. The two went to the employee break room, with Hymon taking his pencil and paper with him and the two sat and smoked. No others were present. Santos specifically denied that either Nicky Fish or Hoelzle were present. Santos recalled that Hymon expressed his anger at the situation and “vented” to Santos who basically responded he was sorry. Santos testified Hymon never asked for a witness.

Mr. Santos initially testified he did not ask any questions of Hymon in the smoke room. He later testified:

Q. Did you ever interrogate or investigate with Tody Hymon about the events that had happened that night between him and Shawn Beckwith?

A. Just basically asking him what happened.

Q. And when did you ask him that?

A. When -- it was in between while he was writing his statement and he was trying to explain to me what had happened and that -- he told me -- I believe Shawn -- "Shawn puffed upon me" I believe is what he said "and so I hit him."

Subsequently during cross examination, when asked for the details regarding when he asked Hymon about the events, Santos denied asking Hymon questions, but rather suggested that he had learned the details from Supervisor Fisher who had later reported his conversations with Hymon about the altercation.

At this point, in Santos’ memory, Montgomery entered the break room sitting at a different table. Mr. Santos specifically denied Montgomery asking to be Hymon’s witness. After a time during which no conversation took place, Santos left the smoking area to check on things in other areas. After notifying the store manager, passing the store manager’s instructions to other managers, and dealing with the other disputant, Santos looked for Hymon and found him in the invoice office working on his statement. Santos waited without talking to Hymon until Hymon finished his statement and gave it to Santos. Santos then told Hymon he was suspended pending investigation and Hymon left the store.

Employee Nicky Fish did not testify at the hearing and Mr. Hoelzle testified that he was never in the smoking or break room with Santos, Hymon, Montgomery, Sawyer and/or Fish on the morning of the Hymon-Beckwith altercation.

**b. The February 10, 2003 Events**

A meeting between Mr. Hymon and Store Manager Dan Holland was arranged for February 10, 2003. Mr. Hymon as of that date was still suspended and had not received formal notification of termination nor his final paycheck. Mr. Holland, who had been out of town on business during the intervening days, had returned to the store only that morning at about 8 a.m. He was informed of the scheduled meeting and given the relevant file that included the employees’ statements, which established that Hymon had struck Beckwith. Holland testified he perused the file and based on it decided to terminate both employees. Thereafter he

informed People Manager Lynn Leckie of his decision so that she could initiate the necessary personnel processing.

At the appointed meeting time, Mr. Hymon arrived at the store with his sister, Clora Hymon, and Mr. Montgomery. The three were ushered into the administrative offices by Ms. Leckie who joined them. Mr. Hymon testified that Holland questioned the presence of other two individuals. Hymon told him that they were there at his request to be witnesses. Holland responded that the meeting was an “open-door meeting” only for associates. A card was produced by Hymon dealing with “Weingarten” rights and he and his sister referred to the rights discussed on it. Holland did not enter into a discussion respecting it, but rather directed that the card be put away as it “didn’t come from us.” Mr. Hymon testified that he then asked his sister to leave the meeting and she did so.

At this point, Hymon recalled that Holland questioned the continued presence of Montgomery. Hymon and Montgomery indicated that they were associates, that the open-door policy meetings were for associates and that the two were there to discuss Hymon’s status. Holland, in Hymon’s memory, told Montgomery that he could discuss Hymon’s business, but that he must "do it outside of this room, not while we have a meeting going on." At that point Hymon asked Montgomery to leave the meeting, he did so, and the meeting continued with only Hymon, Leckie, and Holland present.

Mr. Montgomery testified that during the meeting, after he and Hymon’s sister, Clora Hymon, were identified as witnesses for Hymon: “Mr. Holland proceeded to say that his was an open-door policy and it was none of our business and if Mr. Hymon wanted to discuss the issues with us he would have to do it after the meeting.” When the references to “Weingarten rights” as read from the card were rejected by Holland out of hand, “Holland asked us to leave and we left.”

Hymon testified further under cross-examination:

Q. And Mr. Holland on February 10th told you not once but at least twice that he wasn't going to have an open-door meeting with you with either your sister or Phenix Montgomery present?

A. That is correct.

Q. And after he told you that, you elected to continue to have the meeting with him without them being present?

A. That is correct.

Mr. Holland testified that he told the three just before Montgomery and Ms. Cora Hymon left:

> “This is Tody's meeting, folks, it's Tody's time," you know, "this is Tody's open-door." just asked Tody, I said, "Tody, this is your meeting, it's up to you, do you want to continue this meeting? I can't continue it with all" -- "all these folks in here, but I'm more than happy to speak to you. . . . "At that time he just kind of motioned himself out, kind of a hand gesture to Phenix and this other lady, said, "I'll be fine."

Ms. Leckie corroborated Holland. She testified that Montgomery had asserted his desire to be present at the meeting, but that Holland repeated that the meeting was not for him, but rather for Hymon and that Montgomery could not remain. She recalled that Holland asked

Hymon: “How do you want to handle this?” at which point Hymon waived Montgomery and Clora Hymon out of the room, they left and the meeting continued with only Messrs. Holland and Hymon and herself present. Ms. Clora Hymon did not testify.

**2. The March 16, 2003, Hoelzle-Montgomery Conversation – Complaint paragraph 5(e)**

Mr. Montgomery’s immediate supervisor is Mr. Fred Hoelzle. Each apparently regularly uses the smoking room on breaks during the night shift. Montgomery testified that in March 2003, he began distributing Union literature at the facility in the break room. On March 15, 2003, Montgomery testified he observed Hoelzle looking at him while he was distributing union literature in the break room. He also testified to a conversation in the area between the store break room and maintenance area with Hoelzle on that same date:

> The maintenance supervisor, Mr. Hoelzle, asked me was I involved with the union, and I said yes, and he proceeded to say that "you have the right to a union, you have the right" -- "that's your right," and -- but he – […] He also said that I could get fired for it.

Montgomery did not recall if he replied to Hoelzle’s remark as quoted above or if the conversation ended at that point.

Mr. Montgomery’s April 2003 Board-prepared affidavit, however, attributes the statement that he could be fired for his union activities to “another employee.” Further in the affidavit Montgomery, in describing Hoelzle’s statement to him, is unable to place the date of the conversation and omits to include that portion of his testimonial recollection that asserts Hoelzle said to him that he could be fired for his union activities.

Mr. Hoelzle testified that in March 2003, Montgomery began openly passing out union materials and soliciting support for the Union in the break room and that he had personally observed these activities. Hoelzle added that Montgomery had personally solicited him on several occasions offering him union buttons and literature. Hoelzle testified he told Montgomery in response to his efforts that he “didn’t need it.” Hoelzle also recalled he further told Montgomery in response to the solicitation, “he had – it was everybody's right if they wanted to be union or non-union, it's their right if they wanted to do it.” Hoelzle specifically denied asking Montgomery if he were supporting the Union asserting such a question was simply unnecessary given Montgomery’s open and ongoing solicitation for the Union.

**3. The March 28, 2003, Burke – Montgomery conversation – Complaint paragraph 5(f)**

Ms. Linda Burke, then a new People Manager, conducted a store meeting attended by Montgomery and other employees at which the Union’s organizing efforts were discussed. Montgomery made statements at the meeting that made clear his pro-union sympathies. One subject mentioned was Montgomery’s dissatisfaction with the Respondent’s “open-door policy” and the fact that the process had not resolved matters of concern to him.

After the meeting, Montgomery, Burke, and Assistant Manager Bryce Blackburn met in a separate room at Burke’s suggestion and Burke invited Montgomery to raise any issues he had. Montgomery demurred asserting he would rather not because he had raised the matter with state officials. He recalled that Burke:

> Proceeded to ask me was I sent to that store to -- by the union to organize a union. . . .I told the people's manager that I didn't know -- when I became employed at Wal-Mart I didn't know whether it was union, non-union, and it didn't matter to me. . . .I told the

> assistant manager -- I mean the -- I'm sorry the personnel manager that I didn't appreciate her screening me like that . . . After that the assistant manager said she was not anti-union. Also the assistant manager Bryce said that he was not anti-union, as well as the personnel manager, Linda, she said she wasn't anti-union either.

Ms. Burke testified in detail about the meeting with Messrs. Montgomery and Blackburn. She specifically denied that she ever asked Montgomery if he had been sent to the store to organize a union. Rather she recalled that after Montgomery had been invited to discuss his problems and after he had declined that opportunity, he raised a new issue.

> He asked me why Wal-Mart was so afraid [of] unions and why people who worked at Wal-Mart were afraid to even say the word "union." I told him that we were not afraid of unions, that was not the issue, it's just that we didn't feel it was necessary for an associate to have to pay for somebody to speak for them. I reiterated that we were there to help him and that in the 13 years that I had worked for Wal-Mart, I had never felt a need to have to pay somebody to speak for me or had a problem that I could not discuss with some member of management . . . He asked -- I think he made some comment to Bryce and looked back to me and he said, "You know, I like it here, I don't" -- "I don't like problems, I enjoy working here," he told me that he and his wife had been in the store prior to his employment, just shopping, and they had had a conversation and thought that this would be a good place for him to work. . . . I asked him where he had worked prior to that . . . He asked me if I was trying to interrogate him. I told him no, I was not trying to interrogate him, I just -- I had worked at different companies prior to Wal-Mart and they had not been the type of company that Wal-Mart was and I was pleasantly surprised when I came to work there.

Mr. Blackburn, now a co-manager in a Respondent facility in another state, recalled the meeting with Burke and Montgomery, but denied that Montgomery was ever asked if he was sent to organize the store or any other question about his union support or sympathies. Blackburn testified that following Montgomery's decline of Burke's offer to discuss any unresolved problems, Montgomery asked why Wal-Mart was afraid of unions. Burke responded that the Respondent was not "scared of unions" and both she and Blackburn asserted they were not anti-union. He then described the subsequent exchange.

> Linda [Burke] asked Phenix [Montgomery] what it was that attracted him to come to Wal-Mart for work and -- He responded that he and his wife had been in shopping one night, that he really enjoyed the store, that he felt like Wal-Mart would be a fun place to work. Linda then asked Phenix what it -- where it was that he worked prior to Wal-Mart. . . . Phenix asked if Linda was interrogating him . . . Linda replied: to the contrary, she was just curious if -- if he had ever worked for a place similar to Wal-Mart, that she was quite surprised when she came to Wal-Mart that the associates have that privilege, to use the open-door policy that Wal-Mart has.

**4. The April 2, 2003, Kirk Williams address to employees – Complaint paragraph 5(g)**

On or about April 2, 2003, in the late evening, the Respondent conducted a mandatory employee meeting for the night-shift employees. Videotape was shown to groups of employees and Corporate Labor Manager Kirk Williams spoke respecting the Respondent's position on trade unions and answered questions. Mr. Montgomery attended as part of a group of about 15 employees. Following the viewing of the tape, he testified that Williams spoke stating, inter alia:

> Well, [Williams] said that if Wal-Mart was ever to go union, that even if it was 49 percent to 51, that they would still fight it. He also mentioned the loss of benefits, he said that if Wal-Mart was to go union, that we would lose benefits, profit sharing, and he mentioned the union dues that we would have to pay also.

Mr. Montgomery's Board-prepared affidavit's recitation of the remarks attributed to Williams the statement that employees "could" as opposed to "would" lose benefits if a union represented them.

Mr. Williams testified that as a Senior Labor Manager he has received extensive training in what may or may not be said to employees and has given employee addresses many times. He and his headquarters labor relations group colleague, Gneiting, were at the store consistent with the Respondent's policy of holding employee meetings where union activities have been observed. During the process of meeting with employees in groups of 15-25, Williams held a meeting, which included Montgomery. Following his initial remarks, Williams took questions. Mr. Montgomery asked questions and made clear his pro-union sentiments, which engendered hostile remarks from other employees which Williams discouraged. Williams specifically denied telling employees that they would lose benefits including profit sharing if they supported the union.

Williams, corroborated by Mr. Gneiting, and meeting attendees Assistant Manager Sawyer and maintenance employee Cigalina, testified he did describe the process of recognition and bargaining as one that could result in bargained changes. Thus, he testified that respecting their benefits and wages:

> That they could get more, they could get less, they could get the same, no one knew, I didn't know, the company has never negotiated a contract, but there are no guarantees once collective bargaining begins.

### 5. The April 3, 2003, Threat of Physical Harm Allegations – Complaint paragraphs 5(h) and (i)

#### a. Montgomery - Williams Conversation

On April 3, 2003, an evening employee meeting was held attended by many employees and Messrs. Montgomery and Williams in the employee break room. At the gathering's conclusion as the employees dispersed, Williams and Montgomery had a short exchange. Mr. Montgomery testified that as the two were leaving the break room Williams greeted him "Hi, Phenix, how you doing?" Montgomery recalled that he answered, "okay" whereupon Williams answered, "It's a good day to be alive." In Montgomery's recollection William's tone of voice in this final remark was a bit "rougher" than normal. No further comments were exchanged and the two went their separate ways.

Mr. Williams had a similar but not identical recollection of the matter. He also recalled that at the meeting's end as the two were physically proximate in leaving the meeting room he asked: "Hey, Phenix, how are you?" and was answered by Montgomery: "I'm fine, thank you, how are you?" At that point, Williams recalled he told Montgomery: "It's a great day to be alive" and the two parted not to speak again. Williams differs significantly however in his description of his delivery of the final remark. He denies his words, or their delivery, were freighted in any way with menace in fair meaning, expression, tone or cadence. Rather, he asserted he made the remark as he has done many times to others in a positive pleasant manner.

### b. Montgomery's Later Inquiries

#### 1) Conversation with Hoelzle

Mr. Montgomery testified that he was surprised by the final statement of Williams and sought out his supervisor, Mr. Fred Hoelzle.[3] He reported to Hoelzle the exchange he had just had with Williams and asked Hoelzle, "Does it sound like a threat?" Montgomery testified to Hoelzle's response:

> "Yes, it sounds like a threat because" he said "that man don't know you well enough to" -- "to say something like that." He said that those people are from Bentonville and "you need to be careful" and he went on to say, "Remember Jimmy Hoffa."

The conversation ended without further exchange.

Mr. Fred Hoelzle recalled meeting with Montgomery in the early morning, but recalled the conversation differently. He testified:

> [Montgomery] walked up to me and he said, "Fred, we've got a serious problem." I said, "What?" He said, "These guys from the home office said" -- one of them told him that it was a great day to be alive, and I said, "Well, Phenix, maybe the guy just felt good and he felt like he'd express that to you and whatever," you know[.] I said, "I don't know what you're referring to," and he said, "This is serious, Fred." I said, "Okay, if you think it's that serious," I said, "Dan [Holland] is still here, go speak with Dan about the matter."

Hoelzle specifically denied at anytime referring to Hoffa or telling Montgomery that he should be concerned regarding, or fearful of, the people from Bentonville.

#### 2) Conversation with Holland

Mr. Montgomery was at a store entrance later that morning and was greeted by Dan Holland. Montgomery testified he reported to Holland his earlier exchange with Williams and that Holland told him it did not "feel like it was a threat, it just sounded like common ordinary everyday language." Montgomery told Holland that it "felt like it was a threat" to him and he asked Holland to look into it. Holland, in Montgomery's memory, told Montgomery that he would look into it and get back to him. In any event Montgomery never heard further from Holland regarding the matter. Montgomery also filed a complaint with the personnel department respecting the statement.

Mr. Holland testified that he did indeed have a brief exchange with Montgomery at a store entrance that morning. He testified that he greeted Montgomery and Montgomery asked him: "What would you think if somebody told you it was a great day to be alive", to which Holland answered: "I think it's always a great day to be alive." In Holland's recollection Montgomery looked a little puzzled at that point so he asked Montgomery if there was anything

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[3] The General Counsel on brief at 17 suggests, based on Montgomery's testimony respecting the time of his conversations with Hoelzle and Holland that Montgomery spoke first to Holland. Montgomery's testimony as a whole makes it quite clear that he spoke to Hoelzle first. Further he specifically testified that after he left Williams: "I went to my supervisor." To the extent that Montgomery's testimony respecting time estimates suggest otherwise, I find he was mistaken.

he could do, but did not receive a response and the conversation ended. Holland specifically denied Montgomery was more forthcoming on the reason for his question or that he attributed remarks to any other individual. Finally Holland denied that he was asked by Montgomery to investigate any matter.

## C. Analysis and Conclusions

### 1. The *Weingarten* Allegations – complaint paragraphs 5(a) through 5(d)

The Supreme Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975), established the principle that employees in represented bargaining units had the right to have a coworker present at an investigatory interview which the employee reasonably believes might result in disciplinary action. The Board has taken changing positions respecting the application of this doctrine to unrepresented employees. However in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), the Board clearly applied the principles of Weingarten to unrepresented employees and that decision is current law applicable to the instant case.

The Court in *Weingarten*, and the Board in *Epilepsy* and in a host of cases in the almost 30 years since the Court's decision, have explained and clarified the contours and limits of the rule. It is clear that the right only arises where the employee requests representation. Further, the employer may carry on its inquiry without interviewing the employee, leaving the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one. Finally, the employee has no right to representation at a meeting held to inform the employee of discipline already decided upon so long as the employer does not engage in investigatory conduct beyond merely informing the employee of the earlier made discipline decision. An employer may require an employee to submit a written explanation of conduct in lieu of a disciplinary interview.

#### a. The February 2, 2003, Events

The events of the morning of February 2 were quite complex and complaint paragraph 5 does not specify the precise aspects of the events under challenge,[4] but the General Counsel narrowly defines the violation advanced on brief at 5:

> The Respondent denied Hymon his *Epilepsy* right to have a witness present when Santos agreed to have Montgomery serve as Hymon's witness, sent Montgomery out of the smoke room to fetch a statement, and proceeded to question Hymon.

To establish the wrongful interrogation, the General Counsel relies on Montgomery's testimony that, upon returning to the break room after being sent out, he heard Santos ask Hymon, "What did Shawn do?" and urges that I find that an interrogation of Hymon took place in Montgomery's absence and despite an earlier request that he be Hymon's witness.

The Respondent notes that both Santos and Hymon testified that Santos did not question Hymon at any time about the incident. The Respondent urges that Montgomery's

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[4] Complaint paragraph 5(a):

On or about February 2, 2003, the Respondent, by Vincent Santos and Fred Sawyer, at the Tropical Parkway facility, denied the request of its employee Tody Hymon . . . to be represented by another of its employees during an interview.

testimony be discredited as, at the very least, a misrecollecton or a mistaken attribution of Hymon's statements in part to Santos.

The General Counsel in reply asks that Hymon's initial testimony to the contrary be discredited because of his "daze" during these events and because of his subsequent testimony that he might have been questioned. The General Counsel further argues Santos' denials should be discredited because he at one point in his testimony alluded to a possible questioning of Hymon.

I have considered the entire record and the briefs of the parties on this narrow point as well as the demeanor of the witnesses. I did not find any witnesses' testimony on this issue to have been duplicitous or otherwise not an honest recollection of events. As further discussed as to other complaint allegations below, I find that Mr. Montgomery has in his testimony likely misrecalled or mislocated conversations or portions of conversations. I find that this is most likely the situation here. Contrary to the General Counsel's arguments on brief, however skilled, I find the credible denials of Montgomery and Santos that any questioning occurred during the short period of Montgomery's absence from the break room, defeats the General Counsel's allegation. There is no evidence that Santos asked any question other than the one quoted above. As to that single question, I specifically discredit Montgomery's testimony and I find that Santos did not question Hymon as alleged in the complaint. The General Counsel has therefore failed to meet his burden respecting this complaint allegation and it shall be dismissed.[5]

**b. The February 10, 2003, Meeting**

The General Counsel argues that Hymon had a reasonable belief that the February 10 meeting would lead to discipline, that he brought witnesses with him to the meeting and asked that they stay on his behalf. The Respondent, argues the General Counsel, denied Hymon's request and caused the witnesses to leave only to continue the meeting thereafter discussing with Hymon the circumstances of the altercation for which he was then fired. The General Counsel argues further on brief at 9:

> Holland did not give Hymon the option of either having the meeting unaccompanied by his representative or of having no meeting at all. Instead Holland told Hymon that Respondent's open-door policy was only for associates and asked Montgomery to leave.

The General Counsel seeks to establish the fact that Hymon was not given a choice to either proceed alone without representation or insist on representation and in consequence forgo the meeting by the testimony of Montgomery and Hymon that Holland asked Clora Hymon and Montgomery to leave and they did so without an explicit option being provided by Holland before the two left.

While the Respondent disputes other elements of the General Counsel's argument as well, respecting the "no option" argument, the Respondent points out that Hymon admitted, as quoted earlier, that he "elected" to continue the meeting without the witnesses when he was informed there would be no meeting at all with them. Further, the Respondent notes that both Holland and Leckie testified that Hymon was clearly given the option of preceding without the others present and that he explicitly so elected.

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[5] Having found that no questioning occurred, it is unnecessary to address other elements of the General Counsel's prima facia case and the Responses other defenses to the allegation.

I find the record amply supports the Respondent's assertion that Hymon was told he could continue the meeting only without Montgomery and his sister and, as he testified, he elected to do so. Further, I explicitly credit the testimony of Holland and Leckie respecting the meeting. Having made these factual findings, the General Counsel's allegation fails for no *Weingarten* violation occurs when the individual is provided an option of proceeding with a meeting without a representative or having no meeting at all and the individual elects to proceed on that basis.[6] Accordingly, this paragraph of the complaint will be dismissed.

**2. The March 16, 2003 Hoelzle-Montgomery Conversation – Complaint paragraph 5(e)**

The General Counsel, relying on the testimony of Mr. Montgomery that Mr. Hoelzle asked him if he was supporting the Union, alleges the question violates Section 8(a)(1) of the Act as a wrongful interrogation. The Respondent argues that Montgomery be discredited and the denial of Hoelzle be relied on to find the remark was never made.

The Respondent argues further that under Board law such a question by a low level supervisor made to an open union supporter who had solicited the supervisor involved in a context free of other coercive circumstances is not a violation of the Act in any event. The General Counsel seeks to meet this argument by noting that Montgomery testified that he had just begun his open and active support for the Union the day of the conversation and therefore it was neither unnecessary – as Hoelzle testified – or permissible to have asked Montgomery about his activities at that time.

I find that there is no directly contradictory testimony by the two witnesses, which requires crediting of one individual over the other to resolve the allegation. This is so because there was no direct testimony from Montgomery, or fairly inferable from the record otherwise, that challenges Hoelzle's testimony that he never talked to Montgomery about union activities before Montgomery's open union activities in the break room. Montgomery testified that Hoelzle observed his union activities in the break room on March 15, but he did not testify whether that open organizational activity occurred before or after his conversation with him that day. The record makes it clear that the shift that Montgomery and Hoelzle work started late in the evening and had breaks early in the morning of the following day which they took before the 2:30 a.m. conversation described by Montgomery.

There is no evidence that Hoelzle initially learned of Montgomery's union activities other than through Montgomery's words and actions. Hoelzle would have asked the question at issue only if some information regarding the possibility of Montgomery supporting the Union had prompted it. On this record, only Hoelzle's testimony that he had seen Montgomery distributing union literature and soliciting employees, and was himself a subject of union solicitation from Montgomery, provided that information. Given all the above, it is clear and I find that Hoelzle did not ask Montgomery any question about his Union activities until after Montgomery had engaged in open support for the Union at the workplace.

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[6] The Charging Party's post-hearing brief was submitted:

> [S]olely to highlight a single issue, that is, [the] Respondent's policy of always refusing to honor the right of employees to have a witness of their choice present during any investigatory interrogation [The Charging Party's brief at 2, citations omitted].

The Charging Party's brief makes the eloquent argument that such a policy, as was applied herein, should be a violation of the Act. Such an argument requires a change in decisional law and is for the Board not its administrative law judges to consider.

I also credit Hoelzle's testimonial denial and Montgomery's Board affidavit's version of events over Montgomery's courtroom testimony that Hoelzle suggested that Montgomery could be fired for his union activities. Montgomery's affidavit attributes these remarks to another individual, not to Hoelzle. I find that the affidavit lends critical support to Hoezle's denials respecting this contested remark.

I agree with the Respondent that under the Board's *Rossmore House*, 269 NLRB 1176 (1984), doctrine, the nature, context and totality of circumstances of an interrogation must be considered in determining if it violates the Act. Here where the question alleged to be in violation of the Act -- if it was made at all -- was made by a low level supervisor after observing that employee's open union solicitation and distribution of union literature in the employee break room, no violation of the Act may be found even if Mr. Montgomery's testimony be credited in full.[7]

Given all the above, I find therefore that the General Counsel has failed to sustain his burden with respect to complaint paragraph 5(e) and it shall be dismissed in its entirety.

**3. The March 28, 2003 Burke – Montgomery conversation – Complaint paragraph 5(f)**

The General Counsel relies on the testimony of Mr. Montgomery, as quoted above, to establish that Burk asked Montgomery if he had been sent by the Union to organize the store. The Respondent asks that Montgomery's testimony in this regard be discredited and the contrary testimony of Burke and Blackburn be credited to find that the question was never asked. The Respondent argues additionally as discussed in an earlier allegation that the question alleged to have been asked, under all the circumstances, would not be a violation of the Act.

I have carefully considered the testimony of the meeting participants and the record as a whole. I find that, while Mr. Montgomery's recollection was doubtless honestly held and described, that his memory is mistaken and that Burke simply did not ask the question he described. The context of the exchange at the meeting is clear from the generally corroborative versions of events from all three participants. The question at issue does not ring true as coming from a trained management representative in such a context. The two corroborative denials of Burk and Blackburn that the question was not asked were also credible and each had a sound demeanor.

Given the burden that the General Counsel bears as to all aspects of the complaint, I find that the General Counsel has not sustained his burden of proof as to complaint paragraph 5(f) and it shall be dismissed.

**4. The April 2, 2003, Kirk Williams address to employees – Complaint paragraph 5(g)**

The versions of the meeting in contest are set forth in part above. The General Counsel relies on the testimony of Montgomery that Williams told employees they would lose benefits including profit sharing if they were to "go union". The Respondent challenges the testimony of

[7] The complaint allegation sounded only in an interrogation. Mr. Montgomery's testimony attributed to Mr. Hoelzle an arguable threat, i.e. that he "could get fired" for union activities. Since the threat was explicitly not pleaded, the issue of a wrongful threat is not raised in the case and no findings respecting it are made herein.

Montgomery as inconsistent with his affidavit and advances the denials of Williams, Gneiting, Sawyer and Cigalina.

I find, as in earlier analyses above, that Montgomery was mistaken. His earlier prepared affidavit and the testimony of the other meeting participants are credited. I find Williams did not tell the employees they "would" lose benefits, but rather told them that benefits "might" be lost in any concluded collective-bargaining agreement with the Union.

It is a common occurrence that the subtle practiced statements of informed and sophisticated agents of management in group meetings with employees respecting the potentially adverse consequences of employee selection of a collective-bargaining representative are not precisely recalled by employees not experienced the sophistries and nuances of language parsed to meet the requirements of the Act. Rather the subtle statements of what may happen as a result of bargaining – wages and benefits gained or lost – are often recalled by employees not as statements of possibility but rather as simple unconditional statements of loss resulting from union organization. I find such an occurrence here.

I find therefore that the General Counsel has not sustained the allegation of the complaint and complaint paragraph 5(g) will be dismissed.

**5. The April 3, 2003 Threat of Physical Harm Allegations – Complaint paragraphs 5(h) and (i)**

Complaint paragraphs 5(h) and (i) allege that Kirk Williams and Fred Hoelzle in separate incidents on April 3, 2003, threatened employees "with physical harm because of their support for the Union." As noted, supra, the facts respecting Williams are not in dispute and the events involving Hoelzle are.

**a. Williams' Statement**

There is no dispute that Williams, a headquarters-based labor relations specialist, said to Montgomery, a known and perhaps leading union adherent: "It is a good day to be alive." It is also uncontested that Williams received the remark with suspicion, if not trepidation. To the extent Montgomery suggested William's delivery of the words in controversy was rougher than usual, I credit Williams that he used a normal voice and manner in speaking the words involved.

The standard to be applied under the Act in determining whether a threat was made which violates the Act is an objective one. It is not how the particular employee takes or understands the remark made, but rather how such a remark should reasonably have been taken by an employee in the circumstances presented.

Further the question presented here is not the simple meaning of the words spoken. They are unambiguously benign. Rather the General Counsel's theory is that the words were so out of place and unusual in context and delivery that they would reasonably be taken not at face value but rather as a threat or warning. Therefore the issue is: Is the statement, while seemingly a benign and optimistic commonplace, in the context of its delivery, freighted with menace?

If the standard to be applied is an objective one, the particular employee and the agent of the employer involved are factors to consider in evaluating the statement made. Mr. Montgomery is a black man and an open labor union supporter employed by an enterprise that not only openly urges its employees to reject union representation, but at all its many facilities

has not concluded a labor agreement. Mr. Williams is a white agent from the Respondent's headquarters who had come to the store to bring the Respondent's position respecting unions to its employees. It is not unreasonable for an employee in like circumstances to be aware of the historical facts that black males have suffered physical harm at the hands of whites, that union supporters have come to violence, and that Mr. Williams was an agent of the Respondent who was at the store because of employee union activities.

All these factors, in my view, while relevant, standing alone do not suffice to convert an otherwise benign remark into a threat without more. The factors mentioned which make it reasonable to view remarks with suspicion are based on historical events and are not specifically related with any sense of immediacy to the employees personal setting and circumstances in his dealings with an agent of management. On this record the remark at issue is facially benign and simply cannot be found to be any type of threat or warning.[8]

Accordingly, I find that without a context to put a malign meaning to the words, and given the burden the General Counsel bears and the Board's reluctance to find threats of death,[9] that the statement objectively viewed is not a threat and its utterance in the context described did not violate the Act. I shall therefore dismiss complaint paragraph 5(h).

**b. Hoelzle's Statement**

There is no doubt that Montgomery raised with Hoelzle his puzzlement and trepidation respecting Williams' statement to him. Montgomery quoted Williams and asked Hoelzle what he made of the remark. What is disputed is Hoelzle's response. Mr. Montgomery testified that Hoelzle stated that the remark sounded like a threat, that one needed to be careful with people from the Respondent's headquarters and reminded him to "remember Jimmy Hoffa". Mr. Hoelzle denied making those responses and, as quoted in greater detail supra, testified he told Montgomery in effect the remark was innocuous and, when told by Montgomery that the matter was "serious" referred Montgomery on to the store manager.

The General Counsel argues that Montgomery should be credited and Hoelzle's statement found to be a threat, especially when overlaid with the allusions to dangerous headquarters personnel and to Jimmy Hoffa.[10] The Respondent urges that Hoelzle be credited and the statements simply found never to have been uttered. Moreover the Respondent argues, the remarks, even if made, simply do not rise to the level of a violation of the Act.

Having considered the testimony of both Messrs. Montgomery and Hoelzle respecting this conversation, I credit elements of each version. There is no doubt that Montgomery raised the Williams' statement with Hoelzle. I further find, crediting Montgomery, that Hoelzle told him it was a threat, that "those people are from Bentonville . . . you need to be careful." I do not however find that Hoelzle added the statement: "Remember Jimmy Hoffa." Mr. Montgomery's testimony convinced me that his memory was prone to attribute additional remarks to speakers

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[8] The General Counsel did not advance or even suggest there is any odd or special hidden or uncommonly understood threat inherent in the particular words used.

[9] See for example *Electrical Workers IBEW Local 6 (San Francisco Electrical Workers),* 318 NLRB 109 (1995).

[10] I administratively notice that Mr. Hoffa was a former labor union official who disappeared under mysterious circumstances and is assumed at least in the public's mind to have been murdered.

which may well have been addressed to him by others. As to these remarks, I credit the denial of Hoelzle.

I further find however, crediting Hoelzle respecting the latter portion of the exchange, that Williams then told Hoelzle: "This is serious, Fred." At which point Hoelzle directed Williams to speak to the store manager about the matter. I reach these findings based on a belief based on the two individuals entire testimony and demeanor. Neither individual demonstrated a consistently excellent or accurate memory. It appeared to me the Hoelzle was determined to simply deny making the remarks attributed to him which, even if jocularly delivered at the time of making, we embarrassing for him.

Given these findings, it is appropriate to look to the statement in its full context. Hoelzle did not initiate the exchange, but rather was asked a question and gave his answer. The question asked was a solicitation of his "take" or impression of the Williams' comment that has been quoted and discussed earlier and has been found herein not to be an objective threat nor a violation of the Act. The Hoelzle statement at issue under the General Counsel's theory of a violation is thus in the unusual posture of being a threat contained in an answer to a solicitation of his impression of the statement of another which other statement was not objectively threatening nor a violation of the Act. The Respondent correctly points out on brief that a low level supervisor's response to an employee initiated question when the response is a statement of the supervisors opinion about matters over which the supervisor has no control is a special circumstance citing *Selkirk Metalbestos,* 321 NLRB 44, 52 (1996), *The Standard Products Co*., 281 NLRB 141, 151 (1986), *Wendt-Sonis Co.,* 138 855, 856-57 (1962).

Given all the above, I find that the entire context saves Hoelzle statements from rising to the level of a violation of the Act. In reaching this conclusion I rely in particular on the following factors: 1) that the initial Williams statement which was the subject of the conversation was not violative of the Act, 2) that Montgomery initiated the question prompting the answer under challenge and 3) that Hoelzle was a low level supervisor with no control or complicity in the matter that worried Montgomery and was the subject of his inquiry. Accordingly I shall dismiss complaint paragraph 5(i).

## Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, 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.

## ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[11]

**The complaint shall be dismissed in its entirety.**

Dated, San Francisco, California, January 27. 2004.

ca

Clifford H. Anderson
Administrative Law Judge

[11] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.