UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MAL ENTERPRISES, INC.,
d/b/a LAWRENCE BROS.

and

Cases 28-CA-20824
28-CA-21008

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1564

Chris J. Doyle, Atty., Counsel for the General Counsel,
Region 28, Phoenix, Arizona.
Greg Frazier, Secretary-Treasurer, Charging Party,
Albuquerque, New Mexico.
Shane Youtz, Atty., Charging Party,
Albuquerque, New Mexico.
Fred B. Grubb, Grubb, Quist & Associates, LLC,
Representative of Respondent, Waterbury, VT.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Ruidoso, New Mexico on November 29 through December 1, and December 13 through 14, 2006[1] upon Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint), issued October 31 by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by United Food and Commercial Workers Union, Local 1564, AFL-CIO (the Union),[2] alleging that MAL Enterprises, Inc., d/b/a Lawrence Brothers (the Respondent) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[3] The Respondent essentially denied all allegations of unlawful conduct.

[1] All dates herein are 2006 unless otherwise specified.

[2] Hereinafter correctly designated United Food and Commercial Workers Union, Local 1564.

[3] At the hearing, Counsel for the General Counsel twice amended the Complaint. The first amendment added paragraph 6(f), alleging that Fred B. Grubb, representative of the Respondent, was at relevant times an agent of the Respondent within the meaning of Section 2(13) of the Act and that Mr. Grubb unlawfully interrogated employees on November 7. The second amendment added paragraph 8(g), alleging that in withdrawing its recognition of the Union as the exclusive collective-bargaining representative of unit employees, the Respondent relied upon a petition that was fraudulently procured. The Respondent stipulated that Mr. Grubb was, at relevant times, an agent of the Respondent, but otherwise denied the amended allegations.

II. Issues

1. Did the Respondent engage in independent violations of Section 8(a)(1) of the Act by threatening employees with the following: loss of vacation pay, withheld wage increases, withheld transition to full-time status, written warnings, cessation of the Union as employees' collective-bargaining representative, and nonacquisition of new equipment.
2. Did the Respondent engage in independent violations of Section 8(a)(1) by promising to convert employees to full-time status if employees decertified the Union and by interrogating employees?
3. Did the Respondent violate Section 8(a)(3) of the Act by the following conduct: withholding wage increases from employees Tracy Saenz, Carlos Negrete, Richie Elisarras, and Justin Blea, withholding vacation pay from employee Linda Padilla, and imposing more onerous sick leave requirements on Linda Padilla.
4. Did the Respondent violate Section 8(a)(5) of the Act by engaging in the following conduct concerning employees employed in the unit represented by the Union without prior notice to the Union and without affording the Union an opportunity to bargain regarding the changes: beginning on November 15, 2005 ceasing to provide its employees with commensurate wage increases upon promotion; on October 16, announcing it would, effective December 1, provide its employees with pay increases and announcing it would convert certain of its employees to full-time status upon completion of a review.
5. Did the Respondent violate Section 8(a)(5) of the Act by withdrawing recognition from the Union on September 20.

III. Jurisdiction

The Respondent, a Texas corporation, with an office and place of business in Ruidoso, New Mexico (the Ruidoso store) has, at all relevant times, been engaged in the retail sale of groceries and related products. During the 12-month period ending May 15, the Respondent, in conducting its operations, derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of New Mexico. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union has been a labor organization within the meaning of Section 2(5) of the Act.[4]

IV. Findings of Fact

A. Company Policies and Collective Bargaining

Respondent, with corporate offices located in Sweetwater Texas, operates twenty-three supermarkets in the states of New Mexico and Texas. Respondent's three stores in New Mexico are located in the cities of Roswell, Albuquerque, and Ruidoso. Respondent acquired

[4] Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

the Ruidoso store in 2001.[5] At all relevant times, the Ruidoso store was managed by Greg Stewart (Mr. Stewart), store manager, succeeded in August 2005 by Alfred G. Romero (Mr. Romero), along with Bob Crumpton (Mr. Crumpton), District Manager responsible for the New Mexico stores, whose office was at the Ruidoso store (the respective store manager and Mr. Crumpton are hereinafter referred to collectively as store managers). Mr. Crumpton reported to Jay Lawrence (Mr. Lawrence), president of Respondent.

At all relevant times, certain terms and conditions of employment of Respondent's employees companywide were set forth in a employee handbook issued to employees, which, in relevant part, provided that employees who regularly worked a minimum of 32 hours per week in a period of ninety days were entitled to fulltime status while employees who worked fewer hours were considered part-time. Part-time employees were not entitled to vacation pay, sick leave, or health insurance benefits. No specific company policy or procedure existed for transitioning employees from part-time to fulltime status, but according to Mr. Stewart, the Respondent regularly transitioned employees when their work hours averaged over 32 hours a week during a 90-day period.[6] The handbook further provided that all employees notify the store manager in advance of absence.

The Respondent's employee handbook did not address pay increases. However, the Respondent's common practice was to grant an attendant wage increase upon promotion to a higher-paid position. Merit increases were also granted, either by the managers, sua sponte, or when an employee requested a merit pay increase. In the latter circumstance, the Respondent's practice was for store managers to evaluate the employee's request based on his/her job responsibilities, attendance, and customer service.[7] With regard to time off, the employee handbook provided for sick leave and vacation benefits only for fulltime employees. No specific policies or procedures existed for implementation of the leave provisions or for otherwise allowing leave. The store managers had broad discretion to promote employees, to grant merit pay raises, to grant paid and unpaid leave, and to transition employees from part-time to fulltime status.

In July 2005, the Union filed a representation petition with the Board covering employees at the Ruidoso store. According to Mr. Stewart, thereafter Mr. Crumpton told supervisors in management meetings that Mr. Lawrence said the company would never sign a union contract. Mr. Lawrence denied ever having said that to Mr. Crumpton, which denial Mr. Crumpton corroborated. The following participants in management meetings denied that Mr. Crumpton ever made any such statement: Ken Redfearn, produce manager, Steve Day, night manager; Larry Perkins, assistant store manager since August 2005; and Mr. Romero. While I found

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[5] At the hearing, the General Counsel was not permitted to adduce evidence that at time of acquisition, Respondent restricted the hiring of union-represented employees of the predecessor employer in order to avoid having to recognize the Union. In its post-hearing brief, Counsel for the General Counsel moves for reconsideration of the ruling excluding such evidence. The motion is denied.

[6] In spring 2005, the Respondent's central payroll office sent Mr. Stewart a list of employees whose hours worked dictated the transition to fulltime status. On other occasions, when employees asked for a status change, the managers calculated the hours and directed or denied the change.

[7] As to promotions, merit increases, and part-time to fulltime transitions at the Ruidoso store, Mr. Crumpton had final approval.

Mr. Stewart to be generally credible, his testimony in this regard, which provides neither context nor explicit wording, deters reasonable evaluation of the alleged statements; consequently I do not accept his testimony.[8]

Following the filing of the representation petition, the Respondent, through Fred B. Grubb (Mr. Grubb) its labor consultant, investigated operations at the Ruidoso store. By a July 28, 2005 memorandum, Mr. Grubb informed Mr. Lawrence, inter alia, that employees felt they had little hope of getting wage increases, as the practice was to consider an increase only after an employee requested one. At the request of employees, Mr. Lawrence held an employee meeting exclusive of Mr. Stewart and Mr. Crumpton. In the meeting, employees complained about various employment issues, including the failure consistently to transition qualifying employees into fulltime status and to grant earned vacation time. Mr. Lawrence concluded that Mr. Stewart had not followed the handbook provisions regarding part-time/fulltime status and allocation of vacation time. On August 5, 2005, the Respondent terminated Mr. Stewart, replacing him with Mr. Romero.

On September 12, 2005, following a Board-conducted representation election, the Board certified the Union as the representative of the following unit of employees in the Ruidoso store (the unit):

> All employees employed by the Respondent at [the Ruidoso store], excluding the Store Director, Assistant Store Directors, Bakery/Deli Manager, Produce Manager, Market Manager, guards, and supervisors as defined in the Act.

Thereafter, the Respondent and the Union engaged in collective bargaining over terms and conditions of employment affecting the union, holding six negotiating meetings between December 6 2005, and March 15. The Ruidoso store, employing 34 unit employees, was the Respondent's only store where employees were represented by a union.

Following the Union's certification, the Respondent never notified the Union and/or afforded the Union an opportunity to bargain about changes to the Respondent's promotion/wage increase practices. During the course of negotiations between the Respondent and the Union, the Respondent insisted that the economic status quo be maintained at the Ruidoso store, of which position the Union informed employees in the Ruidoso store in a February 3 collective bargaining update:

> ...
> The Union gave Lawrence Brothers a complete economic proposal on January 24. The Union's proposal included pay raises for every employee…The Company rejected the Union's proposal which then led to the Union making a second proposal on wages. Lawrence Brothers again rejected the Union's proposal. Lawrence Brothers only proposal was to keep the status quo with Insurance, Wages, Vacations, and holidays, meaning they stay exactly as the last five years…

[8] Inter alia, Mr. Stewart testified, "Basically [Mr. Crumpton said] that the Lawrence Brothers would never sign a union contract. They would possibly fail or close the stores that were—that went union." Mr. Stewart's use of the word "basically" suggests that he may have been recounting inferences he drew from Mr. Crumpton's statements rather than the statements themselves.

In May, the Respondent instituted a new system with regard to promotions and wage increases in all stores except the Ruidoso store. The new wage increase program provided essentially that the Respondent conduct an annual review of each employee's performance and grant wage increases indexed to employees' performance scores.

B. Post-election Company Actions Regarding Part-time/Fulltime Status and Promotional Wage Increases

Both before and after the union election, part-time employee Linda Padilla (Ms. Padilla) asked to be made a fulltime employee consistent with the number of hours she worked. Two weeks after the election, according to Ms. Padilla, the Respondent reduced her hours. When she asked Mr. Romero for an explanation, he told her it was because of "this union stuff," that everything was on hold, that he had to follow proper procedure, and that until things were settled the company would reduce her hours so that she would not qualify as fulltime.[9] Mr. Romero agreed that he had cut Ms. Padilla's hours following the election but explained that all hours were cut because of reduced sales after Labor Day. Although tacitly denying that he had cut Ms. Padilla's hours to prevent her qualifying for fulltime status, Mr. Romero did not otherwise deny Ms. Padilla's account of their conversation, which I credit.[10]

When the Respondent hired Justin Blea (Mr. Blea) in March 2005, Mr. Romero told him he would receive a raise after 90 days. In October or November 2005, Mr. Blea asked Mr. Romero why he had not yet received the raise. Mr. Romero told him that he could do nothing because of the Union.[11]

In November or December 2005, Tracy Saenz (Ms. Saenz) was promoted from the position of sacker to checker, entitling her to a wage increase.[12] The increase was not forthcoming, and in February Ms. Saenz asked Mr. Romero about her wages. He told her that there was a rate freeze due to "the other" and that he could look into it after "the other." Ms. Saenz assumed he was talking about the Union.[13] In April, Ms. Saenz asked Mr. Crumpton when she would get her raise. According to Ms. Saenz, Mr. Crumpton told her that he could not

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[9] At about the same time, the Respondent transitioned Judy Kendall to fulltime status. In his post-hearing brief, Counsel for the General Counsel argues the transition was a discriminatory reward for antiunion activity that included vocally opposing the Union and serving as the Respondent's observer at the representation election. Ms. Kendall's transition to fulltime status, while immune from complaint allegation because of Section 10(b) of the Act, can demonstrate animus if found discriminatory. *Smithfield Foods, Inc.,* 347 NLRB No. 110, fn 9 (2006). There is, however, insufficient evidence to support a finding that the Respondent was unlawfully motivated in transitioning Ms. Kendall.

[10] The Respondent's September 2005 reduction of Ms. Padilla's hours falls outside the 10(b) period, and it is not clear the reduction was a continuing practice. Therefore, I have considered only whether the exchange demonstrated animus.

[11] Mr. Blea had obvious difficulty with recollection, necessitating frequent leading by Counsel for the General Counsel. I cannot give weight to Mr. Blea's testimony where it conflicts with that of other witnesses. Mr. Blea's testimony in this regard is uncontroverted, but, as it is unclear whether the latter conversation occurred within the 10(b) period, I have considered only whether Mr. Romero's statements reflected animus.

[12] There being no evidence to the contrary, I find the promotion occurred within the 10(b) period.

[13] A later conversation between Mr. Romero and Stella Harris reveals that Mr. Romero did, in fact, mean the Union by his oblique reference to "the other."

guarantee anything until "all this" was cleared up. Mr. Crumpton denied telling Ms. Saenz that there was a pay freeze. Ms. Saenz' recollection of that conversation was admittedly weak, and Counsel for the General Counsel elicited her testimony of it through leading questions. While I accept Ms. Saenz' testimony regarding her conversation with Mr. Romero, I do not credit her account of her conversation with Mr. Crumpton. In June, following the Union's unfair labor practice charge, Mr. Romero gave Ms. Saenz a check for retroactive wages to cover the raise she should have received upon promotion to checker and apologized for the delay.

In December 2005, Carlos Negrete (Mr. Negrete) was promoted from sacker to stocker, which entitled him to a wage increase. At the time of promotion Mr. Romero told Mr. Negrete he would receive an increase of $1 to $1.50 an hour. After assuming the stocker duties, Mr. Negrete asked about the wage increase, but Mr. Romero told him he would not receive one at that time. According to Mr. Negrete, Mr. Romero said everything was frozen because of what was going on with the Union, and Mr. Negrete would not receive a raise until everything was taken care of. Richie Elisarras (Mr. Elisarras) who had also been promoted to stocker and who also did not receive the commensurate pay raise was present, and Mr. Romero gave Mr. Elisarras the same explanation for his omitted raise.[14] During the ensuing weeks, both Mr. Negrete and Mr. Elisarras continued to ask Mr. Romero about their raises. Each time Mr. Romero answered that he could do nothing about it until everything was cleared up with the Union. Mr. Romero denied telling Mr. Negrete he would receive a raise upon promotion, testifying that he told Mr. Negrete he would be on probation. Mr. Romero did not otherwise dispute Mr. Negrete's testimony of conversations among Mr. Negrete, Mr. Elisarras, and Mr. Romero concerning raises. Mr. Romero admitted that no other promoted employee had been placed on probation and agreed that employees customarily received wage increases upon promotion. The unexplained disparity in denying Mr. Negrete a promotional wage increase undercuts Mr. Romero's credibility, as does his failure to recount fully his interchanges with Mr. Negrete and Mr. Elisarras. The Respondent argues that Mr. Negrete's testimony should not be accepted because it was uncorroborated by Mr. Elisarras. However, the absence of refutative evidence justifies reliance on Mr. Negrete's testimony.

During the same period, Mr. Negrete and Mr. Elisarras also spoke to Mr. Perkins about their prospective raises. Mr. Perkins told them that because of what was happening with the Union, everything was frozen, and the raises might be withheld for three months to a year. Mr. Negrete received no wage increase during the remainder of his employment with the Respondent, which ended March 18.

In March, Stella Harris (Ms. Harris) a checker for Respondent who had been employed at the store since 2001, asked Mr. Romero for a raise. Mr. Romero said that because of the "other," everything was frozen. Ms. Harris asked if by the "other," he meant the Union, and

[14] Mr. Elisarras did not testify, and findings as to him are based on Mr. Negrete's testimony. Mr. Romero testified that Mr. Elisarras was promoted to stocker at the end of December 2005 or beginning of January and that he received his pay raise, although Mr. Romero could not recall the date. No clarifying company records were adduced. Based on Mr. Negrete's testimony, credited as explained below, I find that Mr. Elisarras was promoted at about the same time as Mr. Negrete and that the Respondent withheld a commensurate wage increase.

according to Ms. Harris, Mr. Romero said he did.[15] At about the same time, Ms. Harris overheard Mr. Perkins tell someone that when all the "union crap" was over the store might be able to get a needed piece of power equipment.

In late May or early June, Mr. Blea was promoted from courtesy clerk to stocker but did not receive the commensurate pay increase for two to three weeks. Prior to the advent of the Union, no other promoted employee had had to wait that long for a promotional raise.

When Respondent hired Amanda Meredith (Ms. Meredith) as a part-time employee in October 2005, Mr. Romero told her that after a 90-day probationary period, she would be transitioned to fulltime status with the possibility of a raise. Thereafter, Ms. Meredith worked up to 40 hours per week. In late May or early June, Ms. Meredith asked Mr. Romero why she was still classified as a part-time employee. Mr. Romero said that because people were trying to get the Union in, there was nothing he could do about transitioning her, but that once the Union left, everything could return to normal.[16]

C. Post-election Company Actions Regarding Time Off

In December 2005, Mr. Romero granted Ms. Padilla leave from December 11 through 17, 2005. According to Ms. Padilla, Mr. Romero and Larry Perkins (Mr. Perkins), assistant store manager, assured her she would be paid for her time off but told her to say nothing about it, as other employees would not receive a similar benefit.[17] The Respondent did not pay Ms. Padilla for the time off, and when Ms. Padilla protested, Mr. Perkins, and later Mr. Romero, told her that because of the Union, everything was on hold. Shortly thereafter, when Mr. Lawrence visited

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[15] Mr. Romero admitted telling Ms. Harris that the Respondent could not give her a raise "because of the other," but he testified that when she asked if he meant the Union, he did not respond. I credit Ms. Harris' testimony. Even if I were to accept that Mr. Romero did not explain what he meant by his reference to the "other," it is reasonable to infer from his silence that he meant the Union and that Ms. Harris was justified in so inferring.

[16] Ms. Meredith's testimony that the conversation referenced people "trying to get the Union to come in" seemed to suggest that the interchange occurred prior to the election. Under cross-examination, Ms. Meredith explained that the conversation took place at a time when the Union "wasn't completely voted in, like all of this stuff was going on." Under redirect examination, Ms. Meredith further explained that although the Union had been voted in, discussion about the terms meant that they were not completely in. Contrary to the Respondent's post-hearing argument, I find Ms. Meredith's testimony was not unreliably inconsistent, but merely reflected an unsophisticated view that the Union was not fully established until contract negotiations were successfully concluded. I credit her testimony.

[17] Mr. Romero denied giving any such assurance. Mr. Romero was vague about whether he had discussed denial of pay with Ms. Padilla, but he testified he thought he told her she could not receive vacation pay because she did not accrue vacation as a part-time employee. Mr. Perkins testified that he did not recall ever having a conversation with Ms. Padilla where Mr. Romero was also present and denied telling Ms. Padilla she would get paid vacation. Mr. Perkins' testimony does not clearly corroborate Mr. Romero's denial or contradict Ms. Padilla's account. After evaluating the directness and sincerity of the three accounts, I accept Ms. Padilla's testimony.

the Ruidoso store, Ms. Padilla complained to him about not receiving either vacation pay or fulltime status. Mr. Lawrence told her he would check into it, but everything was on hold because of the Union.[18]

On May 6, Ms. Padilla missed work because of a family emergency. According to Ms. Padilla, the following day Mr. Romero told her that in future she would have to provide a two-week notice before any absence. Mr. Romero denied requiring Ms. Padilla to give two-weeks notice before missing work.[19]

D. Employee Disaffection with the Union and the Respondent's Withdrawal of Recognition

In the months following certification, the following employees reported to Greg Frazier (Mr. Frazier), secretary-treasurer of the Union, that because of the Union the Respondent was refusing to grant wage increases or was changing other conditions of employment: Fred Hall, who also expressed anger at the Union; Mr. Negrete, who raised the issue during a union meeting; Ms. Padilla, who was angry with the Union because her hours had been reduced and she had not been given vacation pay; Ms. Meredith, who said she had been refused a change to fulltime status because everything was on hold; Leah Harris, who said she was leaving the Respondent's employ because everything was taking too long; and Aimee Noel who wanted the Union to strike to force the Respondent to give wage increases. During the post-certification period, the Union held three or four meetings of the Respondent's employees with steadily decreasing attendance.

During September, Judy Kendall (Ms. Kendall), video, customer service, and office clerk for the Respondent, contacted three of the Respondent's stores, asking about their pay raises and benefits. Upon learning that each store had a pay scale, she contacted the Board and inquired how to discontinue union representation at the company. Thereafter, she drafted a handwritten, undated document headed "Please sign this pitition [sic] to stop Union Local 1564" (the Disaffection Petition) and circulated it among employees. According to Ms. Kendall, she told each solicited employee that all the Respondent's other stores had a pay raise scale. She said she had spoken to the Board, and the only way for employees to receive similar benefits was to stop the Union.

Eight of the Disaffection Petition signers testified as follows: Julean Rushing and Sandra Garcia testified, essentially, that Ms. Kendall told them the purpose of the petition was to keep the Union out, as well as to get a pay raise. Regina Redfearn, Edgar Ulrich, and Steve Day testified, essentially, that Ms. Kendall told them the purpose of the petition was to get rid of the Union. Mr. Blea, Joanne Otero (Ms. Otero), and Duane Franco (Mr. Franco) testified that Ms. Kendall told them the only purpose of the petition was to obtain pay raises. Mr. Blea whose signature is seventh on the Disaffection Petition and Mr. Franco, whose signature is ninth, further testified that when Ms. Kendall proffered the petition to them, no heading existed on the document. As noted above, Mr. Blea was not a reliable witness. As for Mr. Franco's testimony,

[18] Mr. Lawrence agreed he spoke to Ms. Padilla in January. Although he did not recount their conversation, he denied talking to her about the Union. In its post-hearing brief, the Respondent states its position that it was forbidden from making changes to the status quo after the representation petition was filed. As Mr. Lawrence's nonspecific denial prevents me from fully assessing his version of his and Ms. Padilla's conversation, and as the statement Ms. Padilla charges him with is consistent with the Respondent's position, I credit her account.

[19] I found Ms. Padilla to be forthright and sincere, and I credit her testimony in this regard.

witnesses who signed before he did recalled seeing the heading,[20] and examination of the original Disaffection Petition showed the "J" in the first signature to have been written over a letter in the heading, indicating that the first signature was appended after the heading was written. Consequently, I do not credit Mr. Blea or Mr. Franco's testimony regarding the Disaffection Petition. As for Ms. Otero's testimony, both Ms. Kendall and Ms. Otero were candid and forthright in recounting, respectively, the former's circulation and the latter's reception of the Disaffection Petition. I find, therefore, that although Ms. Kendall informed all solicited employees that the purpose of the petition was to stop or get rid of the Union as well as to get a raise, Ms. Otero, in the press of her busy day, did not take time to read the heading on the petition and heard only information about a possible raise.

After Ms. Kendall had garnered 26 signatures, she gave the Disaffection Petition to Mr. Crumpton, who said he would take care of the matter. Following Mr. Crumpton's acceptance of the Disaffection Petition, the Respondent, by letter dated September 20, withdrew recognition of the Union and thereafter had no contact with the Union regarding terms and conditions of unit employees' employment.

On October 16, the Respondent held three separate meetings of unit employees at its Ruidoso store, two of which were conducted by Mr. Lawrence and the last of which was conducted by Mr. Crumpton. Ms. Otero testified that in the meeting she attended, Mr. Lawrence said employees had voted the Union out by signing the Disaffection Petition although "there might be some people that said they didn't know what they were signing." Ms. Garcia testified that in the meeting she attended, Mr. Crumpton or Mr. Romero said that "a lot of people signed [the petition] and didn't know what they were signing."[21] In each respective meeting, Mr. Lawrence and Mr. Crumpton informed employees that based on the Disaffection Petition the Respondent would no longer bargain with the Union and on December 1 would implement the employee evaluation and compensation program that other stores in the Respondent's system enjoyed. Further, Mr. Lawrence and Mr. Crumpton told the employees that the Respondent planned to regularly review employees' hours to determine qualification for fulltime status.

E. Post-Complaint Employee Interviews

During the first week of November, Mr. Grubb met with various employees in preparation for the upcoming unfair labor practice hearing. Each interviewed employee signed an "Assurances" statement to the effect that the meeting was voluntary, that the employee could terminate the interview at any time, that the employee did not have to answer any questions, and that no reprisals would result. Mr. Grubb asked Edgar Ulrich, inter alia, if he had attended any union meetings.

[20] Steve Day and Regina Redfearn, numbers 2 and 5 respectively on the Disaffection Petition, credibly recalled seeing the heading.

[21] I cannot accept Ms. Garcia's testimony in this regard. It is inherently implausible that either Mr. Crumpton or Mr. Romero would inform employees that the Respondent would no longer bargain with the Union based on the Disaffection Petition while at the same time admitting that its signators did not know what they were signing.

V. Discussion

A. Positions of the Parties

The General Counsel's theory of the case, based *Master Slack Corp.*,[22] is that, following certification of the Union, the Respondent engaged in a course of unfair labor practices that resulted in loss of employee support for the Union and consequent withdrawal of recognition by the Respondent.

The Respondent contends that no unfair labor practices occurred, or, assuming they did, they were not the proximate cause of employee dissatisfaction with the Union, and that it lawfully withdrew recognition of the Union based on an uncoerced and clearly demonstrated disaffection of the majority of its unit employees.

B. Alleged Unfair Labor Practices

1. Alleged Threats and Promises

The Complaint alleges that during the period of November 2005 through June, supervisors of Respondent made the following threats or promises: threat to withhold fulltime status or wage increases, threat of loss of vacation pay, threat to issue written warnings, threat to forestall acquiring new equipment, threat that the Union would cease to be employees' representative, and promise to grant fulltime status if employees decertified the Union.

In September 2005, Mr. Romero told Ms. Padilla that because of "this union stuff" her hours would be reduced to prevent her attaining fulltime status until things were settled. The evidence shows that, albeit somewhat haphazardly applied, the Respondent had a practice of converting part-time employees to fulltime status when their work hours averaged over 32 hours a week during a 90-day period. Mr. Romero's statements to Ms. Padilla threatened that any transition to fulltime status would be hindered because of the Union, which statements could reasonably be expected to interfere with, restrain, and coerce employee support of the Union. See *Jensen Enterprises, Inc.*, 339 NLRB 877 (2003).[23]

In January, in separate conversations, Mr. Perkins, Mr. Romero, and Mr. Lawrence told Ms. Padilla (still on part-time status) that promised vacation pay for an absence in December would not be forthcoming because of the Union. Although the evidence does not establish that the Respondent had any past practice of granting vacation pay to part-time employees, an employer violates Section 8(a)(1) of the Act by attributing its refusal to implement a promised benefit to the representational presence of the Union. See *Invista,* 346 NLRB No. 107, slip op. 3 (2006).

When the Respondent hired Mr. Blea in March 2005, Mr. Romero told him he would receive a raise after 90 days. After the Union was certified, Mr. Romero told Mr. Blea that he could not grant the raise because of the Union, clearly demonstrating animus.

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[22] 271 NLRB 78 (1984).

[23] The Complaint alleges that in and after November 15, 2005 through June, the Respondent threatened to withhold converting employees to fulltime status because of the union. This interchange between Mr. Romero and Ms. Padilla occurred in September 2005 and is clearly outside the 10(b) period. However, it demonstrates animus as well as showing the extent of the Respondent's attributing changed conditions to the Union.

On various occasions within the 10(b) period, Mr. Romero and/or Mr. Perkins told Ms. Saenz, Mr. Negrete, and Mr. Elisarras, each of whom had been promoted to higher paying positions, and Ms. Harris, who requested a raise, that wages were frozen because of the Union. Informing employees that they cannot receive wage increases because of the Union or that wages are frozen during negotiations unlawfully imparts to employees the message that their wages are endangered because they have selected the Union as their collective bargaining representative. *Federated Logistics and Operations,* 340 NLRB 255 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005); *Jensen Enterprises, Inc.,* at 877. Accordingly, by telling employees their wages were frozen because of the Union, the Respondent violated Section 8(a)(1) of the Act.

In May or June, Mr. Romero told Ms. Meredith that her promised transition from part-time to fulltime status could not be effected until after the Union left, at which time everything could return to normal. Mr. Romero's statement amounted to a threat to deprive employees of previously available benefits because they were represented by the Union and violated Section 8(a)(1) of the Act. See *Jensen Enterprises, Inc.,* at 878.

In March, Ms. Harris overheard Mr. Perkins tell someone that when all the "union crap" was over the store might be able to get a needed piece of power equipment. Counsel for the General Counsel contends the statement constituted a threat to forestall acquiring new equipment because employees had selected the Union, citing *The Kroger Co.,* 311 NLRB 1187 (1993). In the Kroger case, the employer, in violation of Section 8(a)(1) of the Act, told employees that plans to build a new freezer facility had been put on hold because of union activity. The instant situation is significantly different. Mr. Perkins' comment could only reasonably have been perceived as idle speculation about whether and when Respondent might replace a piece of equipment and could not objectively be viewed as threatening or coercive. I shall, therefore, dismiss this allegation of the Complaint.

As noted above, I have credited Mr. Crumpton's denial that he told Ms. Saenz there was a pay freeze. Accordingly, I shall dismiss the Complaint allegation relating to that alleged conversation. The General Counsel presented no evidence regarding complaint allegations that Respondent threatened, in March, to issue written warnings, threatened, on May 31, that the Union would cease to be the employees' representative, and promised, on May 31, to grant fulltime status if employees decertified the Union. I shall, therefore, also dismiss those allegations.

The General Counsel amended the Complaint at the hearing to allege that Mr. Grubb unlawfully interrogated employees. Counsel for the General Counsel concedes that when Mr. Grubb met with employees on November 7 in preparation for the upcoming unfair labor practice hearing, he gave them the requisite *Johnnie's Poultry*[24] assurances. Counsel for the General Counsel argues, however, that Mr. Grubb overstepped the boundaries of those safeguards when he asked Mr. Ulrich about his union activities. Counsel for the General Counsel does not specify which of Mr. Grubb's questions were allegedly unlawful but presumably Mr. Grubb's asking whether Mr. Ulrich had attended any union meetings qualifies. Questions asked in *Johnnie's Poultry* circumstances must have a legitimate purpose and not otherwise interfere with an employee's statutory rights. Inasmuch as the General Counsel propounded a *Master Slack* theory of unlawful withdrawal of recognition, employee attendance

[24] 145 NLRB 770 (1964), enf. Den. 344 F2d 617 (8th Cir. 1965).

or nonattendance at union meetings has at least some relevance to the issues.[25] Mr. Grubb's question about union meeting attendance, by itself, did not constitute a coercive attempt to elicit information about Mr. Ulrich or other employees' union sentiments. I find that Mr. Grubb did not overstep the *Johnnie's Poultry* boundaries, and accordingly I shall dismiss this allegation of the complaint.

2. Alleged Violations of 8(a)(3)

The Complaint alleges that in 2005, the Respondent discriminatorily withheld wage increases from employees Ms. Saenz, Mr. Negrete, and Mr. Elisarras and in 2006 from Mr. Blea. In November or December 2005, Ms. Saenz was promoted to the position of checker, and in December 2005, Mr. Negrete and Mr. Elisarras were promoted to the position of stocker. Under the Respondent's usual practice, the four employees would have received pay increases consequent to their promotions. Mr. Negrete and Mr. Elisarras received no pay increases, and Ms. Saenz' increase was delayed for seven months. When Mr. Negrete and Mr. Elisarras asked Mr. Romero and then Mr. Perkins for an explanation, the two supervisors on several occasions told them, essentially, that wages were frozen until matters were resolved with the Union. When Ms. Saenz asked for an explanation, Mr. Romero told her that a wage freeze existed because of the "other," meaning the Union, and that he could look into the matter after "the other." In June, when Mr. Blea was promoted to a stocker position, the Respondent delayed his attendant wage increase for two to three weeks. Although there is no evidence the Respondent expressly linked the delay to the Union, it is reasonable to infer, in the absence of any explanation and given the abnormality of the delay, that it was a result of the Respondent's wage freeze.

When an employer premises withholding wage increases on the Union's participation in collective bargaining, the withholding constitutes "discrimination in regard to…[a] term or condition of employment…" and perforce has the effect of "discourag[ing] membership in [a] labor organization…"[26] In these circumstances, withholding wage increases violates Section 8(a)(3) of the Act. See *SNE Enterprises, Inc*., 347 NLRB No. 43 (2006). Accordingly, the Respondent's withholding of promotional wage increases due Mr. Negrete and Mr. Elisarras, and its delay of promotional wage increases to Ms. Saenz and Mr. Blea violated Section 8(a)(3) and (1) of the Act.[27]

The Complaint alleges that since December 2005, the Respondent has discriminatorily withheld vacation pay from Ms. Padilla. In December 2005, Mr. Romero reneged on a promise to Ms. Padilla to grant her paid time off, telling her that because of the Union, everything was on hold. I find that the withholding of any benefit, even one discretionally bestowed, because of ongoing collective bargaining negotiations, has the effect of discouraging membership in the Union and violates Section 8(a)(3) and (1) of the Act.

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[25] In fact, Counsel for the General Counsel introduced evidence of diminished attendance at union meetings to support his argument that the Respondent's conduct vitiated employee support for the Union.

[26] Section 8(a)(3) of the Act.

[27] The Respondent contends that its subsequent payment to Ms. Saenz of her withheld pay increase and concurrent apology render the allegation moot. The alleged conduct is neither *de minimus* nor isolated, and the compensation and apology do not dispel the restraining and coercive effects of the unlawful conduct on employee rights. See *In Re Golub Corp.,* 338 NLRB 515, 516 (2002).

The Complaint alleges that on May 20, Respondent imposed more onerous sick leave reporting requirements on Ms. Padilla in violation of Section 8(a)(3) of the Act. In May, Mr. Romero told Ms. Padilla that she would thereafter have to provide the Respondent with a two-week notice prior to any absence from work. Although Mr. Romero's directive may have been unwarranted and intemperate, there is no evidence that antiunion considerations prompted it. Accordingly, I shall dismiss that allegation of the Complaint.[28]

3. Alleged Violations of 8(a)(5)

The Complaint alleges that the Respondent engaged in certain unilateral conduct in violation of Section 8(a)(5) of the Act: (1) beginning in November 2005 the Respondent ceased providing its employees with commensurate wage increases upon promotion to higher level job classifications; (2) on September 20, the Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of its unit employees; (3) on October 16, the Respondent announced it would provide employees with cost-of-living adjustment pay increases effective December 1 and would convert certain of its employees to full-time status upon completion of a review.

When employees are represented by a labor organization, their employer may not unilaterally change any of their terms and conditions of employment. See *NLRB v. Katz,* 369 U.S. 736, 747 (1962). The employer has a duty not only to maintain what it has already given its employees, "but also to implement benefits that have become conditions of employment by virtue of prior commitment or practice." *Jensen Enterprises, Inc.,* at 877, citing *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983). An employer may not unilaterally discontinue a practice of granting wage increases during negotiations even if an employer exercises discretion in setting the amount of such raises. *Five Star Manufacturing, Inc.,* 348 NLRB No. 94, fn. 4 (2006); *Jensen Enterprises, Inc.,* at 877-78. The Board has stated, "What is required in such circumstances 'is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.'" *Jensen Enterprises, Inc.,* at 878, citing *Oneita Knitting Mills,* 205 NLRB 500 fn. 1 (1973). Further, an employer may neither announce nor implement pay or benefit increases without first notifying the union that represents its employees and offering it an opportunity to bargain over any prospective change. *Highlands Hospital Corporation,* 347 NLRB No. 120 (2006); *Caldwell Manufacturing Company,* 346 NLRB No. 100 (2006); *Kurdziel Iron of Wauseon, Inc.,* 327 NLRB 155 (1998).

In the months following the September 2005 certification of the Union, Respondent discontinued its practice of granting commensurate wage increases to its employees who were promoted into higher-paying job classifications. Respondent did so without first notifying the Union and offering it an opportunity to bargain over the cessation and thereby unilaterally changed terms and conditions of unit employment in violation of Section 8(a)(5) of the Act.

On September 20, the Respondent withdrew recognition of the Union based on the Union's loss of majority status as evidenced by the Disaffection Petition. On October 16, following its withdrawal of recognition from the Union, the Respondent informed employees that

[28] The General Counsel did not allege that Mr. Romero's imposition of a two-week notice requirement violated Section 8(a)(5) of the Act.

on December 1 it would implement the employee compensation program previously instituted in its other stores and convert qualifying employees to fulltime status upon completion of a review. The legality or illegality of this conduct depends on the integrity of the Disaffection Petition.

The General Counsel contends that Respondent could not lawfully rely upon the Disaffection Petition to withdraw recognition on two grounds: (1) employees were intentionally misled regarding the purpose of the petition, and (2) the Respondent's unfair labor practices created employee disaffection and tainted the Disaffection Petition, precluding the Respondent's reliance upon it, as "[a]n employer may not avoid its duty to bargain if its own unfair labor practices caused the union's loss of majority support." *Goya Foods of Florida,* 347 NLRB No. 103, slip op. 4 (2006) and cases cited therein.

As to the first ground, Counsel for the General Counsel argues that the wording on the Disaffection Petition was ambiguous at best and that employees were misled regarding its purpose. The wording read, "Please sign this pitition [sic] to stop Union Local 1564," a purpose that Ms. Kendall echoed in circulating the petition. The only reasonable and logical conclusion to be drawn from the wording and Ms. Kendall's oral presentation was that the Disaffection Petition sought to bring an end to union representation, which conclusion five of eight testifying signers reached, recalling that Ms. Kendall told them the purpose of the petition was, essentially, to get rid of the Union. I find the wording on the petition demonstrated a clear intention to end representation by the Union, and Ms. Kendall's explanation of its purpose further alerted employees to its objective. Therefore, nothing in the composition or circulation of the Disaffection Petition precluded the Respondent from relying on it.[29]

As to the second ground, the Board has set forth a four-part test to determine whether a causal relationship exists between unfair labor practices and employee disaffection, thereby tainting or precluding a lawful withdrawal of recognition: (1) [the length of time between the unfair labor practice and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Master Slack Corp.*, supra at 84.

Proximity in time. Commencing not long after the Union's certification, the Respondent withheld fulltime status and promotional wage increases from qualifying employees. The Respondent also attributed its failure to grant fulltime status and promised vacation pay and/or to consider otherwise warranted wage increases to the presence of the Union as the employees' collective-bargaining representative. The Respondent's conduct continued into May or June 2006, spanning the period of collective bargaining meetings between the parties. Thus, the Respondent's unremedied unfair labor practices, coupled with their ongoing consequences, had a significant temporal nexus with the Disaffection Petition.

Nature of the unfair labor practices, possibility of a detrimental or lasting effect on employees, and tendency to cause disaffection from the Union. Unilateral action is particularly destructive of employee confidence in a bargaining representative. As the Board stated in *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001), "Where unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of

[29] I find it unnecessary to determine whether Ms. Otero's signature cannot be relied upon as an indication of loss of majority support; even without her participation, a clear majority of unit employees signified their rejection of union representation.

a detrimental or long-lasting effect on employee support for the union is clear." The inherent harm to union support must surely be compounded when unilateral action focuses on matters of particular concern to employees. Prior to the September 2005 representation election, the Respondent had identified employee discontent with its failure to consistently transition qualifying employees into fulltime status and grant promotional wage increases. Indeed, Mr. Stewart had been fired because of his inconsistent application of the Respondent's practices in this regard. Within weeks of the Board's certification of the Union, the Respondent unilaterally froze benefits in those areas of greatest consequence to its employees and attributed its unlawful conduct to employees having selected the Union as their representative.

Concurrent with its unlawful conduct, the Respondent maintained an adamant bargaining position that precluded wage increases for unit employees. At the same time, the Respondent instituted a procedure of regular, systematic increases at its other stores. Although no one contends that the Respondent's bargaining posture or its institution of a new wage increase system for its nonunionized employees was unlawful, the Respondent's unlawful conduct in such circumstances must have created a logical inference that with the Union gone, the freeze on wages and benefits would be lifted and benefits extended to other stores would be attained. Indeed, Ms. Kendall promoted that inference while soliciting signatures for the Disaffection Petition by telling employees that the only way for them to receive benefits available at other stores was to get rid of the Union, and a number of employees signed the Disaffection Petition with the hope of getting raises. It is clear that the Respondent's widespread and ongoing unfair labor practices reasonably tended to coerce employees into abandoning support for the Union.

The effect of the unlawful conduct on employees' morale, organizational activities, and membership in the Union. During the period in which Respondent attributed the freeze in wages and benefits to the Union, employee support for the Union flagged. Six unit employees complained to the Union about the Respondent's refusal to grant otherwise merited wage increases and/or benefits, and Mr. Negrete raised the same issues during a union meeting with employees. Employees also expressed dissatisfaction with the Union, and attendance at union meetings steadily decreased. In these circumstances, there is no validity to the Respondent's argument that union ineptitude, and not the Respondent's conduct, created employee disaffection. Rather, the evidence demonstrates an increasing deterioration in the relationship between unit employees and the Union, which can reasonably be linked to the Respondent's unfair labor practices. See *Broadway Volkswagen,* 342 NLRB 1244, 1247 (2004) (unilateral changes involving wage increases and promotions, particularly where the union is bargaining for its first contract, can have a lasting effect on employee support for the union.)

Inasmuch as the Respondent's substantial and ongoing unfair labor practices tainted the Disaffection Petition, the petition cannot provide a lawful basis for withdrawal of recognition. *Goya Foods of Florida,* supra; *Priority One Services, Inc.,* 331 NLRB 1527 (2000); *Lee Lumber & Building Material Corp.,* 322 NLRB 175 (1996) *(Lee Lumber II)*, enfd. In relevant part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997); *Powell Electrical Mfg. Co.,* 287 NLRB 969 (1987) enfd. 906 F.2d 1007, 1014 (5th Cir. 1990).[30]

[30] *Renal Care of Buffalo, Inc.,* 347 NLRB No. 112 (2006), cited by the Respondent, is inapposite. In that case, the Board agreed with the ALJ that the unfair labor practice alleged to have tainted the withdrawal petition therein did not occur, whereas significant and coercive unfair labor practices have been identified herein.

Accordingly, I find that the Respondent violated Section 8(a)(5) of the Act by the following conduct: (1) curtailing its practice of providing its employees with commensurate wage increases upon promotion to higher level job classifications; (2) withdrawing recognition of the Union as the exclusive collective-bargaining representative of its unit employees; and (3) announcing its plans to provide employees with a new wage increase system effective December 1 and to transition certain of its employees to full-time status upon completion of a review.[31]

Conclusions of Law

1. Respondent, MAL Enterprises, Inc., d/b/a Lawrence Brothers, is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. On September 12, 2005, the Union was certified by the Board as the collective-bargaining representative in the following unit of Respondent's employees, which is an appropriate unit for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

   > All employees employed by the Respondent at [the Ruidoso store], excluding the Store Director, Assistant Store Directors, Bakery/Deli Manager, Produce Manager, Market Manager, guards, and supervisors as defined in the Act.

4. The Union has been at all times since September 12, 2005 the exclusive bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Since on and after November 15, 2005, the Respondent has violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to provide its employees with commensurate wage increases upon promotion to higher level job classifications.
6. Since September 20, 2006, the Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union concerning the terms and conditions of employment of employees in the above-described appropriate unit.
7. On October 16, 2006, the Respondent violated Section 8(a)(5) and (1) of the Act by announcing to its employees in the above-described appropriate unit that effective December 1, 2006, it would institute a new wage increase system and transition qualifying employees to fulltime status upon completion of a review.
8. Respondent violated Section 8(a)(3) and (1) of the Act by withholding wage increases from employees Tracy Saenz, Carlos Negrete, Richie Elisarras, and Justin Blea because employees selected the Union as their collective-bargaining representative.
9. Respondent violated Section 8(a)(3) and (1) of the Act by withholding promised vacation pay from employee Linda Padilla because employees selected the Union as their collective-bargaining representative.
10. Respondent violated Section 8(a)(1) of the Act by threatening that any transition to fulltime status would be hindered because of the Union.
11. Respondent violated Section 8(a)(1) of the Act by attributing its refusal to implement a promised benefit of vacation pay to representation by the Union.

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[31] The complaint does not allege that, and I make no findings whether the Respondent implemented the proposed changes on December 1, as announced. The announcement violates Section 8(a)(5) of the Act irrespective of implementation. *ABC Automotive Products Corp.,* 307 NLRB 248 (1992).

12. Respondent violated Section 8(a)(1) of the Act by Informing employees that wages were frozen during negotiations, thereby threatening wage endangerment because employees had selected the Union as their collective-bargaining representative.
13. Respondent violated Section 8(a)(1) of the Act by threatening to deprive employees of previously available benefits because they were represented by the Union.
14. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent bargain in good faith with the Union as the exclusive collective bargaining representative of the above-described unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document. If requested by the Union, the Respondent must rescind any unilateral changes in benefits and conditions of employment implemented since November 15, 2005, including any unilateral changes in benefits and conditions of employment implemented since the withdrawal of recognition on September 20, 2006. Nothing in the recommended Order, however, should be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union. See *Taft Broadcasting Co.,* 264 NLRB 185 fn. 6 (1982).

I shall also recommend that the Respondent make whole those employees who suffered losses due to the Respondent's unilateral changes and/or discriminatory withholding of wage increases and vacation pay for any loss of earnings or other benefits they may have suffered, with interest, as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, MAL Enterprises, Inc., d/b/a Lawrence Brothers, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food and Commercial Workers Union, Local 1564 (the Union) by unilaterally ceasing to provide its employees in the following appropriate unit (the unit) with commensurate wage increases upon promotion to higher level job classifications:

[32] 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.

All employees employed by the Respondent at [the Ruidoso facility], excluding the Store Director, Assistant Store Directors, Bakery/Deli Manager, Produce Manager, Market Manager, guards, and supervisors as defined in the Act.

(b) Withdrawing recognition from and refusing to bargain with the Union concerning the terms and conditions of employment of employees in the unit.

(c) Announcing to its employees in the unit prospective changes in its wage increase system and prospective transition of qualifying employees to fulltime status upon completion of a review without first notifying and bargaining in good faith with the Union.

(d) Withholding wage increases from employees because employees selected the Union as their collective-bargaining representative.

(e) Withholding vacation pay from employees because employees selected the Union as their collective-bargaining representative.

(f) Threatening that any transition to fulltime status would be hindered because of the Union.

(g) Attributing its refusal to implement a promised benefit of vacation pay to the representational presence of the Union.

(h) Informing employees that wages are frozen during negotiations, thereby threatening wage endangerment because employees selected the Union as their collective-bargaining representative.

(i) Threatening to deprive employees of previously available benefits because they are represented by the Union.

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

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Make affected employees, including Tracy Saenz, Carlos Negrete, Richie Elisarras, and Justin Blea, whole for any losses they may have suffered as a result of the Respondent's unlawful unilateral changes, with interest.

(c) Make Tracy Saenz, Carlos Negrete, Richie Elisarras, Justin Blea and Linda Padilla, whole for any losses they may have suffered as a result of the unlawful discrimination against them, with interest.[33]

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[33] The question of whether Respondent has already made Tracy Saenz and Justin Blea whole is left to the compliance stage of these proceedings.

(e) Within 14 days after service by the Region, post at its Ruidoso, New Mexico store copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 28 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 Respondent at any time since November 15, 2005.[35]

(f) 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 Respondent has taken to comply.

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

Dated: Washington, D.C., February 15, 2007.

Lana H. Parke
Administrative Law Judge

[34] 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."

[35] Counsel for the General Counsel requests that a high-ranking official of Respondent or an agent of the Board read the notice to assembled employees at the Ruidoso facility. As the General Counsel has not shown that the Board's traditional remedies are inadequate, I deny the request. See *Chinese Daily News*, 346 NLRB No. 81, slip op. 4 (2006).

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT withdraw recognition from or refuse to bargain in good faith with United Food and Commercial Workers Union, Local 1564 (the Union) over the terms and conditions of employment of employees in the following unit (the bargaining unit):

All employees employed by the Respondent at [the Ruidoso store], excluding the Store Director, Assistant Store Directors, Bakery/Deli Manager, Produce Manager, Market Manager, guards, and supervisors as defined in the Act.

WE WILL NOT make changes to the terms and conditions of your employment without prior notice to the Union in order to permit the Union to bargain with us about any changes, including changes to our wage system and/or to the way we change your employment status from part-time to fulltime.
WE WILL NOT announce to our employees changes in our wage system and/or to the way we change your employment status from part-time to fulltime without first notifying and bargaining in good faith with the Union.
WE WILL NOT withhold wage increases from employees because our employees have selected the Union, or any other collective-bargaining representative, to represent them.
WE WILL NOT withhold promised vacation pay from employees because our employees have selected the Union, or any other collective-bargaining representative, to represent them.
WE WILL NOT threaten that any transition to fulltime status will be hindered because our employees have selected the Union, or any other collective-bargaining representative, to represent them.
WE WILL NOT tell any employee that we will not grant vacation pay because our employees have selected the Union, or any other collective-bargaining representative, to represent them.
WE WILL NOT inform employees that wages are frozen during negotiations with the Union.
WE WILL NOT refuse to transition employees to fulltime status because our employees have selected the Union, or any other collective-bargaining representative to represent them.
WE WILL NOT In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.
WE WILL, insofar as we have not already done so, make employees whole, with interest, for any losses they may have suffered as a result of changes we made in our wage system or to the way we change your employment status from part-time to fulltime.
WE WILL, insofar as we have not already done so, make Tracy Saenz, Carlos Negrete, Richie Elisarras, Justin Blea and Linda Padilla whole for any losses they may have suffered as a result of our unlawful discrimination against them, with interest.

MAL Enterprises, Inc., d/b/a Lawrence Brothers

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.