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**Stern Produce Company and United Food and Commercial Workers, Local 99.** Cases 28–CA–282577 and 28–CA–285540

April 11, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS WILCOX  
AND PROUTY

On June 22, 2022, Administrative Law Judge Dickie Montemayor issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>2</sup>

I. BACKGROUND

In about 2015, the Union conducted an organizing campaign among drivers and warehouse employees at the Respondent’s wholesale distribution and delivery facility in Phoenix, Arizona. A representation election was scheduled for late 2015, but was postponed after the Respondent was alleged to have committed numerous unfair labor practices. The two employees involved in the present case—Jose Ruiz and Uvaldo Ponce—supported the Union’s organizing effort, and Ponce has been a union committee leader since 2015. Both Ruiz and Ponce testified at the hearing arising out of the 2015 charges, and the Board issued a decision in 2019 finding that the Respondent engaged in numerous violations of Section 8(a)(1) of the Act. As relevant to this case, the Board found that the Respondent unlawfully interrogated Ruiz and created the impression that the union activities

<sup>1</sup> The General Counsel has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> We shall amend the judge’s conclusions of law and provide for a remedy, Order, and notice consistent with our findings herein and the Board’s standard remedial language.

of employees, including Ruiz and Ponce, were under surveillance.<sup>3</sup>

In 2020, Ruiz and Ponce were the subject of additional unfair labor practice charges challenging the Respondent’s failure to reinstate them, and others, after they were laid off early in the COVID-19 pandemic. In January 2021,<sup>4</sup> the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1) by selectively recalling laid-off employees in a manner calculated to dilute the Union’s strength in a Board-conducted election and violated Section 8(a)(3) and (1) by refusing to recall Ruiz, Ponce, and several of their coworkers from layoff to discourage their union membership. The Respondent subsequently entered into a formal settlement agreement. In June, pursuant to a Board Order approving the settlement (later enforced by the United States Court of Appeals for the Ninth Circuit), the Respondent reinstated Ruiz, Ponce, and their coworkers, and provided backpay to the employees.<sup>5</sup>

In the months after the Respondent reinstated Ruiz and Ponce, the Union filed charges asserting new unlawful treatment of both employees by the Respondent that is the subject of the present case. Based on these charges, the complaint in the instant proceeding alleges that the Respondent violated Section 8(a)(1) by creating an impression of surveillance in accessing the inside-facing camera in the cab of Ruiz’ truck during his lunch break and violated Section 8(a)(1), (3), and (4) by issuing a letter of warning to Ponce for his first infraction of using inappropriate language in the workplace. The judge dismissed both allegations. For the reasons discussed below, we find merit in the General Counsel’s exceptions to the dismissal of these allegations and find, contrary to the judge, that the Respondent violated the Act as alleged.

II. IMPRESSION OF SURVEILLANCE

In 2019, the Respondent installed in its fleet of delivery trucks a telematic system, including dual cameras with an outside view of the street and an inside view of the cab. The cameras serve various functions, including protecting the public from unsafe driving and protecting drivers from liability for accidents in which they are not at fault. The system can issue an alert if a driver is in an unauthorized residential area, stops for an extended peri-

<sup>3</sup> *Stern Produce Co.*, 368 NLRB No. 31, slip op. at 2, 21, 23, and 25 (2019). As to the impression of surveillance violation, the Board found that Respondent had assembled small group meetings of employees where the unfair labor practice charges were read verbatim and Ruiz and Ponce were identified as among the employees who filed the charges. *Id.* at 21, 25.

<sup>4</sup> Hereafter all dates are in 2021 unless otherwise indicated.

<sup>5</sup> See Case 28–CA–258619.

od, or engages in a harsh braking event. While footage from the truck cameras is accessible to the Respondent in the event of an accident, the Respondent does not routinely view camera footage.

Jose Ruiz had worked as a driver for Respondent over a period of 9 years. He was a union supporter who participated in the NLRB proceedings resulting in the Board's 2019 decision. Further, in June, Ruiz was paid backpay and reinstated pursuant to the 2021 settlement agreement of separate unfair labor practice charges. On July 13, only a few weeks after Ruiz was reinstated, he covered the inside-facing camera of his truck while eating lunch. Ruiz explained that he covered his camera because he viewed lunch as his own time and wanted privacy. Ruiz also testified that no one had ever previously told him he could not cover his inside-facing camera.

Soon after Ruiz covered his camera, he received a text from his supervisor, Transportation Manager Nick Barr, stating that "you cant [sic] cover the camera it's against company rules." Although Barr testified that he had never texted a driver about a camera being covered, a "screen shot" from Ruiz' phone demonstrated that Barr had sent the text to Ruiz. (GC Exh. 18.)<sup>6</sup> Barr further testified that he checked the truck cameras only when there was a safety issue, an accident, a harsh brake incident, or a stop in an unusual location for at least two hours. However, it is undisputed that none of those circumstances were present when Barr accessed Ruiz' camera and texted him. After receiving Barr's text, Ruiz has kept the inside-facing camera uncovered at all times.

The General Counsel alleged that under these circumstances, Barr's July 13 interaction with Ruiz unlawfully created the impression that Ruiz and any of his potential union activity was under surveillance. The judge, however, dismissed the allegation. He noted that Ruiz was "not engaged in any union activity in the cab of his truck" when Barr accessed his camera. Given the presence of the camera in Ruiz' truck, the judge found that Barr's accessing Ruiz' camera and telling him to uncover it was not "out of the ordinary." Thus, the judge concluded that Barr's conduct was nothing "other than 'mere observation' of activity of the changing workplace of a driver" that "did not create an unlawful impression of surveillance." As explained below, we disagree.

The Board's standard for determining whether an employer has unlawfully created an impression of surveillance is "whether, under all the circumstances, the em-

ployer's statements or other conduct would lead reasonable employees to assume that the employer has placed their union activities under surveillance." *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 4 (2018), enfd. 939 F.3d 798 (9th Cir. 2019). Under this standard, the Board has held that mere observation of open union or other protected activity on an employer's property does not necessarily create an impression that the employees' activities are under surveillance. See, e.g., *Fred'k Wallace & Son*, 331 NLRB 914, 915 (2000). However, it is well established that "an employer may not do something 'out of the ordinary' to give employees the impression that it is engaging in surveillance of their protected activities." *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007) (citation omitted).

Applying the above principles, the Board has consistently found that employers have created the impression of surveillance when they have departed from prior practice by physically following or otherwise changing how they observe prounion employees. For example, the Board found an impression of surveillance violation where supervisors followed prounion employees more frequently than in the past and joined them in locations that supervisors had not visited previously. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 501-504 (1995), enfd. in relevant part, 97 F.3d 65 (4th Cir. 1996). In addition, in *K-Mart Corp.*, 255 NLRB 922, 924 (1981), enfd. mem. 676 F.2d 710 (9th Cir. 1982), the Board held that a manager following prounion employees within the store would "convey to them the message that their activities were being watched." The Board also relied upon the respondent's failure to show "that it had engaged in similar conduct" previously. *Id.* Further, in *Stoughton Trailers, Inc.*, 234 NLRB 1203, 1205, 1207 (1978), the Board found that the respondent unlawfully created the "appearance" of surveilling a prounion employee, in part, because the plant manager went to the employee's work area to observe the employee more often and for longer periods than in the past.

Consistent with this precedent, we find that Barr's actions here constituted an unlawful impression of surveillance. Ruiz was an open union supporter and the Respondent had recently reinstated him pursuant to a settlement agreement based upon charges that the Respondent had unlawfully failed to recall Ruiz from layoff. Upon his reinstatement, the Respondent did not tell Ruiz not to cover the camera in his truck during break periods and Ruiz was not aware of any policy prohibiting employees

<sup>6</sup> After Exh. 18 was introduced into evidence without objection following voir dire from Respondent's counsel, the Respondent did not recall Barr as a witness to explain his previous denial of ever sending such a text.

from doing so.<sup>7</sup> Nevertheless, as the judge found, just weeks after Ruiz was reinstated, Barr accessed Ruiz' camera for no apparent reason and told Ruiz to uncover the camera. Barr testified that he only accessed truck cameras under specific circumstances, but it is undisputed that none of those circumstances was present when he accessed Ruiz' in-truck camera. Barr also testified that he had never before texted a driver about covering their truck's camera. Barr's testimony underscores how unusual it was for Barr to access Ruiz' camera and contact him about it, and it warrants a conclusion that Barr's observation of Ruiz was "out of the ordinary."

In these circumstances, Ruiz, an open union supporter who had a history of unlawful treatment by the Respondent directed at his protected activities, would reasonably have interpreted Barr's sudden and unusual interest in viewing camera footage from his inward-facing camera when he was stopped for lunch as an indication that the Respondent was surveilling Ruiz for any signs of union activity in violation of Section 8(a)(1).

In dismissing the allegation, the judge relied heavily on the absence of union activity by Ruiz in the cab of his truck at the time Barr accessed the camera. Unlike the judge, we do not view the fact that Barr did not actually observe Ruiz engaging in protected activity as dispositive. See *NCRNC, LLC d/a/a Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 7 (2022) ("the Board has found unlawful surveillance where there is no indication that union or protected activity was observed"). In addition, the judge's narrow focus does not take into account all the relevant circumstances, as the legal standard set forth in *Charter Communications*, above, requires. The record clearly demonstrates that the Respondent had ample evidence of Ruiz' union support and protected activities whether or not he was actively engaged in such activities at the time of Barr's text.<sup>8</sup>

<sup>7</sup> In this regard, Ruiz testified that he had never been told of a rule prohibiting employees from covering inward-facing cameras during their break periods and Barr testified that he had never contacted an employee about covering their in-truck camera. The Respondent's 2021 Driver Safety Manual does require that "[a]ll vehicle safety systems, telematics, and dash-cams must remain on at all times unless specifically authorized to turn them off or disconnect." (R. Exh. 8 at 10). But the manual does not address employees covering their cameras during break periods and there is no evidence or argument that Ruiz had turned off or disconnected the camera in violation of the manual's requirements.

<sup>8</sup> As noted above, in its 2019 decision, the Board found that the Respondent had unlawfully created the impression that the union activities of employees, including Ruiz, were under surveillance. *Supra* at 2 fn.3. The Board also found that the Respondent had unlawfully interrogated Ruiz about his union sympathies. *Id.* Thus, not only was Ruiz a witness in the proceeding resulting in unfair labor practice findings by the Board, but the Respondent's unfair labor practices had been directed, in part, against Ruiz. Moreover, the Respondent subsequently refused to

Thus, as explained, an employee in these circumstances would reasonably understand Barr's unusual behavior as creating an unlawful impression of surveillance.

Further, we disagree with the judge that Barr's actions were a mere observation that was not out of the ordinary. While the Respondent may have legitimate reasons for placing cameras in employees' trucks that allow for viewing footage of accidents, near-accidents, or driving in unauthorized areas, it cannot utilize the cameras in a manner that would indicate to the employees that their union or protected activities are under surveillance. See, e.g., *Charter Communications, LLC*, above. Here, the Respondent asserted no safety-related reason for accessing Ruiz' camera and made no showing that Barr's actions fit any established pattern of its monitoring drivers through their cameras. In these circumstances, we find that the judge erred in dismissing Barr's actions as a merely lawful and routine observation of Ruiz' work activities. On the facts of this case, the Respondent's "out of the ordinary" actions related to Ruiz' camera would lead a reasonable employee to assume that the Respondent was monitoring them for union activity and thus created an unlawful impression of surveillance. Based on the foregoing, we find, contrary to the judge, that the Respondent violated Section 8(a)(1) by creating an impression that employees' protected activities were under surveillance

### III. WRITTEN WARNING

A month after Barr texted Ruiz to uncover his camera, and less than 3 months after driver Ponce was reinstated, the Respondent issued Ponce a written warning. The disciplinary action was for statements that Ponce made in the workplace in early August to fellow driver Mohamad Chaykho after watching Chaykho and driver Joe Metzgar call each other "baby," and Metzgar blow Chaykho a kiss. Chaykho testified that he and Metzgar were playing around and joking. Ponce then said to Chaykho, "They kill people like [that] in your country." When Chaykho asked what Ponce meant, Ponce replied "gays." Chaykho then asked Ponce where he thought he was from, and Ponce answered Afghanistan or Iraq, which Chaykho replied was incorrect and then left the room.

After learning of this incident from supervisor Linda Sili, manager Barr asked each witness to it to provide a written statement about what had happened, which they all did. See Respondent Exhibits 5-6 (statements by Chaykho, Metzgar, Sili, and Ponce). Shortly thereafter,

recall Ruiz and other union supporters from layoff leading to a complaint issued by the General Counsel, and the Respondent settled that complaint by reinstating Ruiz and his fellow union supporters with backpay just weeks before the alleged creation of an impression of surveillance.

Barr, Respondent's owner Bill Stern, and acting human resources chief Patricia Helms met to decide how to discipline Ponce for his remarks. They decided upon a written warning, which was issued to Ponce at an August 31 meeting. The decisionmakers found that Ponce's remarks had violated the Respondent's policy prohibiting the "use of disparaging or abusive words or phrases, slurs [or] negative stereotyping" related to an employee's status protected by federal, state, or local laws. See Respondent Exhibit 1 at 45–47.

In considering Ponce's discipline, the judge applied *Wright Line*,<sup>9</sup> which is applicable to both Section 8(a)(3) and 8(a)(4) claims.<sup>10</sup> The judge found that the General Counsel failed to prove that the Respondent knew of union activity by Ponce or that the Respondent had animus against such activity. The judge posited that the evidence showed only that Ponce engaged in union activity in 2016 and that Ponce was a union committee leader at the time of his discipline, but did not establish that the Respondent was aware of any current union activity when it disciplined him. The judge further found no evidence to show that the Respondent had "any animus" that was causally connected to Ponce's prior union activity in 2016. Thus, the judge summarily found that there was insufficient evidence to prove that, in issuing the warning, the Respondent was "in any way motivated by [Ponce's] union activity or prior participation in Board processes." The judge concluded that the General Counsel failed to establish her initial burden under *Wright Line* and made no more than a vague reference to whether the Respondent met its *Wright Line* defense burden.

As explained below, we disagree with the judge and find that the General Counsel met her initial burden under *Wright Line* and that the Respondent failed to prove that it would have disciplined Ponce even absent his Union activity. Turning first to the General Counsel's ini-

tial *Wright Line* burden, there is no serious dispute that Ponce engaged in protected union and Board activities. As to the Respondent's knowledge of this activity, the record fully demonstrates that the General Counsel established this element as well. As the judge found, at the time of the hearing, Ponce had been "working to establish the Union at Respondent's facility for a period of 6 years." He had been an open union supporter and was specifically named in charges filed against the Respondent. In addition, Ponce testified at the hearing resulting in the Board's 2019 decision and, like Ruiz, the Respondent was found to have violated the Act by creating the impression that his union activities were under surveillance.<sup>11</sup>

In addition, Ponce participated in the more recent Board proceeding challenging the Respondent's failure to reinstate him and other union supporters. Indeed, the date of the Board's formal settlement and of Ponce's actual reinstatement was June 7, less than 3 months before Respondent disciplined him on August 31. It is undisputed that Respondent's owner Bill Stern and officials Patricia Helms and Nick Barr were all directly involved in the Ponce disciplinary decision and knew about the more recent settlement of unfair labor practice allegations leading to Ponce's reinstatement. Stern even testified that he could name all or most of the employees who had been reinstated under the Board settlement, and specifically mentioned "Uvaldo Ponce."<sup>12</sup> In finding a lack of employer knowledge, the judge erroneously disregarded the above evidence.

Turning to evidence of the Respondent's animus, we disagree with the judge's finding that the record lacked evidence to show the Respondent had "any animus that was in any way causally connected to [Ponce's] union activity." Animus against Ponce's union support and participation in Board proceedings is shown, in part, by the timing of his discipline within 3 months of being

<sup>9</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The judge also applied the Board's decision in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019). We decline the General Counsel's request to overrule *Tschiggfrie* in this case. In so doing, Chairman McFerran adheres to the views expressed in her concurrence in *Tschiggfrie* that the clarification of *Wright Line* principles in that case was unnecessary as the causal relationship "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." *Id.*, slip op. at 10. See, e.g., *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1 fn. 2 (2022). Member Wilcox notes her agreement with Chairman McFerran's concurrence in *Tschiggfrie*. See, e.g., *Gavilon Grain, LLC*, 371 NLRB No. 79, slip op. at 1 fn. 1 (2022).

<sup>10</sup> See, e.g., *Rockwell Mining, LLC*, 367 NLRB No. 39, slip op. at 1 fn. 1, 8–9 (2018); *Freightway Corp.*, 299 NLRB 531, 532 fn. 4 (1990).

<sup>11</sup> See *supra* at 2 fn. 3.

<sup>12</sup> These facts contradict the judge's view that a violation could be found only by interpreting the facts as the Respondent "lying in wait since 2016, to retaliate against Ponce by issuing him a mere warning."

The Respondent erroneously argues that the General Counsel failed to except to the judge's finding that Ponce's only protected activities consisted of his current position as the Union committee lead and his 5-year-old testimony in the prior Board proceeding. To the contrary, the General Counsel did except to "the ALJ's failure to find anti-Union animus in light of Respondent's history of extensive and serious unfair labor practices and the Board's Decision and Order in *Stern Produce Co. Inc.*, 368 NLRB No. 31 (2019), and the Board's Decision and Order, Case 28–CA–258619 (June 7, 2021)" and to "the ALJ's characterization that Respondent was unaware of Ponce's protected activity." (GC Exhs. Nos. 12 & 13.) Given these exceptions, we reject the Respondent's argument that Ponce's reinstatement under an unfair labor practice settlement is irrelevant.

reinstated.<sup>13</sup> See, e.g., *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2, 8, & 10 (2020) (the “few months” between a February protest and July 1 terminations of the pro-union protesters “provide[d] some evidence of a causal link between the employees’ union activities and their loss of employment”), enfd. 5 F.4th 759 (7th Cir. 2021); see also *Voith Industrial Services (II)*, 363 NLRB 1020, 1020 fn. 2 (2016) (finding 8(a)(4) violations based, in part, on employees’ testimony at a prior NLRB hearing that closed around 3 months before the disciplines and discharges at issue). We also find that the Respondent’s disparate treatment of Ponce in choosing a written warning as discipline for his first-time offense, discussed more fully below, lends additional support to the General Counsel’s showing of animus. See, e.g., *Shamrock Foods Co.*, 366 NLRB No. 107, slip op. at 1 fn. 1 (2018) (disparate disciplinary treatment of employee showed animus), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019). Finally, we find evidence of animus based on the “impression of surveillance” violation found above. See *Austal USA, LLC*, 356 NLRB 363, 364 (2010) (contemporaneous 8(a)(1) violations support a finding of animus).

We further find that the circumstances surrounding Ponce’s prior Section 7 activity illustrate the Respondent’s animus towards his protected activities.<sup>14</sup> In this regard, as noted above, the Respondent was found to have committed multiple serious unfair labor practices in response to the Union’s 2015–2016 organizing campaign, some of which included Ponce. These unfair labor practices included specifically creating the impression that Ponce’s activities were under surveillance and threatening that employees would be fined or jailed if they testified (which Ponce did) during the Board’s investigation of the charges.<sup>15</sup> In addition, Ponce was the

<sup>13</sup> The judge’s disregard of the relevance of the timing of Ponce’s discipline might have been affected by his mistake in finding that Ponce was reinstated on May 1, 2020, when in fact, Ponce was reinstated on June 7, 2021.

<sup>14</sup> We note more generally that the Respondent is a repeat violator of the Act, and that the violations found in the 2019 decision, which included threats to lock out employees in the event that they chose union representation, were deemed egregious enough to justify a both a notice reading and a broad cease-and-desist order. The Board also noted in that decision that Respondent’s president William Stern—who was directly involved in the discipline of Ponce in this case—was “personally and directly involved” in the misconduct. *Stern Produce Company, Inc.*, 368 NLRB No. 31, slip op. at 5.

<sup>15</sup> *Stern Produce*, supra, 368 NLRB No. 31, slip op. at 2, 21, 25, and 27. In finding that Ponce’s activities with the Board motivated the Respondent to discipline him, we acknowledge the importance of Sec. 8(a)(4) in protecting employees who make the decision to participate in Board proceedings. The Supreme Court has held that “Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting

subject of unfair labor practice charges alleging that in 2020 the Respondent unlawfully refused to recall him and his coworkers from layoff in order to discourage membership in the Union.<sup>16</sup> Those charges were not settled until his reinstatement approximately 2 months prior to the interaction for which he was given a written warning. Under the circumstances, we find that the Respondent’s prior treatment of Ponce’s protected activities warrants an inference that its actions against him in the instant proceeding were discriminatorily motivated.<sup>17</sup>

Having found that the General Counsel met her initial *Wright Line* burden, we next consider whether the Respondent met its defense burden by proving it would have issued the written warning to Ponce even absent his protected activities.<sup>18</sup> The Respondent asserts that it issued the warning to Ponce because of his offensive remarks to fellow driver Chaykho. The record establishes, however, that the Respondent’s actions in this regard were a departure from its prior disciplinary practices. Despite maintaining a progressive disciplinary policy, the Respondent’s written warning to Ponce is the only example in the record of an employee receiving a written warning for a first infraction involving offensive language.<sup>19</sup>

In this regard, the record demonstrates that at least two other employees in 2021 alone made offensive remarks to and about coworkers without receiving written warnings for their first offenses. In February, employee Roy Keto called coworker Ashley Tomassian “Betty big boobs” and whispered in her ear, “I’ve never seen you with cleavage before.” Keto received only a counseling for his comments, and not the more serious written warn-

them to the Board.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). The Court has also clarified that the use of the term “otherwise discriminate” in Sec. 8(a)(4) reveals . . . an intent on the part of Congress to afford broad rather than narrow protection to the employee.” *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

<sup>16</sup> *St. Mary’s Nursing Home*, 342 NLRB 979, 979–980 (2004) (finding animus based, in part, on evidence from settled unfair labor practice cases that involved a respondent’s actions outside of the Sec. 10(b) period).

<sup>17</sup> Member Wilcox agrees that the timing, disparate treatment, and circumstances surrounding Ponce’s prior Sec. 7 activity demonstrate the Respondent’s animus. She therefore finds it unnecessary to rely on the impression of surveillance finding as additional evidence of animus.

<sup>18</sup> Since the judge found that the General Counsel failed to establish her initial burden under *Wright Line*, he failed to meaningfully analyze whether the Respondent met its *Wright Line* defense burden of proving that it would have disciplined Ponce even absent his protected activities.

<sup>19</sup> The Respondent’s disciplinary forms indicate disciplinary steps beginning with “Counseling,” and followed by “Written Warning,” “Final Written Warning” and finally “Termination” as further explained in the Respondent’s handbook. While we recognize that the Respondent reserved the authority to depart from its system of progressive discipline, we note that Ponce’s written warning is the only such example.

ing issued to Ponce.<sup>20</sup> In addition, the record includes a disciplinary form issued by the Respondent to supervisor Andre Woods, when Woods, after a workplace conversation with recently reinstated union supporter Charles White, stated “F\*\*\* that N\*\*\*\*\*.” While the Respondent issued Woods a written warning, as it did Ponce, the record establishes that the warning was in response to Woods’ second offense, not his first.<sup>21</sup> See General Counsel Exhibit 11 (disciplinary form stated that “this was the 2d time this issue had been addressed with [Woods]”).

The Respondent acknowledges these other disciplines, but contends that they are distinguishable based on the circumstances in each scenario. In this regard, the Respondent asserts that it provided only a counseling to Keto for his remarks to Tomassian because Tomassian said she was not offended by Keto, while purportedly Chaykho, the subject of Ponce’s comments, had complained and told Respondent he was offended, thus warranting a higher level of discipline. But the Respondent’s assertions in this regard are not supported by the record here. Although Chaykho testified that the statements “bothered” him, the Respondent points to no evidence that Chaykho had told any of the decisionmakers on Ponce’s discipline that he was offended by the time they decided to discipline Ponce. In fact, at the hearing, Chaykho testified that he did not raise the incident to the Respondent, “was not even offended” by Ponce’s statements, and only provided a statement about the incident (which did not mention being offended) after being approached by management about it. In this context, we find that the Respondent has not substantiated its explanation for disciplining Ponce more harshly than Keto.

Based on the foregoing, including the evidence showing that, with the exception of the discipline issued to Ponce, the Respondent had not issued written warnings to any employees for a first infraction involving offensive language, we find that the Respondent has not demonstrated that it would have issued a written warning

<sup>20</sup> We further note that Keto was not counseled until he made inappropriate comments to Tomassian a second time. See GC Exh. 10 (“On Monday 2/22/21 an employee shared with me some comments that were made by Roy that are deemed inappropriate. I asked that she describe in detail the comments in an email which is attached. The following day an employee overheard an inappropriate comment made by Roy to the same employee as above.”).

<sup>21</sup> While the Respondent disputes that Woods was issued a written warning for a second offense, Manager Billeoa wrote on a disciplinary form that it was the second time Woods had been spoken to about such offensive language. The Respondent failed to offer testimony from Billeoa, or any other witness, to explain the meaning of this note. In these circumstances, we find that the most plausible interpretation of Woods’ disciplinary form is that it shows a written warning for a second offense.

to Ponce for his remarks even absent his protected activities.<sup>22</sup> We therefore conclude that the Respondent violated Sections 8(a)(1), (3), and (4) by issuing the written warning to Ponce.

#### CONCLUSIONS OF LAW

1. Respondent Stern Produce Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) by creating the impression of surveillance by accessing the inside-facing camera in the cab of driver Jose’ Ruiz’ truck and requesting that he uncover it.

3. The Respondent violated Section 8(a)(1), (3) and (4) of the Act by issuing a written disciplinary warning to warning to driver Uvaldo Ponce, because he supported and engaged in activities on behalf of the Union and participated in National Labor Relations Board proceedings.

The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) by creating the impression of surveillance by accessing driver Ruiz’ in-truck camera and notifying Ruiz it had done so, we shall order it to cease and desist from engaging in such conduct. Having found that the Respondent violated Section 8(a)(1), (3), and (4) by issuing a written disciplinary warning to driver Ponce because he supported and engaged in activities on behalf of the Union and participated in National Labor Relations Board proceedings, we shall order it to cease and desist from such conduct and to rescind the warning against Ponce, expunge that warning from its files, and to notify Ponce in writing that this has been done and that the unlawful discipline will not be used against him in any way.<sup>23</sup>

<sup>22</sup> In so finding, we certainly do not condone such offensive remarks in the workplace. Moreover, we recognize that employers can discipline employees for such misconduct; however, employers cannot discipline them more harshly because they also engaged in activities protected by the Act. See, e.g., *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 2–3 (finding employer’s decision to discharge three union activists for “stealing time” unlawful in light of disparate treatment of other employees).

<sup>23</sup> Member Prouty would also find that a remedial reading of the notice is appropriate in this case. In light of the direct involvement of the Respondent’s owner in the discipline of Ponce, and in light of the Respondent’s prior violations of the Act, referenced above (see *Stern Produce Co.*, 368 NLRB No. 31, *supra*), he would find that the unfair

ORDER

The National Labor Relations Board orders that the Respondent, Stern Produce Company, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(b) Issuing disciplinary written warnings to or otherwise discriminating against employees because of their support for and activities on behalf of the Union.

(c) Issuing disciplinary written warnings to or otherwise discriminating against employees because of their participation in National Labor Relations Board proceedings.

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

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful written warning issued to Uvaldo Ponce, and within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used against him in any way.

(b) Post at its Phoenix, Arizona facility copies of the attached notice marked "Appendix."<sup>24</sup> Copies of the

labor practices committed here against two recently reinstated employees, both of whom had previously participated in the Board's processes and had been personally subjected to the Respondent's prior violations, evidenced a continuation of the Respondent's unlawful efforts to discourage unionization. See *Daily Grill*, 372 NLRB No. 30, slip op. at 4 (2022) (finding a notice reading warranted in light of respondent's recidivism). Thus, he believes a public reading of the notice is appropriate "to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices" and allow the employees to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Daily Grill*, supra, slip op. at 4 (citations omitted).

<sup>24</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read

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 and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. April 11, 2023

\_\_\_\_\_  
Lauren McFerran, Chairman

\_\_\_\_\_  
Gwynne A. Wilcox, Member

\_\_\_\_\_  
David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

\_\_\_\_\_  
"Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT issue disciplinary written warnings to or otherwise discriminate against you because of your support for and activities on behalf of the Union.

WE WILL NOT issue disciplinary written warnings to or otherwise discriminate against you because of participation in National Labor Relations Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to Uvaldo Ponce, and within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used against him in any way.

#### STERN PRODUCE COMPANY

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-282577> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940



*Nestor Zarate Mancilla, Esq.*, for the General Counsel.  
*Patrick R. Scully, Esq.*, and *James S. Korte, Esq.* (*Sherman and Howard LLC*), for the Respondent.  
*Martin Hernandez, Esq.*, for the Charging Party.

#### DECISION

##### STATEMENT OF THE CASE

DICKIE MONTEMAYOR, Administrative Law Judge. This case was tried before me on March 1–2, 2022, via the Zoom for Government videoconferencing platform. Charging Party filed a charge on September 8, 2021, an amended charge on October

6, 2021, and another separate charge on November 2, 2021, and an amended charge on February 3, 2022, alleging that Uvaldo Ponce was issued a written warning and that employees were instructed to uncover cameras in the cabs of their trucks thus allegedly creating an impression among employees that their union and protected concerted activities were under surveillance in violation of Section 8(a)(1), (3), and (4) of the of the National Labor Relations Act (the Act). The cases were combined, and a consolidated complaint was issued. Respondent filed an Answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs which were received on April 5, 2022. I carefully observed the demeanor of the witnesses as they testified, and I rely on those observations in making credibility determinations. I have studied the whole record, the posttrial briefs, and the authorities cited. Based on the detailed findings and analysis below, I conclude and find the Respondent did not violate the Act as alleged in the complaint.<sup>1</sup>

#### FINDINGS OF FACT

##### JURISDICTION

The complaint alleges, and I find that

1(a) The charge in Case 28–CA–282577 was filed by the Union on September 8, 2021, and a copy was served on Respondent by U.S. mail on the same day.

(b) The first amended charge in Case 28–CA–282577 was filed by the Union on October 6, 2021, and a copy was served on Respondent by U.S. mail on the same day.

2(a) At all material times, Respondent has been a corporation with an office and place of business in Phoenix, Arizona (Respondent's facility), and has been engaged in the wholesale distribution of food products.

(b) During the 12-month period ending September 8, 2021, Respondent, in conducting its operations described above in paragraph 2(a), purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Arizona.

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

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act

William Stern	–	President
Linda Sili	–	Night Supervisor

<sup>1</sup> Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Patricia Helms – Controller/Acting HR Representative  
 Nick Barr – Transportation Manager

#### ALLEGED UNFAIR LABOR PRACTICES

Uvaldo Ponce was employed at Stern Produce as a driver delivering produce shipments to various food service facilities since May 1, 2020. He was employed pursuant to the terms of a Formal Settlement Stipulation in Case 28–CA–258619. When he was reemployed, he was provided a copy of Respondent’s employee handbook. Among the terms outlined in the handbook. (R. Exh. 1.) The handbook outlining the policies and procedures of the employer included specific provision prohibiting harassment or discrimination including the following:

STERN PRODUCE CO INC. is committed to the principles of equal employment. We are committed to complying with all federal, state, and local laws providing equal employment opportunities, and all other employment laws and regulations. It is our intent to maintain a work environment that is free of unlawful harassment, discrimination, or retaliation because of . . . race, color, national origin, ancestry . . . sexual orientation (including transgender status, gender identity or expression) . . . or any other status protected by federal, state, or local laws. . . . The Company will conduct an investigation of all plausible allegations of discrimination, harassment, or retaliation, or any violation of the Equal Employment Opportunity Policy in a confidential manner. The Company will take appropriate corrective action, if and where warranted. The Company prohibits retaliation against employees who provide information about, complain about, or assist in the investigation of any complaint of discrimination or violation of the Equal Employment Opportunity Policy. We are all responsible for upholding this policy. You may discuss questions regarding equal employment opportunity with your immediate supervisor/manager or any other designated member of management.

#### *Policy Against Workplace Harassment*

STERN PRODUCE CO INC. has a strict policy against all types of unlawful workplace harassment, including sexual harassment and other forms of workplace harassment based upon an individual’s . . . race, color, national origin, ancestry, . . . sexual orientation (including transgender status, gender identity or expression), . . . or any other status protected by federal, state, or local laws. All forms of harassment of, or by, employees, vendors, visitors, customers, and clients are strictly prohibited and will not be tolerated.

. . .

#### Other Harassment

Other workplace harassment is verbal or physical conduct that insults or shows hostility or aversion toward an individual because of the individual’s . . . race, color, national origin, ancestry, . . . sexual orientation (including transgender status, gender identity or expression) . . . or any other status protected by federal, state, or local laws.

Again, while it is not possible to list all the circumstances that may constitute other forms of workplace harassment, the following are some examples of conduct that may constitute workplace harassment:

The use of disparaging or abusive words or phrases, slurs, negative stereotyping, or threatening, intimidating, or hostile acts that relate to the above protected categories;

- Written or graphic material that insults, stereotypes, or shows aversion or hostility toward an individual or group because of one of the above protected categories and that is placed on walls, bulletin boards, email, voicemail, or elsewhere on our premises, or circulated in the workplace; and
- A display of symbols, slogans, or items that are associated with hate or intolerance toward any select group.

#### *Reporting Discrimination and Harassment*

. . . Discipline for violation of this policy may include, but is not limited to, reprimand, suspension, demotion, transfer, and discharge. If the Company determines that harassment or discrimination occurred, corrective action will be taken to effectively end the harassment. As necessary, the Company may monitor any incident of harassment or discrimination to assure the inappropriate behavior has stopped. In all cases, the Company will follow up as necessary to ensure that no individual is retaliated against for making a complaint or cooperating with an investigation.

(See R. Exh. 1 at 45–47.)

Ponce currently holds the position of committee leader with United Food and Commercial Workers Union Local 99. The position is strictly a volunteer position for which he receives no pay. His duties as a committee leader include attending union meetings and speaking with other workers by telephone or in person. He has been working to establish the Union at Respondent’s facility for a period of 6 years.

In early August of 2021, Ponce while filling out invoices noticed two other employees who were joking around with each other, Mohamad Chaykho and Joe Metzger. During the exchange between the two Metzger greeted Chaykho stating, “hey baby” and blew him a kiss. (See R. Exh. 5–7.) Chaykho responded by saying, “hey baby.” Upon hearing this Ponce said to Chaykho, “you know they kill people like that in your country.” Id. Chaykho responded, “like that, what is that supposed to mean?” Id. Ponce replied, “gays.” Id. What country is that responded Chaykho? Id. To which Ponce replied, “Afghanistan.” Id. Chaykho then asked, “is that where I am from?” Id. Ponce then clarified saying, “no no, I mean from where Saddam Hussein is from.” Id. Chaykho then asked if Ponce was referring to Iraq to which Ponce responded “yes” and Chaykho advised him he was not from Iraq. Id. Ponce asked, “where are your from then.” Id. To which Chaykho responded, “don’t worry about it” and left the office. Id.

The next day an employee who overheard the exchange reported it to Nick Barr, the transportation manager, who then spoke with Bill Stern, the president of the Company. Both decided that an investigation was warranted so Barr requested that each of the witnesses provide written statements to get “everybody’s perspective of what happened. (R. Exh. 5–7, Tr. 281–282.) After the statements were provided, Patricia Helms, the human resources representative, Nick Barr and William Stern met to discuss if any discipline was warranted and if so the appropriate discipline to be meted out. The group decided that since the statements implicated race, ethnicity, and sexual

orientation Ponce's statements violated the Company's EEO policies. Thus it was determined that a written warning was appropriate. (Tr. 293–293.) On August 31, 2021, the Company issued to Ponce a written warning that contained the following language:

This corrective action form is to confirm our discussion today during which you were advised that your recent words and comments about Mohammad and his country. It was stated that you used the words "They Kill people like (sic) in your country". It was asked what is that supposed to mean and it was implied "gays". It was also stated by wittiness that asked Mohammad to tell you what country he was from making Mohammad fell very uncomfortable around answering the question.

Our company policy around the use of disparaging or abusive words, phrases, slurs, and negative stereotyping is very clear and outlined in our employee handbook and will not be tolerated.

It is expected that you will immediately address this situation and that further discussions will not be required. However, if there is a need to again have discussion arising from lack of corrective action being taken by you, the company reserves the right to impose further disciplinary action, up to and including suspension and termination of employment. (R. Exh. 7.)

#### ANALYSIS

##### 1. The letter of warning

Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

Section 8(a)(4) of the Act is essentially an anti-retaliation provision that forbids an employer from discharging or otherwise discriminating against an employee because he or she has filed charges or given testimony under the Act. In *NLRB v. Scrivener d/b/a AA Electric Co.*, 405 U.S. 117 (1972), the court held that Section 8(a)(4) specifically applied to other activities including providing affidavits, appearing but not testifying, and being subpoenaed at a Board hearing.

Section 8(a)(3) makes unlawful discrimination in regard to hire, tenure of employment or any other term and condition of employment to encourage or discourage membership in any labor organization. Where motivation is in issue the Board looks to the test set forth in *Wright Line*, 251 NLRB 1083 (1080), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), to determine if a violation has occurred.

The General Counsel must initially show that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6, 8 (2019); see also *Mondelez Global, LLC*, 369 NLRB No. 46, slip op. at 1–2 (2020). Evidence is proba-

tive of unlawful motivation only if it adds support to a reasonable inference that the employee's Section 7 activity was a motivating factor in the employer's decision to impose discipline. *General Motors LLC*, 369 NLRB No. 127 (2020).

If the General Counsel makes his/her initial case, the employer will be found to have violated the Act unless it meets its defense burden to prove that it would have taken the same action even in the absence of the Section 7 activity. See *Hobson Bearing International*, 365 NLRB No. 73, slip op. at 1 fn. 1 (2017). If the evidence as a whole "establishes that the reasons given for the [employer's] action are pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

After considering the totality of the evidence, I concur with Respondent that the evidence failed to establish elements essential to the General Counsel's claim. The evidence confirmed at most that Charging Party engaged in protected activity some 5 years prior and was at the time of his discipline a union committee leader.<sup>23</sup> However, there is no evidence to establish that the employer was aware of his union activity that was taking place at the time of the discipline. Assuming for the sake of argument that Respondent was aware of the prior union activity there is nothing in the record to establish that there was any animus that was in any way causally connected to his union activity. Rather, the evidence established that Ponce was disciplined not for his union activity and/or participation in Board processes but because he made comments that were found to be offensive and violative of the employer's policies that he himself admits he made. Chaykho explained why he legitimately felt bothered by the comments. He stated,

What bothers me about the whole thing was I've been in a similar situation in the past, you know what I mean, when people make certain comments and I take, I'm sorry, I think it's stupid, referring to me or my people that we kill gay people, you know what I mean. What I worry about somebody around that's gay or have a child that's gay, how are they going to look at me, you know what I mean? Like they might hold a grudge against me or something like that. That's why I didn't like the way he said it or what he said. (Tr. 135.)

I also find that there is insufficient evidence to establish that Respondent's asserted reasons for issuing the letter of warning were pretextual and/or were in any way motivated by Charging Party's union activity or prior participation in Board processes.

<sup>2</sup> The prior Board proceedings Cases 28–CA–63215, 28–CA–166351, and 28–CA–168680 took place in 2016.

<sup>3</sup> I am not persuaded by the argument; and, the facts do not support the conclusion that Respondent had been lying in wait since 2016, to retaliate against Ponce by issuing him a mere warning. In *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983), a case arising under Title VII, the court held that, "where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." Similar reasoning is applicable in this case.

## 2. The alleged impression of surveillance

In 2019, Respondent installed the Samsara system in its fleet of delivery trucks. The system is an advanced system for vehicles which provides real time analytics, WIFI, and cameras on with a view of the street and one with a view of the cab. (Tr. 246.) The cameras have no communication capabilities and do not have any built-in microphones. (Tr. 246.) The cameras serve various functions including protecting the public from unsafe driving as well as protecting drivers from liability when they are not at fault. The Company does not routinely view the camera footage, but it is accessible if there is an accident. The system can alert if a driver is in an unauthorized residential area, the driver has stopped for an extended period or a harsh braking event has occurred. (Tr. 259, 263, 264.) The company has a provision within its Driver’s Manual that requires all vehicle safety systems must always remain on unless the driver is specifically authorized to turn them off. (R. Exh. 8.)

Jose Ruiz was a driver who has been working for the Company for a period of 9 years. On July 13, 2021, while eating lunch Ruiz covered the camera in his truck cab. He did this because he viewed his lunch as his own time and wanted to insure his privacy. (Tr. 105.) At 12:06 his supervisor, Barr, sent him a text message that stated, “got the uniform guy for sizing bud, and you cant (sic) cover the camera its (sic) against company rules.” (GC Exh. 18.) After being told to uncover the camera Ruiz has since complied at all times and kept the camera uncovered. (Tr. 105–106.)

Creating an impression that a company keeps its employees’ union activities under surveillance violates Section 8(a)(1) because it could inhibit the employees’ right to pursue union activities untrammelled by fear of possible employer retaliation. *NLRB v. Ralph Printing & Lithographing Co.*, 379 F.2d 687, 691 (8th Cir. 1967). An employer unlawfully creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to assume that their union activities have been placed under surveillance. See generally *Metro One Loss Prevention Services*, 356 NLRB 89, 102 (2010). It is not a violation of the Act for an employer to merely observe open union activity, so

long as its representatives do not engage in behavior that is “out of the ordinary,” *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005); *Arrow Automotive Industries*, 258 NLRB 860 (1981), *enfd.* 679 F.2d. 875 (4th Cir. 1982).

I find that there is insufficient evidence in the record to conclude that Respondent created an unlawful impression of surveillance. In the first instance there is nothing in the record to indicate that the request to uncover the cab camera was “out of the ordinary” given the existence of the cameras and the longstanding company policies relating to such. Secondly, there is no indication that Ruiz was engaged in any union activity in the cab of his truck, nor that Barr was aware of any union activity of Ruiz in or out of the cab of his truck. (Tr. 111, 265.) Lastly there is nothing to suggest that the cameras were anything other than “mere observation” of activity of the changing workplace of a driver. See *F. W. Woolworth*, 310 NLRB 1197 (1993) (employer’s “mere observation” did not violate the Act). Accordingly, I find that Barr’s request to Ruiz to uncover his camera did not create an unlawful impression of surveillance and did not violate Section 8(a) (1) of the Act.

### CONCLUSIONS OF LAW

(1) Respondent’s actions of issuing a letter of warning to Uvaldo Ponce did not violate Section 8(a)(3), (4), and (1) of the Act.

(2) Respondent’s request that employee Ruiz to uncover the camera in the cab of his truck did not violate Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 22, 2022

<sup>4</sup> 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.