**Sysco Columbia, LLC *and* International Brotherhood of Teamsters Local Union 509.** Cases 10–CA–197586, 10–CA–197588, 10–CA–203636, and 10–CA–210623

December 9, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On August 16, 2018, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions,[4] to amend the remedy,[5] and to adopt the recommended Order as modified and set forth in full below.[6]

ORDER

The National Labor Relations Board orders that the Respondent, Sysco Columbia, LLC, Columbia, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees benefits to discourage them from supporting Teamsters Local 509 (the Union) or any other labor organization.

(b) Soliciting employee complaints and grievances to discourage employees from supporting the Union or any other labor organization.

(c) Threatening employees that their wages and other benefits will be frozen if they vote for union representation.

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[1] Member Emanuel is recused and took no part in the consideration of this case.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent 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. In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias against it. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The judge mistakenly referred to operating companies under Sysco Corporation's market president for the Southeast, Michael Brawner, as "Sysco Southeast" or "Sysco Southeast Division," even though there is no evidence of any such entity or formal division. This error does not affect our disposition of this case.

[4] We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by Brawner's solicitation of grievances and promise of benefits; by the Respondent's statement, made via a DVD that was viewed by employees, that wages and benefits would be "frozen at the status quo" if the Union won the two Board elections at issue; and by the Respondent's subsequent letter, sent to employees on September 25, 2017, informing them that the pay increases "that would typically be made in September" were being withheld because it was required by law to "maintain . . . the status quo . . . until the Union's petitions are resolved," and attributing that withholding to the Union's actions. Because we adopt the judge's conclusions regarding Brawner, the DVD, and the September 25 letter, we find it unnecessary to pass on the similar allegations regarding supervisor-in-training James Fix, including whether he was a Sec. 2(11) supervisor, because it would not affect the remedy. The judge found that the Respondent violated Sec. 8(a)(3) and (1) by granting employees the benefit, just before the election, of parking closer to their work area. We agree with the judge that the Respondent violated Sec. 8(a)(1) by granting this benefit, but we do not find an 8(a)(3) violation because we do not find that the General Counsel established that the granting of the benefit was discriminatory. See, e.g., *Valmet, Inc.*, 367 NLRB No. 84, slip op at 4 (2019). We amend the judge's conclusions of law according to these changes.

[5] The judge's remedy provided for a public reading of the notice by a Board agent or responsible management official. We do not find this extraordinary remedy warranted in this case. See, e.g., *Bodega Latina Corp. d/b/a El Super*, 367 NLRB No. 34, slip op. at 1 (2018). We accordingly amend the judge's remedy to remove the notice-reading remedy. We also amend the judge's remedy to provide that the make-whole remedy for withheld wage adjustments shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), rather than with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection*, supra at 683; see also *Pepsi America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003).

Member McFerran would adopt the judge's recommended notice-reading remedy as "necessary to enable employees to exercise their Section 7 rights free of coercion." See e,g., *Wal-Mart Stores*, 364 NLRB No. 118, slip op. at 40 (2016). The Respondent's unlawful misconduct was not confined to its preelection campaigning (in part by a high-ranking corporate official) but included, 5 months after the two elections were effectively suspended, the unlawful withholding of annual pay increases to both units (while granting increases to other employees), and the letter unlawfully blaming the Union for that action. As the judge observed, these actions "drove home the point that [the employees] were being punished for seeking to organize, reinforcing the earlier unlawful message that voting for the Union would result in no wage increase." The Board has required notice reading to remedy similar violations. See *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21, slip op. at 1 (2015); *Carey Salt Co.*, 360 NLRB 201, 201–202 (2014); *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), enfd. 273 Fed.Appx. 32 (2d Cir. 2008); *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), rev. denied 400 F.3d 920 (D.C. Cir. 2005).

[6] We shall modify the judge's recommended Order and substitute a new notice to conform to the amended remedy and the Board's standard remedial language.

(d) Telling employees that they will not receive wage adjustments because the Union filed petitions to represent them and filed unfair labor practice charges.

(e) Withholding wage adjustments because employees engaged in union activity.

(f) Conferring benefits on employees to discourage them from supporting the Union or any other labor organization.

(g) 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) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) 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.

(d) Within 14 days after service by the Region, post at all of its South Carolina and Georgia facilities copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, 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. Reasonable steps shall be taken by the Respondent 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 facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2017.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, 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

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 promise you benefits to discourage you from supporting Teamsters Local 509 (the Union) or any other labor organization.

WE WILL NOT solicit your complaints and grievances to discourage you from supporting the Union or any other labor organization.

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

WE WILL NOT threaten you that your wages and other benefits will be frozen if you vote for union representation.

WE WILL NOT tell you that you will not receive wage adjustments because the Union filed petitions to represent you and filed unfair labor practice charges.

WE WILL NOT withhold wage adjustments from you because you engaged in union activity.

WE WILL NOT confer benefits on you to discourage you from supporting the Union or any other labor organization.

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 make you whole for any loss of earnings and other benefits you suffered as a result of our unlawful withholding of your wage adjustments, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 10, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

SYSCO COLUMBIA, LLC

The Board's decision can be found at http://www.nlrb.gov/case/10-CA-197586 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.

*John R. Evans* and *Jordan Wolfe, Esqs.*, for the General Counsel.
*Mark M. Stubley, John T. Merrell,* and *Andrew D. Frederick, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on an amended consolidated complaint and notice of hearing (the complaint) issued on February 15, 2018, arising from unfair labor practice charges that International Brotherhood of Teamsters Local Union 509 (the Union) filed against Sysco Columbia, LLC (the Respondent or the Company), in connection with the Union's attempt to represent the Company's drivers and its fleet shop mechanics and spotters.

Pursuant to notice, I conducted a trial in Columbia, South Carolina, on March 12–16 and May 21–24, and took videoconference testimony on June 1, 2018, during which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

### Issues

(1) Did the Respondent, in March and/or April 2017,[1] in a DVD that was played at mandatory preelection company meetings and mailed to employees, threaten employees that their wages would remain frozen during negotiations if they chose the Union to represent them?

(2) Did Michael Brawner, market president for the Southeast Division of Sysco Corporation, in March and/or April, at such meetings and in conversations with individual employees, (a) solicit employee complaints and grievances; and (b) promise increased benefits and improved terms and conditions of employment if employees rejected the Union?

(3) Was Fleet Maintenance Supervisor James Fix, in mid-April, a supervisor and agent of the Respondent within the meaning of Section 2(11) and (13) of the Act as to mechanics and spotters?

(4) If so, in that time period, did the Respondent, through Fix: (a) solicit employee complaints and grievances; (b) promise employees that they would receive increased benefits and improved terms and conditions of employment, including earlier wage increases, if they voted against union representation; (c) blame the Union for not getting wages increases and threaten employees that their pay would be frozen if they voted in the Union; (d) interrogate employees about the impact of the Respondent's promises to gauge their level of support for the Union; and (e) suggest that employees rescind the election process?

(5) Did the Respondent, in about mid-April, confer a benefit on mechanics and spotters by allowing them to start parking closer to their work areas, in violation of Section 8(a)(3) and (1) of the Act?

(6) Did the Respondent, by letter dated September 25, unlawfully inform drivers and mechanics and spotters that they would not receive September wage adjustments because the Union had filed representation petitions and unfair labor practice charges?

(7) Did the Respondent, in September, withhold wage

[1] All dates hereinafter occurred in 2017 unless otherwise indicated.

adjustments from those employees in violation of Section 8(a)(3) and (1)?

Witnesses and Credibility

Counsels for the General Counsel (the General Counsel) called:

As 611(c) witnesses, Michael Brawner and Michael Turner, the Respondent's operations vice president.
Chris Rosell, an international organizer for the Union.
Drivers Jonathan Brewer, Travis Gates, Kyle Hughes, Phillip Otto, Joseph Perisee, and Patrick Windham.
Former Drivers Dane LaCount; John Porter III; and Joshua Taylor, who was promoted to the position of transportation supervisor about a month-and-a-half prior to his testimony on March 16, 2018, pursuant to subpoena by the General Counsel.
Mechanic Robert Anderson.
Former Mechanic Christopher Bookert.
Spotter Carlos Nuttry.

The Respondent called:

Brawner, Turner, and Fix (who was promoted in September to his current position of fleet maintenance manager).
Bogene (Bo) Nash, transportation director.
Ashley Buster, transportation supervisor.
Almetrice (Kema) Weldon, head of human resources.
Ronn English, employer consultant with Kulture Consulting LLC.
Drivers Kelvin Bacon, Joshua Cantrell, Dennis Hills, Rodney Mayers, Fernando Robinson, Alton Salters, Todd Shannon, and Tyler Starling.
Mechanic Joshua Powell.

In making credibility resolutions, I have considered the established precept that a witness may be found partially credible; the mere fact that the witness is discredited on one point does not automatically mean that he or she must be discredited in all respects. *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, a witness' testimony is appropriately weighed with the evidence as a whole and evaluated for plausibility. Ibid at 798–799; see also *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1183 fn. 13 (2004), quoting *Americare Pine Lodge Nursing*, 325 NLRB 98, 98 fn. 1 (1997), enf. granted in part, denied in part, 164 F.3d 867 (4th Cir. 1999); *Excel Container*, 325 NLRB 17, 17 fn. 1 (1997). As Chief Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), regarding witness testimony, "[N]othing is more common in all kinds of judicial decisions than to believe some and not all."

I have also considered the longstanding principle that "the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996), citing *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied for other reasons, 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961); see also *Federal Stainless Sink Division of Unarco*, 197 NLRB 489, 491 (1972).

Finally, I note that when credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. at 1 fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

I have taken into account the many meetings that management held with employees, some of which were lengthy, and the inevitable and understandable inability of witnesses to recall with precision everything that was said. When some witnesses gave more certain and detailed accounts of meetings or conversations, I have generally credited them over witnesses whose versions were equivocal or vague.

The most glaring lack of credibility was the refusal of Brawner and English to acknowledge that the voices on a tape recording (GC Exh. 16, with GC Exh. 6 being a certified transcription thereof) were theirs' and Weldon's. At this point, I will discuss the interrelated contention of the Respondent that the recording (and transcript) are inadmissible because of lack of proper authentication.

There is no dispute that Brawner spoke at "25th hour" meetings that the Company conducted with employees from April 10–12, shortly before the scheduled elections in separate units of drivers and of mechanics and spotters. The General Counsel proffered a tape recording as being from one of three such meetings Brawner held with Columbia drivers on April 12. Although the driver who made the recording did not testify, Driver Brewer listened to the recording at trial. He conceded on cross-examination and redirect examination that he could not be certain that the tape recording was from the meeting he attended with 20–25 other Columbia drivers but that it "carried the same gist and highlights. . . ."[2]

Nevertheless, when listening to the tape, Brewer testified that he recognized the voices of Brawner, whom he had met before and English, whom he had heard speak at prior meetings, as well as Weldon's voice. The voices I heard on the tape sounded identical to those of Brawner, English, and Weldon as they testified before me.

When the tape recording was played to Brawner and English, both were evasive when asked if they recognized their own voices. Brawner conceded that he recognized Weldon's voice and that the voice on the tape "sounds like a recording that someone made of me talking, but I'm not 100 percent sure. . . ."[3] English flat-out testified that he did not recognize his own voice even though he testified that he recalled making statements reflected in the transcript. In fact, when I asked if he remembered making certain other statements contained in the recording, he flippantly answered that the voice "sounded a lot like Ron White to me . . . the comedian Ron White."[4] Furthermore, although English testified that he recognized Brawner's voice on the DVD that was played at the meeting and was part of the tape recording, he still professed not to recall the voice elsewhere on the tape recording

[2] Tr. 178.
[3] Tr. 752.
[4] Tr. 622.

as Brawner's.

Significantly, the Respondent's counsels did not object to the admission of that portion of the transcript of the recording relating to what was stated in the DVD (GC Exh. 6 at 16, L. 7 through 32, L.20) as an accurate rendition, other than as to relevance. Furthermore, the tape recording generally tracked the script that the Respondent used for the 25th hour meetings (R. Exh. 6), which included showing of a DVD. Finally, other Columbia drivers confirmed that Brawner made certain statements contained in the tape recording.

With the exception of the portion pertaining to the DVD, the Respondent objected to the receipt of the tape recording and transcript based on lack of authentication. However, authentication of a tape recording does not require the individual who made it to testify. A tape recording can be authenticated by testimony of a witness with knowledge that supports a finding that the recording is what the presenting party claims it is. *H & M International Transportation, Inc.*, 363 NLRB No. 139, slip op. at 1 fn. 1 (2016). Moreover, tape recordings can be authenticated by circumstantial evidence. See, e.g., *U.S. v. Damrah*, 412 F.3d 618, 628 (6th Cir. 2005) (videotape); *U.S. v. Carrasco*, 887 F.2d 794, 803–804 (7th Cir. 1989) (audiotape).

I have no doubt that the tape recording was an accurate rendition of what Brawner, English (and Weldon) said at the particular meeting with drivers, whether or not Brewer was in attendance. I base this conclusion on a myriad of factors: (1) the contents of the tape, (2) my comparison of the voices on the tape with hearing their voices as witnesses, (3) Brewer's testimony, (4) concessions by Brawner and English, (5) the admission without objection of the portion of the tape pertaining to the DVD, (6) the tape's general consistency with the Respondent's script for the 25th hour meetings, and (7) the testimony of other driver witnesses. To believe that the voices on the tape could have been those of any other individuals and made at a meeting attended by persons other than the Respondent's drivers would be so farfetched as to be absurd. I therefore find the tape recording (and transcript) to be admissible and reliable evidence.

In other respects, English and Brawner were not fully credible. English was markedly evasive on cross-examination and generally exhibited a defensive posture. He first testified "no" in response to my question whether Brawner deviated from the script but on cross-examination eventually conceded that "[t]here were conversations that Mr. Brawner had that were not written down on the script."[5] Moreover, he confirmed the testimony of various employee witnesses (both for the General Counsel and the Respondent), consistent with the tape recording, that Brawner made specific statements outside of the parameters of the script.

Brawner was repeatedly vague or evasive on what he said at the 25th hour meetings, professing not to recall whether he made a number of statements attributed to him by numerous employee witnesses, both for the General Counsel and the Respondent, and by English, and what he stated on the tape recording.

Drivers Gruber, Porter, Taylor, and Windham; Mechanic Anderson; and Spotter Nuttry all testified about separate one-on-one conversations they had with Brawner, either in person or by telephone. I credit all of them for the following reasons. Firstly, Brawner was not fully candid in testifying about what he said at the 25th hour meetings. Secondly, their versions of what Brawner said were quite similar in substance and consistent with what he stated at group meetings. Thirdly, although Brawner offered specific denials of complaint allegations, he did not specifically address their alleged conversations with him, with one exception (Windham).[6] Finally, none of them made any apparent efforts to exaggerate what Brawner said to them.

Windham's accounts of their two conversations were far more credible. I find highly implausible Brawner's testimony that Windham initiated the first call and stated that he was calling because he "just want[ed] to know how things are going"[7] but did not give a specific reason. Moreover, whereas Windham's offered concrete details of the contents of their conversations, Brawner was extremely vague.

I note here the testimony of some of the employees on cross-examination that their conversations with Brawner were cordial and/or nonintimidating, but the allegations of solicitation of grievances and promise of benefits are in the nature of carrots, not sticks, so almost by definition such violations are meant to be nonthreatening.

In crediting Anderson, Gruber, and Porter, I have considered the following, including discrepancies brought out on cross-examination between their testimony on direct examination and their affidavits.

Anderson seemed somewhat uncomfortable, but he testified in considerable detail and appeared candid; his testimony on direct and cross-examination was generally quite consistent; and his testimony comported with that of other fleet shop employees. The inconsistency between his affidavit and his testimony on the number of meetings that Brawner attended was not substantial enough to diminish what I find to be his overall credibility.

Similarly, Gruber testified in detail, was generally consistent on direct and cross-examination, and was consistent with other drivers. The two inconsistencies between his testimony and affidavit were: (1) he testified that his supervisor was present at two meetings, but the affidavit stated that he recalled him at one; and (2) he testified that driver Chris Collins asked a question at a meeting, but his affidavit said that he could not recall the driver's name. Gruber explained that he later thought it over and recalled that the driver was Collins. These discrepancies were in peripheral matters that did not undermine his general credibility.

Finally, Porter testified that he had a phone conversation with Brawner after the petition was filed, whereas his affidavit stated that it was about a month after the election. Although these timeframes are not necessarily incompatible, his description of the conversation makes it much more likely that it was prior to the election. Nonetheless, Porter was unequivocal and detailed in relating the contents of their conversation, and that one possible flaw does not detract from the reliability of his account of what was said.

Mechanics Anderson and Bookert and Spotter Nuttry testified about separate discussions about wages and/or working conditions that Fix initiated with them in early to mid-April almost

[5] Tr. 627.

[6] Windham's name erroneously appears as "Weldon" at Tr. 823.

[7] Tr. 824.

immediately after his promotion from master mechanic to fleet service supervisor at the end of March. I credit them over Fix's denials, noting the similar substance of their accounts of what Fix said. Furthermore, Anderson offered a detailed account of his conversation with Fix; in contrast, Fix conceded that he had a discussion with Anderson about pay ranges available to mechanics but provided absolutely no details other than disputing Anderson's testimony about the document that he showed to Anderson (GC Exh. 11 versus R. Exh. 38). Simply put, I do not believe that all three employees engaged in concerted fabrication.

Crediting their accounts of what Fix said to them, I have to conclude that he, a new first-line supervisor, would not have initiated and held those discussions without having been invested with actual authority by management. I also credit the testimony of Anderson, Bookert, and Nuttry that at the time of those conversations, Fix was not performing mechanic's work as he was transitioning to take over from departing Fleet Maintenance Supervisor Randall Drafts.

Regarding meetings at the Hilton Head location, driver LaCount and shuttle driver Perisee testified for the General Counsel; shuttle driver Mayers and driver Shanning for the Respondent. Mayer had a limited recall, and I credit the fuller versions of the other witnesses, which were not necessarily inconsistent.

## Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, the thoughtful posttrial briefs that the General Counsel and the Respondent filed, and the Respondent's supplemental authority, I find the following.

At all times material, the Respondent, a limited liability company, has had an office and distribution facility located in Columbia, South Carolina, and been engaged in selling, marketing, and distributing food products. The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

Sysco Corporation, headquartered in Houston, Texas, has operations nationwide. The Respondent is one of 11 operating companies that report to the Sysco Southeast Division, headquartered in Atlanta, where Market President Michael Brawner has his main office. Brawner provides guidance on best business practices to the division's 11 operating companies, two of which (one in Atlanta, Georgia) have drivers who are union-represented. Brawner has no responsibility over the day-to-day operations of the operating companies or direct authority over the Respondent's employees.

The Respondent's main or home facility is located in Columbia. It has "domicile" or satellite facilities in leased space in Charleston, Florence, Greenville, Hilton Head, and Myrtle Beach, South Carolina; and Augusta, Georgia. During the period in question, the Respondent's highest-ranking official was President Troy Barnes; the current president is Tom Propps, to whom Michael Turner, vice president of operations, reports (see Jt. Exh. 1, an organizational chart). Turner has responsibility over the directors/ managers of the warehousing, systems, facilities, and fleet departments. He and the directors/managers work out of the Columbia facility.

The Respondent employs about 500 employees and distributes a wide range of food and beverages and food-related products, including such items as plates, containers, utensils, and cleaning chemicals, that customers purchase. Its several thousand customers include chain restaurants, college venders, schools, hospitals, nursing homes, and day care centers. Approximately 700,000 pieces of product go through the Columbia distribution center daily.

Drivers (or transportation employees) work out of Columbia and all of the satellite locations. Their three classifications are: (1) route (or delivery) drivers, who drive trucks with trailers containing product for delivery to customers. They have set routes, which vary daily; (2) shuttle drivers, who move empty trailers to and from Columbia and domicile facility yards; and (3) specialty drivers, who make deliveries to customers in small delivery vans or other vehicles that do not require a commercial driver's license.

All mechanics (or fleet technicians) and spotters (or maintenance utility worker technicians) work in the fleet shop in Columbia. Mechanics perform repairs and preventive maintenance on tractors and trailers. Their three classifications are fleet technicians 1 (master), 2 (journeyman), and 3 (apprentice). Spotters move equipment to be loaded and wash out trailers.

Employees first contacted the Union in approximately April 2016, and on March 15, the Union filed a petition to represent both drivers and mechanics and spotters (GC Exh. 4). On March 29, the Union filed a new petition, seeking to represent only mechanics and spotters (GC Exh. 5). General Counsel's Exhibit 7 is a joint stipulation as to subsequent events relating to both petitions, which sets out the following (see GC Exhs. 8(a)–(c), 9(a)–(c)).

As to the first petition, the Regional Director (RD) on March 28 approved a stipulated election agreement for a unit consisting of all three categories of drivers employed at all of the Respondent's facilities. An election was conducted, in part by mail, with ballots to be counted on April 28. However, due to the Union's filing of the first charges herein, the RD on April 26 ordered the ballots to be impounded and the petition held in abeyance.

Regarding the second petition, the RD issued a decision and direction of election on April 21 for a unit of mechanics and spotters, and he scheduled an election on April 27. However, on April 26, he canceled the election and ordered the petition be held in abeyance due to the Union's charges.

The parties stipulated that at the time of the respective elections, the Respondent employed the following:

> (1) 124 route drivers—Columbia—79; Augusta—7; Charleston—11; Florence—2; Greenville—12; Hilton Head—5; and Myrtle Beach—8.
>
> (2) 16 shuttle drivers—Columbia—3; Augusta—3; Charleston—2; Florence—1; Greenville—3; Hilton Head—2; and Myrtle Beach—2.
>
> (3) Five specialty drivers, all at Columbia.
>
> (4) Two master fleet technicians, two fleet mechanics, and four spotters.

*Management Meetings*

By early February, the Respondent was aware of the Union's organizing efforts. Thus, President Barnes and/or Vice President Turner held meetings with employees from February 6–8, using a script (GC Exh. 19) that presented management's arguments against unionization.[8]

On March 7, management learned that the original petition had been filed. Thereafter, the Respondent utilized the services of Kulture Consulting LLC, which advises employers on being union free, and consultants Ronn English and Peter List participated in management meetings with employees.

The Respondent conducted approximately six "roundtable" meetings a week with different groups of employees during the weeks of March 13 and 20, and from April 10–12 (the "25th hour meetings") (see GC Exh. 18), with each week's meeting having a different focus and a different script prepared by the Respondent's counsels. Respondent's Exhibits 4, 5, and 6 are the scripts for the 1st week's meetings, the second week's meetings, and the last meetings, respectively. The General Counsel does not aver that anything said to employees from the scripts themselves went beyond the bounds of permissible employer campaigning, and I need not describe their contents in detail.

Brawner had served in management roles with the Respondent since the operation began in 2002, and he was its president from 2006–2012, before assuming his current position with Sysco Southeast in Atlanta. At the behest of Sysco Southeast corporate executives and local management, Brawner addressed employees at some of first or second round meetings.[9] He testified that he spoke to drivers in each location and that he could not recall ever having such meetings with drivers in his current position. Brawner also spoke at all of the 25th hour meetings. There is no dispute that he did not always follow the scripts.[10] The General Counsel contends that some of his off-script statements violated the Act.

Supervisors instructed employees to attend these meetings, even on their scheduled time off (see GC Exh. 32); employees signed attendance sheets (see GC Exhs. 17(b)); and the Respondent stipulated that they were paid for the time they were at the meetings. Accordingly, I find that they were mandatory except for the drivers who were out performing deliveries and could not attend for that reason.

At the first set of meetings, management introduced the consultants, who made a presentation on voting and collective bargaining, including showing PowerPoint slides. At the second set of meetings, the focus was an election update, including a review of election procedures and reasons why the drivers should vote against representation. Employees were shown a slide or PowerPoint comparison of the Company's pay and benefits vis-à-vis Sysco Atlanta's unionized drivers.

Almetrice (Kema) Weldon, head of human resources, or a supervisor opened the 25th hour meetings and reviewed in detail the mechanics of the upcoming election, as well as urged a "no" vote. Brawner then spoke prior to the presentation of a video or DVD (see R. Exh. 6 at 3–5), which was also mailed to employees' homes. The only portion of the video that the General Counsel contends unlawful is the following, regarding the consequences of voting in the Union (GC Exh. 6 at 23):

> And even if you didn't pay dues or didn't support the union, your wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations.

At these meetings, employees brought up issues and concerns and asked Brawner questions, as reflected by the testimony of Supervisor Buster, diver Shannon, and several other drivers. Subjects included pay and driver routes. Brawner talked about matters outside the scope of the script, such as the balance between sales and delivery, saying that he was going to put his boots on, and asking employees to give him 12 months and he would fix things; if not, they could bring in a union.

Thus, Drivers Bacon (a witness for the Respondent), Brewer, Gates, and Hughes at Columbia; Gruber, Otto, and Taylor at Charleston; and LaCount at Hilton Head all testified—as did English—that Brawner asked them to give him 12 months or a year to turn things around or fix things. Similarly, both Mechanic Anderson and Spotter Nuttry testified that Brawner asked employees to give him 6 months to a year. Many of them also confirmed that Brawner made statements regarding his prior history with the Company and that he wished to restore the family atmosphere that had once existed. In this regard, Supervisor Buster testified that Brawner asked drivers at Myrtle Beach to give him a chance, saying that he was from Columbia, had worked for Sysco Columbia as president, and that it was his baby and he wanted to take care of it.

Some employee witnesses testified that Brawner stated that he would look into improving pay, supervision, and other benefits. None of them averred that Brawner made any specific promises, with the possible exception of Shuttle Driver Perisee, who testified that when Driver Shanning asked if the Company could guarantee shuttle drivers a 40-hour workweek, Brawner responded, "We can do that."[11] Aside from the issue of whether that amounted to a "promise," Shanning and Mayers, who attended the same meeting, testified that Brawner never promised such a guarantee. I find more plausible Shanning's account—consistent with other statements attributed to Brawner—that Brawner replied that he would look into that.

Brawner conceded on 611(c) examination that he told employees that he could influence their relationship with management and, "I asked them to give me a year to help influence the processes, relationships, those type[sic] things within the company, as is my responsibility."[12] To the extent that he denied or testified that he did not recall making other statements attributed to him by the above employee witnesses or contained in the following tape recording, I do not credit him.

General Counsel's Exhibit 16 is a tape recording made at one of the 25th hour meetings with Columbia drivers. Relevant

[8] Contradicting Turner's testimony that he became familiar with the Union after the petition was filed on March 7.

[9] The record is unclear on which set Brawner attended, but the matter is immaterial.

[10] Consultant English at, inter alia, Tr. 627; see also Supervisor Buster at Tr. 868, 871. English confirmed that Brawner made some of the off-script statements that employees attributed to him.

[11] Tr. 260.

[12] Tr. 743.

portions of the certified transcript thereof (GC Exh. 6) follow.

Brawner stated that he had learned from drivers of issues that had arisen since he left, in particular that the Company had become "sales run," with the result that drivers had too many small stops. He went on to say that he could "affect" a change therein but the Union could not (ibid at 12–13).

He then talked, inter alia, about his history with the Company and that it had been a great family before he left 5 years ago; South Carolina being a nonunion State attractive to large corporations; and that he was coming back "to get the family back together, and I can't do it with a union. . . ." (ibid. at 14–15). He apologized for the company "falling off the side of the hill" and stated:

> I'm asking you for your support. And give me 12 months; that's all I need. Give me 12 months. You vote a union in, I can't help you. You vote no, I can get involved. I can put my boots on. . . . (ibid at15)

After the DVD was played, Brawner resumed speaking. He stated that he could affect the drivers' working conditions and "can have a lot of influence" (ibid. at 39) but that if a union was voted in, having a third party would limit and restrict what he could do. He further said:

> [A]ll I'm asking you is give me 12 months. If this company could give me 12 months and I could get a no vote, I can put my boots on, and I can go affect a lot of things. . . . And it'll be things that affect your daily jobs. . . . I feel like if I'm given the opportunity, I can have a major impact on where we work. . . . (ibid at 40)

In his concluding remarks, he repeated what he could do if given 12 months. The tape recording contains no questions from drivers, but this does not invalidate the consistent and credited testimony of numerous drivers and Supervisor Buster that employees asked questions of Brawner at other meetings.

*Brawner's One-on-One Conversations*

By a March 8, 2018 email, the General Counsel notified the Respondent's counsels that he would be moving to amend paragraph 7 of the complaint (relating to Brawner's statements at group meetings) to add a paragraph 7(f): "About early April 2017, by telephone." Two employees testified about telephone conversations with Brawner.

The Respondent has objected to the amendment (see R. Br. at 50), contending that such conversations should not be considered because they went beyond the scope of the complaint and were time barred under Section 10(b) of the Act.

Section 102.17 of the Board's Rules authorizes a judge to grant complaint amendments "upon such terms as may be deemed just" during or after the hearing until the case has been transferred to the Board. See *Folsom Ready Mix, Inc.*, 338 NLRB 1172, 1172 fn. 1 (2003). The judge should consider whether: (1) there were as surprise or lack of notice; (2) there was a valid excuse for the delay in moving to amend; and (3) whether the matter was fully litigated. *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 549 fn. 8 (2015), enfd. 651 Fed.Appx. 34 (2d Cir. 2016). Here, the new allegation concerned the same individual (Brawner), the same alleged violations, and was in the same time frame as existing allegations. Furthermore, defending against it did not require anything more than Brawner's testimony. Accordingly, allowing the amendment was not prejudicial to the Respondent.

Four employees testified about one-on-one conversations that they had with Brawner. The General Counsel never moved to amend the complaint to add them as allegations, and the Respondent avers that they should not be considered because they are also outside the scope of the complaint (R. Br. at 50). Nonetheless, it is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Mesiner Electric, Inc.*, 316 NLRB 597, 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996); *Pergament United Sales*, 296 NLRB 333, 334 (1989). In *Mesiner*, ibid., the Board majority expressly rejected the dissent's position that the General Counsel had an affirmative obligation to move to amend the complaint. Here, as with the amendment above, the one-on-one meetings involved the same management representative, the same time frame, and the same kinds of statements as the allegations in the complaint. Therefore, they can properly be addressed. I now turn to the phone calls and individual meetings that Brawner had with employees.

In March, Brawner approached Driver John "Jackie" Gruber in the Charleston yard in the afternoon. He asked how Gruber and his family were doing, and Gruber replied fine. Brawner then asked what had happened in the past 5 years that he had been gone. Gruber responded that a lot had changed since Brawner had left and that many drivers were very unhappy because pay had gone down and the work load had gone up. Brawner either did not respond or replied that he could not believe what Gruber was telling him.

At some point prior to the election, Columbia Driver John Porter was at home in the evening when he had a phone conversation with Brawner. He could not recall who initiated the call. Brawner asked how he was doing and then asked where he stood with Sysco. Porter said he would rather keep it to himself unless they could talk man-to-man. Brawner replied that they could. Porter complained about the supervisory team, and Brawner replied that he did not know it had gotten that bad. Porter brought up the drivers not getting raises, which they had received regularly in the past. The conversation then switched to casual subjects.

In approximately April, Driver Joshua Taylor was in the Charleston yard in the late afternoon when Brawner approached and introduced himself. He asked Taylor about what he did and if everything was okay, saying that he did not understand how things had gotten to where they were. Taylor responded that many drivers were unhappy with their routes and that supervisors' inaccessibility indicated a lack of concern for their problems. Brawner stated that he was going to have to start coming down more, that he had had a great relationship with the drivers when he was president, and that he hoped Taylor would give him a chance. He asked for 12 months to change things and, if not, he would personally call the Union. He also said that if the Union was brought in, this could hurt the Company's relationship with customers and its business. The conversation lasted about 10 minutes.

In approximately late March or early April, a coworker told Florence Driver Patrick Windham that Brawner wanted to talk to him. Windham called Brawner, in the presence of Jason Knotts, the other Florence driver. Brawner introduced himself. He expressed concern over whether the Florence yard had any problems that he could work out for them. Brawner assured them that he would do what he could to make things better for them if they had problems. The call lasted for 30–35 minutes. Brawner called him a week or 2 later. Knotts was again present. Brawner stated that he was letting Windham know that he wanted to check on them. Windham replied that they were good.

In mid-April, Fleet Maintenance Supervisor Drafts approached Mechanic Robert Anderson in his work bay and told him to go to the office of Duane McCloud, fleet maintenance manager. There, Anderson met with Brawner for about 30–40 minutes, with the door closed. Brawner started with pleasantries and then asked if the employees could give him a chance to try to fix the problems. Anderson asked where they were 5 years ago, and Brawner replied that they were there now. Brawner stated that if the Teamsters came in, employees would be put in the status quo, and nothing could be improved or done for at least 9 months to at least 3–4 years.

In approximately the third week of April (after the 25th hour meetings but before the election), another employee told Spotter Carlos Nuttry to see Brawner in McCloud's office in the evening. There, Brawner stated that he knew who Nuttry was and asked if he remembered how things were when Brawner was the president. Brawner discussed insurance coverage and assured Nuttry that things would get better. He asked if Nuttry had anything to say or any questions, and Nuttry replied no. Brawner said to give him 6 months to a year, and if things did not improve, the Company would call the union representatives to come back and talk to the employees.

*Fix as a Supervisor and the Change in Parking*

Fix was a master technician for 6–7 years before being promoted to fleet maintenance supervisor on March 27. Prior to his promotion, he had conversations about working conditions with coworkers and was a union supporter.

In approximately November 2016, Fleet Maintenance Supervisor Drafts formally announced his retirement, effective in May, and the Respondent posted the job in December. Respondent's Exhibit 16 was the job description in effect.

There can be no question that its listed responsibilities over associates (employees) made it a supervisory position within the meaning of Section 2(11). These included, inter alia, supervising their daily work and safety; supervising labor hours and preparing work schedules; performing management functions of staff selection, development, discipline, performance reviews and/or terminations; and making recommendations for disciplinary action and/or behavior modification when required.

The interview process began in January and was completed in February. Fix was one of the applicants, and Turner made the decision to select him in about early March. At around that time, management knew that Kiko Rivera, the fleet shop clerk, also would be retiring in May.

On March 27, Fix was given a formal offer (GC Exh. 22, sealed by agreement of the parties), to be effective the following Monday, and he immediately accepted. As of Monday, March 30, he changed from being hourly paid to salaried. Almost immediately, he got a company email and access to the Company's software programs.

During the period from March 30 to May 11, Fix was a supervisor-in-training, learning from Drafts, McCloud, and Rivera the complexities of the administrative responsibilities and computer technology required of his new position. This included training on scheduling work, coaching employees, and writing performance reviews, primarily by McCloud.[13] A March 31 email from Drafts to Len Bolduc, supervisor of p.m. operations, stated that Fix was taking over from him and handling things and that Draft would be there until May 11 training him (GC Exh. 24a). Other emails reflect that in April, Fix participated in interviews for the fleet technician apprentice position (GC Exhs. 29–31). The Respondent did not include Fix as an employee employed during the payroll period ending April 8, for purposes of eligibility to vote in the upcoming election (see GC Exh. 9(a)).

Fix had worked the third shift but changed his hours to interface with Drafts and Rivera for training. Although Fix continued to wear a mechanic's uniform, he no longer performed a mechanic's duties. At times, he used Drafts' office, a cubicle in an open area; by early April, Drafts had already started removing his personal items from the office.

On about April 1, Fix had a one-on-one meeting with mechanic Christopher Bookert in Drafts' office. Fix started by saying that the technicians were underpaid. He showed Bookert a document regarding pay scales and said he was sharing what he found out. He asked to be given an opportunity to try to resolve some of the issues and fix the situation (make sure that technicians were properly paid based upon their grades). The conversation lasted about 20–30 minutes. Bookert considered him a supervisor at the time.

Prior to about mid-April, fleet shop employees parked their vehicles in the parking lot in front of the main building and had to go through the warehouse to get to the fleet shop. Bookert sometimes parked by the fence in the back lot when weather was bad, but McCloud told him that he could not do so. Spotter Nuttry characterized parking in the back as "way better" because it was closer to their work area and of benefit in bad weather and when an employee was running late.[14]

In about mid-April, Fix held a meeting with the four spotters, including Nuttry, in the fleet shop break room at about 5 p.m. That week, Nuttry did not see Fix with Drafts, and Fix ran the fleet, assigned who had to fill in for another spotter, and handled paperwork. At the meeting, Fix started by saying he was having the meeting to see what could be worked out and asked what was bothering them as far as issues that they wanted to bring up. He wrote down what they told him. One of the items that they raised was the location of parking for mechanics and spotters.

Later that day, Fix asked Turner if fleet shop employees could park in the back, closer to their work area, saying that it would be a good idea because they had "been stomping across the front parking lot, going through the warehouse, going all the way

[13] Turner at 928, et. seq.

[14] Tr. 389–390.

through the back of the shop," which was more of a burden to them on rainy days.[15] Turner agreed. The next day—the day following his meeting with the spotters—Fix announced to mechanics and spotters that they could do so. Mechanic Anderson was in his work area when Fix came by and announced it to him as "some good news."[16]

In mid-April, Fix had a 25–30-minute conversation with Anderson in Anderson's bay work area in the late afternoon. Fix stated that he was new to the position (of supervisor) and wanted a chance to have an impact. He asked if Anderson was happy with everything and stated that if Anderson rescinded his position, it would help speed things up on getting pay increases and items fixed around the facility. He showed Anderson a picture of an email that had pay scales for mechanics at another Sysco location. Fix then stated that if the employees rescinded their position, it would be faster and easier for him to put that into place and that Anderson could get an increase of between $2 and $5 an hour. Fix said that if they voted the Union in, his hands would be tied, everything would be frozen, and they would be put in status quo; if they voted "no," he could "speed things up on getting . . . stuff fixed."[17]

*Employees' Compensation*

Route drivers are compensated through an incentive program called DIP (driver incentive program), which has a an hourly default rate or floor plus incentives based on the Company's evaluation of their performance in carrying out various activities, which are measured against a grid (see R. Exh. 17, an example). Activity-based compensation is always higher than the hourly default rate, and most drivers receive all of their compensation through the incentives; exceptions are new drivers, drivers who use sick leave hours (paid at base rate), and drivers who take vacation (whose pay is calculated based on their previous year's earnings). Shuttle drivers and specialty drivers are paid at an hourly rate.

Mechanics are paid an hourly rate but may get pay increases based on their achieving additional mechanical certificates or their annual performance appraisals. Spotters are hourly paid.

Turner testified that in years past, across-the-board increases were given by the Respondent's Southeast Division based on the Company's performance the previous year and compensation paid by competitors in the market. Since March 2017, the Respondent has maintained the status quo as far as compensation to drivers and to mechanics and spotters.

The following summarizes changes made in employees' compensation in prior years (reflected in Jt. Exhs. 5–19; R. Exhs. 19–39; see also R. Br. at 16, 21). Changes for each new fiscal year (FY) for drivers became effective in July; for example, FY 2011 rates became effective on July 4, 2010. Rates are per hour unless otherwise indicated.

*Drivers*

FY 2011—The rate for route drivers went up from $21.95 to $22.60; shuttle drivers from $22.17 to $22.83.

FY 2012—The Company converted to the DIP compensation system for both route and shuttle drivers. The base default rates remained the same. In addition, they would receive $35/week if they achieved certain levels of performance in scanning barcodes (STS incentive).

FY 2013—Drivers' pay rates remained unchanged. The STS incentive was replaced by a $60/week drive cam incentive for good driving.

FY 2014—Drivers' base default rates were unchanged, but they received a 1.5 percent increase in DIP rates for various tasks. Specialty or fish van drivers (whose classification was created during FY 2013) received a pay increase of $.60 to $12.60.

In April 2014, the DIP system for route drivers was modified (DIP fusion), with the default or base rate becoming a floor or minimum rate. Shuttle drivers were returned to a base hourly rate, which was increased.

FY 2015 (effective October 1, 2014)—the base rate for current or "grandfathered" route drivers increased to $23.05, new route drivers went up from $15 to $20, and shuttle drivers went up from $23.20 to $23.55.[18]

FY 2016—route drivers' base and incentive rates remained unchanged, but they received a $1,000 lump sum bonus; shuttle drivers' base rate was increased to $24.02; and specialty drivers went up to $14.07.

FY 2017—new route drivers' base rate went up to $21; "grandfathered" route drivers remained at $23.050, but the grid rate increased from $27 to $27.30. Shuttle drivers went to $24.27, and specialty drivers to $14.32. In addition, a $500 annual safety bonus was introduced, payable in December 2017 for being accident free in calendar year 2017.

*Mechanics and Spotters*

For FYs 2011 and 2012, mechanics and spotters received hourly pay increases. In FYs 2013, 2014, and 2015, all classification but p.m. mechanic trainee received increases. The increases were effective September 1 of the calendar year.

For FY 2016 (R. Exh. 38), a new model was used, with merit increases based on performance ratings (below, on, above, or significantly above target). The positions were for the particular employees who encumbered them. The base line was increased for all categories. The same model was used for wage adjustments in FY 2017.

*September 25 Letter and Withholding of Wage Adjustments*

On September 25, the Respondent mailed and delivered a letter, signed by Turner and Weldon, to drivers and to mechanics and spotters. It stated that in response to employee inquiries, the Company was unable to make wage adjustments that "would typically be made in September" because the Company was required by law to maintain the status quo until the Union's pending petitions and unfair labor practice charges were resolved (GC Exh. 3).

[15] Testimony of Turner at Tr. 942–943, which I credit over Fix's testimony that he asked Brawner. Turner's account was more detailed than Fix's, and it is more plausible that Fix would have gone to Turner, who was in his direct line of supervision.

[16] Tr. 484.

[17] Tr. 466–467.

[18] At some point, they had gone up to $23.20.

Warehouse employees received wage adjustments effective September 3 (GC Exh. 13); drivers and mechanics and spotters did not.

*Respondent's "Open Door" Policy*

Weldon testified about the various means by which management has encouraged all employees to communicate their concerns:

(1) The open door policy contained in the 2015 handbook that is still in effect (R. Exh. 40).
(2) The PAR (Positive Associate Relations Program) that was started in around September or October 2016, as part of which daily dialogue conversations of issues raised by employees are logged by their supervisors, and tracked on an ongoing basis for resolution (see R. Exh. 41).
(3) Ethics Hotline.

Transportation Director Bogene (Bo) Nash oversees the delivery operation and 6 supervisors and 143 drivers. He testified that very soon after he came to Columbia, he instituted the "fix one thing" procedure, encouraging drivers to report to him daily anything that they feel needs fixing or improving, including issues or complaints concerning their routes (see R. Exhs. 9–15, examples), which he forwards to the appropriate supervisors or routers. After about 6 months at Columbia, he also created a load condition hotline for drivers to call as an alternative to writing down their issues. Routing issues impact drivers' working conditions and/or effective rate of pay.

Analysis and Conclusions

*Fix's Status in Mid-April*

Section 2(11) of the Act defines a "supervisor" as an individual who possesses the authority in the interest of the employer, to use independent judgment in exercising or effectively recommending any one of 12 enumerated indicia, including disciplining, assigning, and responsibility directing employees. The party asserting supervisory authority has the burden to prove it by a preponderance of the evidence. *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 8 (2016); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 694 (2006).

There is no dispute that the Fleet Maintenance Supervisor position which Fix encumbered in mid-April was supervisory within the meaning of Section 2(11), conferring authority to, inter alia, assign, direct, evaluate, and discipline employees. The Respondent argues that at the time (and until Drafts retired on May 11), Fix was only a supervisor-in-training without any actual supervisory authority. However, possession of authority consistent with any of the indicia is sufficient to establish supervisory authority even if such authority has not been exercised. *Avante at Wilson, Inc.*, 348 NLRB (2006), citing *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001).

In any event, by mid-April Fix was engaged exclusively in performing or being trained in administrative/supervisory functions and no longer performed any rank-and-file work. He was learning how to write employees' performance appraisals and participated in interviewing applicants for employment; had changed his work hours in order to interact with outgoing Supervisor Drafts and Clerk Kiko; used Draft's office; and, on his own, performed Draft's functions in Draft's absence, including directing spotters when to fill in for other spotters. Other than continuing to wear a mechanic's uniform, his role as a mechanic had ended. The General Counsel notes (GC Br. at 42) Respondent's omission of Fix from the list of eligible voters. I find this was an implicit concession that at least by April 8, the Respondent considered him promoted out of the unit and into a supervisory position.

Based on the above, I conclude that in mid-April, Fix had authority to perform various indicia of supervisory authority and did exercise, inter alia, the authority to assign and direct employees. That Drafts continued to perform supervisory and administrative functions during that period does not dictate a contrary result. Having two supervisors simultaneously supervise a group of employees is not inherently illogical or contradictory, and the Respondent produced no evidence that it has a policy prohibiting dual supervision of a department.

The Respondent cites (R. Br. at 64[19]) *Bredero Shaw*, 345 NLRB 782 (2005), for the proposition that "supervisors in training" such as Fix are not 2(11) supervisors. Such reliance is misplaced. Therein, the "supervisor in training" in question was never formally promoted to a supervisory position and, although he might have performed supervisory functions earlier, the Board concluded that he no longer exercised any by the time of the election. Thus, at that time, his direction of employees was determined by how his supervisor directed him, not by his independent judgment, and his preparation of the work schedule was based on set established factors that did not entail exercising independent judgment. Accordingly, the Board overruled the challenge to his ballot.

Because I have found that Fix had actual supervisory authority, I need not determine whether he possessed at least apparent supervisory authority. However, I do note that in the two one-on-one conversations with mechanics (one in Draft's office) and the group meeting that Fix had with spotters, Fix held himself out as a representative of management, asked employees their concerns, and stated that he would try to work them out. Furthermore, the day after spotters complained to him about their having to park in the front lot, Fix notified them that management had approved their parking in the back lot, effective immediately.

*Change in Parking*

An employer violates Section 8 of the Act by conferring employee benefits while a representation election is pending if the purpose is to induce employees to vote against the union. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 406 (1964); *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). See also *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686

[19] For cases cited in the Respondent's brief, I am using the accurate page numbers on which they appear in the body of the brief, as opposed to the table of authorities.

(1944). The burden is on the employer to show a legitimate business reason for the timing of a grant of benefits during an organizing campaign, or the Board will infer improper motive. *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); see also *Kanawha Stone Co.*, 334 NLRB 235, 235 fn. 2 (2001).

Unquestionably, both employees and Fix viewed the change in parking location for the mechanics and spotters in mid-April, from the front lot to the back lot, as a benefit: (1) employees told Fix that the parking situation was one of the issues "bothering them;" (2) Fix told Turner that the employees would like to park closer to their work area, especially on rainy days; (3) Fix announced the change to Anderson as "good news; and (4) the testimony of Bookert and Nuttry.

Furthermore, the change was designed to diminish employee support for the Union. Indeed, just 1 day before Fix announced the change, and 2 days before it went into effect, Fix solicited grievances, one of which was the parking situation. That same day, Fix suggested to Turner that mechanics and spotters be allowed to park in the back, closer to their work area. At around this same time, Fix made statements to Anderson in violation of Section 8(a)(1), as discussed below. Against this backdrop of unlawful motive, the Respondent has not offered any legitimate business purpose for the timing of the benefit.

The Respondent argues that the change did not provide the mechanics and spotters with any parking advantage or benefit over other employees because they still had to walk at least as far as other employees (R. Br. at 72–73). This is irrelevant because the proper focus of the inquiry is whether the change was an improvement or benefit to the mechanics and spotters, not how their changed parking arrangement compared with other employees.

The Respondent contends that the Board's reasoning in *Berkshire Nursing Home, LLC,* 345 NLRB 220, 221 (2005), should apply here (R. Br. at 73–74). In that case, the employer increased the employees' parking distance so that they had a 3 to 5-minute walk instead of a 1-minute walk. The Board found this difference to be a "relatively minor inconvenience to the employees," insufficient to warrant imposing on the employer a duty to bargain before making the change. However, I find *Berkshire* inapposite inasmuch as it involved a unilateral change, unlike the situation here, where the Respondent conferred a benefit that could impact the outcome of a pending election.

Accordingly, I conclude that the Respondent violated Section 8(a)(3) and (1) by conferring a parking benefit on mechanics and spotters in mid-April to discourage them from voting for the Union.

*DVD*

The General Counsel contends that the following portion of the video played at the 25th hour meetings, regarding the consequences of voting for the Union, was unlawful:

> And even if you didn't pay dues or didn't support the union, your wages and benefits would still be frozen at the status quo, during the possible months or years of negotiations.

Here, going back to at least FY 2011, the Respondent has had a fairly consistent practice of giving annual pay increases to drivers and to mechanics and spotters. This is reflected in the Company's September 25 letter to employees, which stated that wage adjustments "would typically be made in September."

An employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wages increases. *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2010), citing, inter alia, *Illiana Transit Corp.*, 323 NLRB 111, 113–114 (1997), and *More Truck Lines*, 336 NLRB 772, 773–775 (2001), enfd. 324 F.3d 735 (D.C. 2003). The Board reasoned that following its employees' selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases, and that such a statement suggests that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back. See also, *DHL Express, Inc.*, 355 NLRB 1399, 1399 (2010) (employer gave no assurances that the status quo of granting scheduled wage increases would continue during contract negotiations).

*Mantrose-Hauser Co.*, 306 NLRB 377 (1992), cited by the Respondent (R. Br. at 36) does not dictate a contrary result. In that case, the Board construed a statement that "wage and benefit programs" would "typically remain frozen" during bargaining as implying that past practices, including granting predetermined wage increases, would continue. The Board further concluded that the qualifier "typically" reduced the possibility that employees would reasonably perceive the statement as a threat of loss of wages and benefits. No such qualifier was used here; instead, the language was "would be."

Accordingly, I conclude that the above passage in the video violated Section 8(a)(1) of the Act.

*Solicitation of Grievances/Promise of Benefits*

As an initial matter, I reject out of hand the Respondent's argument (R. Br. at 40–41) that Brawner was not employed by the Respondent and had no authority to effectuate any promises, and that no employee would reasonably have construed his comments as representing promises by the Respondent. Firstly, the Respondent's status as an operating entity reporting to Sysco Southeast cannot be ignored, and in the corporate structure, Brawner occupied a higher position than the Respondent's president, Troy Barnes. Secondly, by Brawner's own account, corporate and local management asked him to address employees at the 25th hour meetings. Thirdly, the statements that Brawner made reasonably gave employees the impression that he could influence management decisions relating to their wages, benefits, and working conditions.

As the Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (quoting from Section 8(c) of the Act), employers can communicate to their employees their general views about unionism or specific views about a particular union, so long as the communications do not contain "a threat of force or promise of benefit."

The Board has recognized that "generalized expressions of an employer's desire to make things better have long been held to be within the limits of campaign propaganda." *MacDonald Machinery Co.,* 335 NLRB 319, 319 (2001). Such statements can be distinguished from promises of improvements in specific terms and conditions of employment. See *KAG-West, LLC,* 362

NLRB 981, 981 fn. 1 (2015); *Purple Communications, Inc.*, 361 NLRB 575, 578 (2014).

The most recent Board decision on implied promises is *Franklin Prepatory Academy*, 366 NLRB No. 67 slip op. at 1 fn. 3 (2018). Therein, the Board found that a manager's statement that "[i]f I haven't done what I say we can do, another Union election can be held in 366 days" did not constitute an implicit promise of benefits:

> The statement does not promise that anything in particular will happen, and it was not accompanied by any request to air specific concerns or any other promises or grant of specific benefits. Under these circumstances, we find that the statement is merely a generalized request for more time and thus falls within the limits of permissible campaign propaganda. Cf. *Noah's New York Bagels*, 324 NRB 266, 267 (1997).

See also *Newburg Eggs, Inc.*, 357 NLRB 2191, 2193 (2011) ("[G]ive me one more chance" not unlawful); *National Micronetics, Inc.*, 277 NLRB 993, 993 (1985) (employer's generalized request for "another chance" and "more time" did not violate Section 8(a)(1)).

Those cases are distinguishable from those where the employer's request for more time speaks of providing a specific benefit, such as raises, if the employees reject unionization (see *Tampa Electric Co.*, 364 NLRB No. 124 (2016); *Valerie Manor, Inc.*, 354 NLRB 1306, 1310 (2007)), or where the statement promises to deliver, following earlier references to specific benefits that the employer already bestowed. See *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1156 (1995). In those situations, the Board finds violations.

Fundamentally, statements found to be lawful are not in the context of solicitation of employee grievances or complaints. As to express or implied promises in conjunction with the solicitation of grievances, the Board stated in *Traction Wholesale Center Co.*, 328 NLRB 1058, 1058 (1999), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972):

> When an employer undertakes to solicit employee grievances during an organizational campaign, there is a "compelling inference," which the Board can make, that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act.

In connection with the solicitation of grievances, a statement indicating that the employer is "looking into" making changes desired by employees indicates that action is being contemplated and constitutes an implied promise of improvements. *Purple Communications*, above, at 578 (2014); see also *Auto Nation, Inc.*, 360 NLRB 1298, 1299 (2014).

This inference is "particularly compelling" when, prior to the union's organizing campaign, the employer has not had a previous practice of soliciting grievances. *Garda CL Great Lakes, Inc.*, 359 NLRB 1334, 1334 (2013), citing *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), enfd. 165 Fed. App. 435 (6th Cir. 2006).

Before proceeding further, I will first address the Respondent's argument (R. Br. at 55, et. seq.) that the Respondent's "open door" policies undercut the inference that any solicitations and grievances here were improper. Such argument is not persuasive.

In contrast to the existing general policy of encouraging employees to voluntarily contact management on their own volition to report issues, any solicitation by Brawner occurred at specially called mandatory meetings or in the one-on-one conversations that he initiated with employees shortly before the elections. Importantly, Brawner was a very high-level Sysco official—with authority over Sysco Columbia's president—and there is no evidence that had ever before conducted either group or individual meetings with the employees for whom the Union had petitioned. Thus, his communications with the employees were highly out of the ordinary.

First addressing Brawner's off-script statements, the 25th hour meetings concerned the upcoming elections. Although Brawner made no specific promises, he referenced specific complaints that employees had previously raised to him about their pay and working conditions, and he encouraged employees to bring up and discuss their issues at the meetings. Even aside from the testimony of the employees who had one-to-one conversations with him, it is inconceivable that drivers would have raised complaints to Brawner—a high-level corporate executive—had he not solicited them.

Seen in that context, Brawner's repeated statements that he could "affect a lot of things" or "make it right" were enmeshed with his solicitation of employees' complaints, thereby making them impermissible under *Purple Communications* and *Auto Nation,* above. Based on this conclusion, I need not decide whether, in the alternative, Brawner's statements were improper because of their connection to specific employee concerns.

In the time frame of the group meetings, Brawner had individual conversations with six employee witnesses; four drivers, one mechanic, and one spotter. From their depictions of those conversations, Brawner either directly or indirectly solicited their complaints and made implied promises of improved benefits. Thus, Windham testified that Brawner expressly asked about the problems at the Florence yard and said that he would do what he could do make things better for them if they had problems. As to other employees, some of them complained about their supervisors and pay, and I highly doubt that they would have sua sponte done so. I note Taylor's testimony that Brawner asked for 12 months to change things, as he did at the 25th hour meetings. I further note Nuttry's testimony that Brawner brought up insurance coverage and assured Nuttry that things would get better.

Therefore, I conclude that Brawner violated Section 8(a)(1) by soliciting grievances and promising benefits at the Company's preelection meeting with employees and in one-on-one conversations with them.

Turning to Fix, I previously stated my belief that he, as a newly-made first-level supervisor, would not have initiated the mid-April conversations that he had with at least two of the four mechanics and with all four spotters in a group, absent management's approval. Notably, he said, expressly or implicitly, that he was speaking on behalf of the Company, and the contents of his conversations were very similar to what Brawner told individual employees, as well as to Brawner's off-script statements at the 25th hour meetings. These factors lead me to believe that

Fix was given at least loose guidelines or instructions on what to say.

As to Fix's conversations, Fix asked Bookert to give him an opportunity to resolve a specific issue, pay. In Fix's group meeting with the spotters, he directly asked what was bothering them as far as issues, and he wrote down what they said. One of their complaints was parking, which Fix told them the next day had been changed. In Fix's one-on-one meeting with Anderson, he asked if Anderson was happy with everything and stated that if Anderson rescinded his position and employees voted "no," it would help speed things up on getting pay increases and items fixed around the facility. Fix further stated that if they voted in the Union, his hands would be tied, everything would be frozen, and employees would be put in status quo.

By the above conduct, Fix violated Section 8(a)(1) by (a) unlawfully soliciting grievances; (b) promising benefits if the employees rejected the Union; and (c) threatening that employees' pay and other benefits would be frozen at the status quo if they voted for the Union. See the cases I previously cited with regard to the DVD and to Brawner's statements.

Fix did not blame the Union for employees not getting wage increases, and that allegation has not been sustained. The other two allegations—(a) interrogated employees about the impact of the Respondent's promises to gauge their level of support for the Union; and (b) suggested that employees rescind the election process—are essentially subsumed by the allegations that I have found meritorious and are therefore redundant.

*September 25 Letter*

The letter stated that the Company was unable to make wage adjustments typically made in September because the Company was required by law to maintain the status quo until the Union's pending petitions and unfair labor practice charges were resolved.

An employer may lawfully postpone making an improvement if it is uncertain whether it can sustain its burden of proving that the improvement was given free from union considerations provided that it makes clear (1) the improvements will be granted whether or not the employees select a union, and (2) the sole purpose of the postponement is to avoid the appearance of attempting to influence the election. *Woodcrest Health Care Center*, 366 NLRB No.70, slip op. at 5 fn. 11 (2018), citing, inter alia, *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995), and *Uaraco, Inc.*,169 NLRB 1153, 1154 (1968). The Respondent did not do this.

On the contrary, "[A]n employer acts in violation of Section 8(a)(1) by attributing its failure to implement the expected wage or benefit adjustment to the presence of the union. . . ." *Earthgrains Baking Cos.*, 339 NLRB 24, 28 (2003), enfd. 116 Fed.Appx. 161 (9th Cir. 2004); see also *Invista*, 346 NLRB 1269, 1270 (2006); *W. E. Carlson Corp.*, 346 NLRB 431, 433 (2006); *Advanced Life Systems Inc. v. NLRB*, 2018 WL 3673925 (D.C. Cir. Aug. 3, 2018). Such was the case here.

Moreover, the letter sent employees the message that the Respondent was retaliating against them because the Union had filed unfair labor practice charges on their behalves. Cf. *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011); *Valerie Manor, Inc.*, 351 NLRB 1306 (2007).

I therefore conclude that the statements in the letter violated Section 8(a)(1) of the Act.

*Withholding of September Wage Increases*

As reflected above, the Respondent withheld annual pay adjustments in September 2017, for FY 2018, expressly on the basis of pending petitions and unfair labor practice charges. It has not proffered any other reasons or shown any evidence of a valid business justification. Significantly, warehouse employees did receive wage adjustments at that time—contraindicative of bona fide economic factors having been behind the Respondent's action.

The withholding of pay increases from employees who are awaiting the holding of a Board election violates Section 8(a)(3) and (1) of the Act if the employees otherwise would have been granted the pay raises in the normal course of the employer's business. *SNE Enterprises, Inc.*, 347 NLRB 472, 472 (2006); *AutoZone, Inc.*, 315 NLB 115 (1995), enfd. mem. 83 F.3d 422 (6th Cir. 1996); *Florida Steel Corp.*, 230 NLRB 1201, 1203 (1975), affd. 538 F.2d 324 (4th Cir. 1976). These cases apply directly to the mechanics and spotters, whose election has been held in abeyance; there is no reason not to apply this same rationale to the drivers, whose ballots have been impounded. This is especially so because of the possibility of a rerun election. I therefore need not determine whether the conduct violated the Act under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), noting that the General Counsel has not suggested that such an analysis is applicable.

The Respondent contends that the General Counsel cannot prove that September wage adjustments were ever planned for drivers and for mechanics and spotters (R. Br. 25, et. seq.). However, the past practice going back to at least FY 2011 was normally to grant annual wage increases to mechanics and spotters, and either wage increases or bonuses to drivers. In this regard, the Respondent's September 25 letter reflected employees' expectations of a wage increase in September 2017, and it conceded that annual wage adjustments were "typically" given in September. Moreover, the warehouse employees in September did receive a wage adjustment, and the letter blamed the Union's conduct for the withholding of a wage adjustment for drivers and for mechanics and spotters. In my view, these factors shifted the burden to the Respondent to show that, applying the criteria it had used for the past several years, it would have withheld the September wage adjustments regardless of the Union's presence on the scene. This it failed to do.

On August 9, 2018, pursuant to Board Rule 102.6, the Respondent filed a letter of supplemental authorities, citing *Advanced Life Systems*, above. That case does not alter my conclusions. Therein, the court (slip op. at 6) determined that the Board's finding that the Company had an "established payment practice" regarding pay increases and holiday gifts was "not grounded in substantial evidence," and it therefore vacated that portion of the Board's decision. Here, on the other hand, there was an "established practice" of annual pay adjustments, and an important difference is that in *Advanced Life Systems*, there is no indication that any other groups of employees received increased benefits at the same time that employees who sought union

representation were denied them.

Accordingly, the Respondent violated Section 8(a)(3) and (1) by not conferring wage adjustments on drivers and on mechanics and spotters in September 2017.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(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. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Solicited employee grievances and complaints.

(b) Promised benefits to employees.

(c) Threatened employees that their pay and benefits would be frozen if they voted for the Union.

(d) Told employees that they would not receive wage adjustments because the Union had filed petitions and unfair labor practice charges with the NLRB.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

(a) Withheld pay adjustments for employees.

(b) Conferred a parking benefit on employees.

## REMEDY

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

The Respondent having discriminatorily withheld wage adjustments must make employees whole for any losses of earnings and other benefits suffered as a result of that discrimination. A make-whole remedy is appropriate because a remedy should "restore as nearly as possible the situation that would have prevailed but for the unfair labor practices." *E.I. Dupont*, 362 NLRB 843, 850 (2015), quoting *State Distributing Co.*, 282 NLRB 1048, 1048 (1987). The exact amount of the increases can be determined in a compliance proceeding if the General Counsel and the Respondent are unable to agree on precise figures. See *AutoZone, Inc.*, supra at 133, *Otis Hospital*, 222 NLRB 402, 404–405 (1976), enfd. 545 F.2d 252 (1st Cir. 1976). The wage adjustments that the Respondent's warehouse employees received, as well as wage adjustments given to drivers and to mechanics and spotters at other Sysco Southeast companies, may provide guidance.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 10 a report allocating backpay to the appropriate calendar year for the employees. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

As stated in the complaint, the General Counsel seeks an extraordinary remedy, to wit, requiring that at the various locations, Brawner hold meetings and read the notice to employees on worktime in the presence of a Board agent. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during worktime in the presence of at least two of Respondent's supervisors and agents named in paragraph 6.

The Board may order extraordinary remedies, including such a reading of the notice, where the Respondent's unfair labor [20] practices are "so numerous, pervasive and outrageous" that such remedies are necessary "to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996) (and cited cases). In that case, such remedies were imposed in light of the "corporate-wide nature of the Respondent's egregious and notorious unfair labor practices. . . ." Ibid; see also *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003).

Where a particular corporate individual, to the knowledge of employees, was directly responsible for many of the violations that justified the read-aloud requirement, the Board has required that individual to read the notice, in order to make the remedy fully effective. *Ingredion, Inc.*, 366 NLRB No. 74, slip op. at 1 fn. 2 (2018), citing, inter alia, *Domsey Trading Corp.*, 310 NLRB 777, 778–780 (1993), enfd. 16 F.3d 517 (2d Cir. 1994); *Texas Super Foods, Inc.*, 303 NLRB 209, 209 (1991); see also *Conair v. NLRB*, 721 F.2d 1355, 1385–1387 (D.C. Cir. 1983), confirmed on point, *HTH Corp. v. NLRB*, 823 F.3d 668, 673, et. seq., (D.C. Cir. 2016).

Had the Respondent's unfair labor practices been confined to preelection campaigning in the March–April time frame, I likely would not find them sufficiently "numerous, pervasive and outrageous" to warrant a special remedy. However, the Respondent's violations went beyond those parameters. Thus, about 5 months after the mechanics' and spotters' election and the drivers' ballot count were held in abeyance, pending adjudication, the Respondent withheld normally-granted annual pay adjustments and issued a letter improperly blaming the Union for its action—because the Union utilized the Board's representation and unfair labor practice procedures on behalf of employees. These actions discouraged employees from supporting the Union and drove home the point that they were being punished for seeking to organize, reinforcing the earlier unlawful message that voting for the Union would result in no wage increase. This is especially so when the warehouse employees, who had not been the subject of organizing efforts, did receive pay adjustments. I will therefore grant, with modification, the General Counsel's request for the special remedy described above, with language

consistent with the Board's decision in *Ingredion, Inc.*, above; see also *Deep Distributors of Greater NY*, 365 NLRB No. 95, slip op.at 4 (2017).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

## ORDER

The Respondent, Sysco Columbia, LLC, Columbia, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees benefits to discourage them from supporting Teamsters Local Union 509 (the Union) or any other labor organization.

(b) Soliciting employee complaints and grievances to discourage them from supporting the Union or any other labor organization.

(c) Threatening employees that their wages and other benefits will be frozen if they vote for union representation.

(e) Telling employees that they will not receive wage adjustments because the Union filed petitions to represent them and filed unfair labor practice charges.

(f) Withholding wage adjustments because employees engaged in union activity.

(g) Conferring benefits on employees to discourage them from supporting the Union or any other labor organization.

(h) 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) Make employees whole for any loss of earnings or other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this Order.

(b) 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.

(c) Within 14 days after service by the Region, post at all their South Carolina and Georgia facilities, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 communicate with its employees by such means. 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 have gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2017.

(d) During the time that the notice is posted, hold a meeting or meetings at all their South Carolina and Georgia facilities during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees shall be read to employees by Michael Brawner or Tom Propps or, at the Respondent's option, by a Board agent in the presence of Brawner or Propps.

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

I FURTHER ORDER that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 16, 2018

## 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 promise you benefits to discourage you from supporting Teamsters Local Union 509 (the Union) or any other labor organization.

WE WILL NOT solicit your complaints and grievances to discourage you from supporting the Union or any other labor organization.

WE WILL NOT threaten you that your wages and other benefits will be frozen if you vote for union representation.

WE WILL NOT tell you that you will not receive wage adjustments because the Union filed petitions to represent you and filed unfair labor practice charges.

WE WILL NOT withhold your wage adjustments because you engaged in union activity.

[20] 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.

[21] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice "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."

WE WILL NOT confer benefits on you to discourage you from supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of our unlawful withholding of your wage adjustments in September 2017, with interest.

SYSCO COLUMBIA, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/10-CA-197586 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.